No. _____

In the Supreme Court of the United States

COSTAR GROUP, INC.;
COSTAR REALTY INFORMATION, INC.,

Petitioners,

v.

COMMERCIAL REAL ESTATE EXCHANGE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Bell Atlantic Corp. v. Twombly*, this Court recognized the risk of allowing antitrust claims to proceed past the pleading stage in the absence of a "plausible entitlement to relief." 550 U.S. 544, 559 (2007). That risk is particularly acute when a court relies on novel and vague theories of antitrust law. The Ninth Circuit's decision raises precisely that concern: the court reversed the grant of a motion to dismiss based on two theories that provide no plausible entitlement to relief under the Sherman Act or this Court's case law—and that have given rise to conflict and confusion among the courts of appeals. The questions presented are:

1. Whether a "de facto" exclusive dealing claim is cognizable under the Sherman Act in the absence of exclusive contractual terms, programs, or policies.

2. Whether a refusal-to-deal claim prohibited by *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), is cognizable if the plaintiff calls it something else.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner CoStar Realty Information, Inc. states that it is a wholly owned subsidiary of CoStar Group, Inc., and petitioner CoStar Group, Inc. states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

The proceedings directly related to this case are:

CoStar Grp., Inc. v. Com. Real Estate Exchange, Inc., No. 23-55662. U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 5, 2025; rehearing denied September 5, 2025.

CoStar Grp., Inc. v. Com. Real Estate Exchange, Inc., No. 20-cv-8819. U.S. District Court for the Central District of California. Partial final judgment entered July 20, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners CoStar Group, Inc. and CoStar Realty Information, Inc. (collectively, CoStar) respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App. 1a-28a) and the court of appeals' denial of rehearing (App.1a-2a) are reported at 150 F.4th 1056. The decision of the district court granting entry of Rule 54(b) partial final judgment (App. 29a-38a) is not reported but is available at 2023 WL 6783957. The decision of the district court dismissing the first amended counterclaims (App. 39a-58a) is not reported but is available at 2023 WL 2468742. The decision of the district court dismissing in part the counterclaims (App. 59a-81a) is reported at 619 F. Supp. 3d 983. The original opinion of the court of appeals (App. 82a-109a), which was amended and superseded on the denial of rehearing, is reported at 141 F.4th 1075.

JURISDICTION

The court of appeals entered judgment on September 5, 2025. App. 1a-28a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the petition appendix. App. 110a-11a.

INTRODUCTION

This petition presents two important questions of antitrust law on which the courts of appeals are divided. This Court's intervention is needed to bring clarity to the law and ensure that it continues to encourage innovation, growth, and competition.

First, the Ninth Circuit recognized a novel theory of "de facto" exclusive dealing that exacerbates confusion in the circuits over what, short of an expressly exclusive contract, can be treated as such. Some circuits have rejected "de facto" exclusive dealing claims on similar facts; others have recognized such a theory but only in a narrow category of cases. In the decision below, the Ninth Circuit not only recognized "de facto" exclusive dealing as a cognizable theory under the Sherman Act—it did so without any guardrails. Unlike every other circuit to consider the issue, the Ninth Circuit allowed a claim to proceed to discovery based on an expressly *non*exclusive agreement simply because a small handful of customers unilaterally misunderstood the agreement. That decision is wrong and, if allowed to stand, will enable antitrust plaintiffs to obtain costly discovery and extract settlements on flimsy and implausible claims.

Second, the Ninth Circuit ignored this Court's well-established precedent holding that companies may generally refuse to deal with their competitors. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-16 (2004). The reason: because the plaintiff said it was not bringing a refusal-to-deal claim. In so doing, the court split with the Tenth and D.C. Circuits, who do not allow plaintiffs to so easily evade refusal-to-deal doctrine.

This is not the first time the Court has been asked to intervene to correct the Ninth Circuit's failure to apply *Trinko*'s "clear" rule. *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 449-50 (2009). Intervention is needed again to reaffirm that, however framed, a refusal-to-deal claim must be treated as such.

If permitted to stand, the Ninth Circuit's expansive view of antitrust law will allow groundless suits to proceed to discovery, discourage innovation, and encourage circumvention of this Court's precedents. Certiorari is warranted.

STATEMENT OF THE CASE

1. CoStar and CREXi are competing commercial real estate platforms.

CoStar has spent almost 40 years and billions of dollars building its commercial real estate business. 3-ER-347–48 (¶ 52); SER-26, SER-43 (¶¶ 44, 82). That business includes two platforms that are relevant here: (i) an online "listing service[]" called "LoopNet," where brokers can advertise properties for sale or lease, 4-ER-601 (¶¶ 141-42); and (ii) a "web tool" called "LoopLink," which some brokers use to display their LoopNet listings "directly [on] the brokers' website," 4-ER-570–71 (¶¶ 39-40).

To protect its investments, CoStar adopted carefully balanced terms of use. On the one hand, brokers retain all rights to the images or data they upload to CoStar's platforms. 4-ER-574–75 (¶¶ 52-54). CoStar has only a "non-exclusive" right to that material. 2-ER-199–200, 2-ER-221; 2-ER-238–39; 2-ER-268, 2-ER-272; *see* 4-ER-574–75 (¶¶ 52-54). On the other hand, CoStar prohibits downloading material, including CoStar's own copyrighted

photographs, from its platforms for use elsewhere. 2-ER-201–02; *see* 2-ER-221–22; 2-ER-269–71. Together, these terms allow customers to do almost anything they want with their own content. They just cannot take information directly from CoStar's platforms and provide it to CoStar's competitors.

CREXi, by contrast, has built its business by free-riding on CoStar. Using offshore agents, CREXi takes CoStar's data and copyrighted photographs from CoStar's platforms and displays them on CREXi's competing platforms. SER-8–9 (¶¶ 4-6); *see* Order 17-18, D. Ct. Dkt. No. 1237 (finding "ample evidence that CREXi and its [agents] copied listing information, including images, from LoopNet … and crop[ped] out CoStar's watermarks").

2. On September 25, 2020, CoStar sued CREXi for industrial-scale copyright infringement. D. Ct. Dkt. No. 1; *see* SER-124–34 (¶¶ 308-72). On June 23, 2021—nine months after CoStar filed its complaint and two weeks after the district court largely denied CREXi's first motion to dismiss—CREXi brought antitrust and state law counterclaims. 3-ER-330–423; *see* D. Ct. Dkt. No. 71.

CREXi pursued two primary theories: (i) an exclusive-dealing theory, and (ii) a technological-barriers theory.

First, CREXi alleged that CoStar's terms of use imposed "*de facto* exclusiv[ity]" by prohibiting brokers from taking listing materials directly from CoStar's platforms and providing them to CREXi. 4-ER-561 (¶ 3); *see* 4-ER-575–79 (¶¶ 55-69). Although CREXi conceded CoStar's terms of use are expressly nonexclusive, it alleged those terms were "widely understood by brokers to foreclose their ability to

work with competing platforms." 4-ER-578 (¶ 65). As support for that claim, CREXi cited three brokers who supposedly "declined to work with CREXi" based on CoStar's terms. 4-ER-578–79 (¶¶ 66-68). Elsewhere, CREXi admitted that it has "over 500 existing customers" who "use CoStar's LoopLink tool," and "many more" who use LoopNet—contradicting its allegation that CoStar's terms of use are widely understood by customers to be exclusive. 4-ER-633 (¶ 257); *see* 2-ER-182–83; 4-ER-634 (¶ 260).

Second, CREXi alleged that CoStar employed "technological measures" to block competitors like CREXi from accessing LoopLink-hosted content. 3-ER-371–72 (¶ 130); *see* 4-ER-570–71 (¶¶ 39-40). Specifically, CREXi alleged CoStar blocks competitors' IP addresses from accessing LoopLink content. *Id.* According to CREXi, some brokers do not keep back-up copies of their own listing materials, or prefer to share such materials by directing CREXi to their LoopLink-hosted pages. 4-ER-571 (¶ 41). CREXi alleged these brokers were "locked" into CoStar's services because they "d[id] not want to re-create" already-posted listings on CREXi's platforms. 4-ER-631 (¶ 247); 3-ER-366 (¶ 118); *see* 4-ER-571–72 (¶¶ 41-42).

3. The district court twice dismissed CREXi's antitrust counterclaims. App. 39a-81a. The court rejected CREXi's exclusive dealing claim because, under CoStar's terms, brokers "maintain the rights to their original images and can give those images or listings to CREXi." *Id.* at 46a. The only thing they cannot do, the court explained, is "take the images or information directly from LoopNet or LoopLink." *Id.* As for CREXi's technological barriers claim, the court held that, under *Trinko*, "CoStar is not obligated to

provide CREXi with access to its websites and database[s]." *Id.* at 42a-44a.

4. On June 23, 2025, the Ninth Circuit reversed.

In doing so, the Ninth Circuit "recognize[d] a de facto exclusive dealing theory" for the first time. *Id.* at 22a.[1] The court of appeals agreed with the district court that CoStar's contracts contained no expressly exclusive terms. *Id.* at 21a-22a. The contracts, the court explained, "expressly disavow[ed] any ownership in or claim to [the brokers'] data" that would have prevented brokers from sharing that data. *Id.*; *see id.* (acknowledging the terms of use defined CoStar's "right to use [brokers'] data" as "non-exclusive"). But according to the court, CREXi had plausibly alleged exclusive dealing because three brokers "*underst[oo]d* CoStar's contract terms to actually foreclose their ability to work with CREXi." *Id.* at 24a-25a (emphasis altered). The court conceded these brokers may have "misunderst[oo]d the operation of these contracts," but found "these allegations … sufficient" to state a claim. *Id.* at 25a. The court did not address the allegation that over 500 CREXi customers worked with both CoStar and CREXi, undermining the claim that CoStar's contracts imposed any exclusivity in practice.

The Ninth Circuit declined to assess whether CREXi had adequately alleged that a substantial share of the commercial real estate market was foreclosed from dealing with CoStar's competitors. The court instead held that "monopoly power … is

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[1] As described below, the Ninth Circuit amended its original panel opinion in response to CoStar's rehearing petition. Where the original and amended opinions are substantively the same, this petition cites the amended opinion.

[alone] sufficient to allege the substantial foreclosure element of exclusive dealing." App. 91a. Because the court found allegations of monopoly power sufficient, it stopped there and did not assess whether CoStar's contracts foreclosed a substantial share of the market from dealing with CREXi or other competitors.

For CREXi's technological barriers claim, the Ninth Circuit declined to apply (or even cite) this Court's decision in *Trinko*—which holds companies generally have no obligation to deal with their competitors, 540 U.S. at 407-16. Despite the parties' substantial briefing on this issue, the court of appeals dismissed the refusal-to-deal case law entirely because it was "not CREXi's theory of liability." App. 21a. And when it came to the technological-barriers claim, the court concluded CREXi had stated an antitrust claim based on its inability to access CoStar's LoopLink product simply because "many brokers keep their listings only on LoopLink-powered websites" and prefer not to duplicate them on CREXi's platforms. App. 26a.

5. CoStar sought panel rehearing and rehearing en banc. App. 1a-2a. On September 5, 2025, the Ninth Circuit denied rehearing, but issued an amended opinion. Specifically, the court removed the holding that monopoly power alone proves substantial foreclosure and replaced it with a holding that substantial foreclosure may be shown when an alleged monopolist enforces exclusive dealing contracts that "cover [the] market." *Id.* at 10a-11a; *see id.* at 19a. But the court did not explain how CREXi had adequately alleged that CoStar's contracts were exclusive in ways that "cover[ed] the market." *Id.* at 10a-11a.

REASONS FOR GRANTING THE WRIT

This case presents two important questions of antitrust law: (i) whether a "de facto" exclusive dealing claim is cognizable under the Sherman Act in the absence of exclusive contractual terms, programs, or policies; and (ii) whether a refusal-to-deal claim prohibited by *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), is cognizable if the plaintiff calls it something else. The courts of appeals are divided on both questions and the Ninth Circuit's decision marks the extreme end of that circuit confusion. The decision flouts the text of the Sherman Act, this Court's precedents, and the purposes of the antitrust laws. If allowed to stand, it will invite extensive discovery into meritless claims and stifle innovation. Review is warranted.

I. The Ninth Circuit's "De Facto" Exclusive Dealing Theory Implicates Confusion Among The Courts of Appeals And Is Wrong

The traditional exclusive dealing claim rests on a contractual provision requiring customers to purchase goods or services solely from the defendant. In a century-old Clayton Act case, this Court first recognized the concept of "de facto" exclusive dealing. *United Shoe Mach. Corp. v. United States*, 258 U.S. 451 (1922). That theory rested on express contractual terms, but allowed the exclusivity inquiry to turn on their "practical effect." *Id.* at 457. This Court has never decided whether "de facto" exclusive dealing is cognizable under the Sherman Act or the scope of any such theory. And the courts of appeals have struggled with this question in the absence of direction from this Court. The Ninth Circuit's decision is borne from this confusion—but also represents its apex.

Whatever its viability in other forms, an expressly nonexclusive contract cannot become "de facto" exclusive based on nothing more than unilateral confusion by a handful of customers—particularly when hundreds of other customers correctly understood the contract was nonexclusive.

A. The Courts of Appeals Are Confused About "De Facto" Exclusive Dealing

Over the last several decades, a number of circuits have considered the viability and scope of a "de facto" exclusive dealing theory under the Sherman Act. Among those circuits, two (Second and Eighth Circuits) have rejected de facto exclusive dealing on the facts presented; three (Third, Tenth, and Eleventh Circuits) have recognized de facto exclusive dealing as a cognizable claim but sharply cabined the theory; and one (the Ninth Circuit here) has recognized de facto exclusive dealing with no guardrails. The cases are difficult to reconcile and reflect significant confusion about the doctrinal grounding and scope of de facto exclusive dealing under the Sherman Act.

1. The Second and Eighth Circuits have both rejected de facto exclusive dealing theories based on certain common fact patterns.

In *United Air Lines, Inc. v. Austin Travel Corp.*, the Second Circuit rejected a de facto exclusive dealing theory on facts similar to those presented here. 867 F.2d 737, 742 (2d Cir. 1989). The court concluded that the "testimony of certain" customers "who were reluctant" to contract with competitors in other markets was insufficient to establish exclusive dealing when the defendant's contracts were expressly nonexclusive. *Id.* As the court explained,

because the defendant's contracts made clear that customers were "free to use" other competing service providers, the reluctance of a handful of customers to do so was not enough to show substantial foreclosure. *Id.* That was especially so because the evidence showed that some customers, including the plaintiff itself, had contracted with competing vendors. *Id.*

The Eighth Circuit has likewise rejected de facto exclusive dealing claims in cases where the defendants' contracts offered discounts to customers who purchased a certain percentage of their product needs from the defendant. *See Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608 (8th Cir. 2011); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir.), *cert. denied*, 531 U.S. 979 (2000).

In *Southeast Missouri Hospital*, the plaintiff hospital alleged that defendant, a leading supplier of catheters, used "share-based discounts" to achieve de facto exclusive agreements. 642 F.3d at 612. Although the defendant did not require hospitals to purchase catheters from only the defendant, the plaintiff argued that the share-based discounts were "so attractive that hospitals [could not] afford to forgo them" and so the defendant's contracts were effectively exclusive. *Id.* The Eighth Circuit disagreed because hospitals were "free to walk away from the discounts at any time" and purchase catheters from other sellers. *Id.* at 612-13 (citation omitted). And the record showed that hospitals had "purchase[d] products off-contract" when they could "get a better product or a better price." *Id.* at 617.

Similarly, in *Concord Boat*, the Eighth Circuit rejected the argument that share-based discounts established de facto exclusive dealing where customers were "free to walk away from the discounts

at any time" and "in fact switched to [a competing product] at various points when [that competitor] offered superior discounts." 207 F.3d at 1059.

2. The Third, Tenth, and Eleventh Circuits have each recognized de facto exclusive dealing as a cognizable claim. But they have limited the circumstances under which a de facto exclusive dealing claim could be made to two narrow categories: (i) when there are express terms of a contract that, while not exclusive in so many words, function as exclusive due to their economic incentives; and (ii) when the defendant has a program or policy functionally equivalent to an exclusive contract.

Two Third Circuit decisions fall into the first category. In *ZF Meritor, LLC v. Eaton Corp.*, the Third Circuit considered contracts conditioning significant rebates on customers purchasing 80-97.5% of their products from the defendant. 696 F.3d 254, 286 (3d Cir. 2012), *cert. denied*, 569 U.S. 958 (2013). Although the contracts "did not expressly require" customers to meet those targets, a divided panel of the Third Circuit held they violated the antitrust laws because "the targets were as effective as mandatory purchase requirements." *Id.* at 282. *But see id.* at 310-48 (Greenberg, J., dissenting). Similarly, in *LePage's Inc. v. 3M*, the Third Circuit concluded that contractual "'all-or-nothing' discounts" were exclusive in practice because they "le[d] customers to maximize their discounts by dealing exclusively" with the defendant. 324 F.3d 141, 159 (3d Cir. 2003), *cert. denied*, 542 U.S. 953 (2004). "Many" of the plaintiff's "former customers refused to even meet with [the plaintiff's] sales representatives" after these contractual discounts were introduced because they could not risk the loss of those discounts. *Id.* at 158.

In both cases, there was an express contractual provision (rebates or discounts) imposed by the defendant that, as a practical matter, functioned like an agreement to deal exclusively (or nearly so) with the defendant.

As for the second category, the Third, Tenth, and Eleventh Circuits have invoked de facto exclusive dealing where a defendant imposes an expressly exclusive condition through shorter-term policies or programs. In *United States v. Dentsply International, Inc.*, the defendant imposed a condition that customers purchase only its products through "a series of independent sales" rather than a long-term contract. 399 F.3d 181, 193 (3d Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006). The Third Circuit held that, although this was not a typical exclusive contract, it remained "as effective as [exclusive dealing provisions] in written contracts." *Id.*

Similarly, in *McWane, Inc. v. FTC*, the Eleventh Circuit concluded that a defendant's "Full Support Program," which required customers to buy only from the defendant or risk being "cut off," functioned like a "binding contract" to deal exclusively. 783 F.3d 814, 820-21, 833-34 (11th Cir. 2015), *cert. denied*, 577 U.S. 1216 (2016). The program was highly effective, allowing the defendant to retain 90% of the market, *see id.* at 830; customers that purchased from the defendant's competitors were, in fact, "cut off"; and other customers chose to "abide[] by the Full Support Program in order to avoid the devastating result of being cut off." *Id.* at 821.

And in *Chase Manufacturing, Inc. v. Johns Manville Corp.*, the Tenth Circuit held that programmatic "threats" to "cut off any distributors buying" the plaintiff's competing product could

constitute exclusive dealing. 84 F.4th 1157, 1173-76 (10th Cir. 2023). As that court explained, "when the sole domestic manufacturer of a product in a two-firm market threatens to withhold that product," customers "will be wary to engage with the monopolist's competitor." *Id.* at 1176. And that wariness was borne out in practice: over two-thirds of customers whose purchasing data was in evidence purchased exclusively from the defendant, and the defendant ultimately controlled more than 97% of the market. *See id.* at 1163-64, 1169, 1171, 1777.

3. In the decision below, the Ninth Circuit joined the circuits that have recognized de facto exclusive dealing as a cognizable theory—but unlike its sister circuits, rejected all of the aforementioned guardrails.

Prior to this case, the Ninth Circuit had not "explicitly recognized a 'de facto' exclusive dealing theory." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1182 (9th Cir. 2016). While acknowledging that other courts had adopted such a theory, the Ninth Circuit described it as constrained to "certain limited situations." *Id.* As the Ninth Circuit explained, the theory "does not provide … an end run around the obligation to first show that express or implied contractual terms in fact substantially foreclosed dealing with a competitor for the same good or service." *Id.*; *see id.* at 1183 ("Just as in any exclusive dealing claim, however, the [*ZF Meritor*] court first had to be satisfied that specific features of the agreement required exclusivity.").

But in this case, the Ninth Circuit jettisoned all of those limitations. Unlike in *ZF Meritor* and *LePage's*, the Ninth Circuit identified no exclusive agreement. As the court conceded, CoStar's terms of use lack the "rebate or discount terms that create[d] de facto

exclusivity" in cases like *ZF Meritor*. App. 23a. On the contrary, the court recognized that CoStar's terms of use "*expressly disavow[ed]*" exclusivity. *Id.* at 21a-22a (emphasis added).

Unlike in *McWane* and *Chase Manufacturing*, the Ninth Circuit identified no anticompetitive conduct by CoStar—no threats or promises to serve only customers who dealt with CoStar exclusively. The Ninth Circuit instead relied exclusively on the misunderstanding of a handful of CoStar's customers—not any action by CoStar itself. That runs contrary to how the Second Circuit treated similar statements regarding customers' reluctance to work with a competitor in *United Air Lines*.

And unlike all of the Third, Tenth, and Eleventh Circuit cases, CoStar's competitors were not excluded from the market in any meaningful sense. Far from it. According to CREXi's own allegations, over 500 customers used both CoStar *and* CREXi. 4-ER-633 (¶ 257). This case is thus far afield from cases like *Chase Manufacturing* and *McWane* (where the defendant was able to retain control of 97% and 90% of the product market, respectively)—and much more like *United Air Lines*, *Southeast Missouri Hospital*, and *Concord Boats* (where customers were free to and did continue to use competitors' products to a meaningful extent). *See supra* at 9-13.

The Ninth Circuit has now added further confusion by staking out a third path: that a de facto exclusive dealing claim can exist even when the defendant takes no action at all—when the alleged misconduct is squarely tied to the mistakes of others.

B. The Ninth Circuit's "De Facto" Exclusive Dealing Decision Is Wrong

The Ninth Circuit's sweeping version of de facto exclusive dealing cannot be squared with the Sherman Act or this Court's precedent.

1. The circuits that have recognized de facto exclusive dealing claims have imposed strict limits for a reason: any broader version would contravene the text and scope of the Sherman Act.

Section 1 of the Sherman Act prohibits "*contract[s]* … in restraint of trade." 15 U.S.C. § 1 (emphasis added). So to establish liability under Section 1, a plaintiff must first prove the existence of an unlawful agreement, or as this Court has put it, a "meeting of the minds." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). There can be no "meeting of the minds" to impose an unlawful exclusivity requirement when the defendant's contracts impose no such requirement—and certainly not when the contract says the opposite. A one-sided (mistaken) belief that exclusivity is required cannot be enough to establish the agreement mandated by Section 1.

Section 2 does not require an agreement but does require a defendant to "monopolize," "attempt to monopolize," or "combine or conspire … to monopolize." 15 U.S.C. § 2. So a Section 2 claim necessarily requires "an element of anticompetitive conduct" *by the defendant*. *Trinko,* 540 U.S. at 407 (emphasis omitted). When a plaintiff alleges merely that a defendant's customers misunderstood the agreement to require exclusivity, that does not plead anticompetitive conduct *by the defendant*. Absent exclusive contractual language, programs, policies,

threats, or other anticompetitive actions by the defendant, there can be no Section 2 violation.

In sum, a de facto exclusive dealing theory divorced from both contractual terms (Section 1) and any conduct by the defendant (Section 2) is not cognizable. The Sherman Act does not allow a plaintiff to state a claim based on a mistaken interpretation of the defendant's contractual terms when those terms are expressly nonexclusive. Nor does the Sherman Act allow a plaintiff to bring a claim based on the actions of a handful of the defendant's customers rather than the defendant itself. The Ninth Circuit's de facto exclusive dealing theory finds no grounding in the antitrust laws.

2. The Ninth Circuit's theory is also incompatible with this Court's Sherman Act precedents.

The "de facto" exclusive dealing theory traces its origins to two Supreme Court cases that addressed a different antitrust statute: Section 3 of the Clayton Act. *See Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *United Shoe Mach. Corp. v. United States*, 258 U.S. 451 (1922). Section 3 prohibits "agreement[s]" or "understanding[s]" to "not use or deal in the goods … of a competitor or competitors." 15 U.S.C. § 14. Even if those cases support the limited version of de facto exclusive dealing adopted by the Third, Tenth, and Eleventh Circuits, they do not support the extreme version adopted by the Ninth Circuit in this case.

In *United Shoe*, the Court held that certain conditions the defendant imposed on its machinery leases violated Section 3 of the Clayton Act. Those conditions included a provision that the defendant could cancel the leases if the lessee "fail[ed] to use

exclusively machinery of certain kinds made by the [defendant]." 258 U.S. at 456. Although the leases did not "contain specific agreements not to use the machinery of a competitor of the [defendant]," the Court held "the practical effect" was "to prevent such use." *Id.* at 457.

In *Tampa Electric*, the Court applied this precedent to "a requirements contract between the parties providing for the purchase by [plaintiff from defendant] of all the coal [plaintiff] would require as boiler fuel at [a particular site] over a 20-year period." 365 U.S. at 321. The defendant subsequently sought to cancel the contract, contending it was illegal under the antitrust laws. This Court explained that, under the Clayton Act, "if 'the practical effect' of [a] contract [is] to prevent a lessee or buyer from using the products of a competitor of the lessor or seller and the contract [will] thereby probably substantially lessen competition in a line of commerce, it [is] proscribed." *Id.* at 326 (citation omitted). But the Court held that this particular contract was not proscribed because it did not substantially lessen competition in the relevant market, as it accounted for less than 1% of that market. *Id.* at 324, 329-35. Finally, the Court held that the contract did not violate the Sherman Act because it did not violate "the broader proscription of [Section] 3 of the Clayton Act." *Id.* at 335.

The first court of appeals to recognize a de facto exclusive dealing theory under the Sherman Act relied on *Tampa Electric* as support. *See LePage's*, 324 F.3d at 157. That court did not assess the language of the Sherman Act, or explain why the Court's precedent interpreting the broader Clayton Act was applicable. Other courts of appeals have similarly cited to *Tampa Electric*, or *LePage's* and its

progeny, without further elaboration. *See, e.g.*, *Dentsply*, 399 F.3d at 193-94 (citing *LePage's*); *McWane*, 783 F.3d at 833-34 (citing *Tampa Electric* and *Dentsply*). And while the text of the Sherman Act could arguably support a limited form of de facto exclusive dealing along the lines recognized by these circuits, *see supra* at 15-16, neither the text nor the Clayton Act cases can support the Ninth Circuit's limitless version.

In both *United Shoe* and *Tampa Electric*, the contract itself effectively imposed an exclusive relationship, even if it did not say that in so many words. By contrast, under the Ninth Circuit's version of de facto exclusive dealing, even when a contract expressly disavows exclusivity, a plaintiff can proceed to discovery so long as some customers somewhere allegedly misinterpreted that contract to be exclusive. Nothing in the Court's precedent supports that. On the contrary, this Court has repeatedly warned that, given the "unusually high cost of discovery in antitrust cases," courts must be especially careful to weed out implausible cases at the pleading stage. *Twombly*, 550 U.S. at 558-60.

3. The substantial foreclosure element that comes with every exclusive dealing claim further undermines the Ninth Circuit's expansive rule.

This Court has long required a showing of substantial foreclosure in exclusive dealing cases. *See Tampa Elec.*, 365 U.S. at 326-27. That is because the antitrust laws are not designed "to reach every 'remote lessening' of competition" but "only those which [are] substantial." *Id.* at 326; *see Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring in the judgment) ("Exclusive dealing is an unreasonable restraint on

trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal."). And if agreements—even expressly exclusive agreements—cover only a slice of the market, they do not foreclose competitors from contracting with the vast majority of customers. *See United States v. Microsoft Corp.*, 253 F.3d 34, 69 (D.C. Cir.) ("[A]n exclusive deal affecting a small fraction of a market clearly cannot have the requisite harmful effect upon competition …."), *cert. denied*, 534 U.S. 952 (2001).

Allowing a de facto exclusive dealing claim to proceed based on nothing more than the misunderstanding of a few customers nullifies that distinct element. And while the Ninth Circuit amended its opinion to correct its express holding to that effect, App. 10a-11a, it never squared its belated recognition that substantial foreclosure *is* required with its decision to allow CREXi's claim to survive. If allegations that a handful of customers are enough to make a nonexclusive contract somehow exclusive "in fact," the substantial foreclosure element will have no independent bite—at least at the pleading stage.

II. The Ninth Circuit's Refusal To Recognize A Refusal-To-Deal Claim Implicates A Circuit Conflict And Violates *Trinko*

In *Trinko*, this Court held that a monopolist generally may refuse to deal with a competitor and that forced sharing undermines rather than furthers the purposes of antitrust law. Five years later, in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, the Court granted review to address the Ninth Circuit's failure to apply *Trinko* to a different kind of antitrust claim—and reaffirmed the "general rule" that businesses "are free to choose

the parties with whom they will deal." 555 U.S. 438, 448 (2009). This Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985), represents a limited exception to this rule—marking the "outer boundary of § 2 liability," *Trinko*, 540 U.S. at 409. And in the ensuing years, this Court has never departed from that rule: except in rare circumstances, companies are not required to deal with their competitors.

Notwithstanding this Court's straightforward rule, the treatment of refusal-to-deal claims in the courts of appeals has been inconsistent. Some circuits continue to faithfully apply *Trinko* to uphold the right of a company to refuse to deal with its competitors. Others have been willing to accept a plaintiff's characterization of its claim as something other than a "refusal to deal" and decline to apply *Trinko* to factual allegations that, at bottom, are exactly that. And the conflict is especially pronounced when defendants take steps to limit or block competitors' access to new technologies. The Ninth Circuit's failure to apply *Trinko* conflicts with decisions of the Tenth and D.C. Circuits, is inconsistent with this Court's precedents, and will discourage innovation and undermine antitrust policy.

A. The Courts of Appeals Are Not Consistently Applying *Trinko*

The courts of appeals are divided on when to apply *Trinko* and that conflict is particularly stark in the context of modern technologies. The Tenth and D.C. Circuits have both squarely held that refusals to share technological facilities are not anticompetitive. By contrast, the Ninth Circuit below declined to apply *Trinko* in similar circumstances. And even outside

the context of modern computer and internet technologies, other courts of appeals have exalted a plaintiff's characterization of its claim over the facts—further diluting the refusal-to-deal standard.

1. The Tenth and D.C. Circuits have faithfully applied *Trinko* to dismiss antitrust claims that would have required a company to give a competitor access to its technological facilities.

In *Novell, Inc. v. Microsoft Corp.*, the Tenth Circuit analyzed an antitrust case brought by the makers of WordPerfect against Microsoft. 731 F.3d 1064 (10th Cir. 2013) (Gorsuch, J.). WordPerfect challenged Microsoft's refusal to share information about how its Windows operating system worked in advance of the public release of that system. *Id.* at 1066-69. That sharing, the argument went, would have allowed WordPerfect and other software developers to create products that could be used on Windows at the time of its release. *Id.* But because Microsoft refused to share this information, it was going to take software developers several months to make their products compatible with Windows, which would allow Microsoft's competing Microsoft Office suite to take hold in the market. *Id.* at 1068-69.

The Tenth Circuit analyzed this claim under *Trinko* and *Aspen Skiing*, and ultimately determined that the claim did not fit within the "narrow-eyed needle" of viable "refusal to deal" claims. *Id.* at 1074. Notably, the Tenth Circuit specifically rejected the plaintiff's attempt to recast its claim as an "'affirmative' act of interference," emphasizing that the "refusal to deal doctrine is not so easily evaded." *Id.* at 1078-79. Rather than accept the plaintiff's own characterization of its claims, the Tenth Circuit analyzed them according to their true nature—a

refusal to deal—and held that they did not establish an antitrust violation as a matter of law. *See id.*

The D.C. Circuit recently followed the same doctrinal path. In *New York v. Meta Platforms, Inc.*, the D.C. Circuit affirmed dismissal of an antitrust claim alleging that "Facebook was prohibiting [app] developers from using Facebook's Platform to duplicate Facebook's core products"—which "'cut off' competitors from 'access to … [Facebook's] immensely valuable network.'" 66 F.4th 288, 305 (D.C. Cir. 2023) (alterations in original) (citation omitted). As the court explained, this complaint "amount[ed] to a 'claim based upon the defendant's [i.e., Facebook's] refusal to cooperate with its competitor[s] [i.e., the app developers]." *Id.* (second to last alteration in original).

Like the Tenth Circuit, the D.C. Circuit analyzed the claim under *Trinko*. And the court concluded that plaintiffs had failed to state a claim because the antitrust laws permitted Facebook to refuse to deal with its rivals and the plaintiffs did not fall within the narrow exception of *Aspen Skiing*. *Id.* at 305-06. In this way, the D.C. Circuit heeded this Court's direction to "proceed cautiously" in recognizing additional exceptions to the refusal-to-deal context, especially where "novel products or practices" are involved. *Id.* at 305; *see Trinko*, 540 U.S. at 408.

2. In direct contrast to the Tenth and D.C. Circuits, the Ninth Circuit below ignored *Trinko*'s teaching and allowed a plaintiff's characterization of its own claims to drive the antitrust analysis. Despite extensive briefing on *Trinko*, the Ninth Circuit summarily asserted that this was not a "refusal-to-deal" case simply because CREXi said it was not a

refusal-to-deal case, App. 21a—even though CREXi's actual allegations showed otherwise.

CREXi's allegations supporting its technological-barriers claim were, in fact, focused entirely on CREXi's inability to access CoStar's product. *See* 4-ER-570–72 (¶¶ 39-43); *see* 4-ER-571 (¶ 41) (alleging CoStar's LoopLink-hosted webpages are "not available to [CoStar's] competitors"). The gravamen of the claim is that CREXi (a competitor) cannot access CoStar's LoopLink-hosted webpages to take listing data from LoopNet and repost on its own site. That is a classic refusal-to-deal allegation. Yet the Ninth Circuit failed to cite *Trinko*, let alone apply it.

Had this case been filed in the Tenth or D.C. Circuits, the district court's decision to dismiss CREXi's technological-barriers claim would have been upheld. Neither court would have taken CREXi's own characterization of its theory as dispositive; they would have analyzed that theory for what it truly is—a refusal-to-deal claim.

3. The Tenth Circuit's concern about courts evading the refusal-to-deal doctrine through creative pleading has taken hold in other circuits too.

A recent Fourth Circuit case is illustrative. *See Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 111 F.4th 337 (4th Cir. 2024), *petition for cert. filed*, No. 24-917 (Feb. 21, 2025). Among other things, that case raised the question whether "antitrust claims can be recharacterized to evade the Supreme Court's doctrinal tests." *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 122 F.4th 120, 124 (4th Cir. 2024) (Quattlebaum, J., dissenting from the denial of rehearing en banc). The plaintiff claimed that the defendant, a competing energy provider, had deprived

it of service connections it needed to deliver energy to its customers—a classic refusal to deal. 111 F.4th at 362. The Fourth Circuit acknowledged the applicability of *Trinko* but held that it "need not determine, as a matter of law, whether … such conduct in isolation amounted to a § 2 violation under a refusal-to-deal theory of liability" because the conduct was part of a broader scheme. *Id.* at 365-66. And the court ultimately allowed the claim to proceed even though it did not satisfy *Trinko*. *Id.* at 364.

The Seventh Circuit has similarly allowed a plaintiff to recharacterize a refusal-to-deal claim as a tying claim. *See Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 466-74 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 2877 (2021). As the partial dissent explained, although the plaintiff described the claim as unlawful tying, "the crux" of the claim was that the defendant had "withheld the alleged tying product from its *rival*, [the plaintiff], not from its *customers*." *Id.* at 491 (Brennan, J., concurring in part and dissenting in part); *see id.* at 495-502. So understood, the claim should not have been allowed to proceed independently from any refusal-to-deal claim that survived *Trinko*.

Absent this Court's intervention, the playbook is clear: plaintiffs will continue to recharacterize their claims to evade refusal-to-deal doctrine and *Trinko* will be marginalized out of existence.

B. The Ninth Circuit Erred In Failing To Apply *Trinko*

The Ninth Circuit's failure to apply *Trinko* runs directly contrary to that decision, creates all the perverse incentives that decision was intended to

avoid, and undermines the clear rules this Court has developed to guide business conduct.

1. The Ninth Circuit's willingness to allow CREXi to reclassify its theory of the case to avoid *Trinko*'s strictures runs directly contrary to *Trinko* itself.

In *Trinko*, the plaintiff did not allege a straight refusal-to-deal claim. The plaintiff alleged that the defendant had "filled orders of [its competitors'] customers after filling those for its own local phone service, ha[d] failed to fill [them] in a timely manner, or not at all." *Trinko*, 540 U.S. at 404 (quoting complaint). That the plaintiff's theory was about "insufficient assistance in the provision of service to rivals," rather than a categorical refusal to deal, made no difference. *Id.* at 410; *see Duke Energy*, 122 F.4th at 129-30 (Quattlebaum, J., dissenting from denial of rehearing en banc) (even though *Trinko* "was not literally a refusal to deal, but rather a lackluster reluctance to deal," "the Court determined that distinction made no difference"). The Ninth Circuit should have followed this Court's lead and applied the refusal-to-deal framework, rather than allowing CREXi's characterization of its claim to control.

2. This is not the first time the Ninth Circuit has declined to follow *Trinko*. The Court previously granted certiorari to correct such a failure in *linkLine*. *See* Cert. Pet. 14-17, *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009) (No. 07-512), 2007 WL 3028933 ("The Ninth Circuit's Decision Conflicts With *Trinko*"); *linkLine*, 555 U.S. at 444-46 (reversing on that ground). There, the plaintiffs (retail DSL providers) competed with the defendant (AT&T); AT&T offered its own retail DSL service and sold wholesale DSL service to competing retail providers who did not own their own telephone lines

capable of supplying DSL internet. 555 U.S. at 442-43. The Ninth Circuit had allowed the plaintiffs to circumvent *Trinko* by recharacterizing a refusal-to-deal claim as a price-squeezing claim. *Id.* at 443-45. As the Court explained, a "straightforward application" of *Trinko* required dismissal of the plaintiffs' challenge to AT&T's wholesale pricing. *Id.* at 449-51. Because AT&T had "no antitrust duty to deal with its competitors at wholesale" at all, "it certainly ha[d] no duty to deal under terms and conditions that the rivals find commercially advantageous." *Id.* at 450.

The Ninth Circuit committed the same error here. Rather than engage in a "straightforward application" of *Trinko*, the court of appeals accepted CREXi's characterization of its claim as gospel and ignored the reality of what duty CREXi sought to impose on CoStar: a duty to give rivals like CREXi direct access to CoStar's products and intellectual property. This Court should reaffirm, once again, that *Trinko*'s straightforward rule applies in the Ninth Circuit as in all other courts of appeals.

3. The Ninth Circuit's persistent failure to apply *Trinko* creates the same perverse incentives *Trinko* was designed to avoid. As this Court has long recognized, "[t]he antitrust laws ... were enacted for 'the protection of *competition*, not *competitors*.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (citation omitted). This Court's refusal-to-deal case law is one application of that more general principle. And under that principle, companies, even alleged monopolists, are entitled to retain the fruits of their labor without having to share those advantages with their rivals.

As the Court explained in *Trinko*, "[c]ompelling … firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive" for firms "to invest in those economically beneficial facilities." 540 U.S. at 407-08. That is true both for the alleged monopolist, who may be disincentivized from developing those facilities in the first place, and for the up-and-coming rival, who has little incentive to develop competing facilities if it knows it can freeride on its predecessor's work. *Id.* Enforced sharing also poses enforcement problems for courts. It requires them "to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited." *Id.* at 408.

The concerns about forced sharing are front and center here. By forcing CoStar to allow competitors like CREXi to freeride on the databases that CoStar has built through decades of hard work, the Ninth Circuit's decision "reduc[es] the incentive both sides have to innovate, invest, and expand." *Novell*, 731 F.3d at 1073. Under the Ninth Circuit's decision, larger firms will "be deterred from investing, innovating, or expanding" because they know that "anything [they] create[] [they] could be forced to share." *Id.* And smaller firms may "be deterred" from developing innovative ways to compete because they can "just demand the right to piggyback on [their] larger rival[s]." *Id.* The Ninth Circuit's refusal to apply the refusal-to-deal doctrine creates incentives that will discourage innovation in the context of new technologies, where innovation is needed most.

III. The Questions Presented Are Important And This Case Is A Good Vehicle

The questions presented are important. Without the Court's review, the *Twombly* and *Trinko* standards will be diluted; the purposes of antitrust law undermined; and innovation stifled. No vehicle issues preclude resolution of either question.

A. This Court's Review Is Needed On Both Questions

Without further review, the Ninth Circuit's exclusive-dealing and refusal-to-deal holdings will (i) water down *Twombly*, imposing significant discovery costs on antitrust defendants; (ii) encourage plaintiffs to seek creative ways around decisions like *Trinko*, eliminating the clear guidance those decisions provide to businesses; and (iii) discourage innovation and ingenuity. This Court should step in now.

First, under the Ninth Circuit's decision, any antitrust defendant will be subject to discovery and protracted litigation whenever a plaintiff pleads that a handful of customers misunderstood the defendant's expressly nonexclusive contracts to be exclusive. That is a significant watering down of *Twombly*'s strict pleading requirements—requirements that are especially important in the antitrust context where discovery is often "sprawling, costly, and hugely time-consuming," and can "push" defendants "to settle … anemic cases." *Twombly*, 550 U.S. at 559, 560 n.6. Certiorari is needed to ensure courts apply the appropriate level of "care" to ensure that only "allegations that reach the level suggesting" an actual antitrust violation can proceed. *Id.* at 559.

Second, the Ninth Circuit decision also significantly waters down this Court's decision in

Trinko, and will encourage litigants (and courts) to seek creative ways around the Court's precedent. The upshot will be dilution of the clear rules that precedent lays out for businesses seeking to conform their conduct to the antitrust laws. This Court has "repeatedly emphasized the importance of clear rules in antitrust law." *linkLine*, 555 U.S. at 452. The Ninth Circuit's refusal to apply those rules creates confusion and uncertainty for businesses. While companies can control their own contracts and their own conduct, they cannot control how others—especially a de minimis number of others—might perceive those contracts. Nor can they control how plaintiffs might choose to plead their case. The upshot of the Ninth Circuit's holding is that antitrust defendants can and will be subject to extensive discovery and the possibility of treble damages based on the subjective and mistaken conduct of others.

Third, under the Ninth Circuit's twin holdings, companies will have less incentive to invest in their products, knowing that any work must be shared with competitors for free. At a time when protecting original content online is becoming more and more difficult, the Ninth Circuit's decision creates yet another hurdle for innovators. And correcting that holding is especially important because claims targeting technological barriers continue to grow. Indeed, numerous district courts have already cited the Ninth Circuit's decision when denying motions to dismiss. *See, e.g.*, *United States v. Apple, Inc.*, No. 24-cv-4055, 2025 WL 1829127, at *12 (D.N.J. June 30, 2025); *Tekion Corp. v. CDK Glob., LLC*, No. 24-cv-8879, 2025 WL 1939870, at *4-5 (N.D. Cal. July 15, 2025); *see also* Bryan Koenig, *Big Tech's Refusal-To-Deal Defense Hits A Wall: Judges*, Law360 (July 25,

2025), https://www.law360.com/articles/2369616/big-tech-s-refusal-to-deal-defense-hits-a-wall-judges (discussing the decision below and cases relying on it).

B. This Case Is A Good Vehicle

This case is also a clean vehicle for the Court's review. The Ninth Circuit directly addressed both questions presented and declined to reconsider either en banc. Both are claim-dispositive and, together, case-dispositive. And while this case is in an interlocutory posture, this Court has granted review of decisions in that same posture. *E.g.*, *Slack Techs., LLC v. Pirani*, 598 U.S. 759, 765 (2023) (denial of motion to dismiss); *Digital Realty Tr., Inc. v. Somers*, 583 U.S. 149, 159-60 (2018) (same); *Ziglar v. Abbasi*, 582 U.S. 120, 126 (2017) (denial of motion to dismiss in part).

Far from being a detriment, the motion to dismiss posture is precisely what makes the Court's immediate review important. Without timely intervention, this case will proceed to the kind of extensive and expensive discovery *Twombly* warned against—and the lax antitrust pleading standards in the Ninth Circuit will only encourage other suits where there is no plausible entitlement to relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 4, 2025

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COSTAR GROUP, INC.; CoStar Realty Information, Inc., Plaintiffs-counter-defendants-Appellees,

v.

COMMERCIAL REAL ESTATE EXCHANGE, INC., Defendant-counter-claimant-Appellant.

No. 23-55662

Argued and Submitted October 9, 2024
San Francisco, California

Filed June 23, 2025

Amended September 5, 2025

Before: Lucy H. Koh and Anthony D. Johnstone, Circuit Judges, and Michael H. Simon,* District Judge.

Order; Opinion by Judge Johnstone

ORDER

The Opinion filed on June 23, 2025, is hereby amended. The Amended Opinion will be filed concurrently with this order.

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* The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

The panel has voted to deny the petition for panel rehearing. Judge Koh and Judge Johnstone have voted to deny the petition for rehearing en banc, and Judge Simon has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 40. The petitions for panel rehearing and rehearing en banc (Dkt. No. 65) are DENIED. No further petitions for rehearing of the Amended Opinion may be filed.

OPINION

JOHNSTONE, Circuit Judge:

CoStar Group, Inc., and CoStar Realty Information, Inc., (collectively, "CoStar") and Commercial Real Estate Exchange, Inc., ("CREXi") are online platforms that compete for brokers in the commercial real estate listing, information, and auction markets. CoStar holds the largest share in these markets. CREXi is a recent entrant. After CoStar sued CREXi for infringing its intellectual property by listing images and other information that CoStar hosts, CREXi counterclaimed on antitrust grounds. The crux of CREXi's antitrust complaint: CoStar is a monopolist that wields its platform licensing and technology to prevent its customers from doing business with its competitors. CREXi argues that CoStar's conduct is: (1) unlawful monopolization and attempted monopolization under § 2 of the Sherman Act, 15 U.S.C. § 2; (2) unlawful exclusive dealing under § 1 of the Sherman Act, 15 U.S.C. § 1, and California's analogous Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 et seq.; (3) and "unfair" and "unlawful" under California's Unfair

Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq. The district court dismissed CREXi's antitrust counterclaims and directed entry of final judgment on those claims under Rule 54(b), permitting this appeal.

We conclude that CREXi successfully states claims under §§ 1 and 2 of the Sherman Act and under California's Cartwright Act and UCL. It plausibly alleges that CoStar has monopoly power in the relevant markets. And it plausibly alleges that CoStar engaged in anticompetitive conduct by entering exclusive deals with brokers and imposing technological barriers, which prevents brokers from working with competitors. A monopolist wielding its power to exclude competitors and maintain monopoly power in its markets violates § 2 of the Sherman Act. Using exclusive deals to do so is a "contract . . . in restraint of trade" that violates § 1 of the Sherman Act and the Cartwright Act. This same anticompetitive conduct violates the "unfair" and "unlawful" prongs of the UCL. So we reverse.

I. CoStar's copyright claims and CREXi's antitrust counterclaims

CoStar and its competitor CREXi provide listing, information, and auction services to help brokers research and transact commercial real estate ("CRE"). CoStar, founded in 1987, is the established industry leader. For listing services, CoStar offers LoopNet, an online marketplace, and LoopLink, software that enables brokers to display LoopNet listings on their websites. For information services, CoStar offers the CoStar database, which provides current and historical data about CRE properties. And for auction services, CoStar offers Ten-X, a sales

platform for bidding on and selling real estate. CREXi, founded in 2015, offers alternatives to all of CoStar's products.

CoStar sued CREXi for copyright infringement and related claims in September 2020. Among other allegations, CoStar claims that CREXi stole tens of thousands of copyrighted property images, and misappropriated other valuable content from CoStar's services and databases, including listing information from LoopNet. The district court denied CREXi's motion to dismiss CoStar's claims, which are still pending there. CREXi then counterclaimed against CoStar, including the antitrust counterclaims in this appeal. As relevant to this appeal, CREXi asserted counterclaims under § 2 of the Sherman Act for unlawful monopolization and attempted monopolization (claims 1–6); under § 1 of the Sherman Act and the Cartwright Act for exclusive dealing (claims 7–8); and for unfair and unlawful competition under the UCL (claims 12–13).[1]

CREXi alleges that CoStar perpetrates a "scheme" of anticompetitive conduct to prevent its broker customers from doing business with CoStar's competitors. First, CoStar imposes contract terms on its broker customers that expressly or implicitly prohibit them from providing their own listings to CoStar's competitors. Second, CoStar builds technological barriers into its platforms that prevent

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[1] CREXi also claims that CoStar intentionally interfered with its broker contracts and its prospective economic advantage (claims 10–11). But because CREXi first alleged those claims in its amended counterclaims and they were outside the scope of the district court's order granting leave to amend, the district court properly dismissed them. *See* Fed. R. Civ. P. 15(a)(2).

brokers from freely transferring their own listings to competing platforms.[2] The effect of this conduct, according to CREXi, is to build "a moat" around CoStar's vast customer base to the exclusion of its competitors.

The district court dismissed most of CREXi's claims—including all of its antitrust claims—with prejudice. The court held that CREXi did not state a § 2 monopolization claim because it failed to show through either direct or indirect evidence that CoStar has monopoly power. And it held that CREXi did not state a § 1 exclusive dealing claim because the agreements at issue were not exclusive. The court also rejected CREXi's UCL counterclaims because they were derivative of its antitrust claims.

CREXi sought final judgment on, and an immediate appeal of, its dismissed claims under Rule 54(b). Fed. R. Civ. P. 54(b) (permitting final judgment on "fewer than all[ ] claims" where a district court "determines that there is no just reason for delay"). The district court directed entry of final judgment as to the dismissed counterclaims, finding that doing so would not lead to duplicative appellate review.

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[2] CREXi also alleges that CoStar falsely claims copyright over data and images that brokers and others own and improperly uses CREXi's trademarked name to advertise and misrepresent that CREXi is affiliated with CoStar's Ten-X auction service. CREXi's false copyright ownership allegations may be related to or overlapping with its technological barriers theory. However, because we hold that CREXi's allegations of exclusive agreements and technological barriers are sufficient to state a § 2 monopolization claim, we do not address CREXi's additional allegations of anticompetitive conduct. On remand, the district court should revisit these allegations in light of our decision.

Although there is factual overlap between CREXi's claims on appeal and CoStar's and CREXi's unresolved copyright and trademark claims, we agree with the district court that the claims are sufficiently legally severable and will not result in a "piecemeal appeal[ ]." *Wood v. GCC Bend, LLC*, 422 F.3d 873, 878–80 (quoting *Curtiss–Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 10, 100 S.Ct. 1460, 64 L.Ed.2d 1 (1980)). Nor will CoStar suffer any prejudice from having to defend this antitrust appeal now rather than later. *See Gregorian v. Izvestia*, 871 F.2d 1515, 1519 (9th Cir. 1989). Thus, it is a final judgment under Rule 54(b) over which we have jurisdiction. 28 U.S.C. § 1291.

We review de novo the district court's order of dismissal for failure to state a claim. *Coronavirus Rep. v. Apple, Inc.*, 85 F.4th 948, 954 (9th Cir. 2023). When considering a motion to dismiss, we accept all facts alleged in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party. *Ass'n for L.A. Deputy Sheriffs v. County of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011). At this stage, a plaintiff need only state a facially plausible claim, such that a court can "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

II. CREXi's claims under Sherman Act §§ 1 and 2 and related laws

CREXi claims that CoStar engages in anticompetitive conduct by itself and through its contracts with brokers. Under the Sherman Act's § 2, which targets unilateral anticompetitive conduct, CREXi claims that CoStar wields or attempts to wield

monopoly power to exclude competitors from the market by signing exclusionary contracts with brokers and putting up technical barriers. Under the Sherman Act's § 1, which targets concerted anticompetitive conduct, CREXi claims that those same exclusionary contracts are exclusive agreements that prevent the brokers from doing business with competitors. CREXi's claim under California's Cartwright Act mirrors its § 1 claim. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665 n.8 (9th Cir. 2022) (en banc). And based on all this conduct, CREXi claims that CoStar violated the "unfair" and "unlawful" prongs of California's UCL. *See Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163, 83 Cal.Rptr.2d 548, 973 P.2d 527, 539–40, 544 (1999) (explaining that the "unlawful" prong "'borrows' violations of other laws and treats them as unlawful practices" and that the "unfair" prong targets "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws").

CREXi's §§ 1 and 2 claims are both governed by antitrust law's "rule of reason." *See Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 996 (9th Cir. 2010); *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 998 (9th Cir. 2023). Under the rule of reason, CREXi's §§ 1 and 2 claims converge on the same question: does "the challenged [conduct have] a substantial anticompetitive effect that harms consumers in the relevant market[?]" *Fed. Trade Comm'n v. Qualcomm, Inc.*, 969 F.3d 974, 991 (9th Cir. 2020) (quoting *Ohio v. Am. Express Co.*, 585 U.S. 529, 541, 138 S.Ct. 2274, 201 L.Ed.2d 678 (2018)). So although CREXi's Sherman Act claims have different

elements, in this case both claims turn primarily on whether CoStar entered exclusive agreements while holding monopoly power in the markets at issue. Allegations of such anticompetitive conduct, if proven, would show that CoStar harms consumers in violation of the Sherman Act.

We begin by introducing the elements of CREXi's § 2 monopolization claim and its § 1 exclusive dealing claim.

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Section 1 supports several theories of antitrust liability, including CREXi's theory of exclusive dealing. To state an exclusive dealing claim under § 1, a plaintiff must plausibly allege (1) the existence of an exclusive agreement that (2) forecloses competition in a substantial share of the relevant market. *See Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1180 (9th Cir. 2016).

Section 2 of the Sherman Act prohibits "monopoliz[ing] . . . trade or commerce among the several States." 15 U.S.C. § 2. Under § 2, plaintiffs can claim that a defendant both attempted to monopolize and actually monopolized a market. To state an attempted monopolization claim, plaintiffs must start by plausibly alleging that the defendant specifically intended to control prices or destroy competition in the market and has a dangerous probability of achieving monopoly power. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1432–33 (9th Cir. 1995). To state a monopolization claim, plaintiffs must start by plausibly alleging that the defendant has monopoly power in the relevant market. *Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co.*, 99 F.3d 937,

949 (9th Cir. 1996). For both claims, plaintiffs must then plausibly allege that the defendant engaged in anticompetitive conduct to achieve (or attempt to achieve) monopoly power and caused antitrust injury. *See id.*; *Rebel Oil*, 51 F.3d at 1433.

Here, we can bypass some of these elements at the pleading stage. CoStar does not dispute that CREXi plausibly alleged that it specifically intended to control prices or destroy competition, or that it caused antitrust injury. So for CREXi's attempted monopolization claim, the only remaining elements are whether CoStar has a dangerous probability of achieving monopoly power and engaged in anticompetitive conduct in pursuit of that power. And for its monopolization claim, the only remaining elements are whether CoStar has monopoly power and willfully acquired it through anticompetitive conduct. If CREXi has plausibly alleged that CoStar has monopoly power in the relevant market, it necessarily has alleged that CoStar has a dangerous probability of achieving monopoly power. Thus, if CREXi plausibly alleges that CoStar has monopoly power and willfully acquired that power through anticompetitive conduct, it will have stated both a monopolization and attempted monopolization claim under § 2.

A. The overlapping Sherman Act elements at issue

We can further simplify our consideration of CREXi's §§ 1 and 2 claims by mapping the overlap of their remaining elements.

First, a § 2 monopolization claim requires monopoly power, while a § 1 exclusive dealing claim does not. But a § 1 exclusive dealing claim requires a

substantial foreclosure of competition, and CREXi's allegations of monopoly power establish such a foreclosure. CREXi alleges that any exclusive agreements CoStar entered into apply to all brokers using CoStar's services. So if CREXi plausibly alleges that CoStar has monopoly power under § 2 over the markets covered by the alleged agreements, then it has also plausibly alleged that those agreements foreclosed competition in a substantial share of the relevant market under § 1.

By their nature, exclusive agreements can prevent a contracting party's competitors from doing business with respect to the contracted goods or services. Often these agreements have pro-competitive benefits. *Omega Env't, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997). So § 1 only prohibits exclusive agreements if they substantially foreclose competition, that is exclude competitors from so much of the market that they cannot gain a solid foothold to compete. *See Allied Orthopedic*, 592 F.3d at 996; *see also Interface Grp., Inc. v. Mass. Port Auth.*, 816 F.2d 9, 11 (1st Cir. 1987). Because monopoly power "is the substantial ability 'to control prices or exclude competition,'" *Epic Games*, 67 F.4th at 998 (quoting *United States v. Grinnell*, 384 U.S. 563, 571, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966)), if a monopolist enters into exclusive agreements with its customers, those agreements can substantially foreclose competition, *see ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 284 (3d Cir. 2012) ("[I]f the defendant occupies a dominant position in the market, its exclusive dealing arrangements invariably have the power to exclude rivals."). Thus, even though monopoly power is not a necessary element of a § 1 claim, when a plaintiff plausibly alleges that exclusive agreements cover a

market in which the defendant allegedly holds monopoly power, that is sufficient to allege the substantial foreclosure element of exclusive dealing too.

Second, a § 1 exclusive dealing claim requires an exclusive agreement, while a § 2 monopolization claim does not. But a § 2 monopolization claim requires anticompetitive conduct, and exclusive agreements are an example of anticompetitive conduct. So if CREXi plausibly alleges that CoStar entered into exclusive agreements that foreclose competition under § 1, it has also plausibly alleged that CoStar engaged in anticompetitive conduct under § 2.

"The anticompetitive-conduct requirement [of § 2] is 'essentially the same' as the Rule of Reason inquiry applicable to [§ 1] claims." *Epic Games*, 67 F.4th at 998; *see also United States v. Microsoft Corp.*, 253 F.3d 34, 70 (D.C. Cir. 2001). Exclusive dealing is also an exclusionary practice akin to monopolization. P. Areeda & H. Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application §§ 768b2, 1821b (5th ed. 2018). Thus, even though exclusive dealing is not a necessary element of a § 2 claim, it is sufficient to show anticompetitive conduct.

In short, a monopolist that wields exclusive agreements to foreclose competition violates both §§ 1 and 2 of the Sherman Act. This means we must answer only two questions in this appeal: whether CREXi plausibly alleged that CoStar (1) has monopoly power, including the power to substantially foreclose competition, and (2) entered exclusive agreements, an example of anticompetitive conduct. If CREXi has done so, it will have stated a claim under

both §§ 1 and 2 of the Sherman Act. Because CREXi's claim under the Cartwright Act mirrors its § 1 claim, it also will have stated a claim under the Cartwright Act. *See Olean Wholesale*, 31 F.4th at 665 n.8. And because CREXi's claims under the UCL depend on the same underlying conduct as its §§ 1 and 2 claims, it also will have stated a claim under both the "unfair" and "unlawful" prongs of the UCL. *See Cel-Tech*, 83 Cal.Rptr.2d 548, 973 P.2d at 539–40, 544.

B. CREXi's monopoly power allegations

We now consider whether CREXi plausibly alleges that CoStar has monopoly power in the relevant markets. CREXi alleges that there are three relevant product markets—listing services, information services, and auction services—that are further divided into markets for each of fifty metropolitan areas. CoStar does not contest this market definition.

Monopoly power "is the substantial ability 'to control prices or exclude competition.'" *Epic Games*, 67 F.4th at 998 (quoting *Grinnell*, 384 U.S. at 571, 86 S.Ct. 1698). A plaintiff may plead monopoly power in two ways. Either a "predominant share of the market" or an "ability to manage . . . prices with little regard to competition" can "support[ ] an inference of market dominance." *Greyhound Comput. Corp. v. Int'l Bus. Machs.*, 559 F.2d 488, 497 (9th Cir. 1977). Thus, monopoly power can be shown either directly, through evidence of the exercise of monopoly power, or indirectly, through evidence of a firm's predominant market share. *See Rebel Oil*, 51 F.3d at 1434; *Epic Games*, 67 F.4th at 998. CREXi plausibly alleges monopoly power both directly and indirectly.

1. Direct evidence of monopoly power

A plaintiff can plausibly allege that a defendant has monopoly power with "direct evidence of the injurious exercise" of that monopoly power—evidence of either supracompetitive pricing or reduced output. *Rebel Oil*, 51 F.3d at 1434; *see Epic Games*, 67 F.4th at 998 ("Like market power, monopoly power can be established either directly or indirectly."). "A supracompetitive price is simply a 'price[ ] above competitive levels.'" *Epic Games*, 67 F.4th at 984 (omission in original) (quoting *Rebel Oil*, 51 F.3d at 1434); *see also Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475–76 (9th Cir. 1997), *overruled in part on other grounds by Lacey v. Maricopa Cnty.*, 693 F.3d 896 (9th Cir. 2012) (distinguishing high prices from supracompetitive prices). Because monopoly power "is the abilit[y] (1) to price substantially above the competitive level *and* (2) to persist in doing so for a significant period without erosion by new entry or expansion," evidence of supracompetitive pricing is direct proof of the actual exercise of monopoly power. Areeda & Hovenkamp, § 501.

CREXi plausibly alleges that CoStar charged supracompetitive prices and thus has monopoly power. CREXi repeatedly alleges that CoStar has "impose[d] prices much higher than those of its competitors for years, and has not been forced to reduce them." CREXi provides specific examples of how CoStar has increased its prices as competitors have been either forced from the market by CoStar or acquired by CoStar. For example, CREXi alleges that CoStar hiked its average prices by 80% for new customers several months after CoStar used litigation tactics to drive a former competitor, Xceligent, from the market. CREXi also points to anecdotes from

CoStar's customers complaining about CoStar's pricing and the unavailability of alternatives that could drive down prices. For example, one customer complained that after CoStar merged with a former competitor, CoStar "decided to gouge brokers" by "drastically rais[ing] their prices" by 300 to 500%. These allegations are enough to create a plausible inference of long-term supracompetitive pricing—an exercise of monopoly power.

Despite determining that CREXi plausibly alleged supracompetitive pricing, the district court held that CREXi failed to plausibly allege monopoly power because it did not also allege that CoStar restricted output in the relevant markets. But a plaintiff need not allege both output restrictions and supracompetitive pricing to plead direct evidence of monopoly power. As the Supreme Court recently explained, "reduced output, increased prices, *or* decreased quality in the relevant market" may serve as "proof of actual detrimental effects [on competition]." *Am. Express*, 585 U.S. at 542, 138 S.Ct. 2274 (emphasis added) (alteration in original); *see also Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993) ("[A] jury may not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted *or* prices were above a competitive level." (emphasis added)); *Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 461–62, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986) ("[P]roof of actual detrimental effects, *such as a reduction of output*, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects." (emphasis added) (internal citations omitted)); *Epic Games*, 67 F.4th at 983 ("To

prove a substantial anticompetitive effect directly, the plaintiff must provide 'proof of actual detrimental effects [on competition],' such as *reduced output, increased prices, or decreased quality* in the relevant market. Importantly, showing a reduction in output is one form of direct evidence, but it 'is not the only measure.'" (emphasis altered) (citations omitted)). So even if CREXi did not plausibly allege that CoStar restricted output,[3] it still plausibly alleged CoStar has monopoly power.

It makes economic sense that a plaintiff need only allege evidence of supracompetitive pricing to raise a plausible inference of monopoly power. Pricing and output are "two sides of the same coin." *United States v. AMR Corp.*, 335 F.3d 1109, 1115 n.6 (10th Cir. 2003) (citation omitted). "If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too—in other words, output will be restricted." *Calif. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 777, 119 S.Ct. 1604, 143 L.Ed.2d 935 (quoting *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594–95 (7th Cir. 1984)); *see also Brooke Grp.*, 509 U.S. at 233, 113 S.Ct. 2578 ("Supracompetitive pricing entails a restriction in output."). And if firms restrict output, prices will increase. *See Rebel Oil*, 51 F.3d at 1434 ("Prices increase marketwide in response to the reduced output because consumers bid more in competing against one another to obtain the smaller quantity

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[3] Because we conclude that no such showing is necessary, we need not reach the question of whether CREXi has plausibly alleged restricted output. *See INS v. Bagamasbad*, 429 U.S. 24, 25, 97 S.Ct. 200, 50 L.Ed.2d 190 (1976) ("As a general rule courts . . . are not required to make findings on issues the decision of which is unnecessary to the results they reach.").

available." (citing *Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986))). So to allege monopoly power via direct evidence, an antitrust plaintiff need only allege that a firm raised prices to a supracompetitive level *or* restricted output. CREXi does. Thus, the district court erred in dismissing CREXi's monopoly power claim.

2. Indirect evidence of monopoly power

Moreover, CREXi's monopoly power allegations are sufficient at the motion to dismiss stage for an independent reason. The district court overlooked indirect evidence showing that CoStar has a "predominant share of the market" which "support[s] an inference of market dominance" even without direct evidence that it exercises monopoly power. *Greyhound*, 559 F.2d at 497. To establish monopoly power through indirect evidence a plaintiff must, with respect to a defined market, show (1) "that the defendant owns a dominant share of that market," and (2) "that there are significant barriers to entry and . . . that existing competitors lack the capacity to increase their output in the short run." *Rebel Oil*, 51 F.3d at 1434. CREXi also plausibly alleges that CoStar has monopoly power through indirect evidence.

a) Dominant share of the market

"[M]arket shares on the order of 60 percent to 70 percent have supported findings of monopoly power." *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924–25 (9th Cir. 1980); *see also Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997) (explaining that "[c]ourts generally require a 65% market share to establish a prima facie case of market power" to sustain a

monopolization claim). Here, CREXi alleges that CoStar has a 90% share of the CRE listing market, a 90% share of the information market, and a 95% share of the auction services market. Those allegations rely on two sources: local estimates of CoStar's market share in fifty metropolitan areas based on property sales, and national data about CRE activity and the number of visitors to CoStar's LoopNet website.

For local market shares, CREXi divided the dollar value of for-sale CRE listings on CoStar's platform by the total value of closed CRE sales transactions in each metropolitan area. Based on these figures, CREXi estimates that CoStar's market share equals or exceeds 90 percent in twelve of the metropolitan areas, 80 percent in thirty-one of the metropolitan areas, 70 percent in thirty-eight metropolitan areas, 60 percent in forty-six metropolitan areas, and 57 percent in all fifty areas. We recognize that these estimates may be inflated; properties can be listed on multiple sites, and the estimates include properties listed but never sold. But the degree of overestimation and its effect on CoStar's overall market share is a fact-intensive inquiry that cannot be resolved on a motion to dismiss. *See Newcal Indus. Inc., v. Ikon Off. Sol.*, 513 F.3d 1038, 1052 (9th Cir. 2008); *Greyhound*, 559 F.2d at 496 n.17. Drawing reasonable inferences in CREXi's favor, any overestimation would not make CREXi's monopoly power allegations implausible.

National data bolsters CREXi's market share estimates: "nearly 90% of all CRE activity occurs on a CoStar Network," and LoopNet receives over 85% of website visitors as compared to listing competitors. Although "CRE activity" and website visitors to

LoopNet are unlikely to mirror CoStar's market share in the listing market, it is reasonable to infer that these datapoints are correlated with market share. Taken together, CREXi's local and national data render CREXi's allegation that CoStar holds a dominant share of the listing market facially plausible. It is also facially plausible that CoStar holds a dominant share of the information and auction services markets. While the LoopNet data only relates to the listing market, the CoStar network data could pertain to all three alleged markets. And CoStar's information and auction services are complementary products to its listing services, so it is plausible its shares in all three markets are closely correlated.

b) Significant barriers to entry

We next examine whether there are significant barriers to entry into the defined markets. CREXi plausibly alleges that there are. "Entry barriers are 'additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants,' or 'factors in the market that deter entry while permitting incumbent firms to earn monopoly returns.'" *Rebel Oil*, 51 F.3d at 1439 (citing *L.A. Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1427–28 (9th Cir. 1993)). CREXi alleges that the relevant markets are characterized by "network effects," or economies of scale in consumption, a classic barrier to entry. *See Klein v. Facebook, Inc.*, 580 F. Supp. 3d 743, 779–80 (N.D. Cal. 2022); *Epic Games*, 67 F.4th at 984–85. Services with network effects become more valuable as the number of users increases. *See Klein*, 580 F. Supp. 3d at 780. CREXi alleges that an increase in brokers who use CoStar's listing services increases

the value of CoStar's listing to those brokers. A new entrant cannot attract sellers' brokers to list properties unless there are enough buyers' brokers using the service to search properties. But a new entrant cannot attract buyers' brokers to search properties unless there are enough sellers' brokers using the service to list properties. This "catch-22" increases the barriers to entry for new competitors.

In sum, CREXi plausibly alleges that CoStar has monopoly power via direct and indirect evidence under § 2. So, because the allegedly exclusive agreements cover the same market over which CoStar allegedly holds monopoly power and the agreements apply to all brokers using CoStar's services, CREXi has also plausibly alleged that those agreements substantially foreclosed competition under § 1. That alone violates neither section of the Sherman Act. For its § 2 monopolization claim, CREXi also must plausibly allege that CoStar engaged in anticompetitive actions to acquire or maintain its monopoly. And for its § 1 exclusive dealing claim, CREXi also must plausibly allege that CoStar entered into exclusive agreements that restrained trade. We now turn to those elements.

C. CREXi's allegations of CoStar's exclusive agreements and anticompetitive conduct

CREXi alleges that CoStar engaged in anticompetitive conduct by entering exclusive contracts with brokers and imposing technological barriers. "Anticompetitive conduct is behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way." *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir.

2008). So a firm with monopoly power is "precluded from employing otherwise lawful practices that unnecessarily exclude[ ] competition" from a relevant market. *Greyhound*, 559 F.2d at 498. Usually, exclusionary conduct is costly to firms. For example, most consumers prefer not to enter exclusive deals that prevent them from shopping around. *See Microsoft*, 253 F.3d at 87. Typically, a firm must reduce prices to compensate consumers for an exclusive deal, or else forgo their business. Only those firms with monopoly power can recoup those costs by excluding rivals from the market. *See Rebel Oil*, 51 F.3d at 1434; *see also LePage's Inc. v. 3M*, 324 F.3d 141, 164 (3rd Cir. 2003) ("[E]xclusionary practice has been defined as 'a method by which a firm . . . trades a part of its monopoly profits, at least temporarily, for a larger market share, by making it unprofitable for other sellers to compete with it.'") (alterations in original) (quoting Richard A. Posner, *Antitrust Law: An Economic Perspective* 28 (1976)).

Here, CREXi alleges that the exclusive agreements and technological barriers increase brokers' costs of working with CoStar's competitors. If CoStar had monopoly power, it could engage in this exclusionary conduct. And by exercising its monopoly power in this way, it could exclude competitors, like CREXi, from the market. This, in turn, could allow CoStar to maintain its monopoly power and recoup any losses incurred through its exclusionary conduct. *See* Richard A. Posner, *Antitrust Law* 251–54 (2d. Ed. 2001) (explaining the "methods by which a firm that has a monopoly share of some market in a new-economy industry might seek to ward off new entrants," and thereby extend its monopoly). This would be the precise type of conduct that § 2 prohibits.

See Qualcomm, 969 F.3d at 988–89; *Rebel Oil*, 51 F.3d at 1434.

1. Exclusive agreement allegations

In examining CoStar's contracts with brokers, the district court applied a refusal-to-deal framework, asking whether this was the rare instance where a firm had a duty to deal with its competitor. *Aerotec*, 836 F.3d at 1184; *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 448, 129 S.Ct. 1109, 172 L.Ed.2d 836 (2009) ("There are also limited circumstances in which a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability."). But that is not CREXi's theory of liability under § 2. Instead, CREXi contends that CoStar's exclusionary practices kept CoStar's broker customers—not CoStar itself—from dealing with CREXi. A monopolist's efforts "to limit the abilities of third parties to deal with rivals" is a matter of exclusive dealing with the monopolist's customers, not a refusal to deal with the monopolist's competitors. *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013); *see also Allied Orthopedic*, 592 F.3d at 996 (recognizing that exclusive dealing claims involving "an agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor" can violate antitrust law). Thus, we ask whether CREXi plausibly alleges that the contracts are exclusive agreements under § 1. And if it does, then it has also plausibly alleged anticompetitive conduct under § 2.

The foundation of "any exclusive dealing claim is an agreement to deal exclusively." *Aerotec*, 836 F.3d at 1181 (citation omitted). CREXi concedes, however,

that the agreements of which it complains "expressly disavow[ ] any ownership in or claim to [brokers'] data, agreeing that CoStar's right to use the data will be 'non-exclusive.'" But CREXi alleges that these promises are "illusory and contradicted" by other contractual provisions and by CoStar's conduct. Thus, CREXi frames the agreements as "de facto" exclusive.

We have yet to recognize a de facto exclusive dealing theory. *Aerotec*, 836 F.3d at 1182. But we have "readily acknowledge[d] that tying conditions," a similar restraint of trade, "need not be spelled out in express contractual terms to fall within the Sherman Act's prohibitions." *Id.* at 1179; *see also Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540, 74 S.Ct. 257, 98 L.Ed. 273 (1954) ("To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement."). To dismiss an exclusive dealing claim just because a contract does not expressly require exclusivity would be the type of overly formalistic rule that the Supreme Court has cautioned against in antitrust cases. *See Qualcomm*, 969 F.3d at 1004 (considering the "practical effect" of an exclusive dealing agreement (quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 326, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961))); *see also Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law."). Accordingly, we cannot inquire only into whether an agreement's terms expressly exclude one party from dealing with the other party's competitors.

Other courts of appeals have recognized de facto exclusive agreements. These agreements all contained "specific features" that "effectively coerced" parties to work exclusively with a dominant firm. *Aerotec*, 836 F.3d at 1182–83. "Just as in any exclusive dealing claim . . . the court first had to be satisfied that specific features of the agreement required exclusivity." *Id.* at 1183. For example, in *ZF Meritor, LLC v. Eaton Corp.*, the Third Circuit held that "a dominant supplier enter[ed] into de facto exclusive dealing arrangements with every customer in the market," 696 F.3d at 281, by offering rebate programs—backed by purchase and volume targets—that "induce[d] customers to deal exclusively with the firm offering the rebates," *id.* at 275. And in *McWane, Inc. v. FTC*, the Eleventh Circuit held that a defendant's "Full Support Program"—which required distributors to buy "all of their domestic fittings from [defendant]" or else lose their rebates and access to defendant's supply—was an exclusive agreement even though it was short-term and voluntary. 783 F.3d 814, 819– 20, 833–35 (11th Cir. 2015).

CREXi's allegations are different because the contracts at issue do not contain rebate or discount terms that create de facto exclusivity in those cases. Still, CREXi plausibly alleges that specific provisions of each contract contradict the express promise of non-exclusivity. There are four agreements at issue: the LoopNet and LoopLink terms that both govern CoStar's listing service; the CoStar terms that govern its information service; and the Ten-X terms that govern its auction service. The LoopNet terms forbid brokers from using or reproducing content available on LoopNet "in connection with any other . . . listing service" and from "integrat[ing] or incorporat[ing] any

portion of the Content into any other database." CREXi alleges that the LoopNet terms also require brokers to treat "all information obtained from the Service," including brokers' own listings, as "proprietary" to LoopNet. In their contracts, brokers must also agree that it "shall constitute a prima facie breach" of the LoopNet terms if CoStar determines that "any third party," including a competitor, "has access to property listings" provided by brokers and modified by CoStar. The LoopLink, CoStar, and Ten-X terms all contain similar provisions. CREXi alleges that CoStar leverages its market power to ensure these contract terms are "non-negotiable" for individual brokers.

These contractual provisions are not expressly exclusive, and their terms define "Content" as only material "contained on or provided through" CoStar's platform. But CREXi alleges that, in practice, they require brokers to exclusively use CoStar's services. CREXi alleges that the terms of the contracts condition access to LoopNet and to brokers' own LoopLink-hosted websites on an agreement not to support or share equivalent data with CoStar's competitors. In other words, if brokers provide data to CoStar, the terms forbid brokers from also providing that data to a competitor of CoStar. CREXi alleges that the terms, "by design, limit brokers' ability to use other listing platforms . . . and have a chilling effect on brokers' willingness to work with competitors, for fear that they will run afoul of CoStar's overbroad terms."

These allegations of actual de facto exclusivity are not speculation: CREXi provides specific examples of brokers who understand CoStar's contract terms to *actually* foreclose their ability to work with CREXi

and other CoStar rivals. For example, when CREXi offered to match listings posted on a broker's own website, the broker stated that this would be "problematic in regard to [his] contractual relationship with CoStar." Another broker explained that she could not allow CREXi to post her listings because "from what [she] underst[ood], that would be some sort of breach of contract with [CoStar]." A third broker explained that he could not work with CREXi because it would "conflict with our National CoStar agreement." Further proceedings may show that brokers misunderstand the operation of these contracts. But at the pleading stage, these allegations are sufficient to support an inference that the contracts create an exclusive relationship.

Even if CoStar's contracts do not expressly require brokers to work only with CoStar, CREXi has plausibly alleged that specific provisions in all four of CoStar's contracts in practice lock brokers into exclusive agreements with CoStar. CREXi therefore plausibly alleges that the contracts operate as a de facto exclusive agreements for purposes of § 1, and that they are anticompetitive under § 2.

2. Technological barriers

CREXi's allegations of exclusive dealing are not its only allegations of anticompetitive conduct under § 2 of the Sherman Act. It also alleges that CoStar constructed technological barriers.

CREXi alleges that CoStar constructed technological barriers that impede CREXi's ability to access brokers' listing information that is otherwise available to the public on brokers' own websites. CoStar's LoopLink service powers brokers' personal websites, which commonly function as a

comprehensive database for a broker's listings. Listing information may include addresses, sale prices or lease rates, square footage, photographs, narrative descriptions of the properties, and brokers' contact information. When several brokers who worked with CoStar tried to do business with CREXi, they asked CREXi to add listings to its platform by taking their listings from their own websites. But CREXi could not access those listings because, unbeknownst to the brokers, CoStar blocks its competitors—and only its competitors—from viewing them. Because it is costly to maintain a dynamic database of listings on several different platforms at once, many brokers keep their listings only on LoopLink-powered websites. CREXi's inability to access brokers' listings on brokers' own websites frequently means there is no practicable way for brokers to do business with CREXi and other CoStar competitors. For example, one broker explained that he "do[es] not keep lists of our listings on [E]xcel or other platforms as we have over 300 listings that change daily, and I don't have the extra time to keep track on multiple platforms. I can't think of an alternative way to get [CREXi my brokerage]'s listing at this time."

As alleged by CREXi, these technological barriers are particularly problematic because of their deceptive element. It is only after brokers contract with CoStar and build CoStar-powered websites that the brokers realize that they cannot transmit their own listing information and photographs to other listing companies via their own publicly available websites. At least one broker explained that he was surprised that CREXi was unable to access listings on the brokers' own website, stating: "I'm not sure why

you can't access these [listings] because they are on our own website." By blocking only rivals' access to otherwise publicly available listings on brokers' own websites without disclosing such blockage, CoStar deceives its customers and protects its monopoly in a manner not attributable to competition on the merits. *See Microsoft*, 253 F.3d at 76-77 (concluding that Microsoft had engaged in anticompetitive conduct where it led developers to believe they were developing cross-platform applications when, in reality, they were producing applications that would run only on the Windows operating system).

In purpose and effect, CREXi alleges that these barriers "inhibit the free transfer of information from brokers to companies that compete with CoStar" and "prevent competition in the marketplace." This plausibly alleges that the technological barriers are anticompetitive. *See Cascade Health Sols.*, 515 F.3d at 894 (holding that conduct is anticompetitive if its only purpose is to drive up rivals' costs and cut off access to inputs necessary for competition).

III. Conclusion

CREXi plausibly alleges that CoStar has monopoly power in the relevant markets and engaged in anticompetitive conduct by entering de facto exclusive agreements and constructing technological barriers. Because the other elements are also met, CREXi states monopolization and attempted monopolization claims under § 2. Therefore, we reverse the district court's dismissal of claims 1–6. CREXi also plausibly alleges that CoStar's agreements with brokers are de facto exclusive, and that those agreements may substantially foreclose competition in the relevant market. So CREXi states

a claim under both § 1 of the Sherman Act and California's analogous Cartwright Act. Therefore, we reverse the district court's dismissal of claims 7–8. And because CREXi states claims under both §§ 1 and 2 of the Sherman Act, it also states claims under both the "unfair" and "unlawful" prongs of the UCL, which rely on the same allegations. Therefore, we reverse the district court's dismissal of claims 12–13. Lastly, we affirm the district court's dismissal of CREXI's tortious interference claims, claims 10–11, as they were improperly raised in CREXi's amended counterclaims.

Sections 1 and 2 of the Sherman Act consist of different elements and are aimed at different conduct. But at bottom, the Act aims to protect consumers through competition in the marketplace. CREXi has plausibly alleged that CoStar engaged in anticompetitive conduct to protect its monopoly power, and that the conduct is an unreasonable restraint of trade. CREXi must now prove its allegations. And CoStar may raise defenses, such as procompetitive rationales for its conduct. At this stage, however, it is plausible that CoStar's alleged conduct while in possession of monopoly power causes a substantial anticompetitive effect that harms consumers in the CRE listing, information, and auction services markets.

Plaintiffs-counter-defendants-Appellees shall bear all costs on appeal.

AFFIRMED in part; REVERSED in part; REMANDED for further proceedings.

[2023 WL 6783957]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COSTAR GROUP, INC., and COSTAR REALTY INFORMATION, INC., Plaintiffs, v. COMMERCIAL REAL ESTATE EXCHANGE, INC., Defendant.	CASE NO. 2:20-cv-08819-CBM-ASx **ORDER RE: CREXI'S MOTION FOR ENTRY OF RULE 54(B) PARTIAL FINAL JUDGMENT OR ALTERNATIVELY, CERTIFICATION FOR APPEAL UNDER 28 U.S.C. 1292(B). [368]**
COMMERCIAL REAL ESTATE EXCHANGE, INC., Counterclaimant, v. COSTAR GROUP, INC., and COSTAR REALTY INFORMATIO, INC., Counterdefendants.	

The matter before the Court is Defendant and Counterclaimant Commercial Real Estate Exchange, Inc.'s ("CREXi") Motion for Entry of Rule 54(B) Partial Final Judgment or Alternatively, Certification for Appeal Under 28 U.S.C. 1292(B). (Dkt. No. 368.)

I. BACKGROUND

Plaintiffs and Counterdefendants CoStar Group, Inc. and CoStar Realty Information, Inc. ("CoStar") provide commercial real estate ("CRE") services in three relevant markets: CRE information, CRE listings, and CRE auction services. (Counter Compl. ¶ 1, Dkt. 74.) CREXi is a competitor attempting to build its own online CRE marketplace and technology platform. (*Id.* ¶ 2.) CoStar filed this lawsuit on September 25, 2020 alleging that CREXi "harvests content, including broker directories, from CoStar's subscription database without authorization by using passwords issued to other companies.". (Dkt. 1.) The operative Complaint is the second amended complaint ("SAC") which alleges the following causes of action: 1) Copyright Infringement, 2) Removal of Copyright Management Information pursuant to 17 U.S.C. §§ 1202(b)(1), 3) Distribution of Works with Removed or Altered CMI pursuant to 17 U.S.C. §§ 1202(b)(3), 4) Common Law Misappropriation, 5) California Unfair Competition, 6) California False Advertising Law and 7) Breach of Contract. The Court previously ruled on two motions to dismiss CoStar's First and Second Amended Complaints. (Dkt. Nos. 71, 406.)

CREXi filed Counterclaims on June 23, 2021. (Dkt. No. 74.) CREXi alleges CoStar has a 90% market share in each of the three CRE markets and

engages in anticompetitive and other illegal conduct in order to block and bankrupt competition. (*Id.*) This conduct includes blocking CREXi from accessing any websites hosted by CoStar, altering information and images on websites it hosts including by adding watermarks and its own logo, and using CREXi's trademarked name in the header of advertisements placed on Google.

CoStar filed a Motion to Dismiss CREXi's Counterclaims, which the Court granted with leave to amend except as to CREXi's ninth claim for trademark infringement, thirteenth claim for unlawful violations of the UCL, and fourteenth claim for declaratory judgment. (Dkt. No. 146.) On August 5, 2022, CREXi filed its First Amended Counterclaims, the operative pleading, which asserts fourteen causes of action against CoStar: monopolization and attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2, for each of the three (3) relevant markets where CREXi and CoStar compete (Claims 1–6); use of exclusionary contract provisions under Section 1 of the Sherman Act, 15 U.S.C. § 1, and California's Cartwright Act, B&P § 16720, respectively (Claims 7–8); trademark infringement under 15 U.S.C. § 1114 (Claim 9); intentional interference with contract and intentional interference with prospective economic advantage causes of action (Claims 10-11); unfair competition based on the anticompetitive conduct under California's Unfair Competition Law ("UCL"), B&P § 17200 (Claim 12); unlawful competition under the UCL based on the antitrust, trademark, or false advertising claims (Claim 13); and declaratory relief (Claim 14). (Dkt. No. 162.)

CoStar moved to dismiss CREXi's amended counterclaims. (Dkt. No. 198.) CoStar's motion was directed at all of CREXi's amended counterclaims, with the exception of CREXi's claim for trademark infringement and unlawful competition predicated on CoStar's alleged trademark infringement, as the Court previously held that those claims plausibly stated a claim. (*See* Dkt. No. 146.) On February 23, 2023, the Court granted CoStar's Motion to Dismiss CREXi's First Amended Counterclaims, dismissing with prejudice CREXi's counterclaims based on allegations of antitrust violations and tortious interference committed by CoStar (Claims 1–8, 10–12, and 14). (Dkt. No. 340.) The suriving counterclaims are CREXi's claims for trademark infringement and unlawful competition predicated on CoStar's alleged trademark infringement. CREXi now requests that the Court enter partial final judgment on the dismissed claims pursuant to Federal Rule of Civil Procedure 54(b), or alternatively certify the order for interlocutory appeal under 28 U.S.C. § 1292(b), so that CREXi may seek appellate review of the Court's ruling.

II. STATEMENT OF THE LAW

A. Rule 54(b)

Rule 54(b) provides a device for parties to seek interlocutory review of orders that are not truly "final" because they "do[ ] not dispose of all of the claims" in a suit. *See generally, e.g., Jewel v. Nat'l Sec. Agency*, 810 F.3d 622, 627-28 (9th Cir. 2015). A two-step process guides the Rule 54(b) analysis. "A district court must first determine that it has rendered a 'final judgment,' that is, a judgment that is 'an ultimate disposition of an individual claim

entered in the course of a multiple claims action.'" *Wood v. GCC Bend, LLC*, 422 F.3d 873, 878 (9th Cir. 2005) (quoting *Curtiss–Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980)) (further quotation omitted). "Then it must determine whether there is any just reason for delay." *Wood*, 422 F.3d at 878. The latter determination should consider: (1) the interrelationship of the certified claims and the remaining claims in light of the policy against piecemeal review; and (2) equitable factors such as prejudice and delay. *See Curtiss-Wright*, 446 U.S. at 8-10; *Gregorian v. Izvestia*, 871 F.2d 1515, 1518-20 (9th Cir. 1989).

Rule 54(b) "was adopted 'specifically to avoid the possible injustice of delay[ing] judgment o[n] a distinctly separate claim [pending] adjudication of the entire case . . . . The Rule thus aimed to augment, not diminish, appeal opportunity." *Jewel*, 810 F.3d at 628 (quoting *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 902-03 (2015)). The Ninth Circuit has indicated in this vein that the modern trend is toward permitting Rule 54(b) certification, or, more exactly, "toward greater deference to a district court's decision to certify under Rule 54(b)." *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991). That court has also called the "unusual case" and "pressing needs" limitations of *Morrison-Knudsen Co. v. Archer*, 655 F.2d 962 (1981) "outdated and overly restrictive." *Ponsoldt*, 939 F.2d at 798. This assessment is consistent with the Supreme Court's disavowal of early guidance (from a 1946 Advisory Committee note) that confined Rule 54(b) certification to the "infrequent harsh case." *See Curtiss-Wright*, 446 U.S. at 10.

The rule is nevertheless applied "to prevent piecemeal appeals in cases which should be reviewed only as single units." *Jewel*, 810 F.3d at 628 (quoting *Curtiss–Wright*, 446 U.S. at 10). The main concern will normally be to adopt the approach that most efficiently disposes of a lawsuit. "It is left to the sound judicial discretion of the district court to determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal. This discretion is to be exercised 'in the interest of sound judicial administration.'" *Id.* (quoting *Curtiss-Wright*, 446 U.S. at 7) (quoting in turn *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437 (1956)); *see also Jewel*, 810 F.3d at 628 ("juridical concerns" regarding piecemeal appeals are reviewed *de novo*; otherwise, "discretionary judgment of the district court should be given substantial deference").

B. 28 USC § 1292(b)

Under 28 U.S.C. § 1292(b), parties may take an interlocutory appeal when "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *ICTSI Or., Inc. v. Int'l Longshore & Warehouse Union*, 22 F.4th 1125, 1130 (9th Cir. 2022) (citing C*oopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). To certify under Section 1292(b), the order at issue must meet the three certification requirements outlined in § 1292(b): "(1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion [as to that question], and (3) that an immediate [resolution of that question] may materially advance the ultimate termination of the

litigation." *Id.* (citing *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1981).

Section 1292(b) embodies a "narrow exception to the final judgment rule." *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). "The party seeking certification has the burden of showing that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Fukuda v. Cty. of L.A.*, 630 F. Supp. 228, 299 (C.D. Cal. 1986) (citing *Livesay*, 437 U.S. at 475). Even where the statutory criteria of § 1292(b) are met, the district court "retains discretion to deny permission for interlocutory appeal." *Kuzinski v. Schering Corp.*, 614 F. Supp. 2d 247, 249 (D. Conn. 2009); *see, e.g., Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 47 (1995) ("[D]istrict courts [have] first[-]line discretion to allow interlocutory appeals" under § 1292(b).).

III. DISCUSSION

A. Rule 54(b) Certification

To grant a Rule 54(b) motion, the Court must first determine if Rule 54(b) is applicable to the proceedings. First, there must be an action involving multiple claims for relief. *See Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 742–43 (1976). That requirement is satisfied here by CREXi's fourteen counterclaims for relief. Second, there must be a "final judgment" with respect to one or more claims—in other words, a decision upon a cognizable claim for relief that it is an "ultimate disposition of an individual claim entered in the course of a multiple claims action." *Curtiss–Wright*, 446 U.S. at 7 (citation omitted). The Court's Order granting CoStar's

Motion to Dismiss Amended Counterclaims is sufficient to fulfill this requirement.

Next, the Court must expressly determine that there is no just reason for the delay and direct the entry of judgment. *See id.; see also* Fed.R.Civ.P. 54(b). CREXi urges the Court to direct entry of partial final judgment on the following bases: (1) the dismissed counterclaims are substantially different from the remaining trademark infringement and unfair competition claims before the Court, (2) the legal issues to be appealed are complicated and not routine; (3) CREXi will be prejudiced by a delay in its ability to appeal the dismissal of its counterclaims because the case has been pending for two and a half years; (4) immediate appellate examination is important because CoStar's anti-competitive and tortious conduct remains ongoing, disrupting CREXI's relationships with brokers and preventing CREXi from gaining a foothold in numerous geographic markets; and (5) having to wait until this entire case is resolved will inflict significant damage on CREXi and its customers.

In opposition, CoStar argues the following: (1) the factual and legal overlap between the dismissed counterclaims and remaining counterclaims will lead to piecemeal appeals and waste judicial resources; (2) the Court's order applied well-settled, controlling law and dismissed CREXI's counterclaims on multiple grounds; and (3) CREXi will suffer no prejudice by waiting until the case concludes to appeal.

The Court has considered the factors set forth in *Wood*, and the parties' positions, and has determined that there is no just reason to delay the entry of final judgment dismissing CREXi's antitrust and tortious

interference counterclaims. Entering a final judgment under the facts in this case would not result in unnecessary or duplicative appellate review. Any subsequent judgments in this case would not vacate the judgment on CREXi's antitrust and tortious interference counterclaims. Moreover, CREXi's dismissed counterclaims are not legally or factually related to the remaining counterclaims related to trademark infringement and unlawful competition predicated on CoStar's alleged trademark infringement. *See AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 954 (9th Cir. 2006).

On April 17, 2023, the Court accepted the Special Master's Report and Recommendation to amend the scheduling order in this case. (Dkt. No. 373.) The pretrial conference is set for September 24, 2024. (*Id.*) The trial is set for October 22, 2024. (*Id.*) Thus, without certification it may be several years before the dismissed counterclaims are resolved and the dismissal of the antitrust and tortious interference claims could be considered on appeal. Conversely, if final judgment on the dismissed counterclaims is entered, the appeal of the Court's dismissal may be resolved before final resolution of the underlying case on CoStar's claims and CREXi's remaining counterclaims. Thus, judicial efficiency is furthered by certifying final judgment on CREXi's dismissed counterclaims.

B. 28 USC § 1292(b)

Alternatively, CREXi asks the Court to certify the dismissal order for interlocutory appeal under 28 U.S.C. § 1292(b). Only if all three factors under 28 U.S.C. § 1292(b) are met may the Court certify an order for appeal. *Couch*, 611 F.3d at 633

("Certification under § 1292(b) requires the district court to expressly find in writing that all three § 1292(b) requirements are met."). However, CREXi does not show that there is substantial ground for difference of opinion. The "substantial ground" prong is satisfied when "novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions." *Int'l Longshore and Warehouse Union*, 22 F.4th at 1130 (citation omitted). Further, Section 1292(b) is reserved for non-dispositive orders and the Court's Order dismissing CREXi's amended counterclaims is a final order on the merits. *See In re Cement Antitrust Litig.*, 673 F.2d at 1026; *Sateriale v. RJ Reynolds Tobacco Co.*, 2015 WL 3767424, *2 (C.D. Cal. June 17, 2015).

IV.CONCLUSION

Accordingly, the Court **GRANTS** CREXi's Motion for Entry of Rule 54(b) Partial Final Judgment with respect to CREXi's dismissed counterclaims.

IT IS SO ORDERED

DATED: JULY 20, 2023 /s/ *Consuelo B. Marshall*
COUNSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

[2023 WL 2468742]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CoStar Group, Inc., *et al.*, Plaintiff, v. Commercial Real Estate Exchange, Inc., Defendant.	Case No. 2:20-cv-08819-CBM-ASx **ORDER RE: COUNTERCLAIM DEFENDANTS' 12(B)(6) MOTION TO DISMISS AMENDED COUNTERCLAIM [198]**

The matter before the Court is Plaintiffs and Counterclaim Defendants CoStar Group, Inc. and CoStar Realty Information, Inc.'s (collectively "CoStar") Motion to Dismiss the Amended Counterclaims brought by Defendant and Counterclaimant Commercial Real Estate Exchange, Inc. ("CREXi"). (Dkt. No. 198.)

I. BACKGROUND

The background for this case is set forth in the Court's June 17, 2022 Order granting CoStar's Motion to Dismiss CREXi's Counterclaims. (*See* Dkt. No. 146.) The original Counterclaims asserted fourteen causes of action against CoStar: monopolization and attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2, for each of the three (3) relevant markets where CREXi and CoStar

compete (Claims 1–6); use of exclusionary contract provisions under Section 1 of the Sherman Act, 15 U.S.C. § 1, and California's Cartwright Act, B&P § 16720, respectively (Claims 7–8); trademark infringement under 15 U.S.C. § 1114 (Claim 9); false advertising under 15 U.S.C. § 1125(a)(1)(B) (Claim 10); false advertising under California's False Advertising Law, B&P § 17500 (Claim 11); unfair competition based on the anticompetitive conduct under California's Unfair Competition Law ("UCL"), B&P § 17200 (Claim 12); unlawful competition under the UCL based on the antitrust, trademark, or false advertising claims (Claim 13); and declaratory relief (Claim 14). (Dkt. No. 74 – Counterclaims and Demand for Jury Trial.) The Court denied CoStar's Motion to Dismiss CREXi's Counterclaims as to the ninth claim for trademark infringement, thirteenth claim for unlawful violations of the UCL, and the fourteenth claim for declaratory judgment, and granted the Motion to Dismiss as to all other claims with leave to amend to correct the deficiencies identified in the Court's Order. (Dkt. No. 146.)

The First Amended Counterclaims asserts the same causes of action with the addition of two new claims. (Dkt. No. 162.) In place of its false advertising counterclaims (Claims 10 and 11), CREXi added intentional interference with contract and intentional interference with prospective economic advantage causes of action. (*Id.*) CoStar moves to dismiss CREXi's amended counterclaims. (Dkt. No. 198.) CoStar's motion is directed at all of CREXi's counterclaims, with the exception of CREXi's claim for trademark infringement and its unlawful competition claim predicated on CoStar's alleged trademark infringement, as the Court previously held

that CREXi's allegations as to those claims plausibly stated a claim. (*See* Dkt. No. 146.)

II. LEGAL STANDARD

To survive a motion to dismiss, a plaintiff's complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A "pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Id.* (citations and punctuation omitted). When considering motions to dismiss, courts accept all facts alleged in the complaint as true, construe the pleadings in the light most favorable to the nonmoving party, and draws all reasonable inferences in favor of the plaintiff. *Ass'n for Los Angeles Deputy Sheriffs v. Cty. of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011).

II. DISCUSSION

A. Antitrust Claims

CREXi reintroduces its eight antitrust claims against CoStar. CREXi asserts six claims under Section 2 of the Sherman Act for monopolization and attempted monopolization in each of the three markets in which they compete; one claim under Section 1 of the Sherman Act; and one claim under California's Cartwright Act for CoStar's use of exclusionary contractual provisions. (First Amended Counterclaims ("FACC") ¶¶ 265-349.) All of CREXi's antitrust claims require CoStar to have engaged in concerted or independent anticompetitive conduct under Section 1 and Section 2 of the Sherman Act, respectively. *See Fed. Trade Comm'n v. Qualcomm*

Inc., 969 F.3d 974, 989-90 (9th Cir. 2020) ("*Qualcomm*"); *Cty. Of Tuloumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001) (explaining that the analysis under the Cartwright Act mirrors the Sherman Act). The Court will therefore conduct a single analysis of the alleged anticompetitive conduct in this case instead of a separate analysis for each statutory provision. *Qualcomm*, 969 F.3d at 991.

The Court starts its analysis of CREXi's antitrust claims by evaluating the alleged conduct in light of the recognition in antitrust law that a business generally has the right to refuse to deal with its competitors. The Court then evaluates CoStar's alleged market power, a required element for all of CREXi's antitrust claims, based on the allegations of CoStar's market dominance in the geographic markets where its anticompetitive conduct occurred.

1. Alleged Anticompetitive Conduct

"As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc.*, 555 U.S. 438 (2009) ("Linkline"). Likewise, "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.'" *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (alteration in original) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). "[T]he U.S. Supreme Court has recognized that a market participant's right to refuse to deal with competitors generally serves procompetitive purposes, and that restricting that

right can have anticompetitive effects." *Facebook, Inc. v. BrandTotal Ltd.*, No. 20-CV-07182-JCS, 2021 WL 3885981, at *7 (N.D. Cal. Aug. 31, 2021) (quoting *Trinko*, 540 U.S. at 407–08). "This is because the antitrust laws, including the Sherman Act, were enacted for the protection of competition, not competitors." *Qualcomm*, 969 F.3d at 993 (9th Cir. 2020) (quotation omitted).

CREXi alleges that CoStar engaged in anticompetitive conduct in the relevant markets of Commercial Real Estate ("CRE") listing services, CRE information services, and CRE auction services in the following ways: blocking other users from working with CREXi, utilizing exclusionary contractual terms to prevent brokers from using CRE services, falsely claiming ownership over brokers' CRE information and photographs, and infringing on CREXi's trademarked name. (FACC ¶¶ 39-135.) CREXi also alleges that these exclusionary practices have substantially foreclosed competition in the relevant markets. *Id.* at ¶¶ 136-139. The Court reviews CoStar's alleged conduct to determine whether it was anticompetitive or merely a business's legitimate refusal to provide free aid and assistance to a competitor.

a. CoStar Blocks Access to Webpages hosted by CoStar

CREXi realleges that "CoStar imposes technological blocks" that "prevent CREXi from accessing brokers' CRE listings on brokers' own websites," which imposes a "restraint to interfere with economic relationships between brokers and CREXi." (FACC ¶¶ 39-43.) CREXi alleges CoStar does this by integrating its LoopNet search

technology to display brokers' CRE listings on their publicly available website by utilizing database functionality offered by a webtool called LoopLink. (*Id.*) Therefore, when brokers utilize the LoopLink widget to show their CRE listings, CoStar integrates this with its LoopNet search technology so that the listings automatically get listed on LoopNet.com. CoStar's LoopNet.com website contains CoStar's copyrighted images, data from the CoStar database, and edits made by CoStar to "improve marketability" of brokers' listings. (*Id.*) CREXi alleges CoStar's "intended purpose" for this is to "lock-in brokers to exclusive relationships with CoStar, deprive brokers of the effective use of their own CRE listings, and to prevent competition in the marketplace." (*Id.* at ¶ 49.) CREXi further alleges that "many brokerages have become dependent on LoopNet as a repository for their broker-owned listings" and if such information is not available to competitors, "it is often unfeasible for any competitor to compete with CoStar for those brokers because . . . the only original copies the brokers have of their listings are on the broker's LoopLink-powered website." (*Id.* at ¶ 41.) Thus, CREXi alleges that the practical effect of these technological measures is to "lock-in" brokers into exclusive dealing relationships with CoStar and prevent competition in the CRE marketplace. (*Id.* at ¶ 49.)

LoopLink allows brokers to link their websites to CoStar's LoopNet suite and use its search function. LoopLink is operated and hosted by CoStar, and as the Court found in its previous Order, CoStar is not obligated to provide CREXi with access to its websites and database. The main addition to CREXi's allegations is that rather than seeking to deal with or

utilize CoStar's websites directly, CREXi demands access to websites that utilize CoStar's platforms—LoopLink and LoopNet—linked on brokers' public websites. Brokers are not obligated to utilize LoopLink, and if they do, they are still free to utilize CREXi's services as well. Brokers are still free to hire CREXi or share the same information to both CREXi and CoStar. In fact, CREXi's allegations confirm that over 500 existing brokers utilize *both* CoStar and CREXi's services. (*See* FACC ¶¶ 99-100, 108, 257.) If CoStar did not exist, CREXi would still need to perform the same actions it needs to engage in today to conduct business: go to the individual brokers and request listings for CREXi's platform. (*See* Order at 7) ("CoStar blocking CREXi from its own websites does not forbid brokers from hiring CREXi or even stop brokers from sharing the exact same information to both CREXi and CoStar—it only appears to stop CREXi from accessing broker information through CoStar's own websites.") Whether brokers have become dependent on LoopNet and thus choose not to maintain additional copies of listings apart from what is on LoopNet is not anticompetitive conduct by CoStar.

Thus, the use of innovative technology to produce a link to a repository of CRE listings hosted by CoStar and from which CREXi is blocked from accessing is not anticompetitive conduct.

b. CoStar's Alleged *De Facto* Exclusivity Provisions

CREXi alleges that CoStar utilizes contractual provisions to create a "de facto" exclusivity agreement between CoStar and brokers that impacts "access and use of CoStar's publicly accessible websites, and

brokers' own websites hosted by LoopLink." (FACC ¶¶ 55-69.) CREXi further alleges that CoStar "lures" brokers into using its services with promising assurances that brokers will maintain rights and ownership of their listing and photographs, but that ultimately prevents brokers from using or share information obtained through LoopNet and other services. (*Id.* at ¶¶ 52-60.) Put another way, CREXi alleges that CoStar asks brokers to give the company their data and then turns around and claims that data as its own without allowing brokers to use or distribute that data. (*Id.* at ¶ 64.) CREXi identifies terms in CoStar's contracts that allegedly "prohibit or limit customers' ability to use or reproduce content posted on CoStar's platforms." (*Id.* at ¶¶ 56-61.) CREXi includes testimony of brokers who allegedly did not engage CREXi because of CoStar terms of agreement that "deter" brokers from sharing equivalent data with CoStar's competitors. (*Id.* at ¶¶ 60-68.)

When CoStar obtains images from brokers, it adds a watermark or some other information to the listing, and posts the image to its own LoopNet website. (*Id.* at ¶¶ 71, 76, 79.) Notably however, brokers still maintain the rights to their original images and can give those images or listings to CREXi or any other third-party listing service, so long as that they do not take the images or information directly from LoopNet or LoopLink. Thus, the practical effect of these contractual provisions is that the public and brokers are free to access listings through LoopNet, LoopLink, or the brokers' own websites, but cannot copy and reuse the modified images. While CREXi provides examples of brokers refusing to list CRE properties on CREXi's website out of fear of violating CoStar's

contractual provisions, the terms of use only pertain to images that are modified and located on LoopNet, not the brokers' website separable from LoopLink, nor original images maintained by brokers. If CREXi wishes to do business with brokers, CREXi can advise brokers to use their own images, not the modified images listed on LoopNet or linked through LoopLink.

Accordingly, CoStar's contractual provisions prohibiting use of CoStar-modified images do not constitute anticompetitive conduct.

c. CoStar's Alleged False Claims of Ownership

CREXi alleges that CoStar falsely claimed intellectual property ownership over customers' CRE information and photographs to stifle competition. To do this, CREXi alleges, CoStar "demanded that CREXi hire a vendor to install an image filter" to "screen for CoStar's copyrighted images" on CREXi's website and "filter out such images." (*Id.* at ¶ 92.) Thereafter, CREXi employed Getty Images ("Getty"), a third-party vendor that provides image recognition technology to filter CoStar's copyrighted photographs on CREXi's website. CoStar "represented" that the Getty filter would flag "only CoStar's copyrighted images." (*Id.* at ¶ 93.) The Getty filter ultimately identified a number of images—one out of every nine images flagged—over which CoStar does not have a copyright, including images submitted to CREXi by brokers. (*Id.* at ¶¶ 93-95.) Consequently, in the course of scanning CREXi's website and upon receiving notification of the flagged images, CREXi sent copyright notices to brokers informing them that CoStar claimed ownership over their images on

CREXi's website, which CREXI alleges, disrupted its relationships with those brokers. (*Id.* at ¶¶ 96-109.)

As a preliminary point, CoStar contests CREXi's characterization that CoStar "demanded" CREXi engage Getty Images to screen for CoStar's copyrighted images. CoStar contends CREXi was not obligated to employ this vendor, or any vendor for that matter. CoStar also contends that the "false positive" flagging by the Getty filter cannot be attributed solely to CoStar, if at all. CREXi alleges that CoStar falsely assured CREXi that the filter would scan only for CoStar's copyrighted images and populated the filter repository with images it does not own. (FACC at ¶¶ 92-93.) CREXi further alleges it "engaged CoStar's *proposed* vendor" to implement on its website, "at CREXi's own expense". (*Id.* at ¶ 93) (emphasis added.) CoStar argues it cannot be responsible for Getty Images producing inaccurate flagged results or for actions CREXi took as a result of Getty Images' "false-positive" flagging. CoStar further argues that CREXi could have reviewed and disputed the flagged results prior to sending copyright notices to brokers and "disrupting" those relationships.

The false-positive flagging of images on CREXi's website by Getty Images and the subsequent actions CREXi took as a result are not sufficient to constitute anticompetitive conduct by CoStar.

d. CoStar's Alleged Infringement of CREXi's Trademark

CREXi alleges that CoStar engaged in anticompetitive conduct by purchasing "CREXi" as a Google AdWord and explicitly infringed the CREXI® mark in the header and text of CoStar's

advertisements. (FACC ¶ 128.) For example, a search for "crexi" on Google yielded an advertisement for "Commercial Buildings For Sale – Crexi" at the top of the results page that was actually purchased by CoStar and links to CoStar's Ten-X website. (*Id.*) CREXi cites to two cases for support which the Court previously determined do not support a finding of anticompetitive conduct by CoStar. *See Church & Dwight Co. v. Mayer Labs., Inc.*, 2011 WL 1225912, at *16 (N.D. Cal. Apr. 1, 2011) and *Dodge Data & Analytics LLC v. iSqFt, Inc.*, 183 F. Supp. 3d 855, 868 (S.D. Ohio 2016). Upon revisiting those cases, the Court's opinion remains the same. As the Court noted in its previous Order, those cases apply a different standard for analyzing a claim for anticompetitive conduct. The Court in *Church* cited to extensive allegations establishing anticompetitive conduct and the foreclosure of competition in a substantial share of the relevant market. *Church & Dwight Co.*, 2011 WL 1225912 at *14. Here, however, CREXi alleges a relatively limited number of instances of trademark infringement in ads for a CoStar subsidiary. (FACC ¶¶118-35.) As for *Dodge*, there the Court applied the Sixth Circuit test for determining whether a defendant possessed sufficient market power. 183 F. Supp. 3d at 865 (citing *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir.1982). Although the Court previously found that CREXi stated a claim for trademark infringement, such conduct is not enough to constitute anticompetitive conduct. Accordingly, CREXi's trademark infringement allegations are insufficient to constitute anticompetitive conduct.

2. Allegations of Market Power

"Market power is the ability to raise price profitably by restricting output." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2288 (2018) (emphasis removed) (quoting Philip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 5.01 (4th ed. 2017)). "A threshold step in any antitrust case is to accurately define the relevant market, which refers to 'the area of effective competition.'" *Qualcomm*, 969 F.3d at 992 (citing *Am. Express Co.*, 138 S. Ct. at 2285). Under Section 1 and Section 2 of the Sherman Act "the plaintiff must allege both that a 'relevant market' exists and that the defendant has power within that market." *Newcal Indus., Inc. v. Ikon Off. Sol.*, 513 F.3d 1038, 1044, 1044 n.3 (9th Cir. 2008). "The relevant market must include both a geographic market and a product market." *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018). Such allegations need not be pled with specificity. *Newcal Indus., Inc.*, 513 F.3d at 1045. Although the "validity of the 'relevant market' is typically a factual element rather than a legal one," an antitrust complaint may be dismissed under Rule 12(b)(6) "if the complaint's 'relevant market' definition is facially unsustainable." *Id.* In addition, "failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim." *Tanaka v. Univ. of S. California*, 252 F.3d 1059, 1063 (9th Cir. 2001).

CREXi alleges the relevant product markets for its antitrust claims are "Internet CRE listing services, Internet CRE information services, and Internet CRE auction services," (FACC ¶ 140) and the relevant geographic markets are "Individual Metropolitan Statistical Areas ("MSAs"). (*Id.* at ¶ 158.) CREXi

provided a list of 50 MSAs at issue. (*Id.* 165, Ex. B.) CoStar does not challenge CREXi's identification of the relevant product markets or the relevant geographic markets, but does challenge its dominance in those markets.

a. Market Dominance

The Ninth Circuit has indicated that "[m]arket power may be demonstrated through either of two types of proof." *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). The first type of proof is "direct evidence of the injurious exercise of market power." *Id.* That is "evidence of restricted output and supracompetitive prices." *Id.* "Direct evidence of anticompetitive effects would be proof of actual detrimental effects on competition." *Am. Express Co.*, 138 S. Ct. at 2284 (quotation and citation omitted). The second and "more common type of proof is circumstantial evidence pertaining to the structure of the market." *Rebel Oil Co.*, 51 F.3d at 1434. "To demonstrate market power circumstantially, a plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." *Id.* (citing *Ryko Mfg. Co. v. Eden Serv.*, 823 F.2d 1215, 1232 (8th Cir.1987), *cert. denied*, 484 U.S. 1026 (1988).

In support of direct evidence of market dominance, CREXi alleges the following: (1) the FTC intervened to block a number of CoStar's anticompetitive acquisitions, including LoopNet and RentPath; (2) nearly 90% of all CRE activity occurs on a CoStar Network; and (3) CoStar drastically increased its

prices for informational services and listing services following the acquisition of LoopNet. (*Id.* at ¶¶ 186-27, 21-212, 215.) However, CREXi does not make any allegations regarding restricted output. In *Rebel Oil* the Ninth Circuit defined "direct evidence" as "evidence of restricted output ***and*** supracompetitive prices." 51 F.3d at 1434 (emphasis added). Therefore, CREXi's allegations are insufficient to support direct evidence of CoStar's market dominance.

In support of circumstantial evidence of market dominance, CREXi alleges that CoStar holds greater than 90% market share in the internet CRE listing services market.[1] With respect to listing services, CREXi's allegations include internal market analysis of CoStar's market share in 50 MSAs and determined the following: in 12 MSAs, CoStar's market share is at least 90%; in 31 MSAs, it is at least 80%; in 38 MSAs, it is at least 70%; in 46 MSAs, it is at least 60%; and CoStar's market share exceeds 57% in all 50 MSAs. (FACC ¶¶ 220-23.) CREXi alleges that it determined these market shares using 2021 data on the dollar value of sale listings in relation to the total value of closed CRE sales transactions in each MSA. (*Id.*) However, CoStar is not in the business of selling

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[1] CREXi does not allege facts regarding CoStar's estimated market shares with respect to CoStar's Internet CRE information services and Internet CRE auction services products. Instead, CREXi alleges that the markets for information and auction services are complementary to listing services and thus, market level monopoly power in CRE listing services translates to market-level monopoly power in CRE information and CRE auction services. (FACC ¶¶ 224-25.) The Court does not reach this issue given that CREXi's allegations of market power for the listing services market are insufficient to state a claim.

property so the total value of closed CRE sales to the dollar value of properties in CoStar's listings does not represent CoStar's market share in the *listing services* market. Accordingly, CREXi's allegations do not plausibly demonstrate monopoly power in the relevant market—the CRE listing services market.

b. Entry Barriers

The Ninth Circuit has defined entry barriers as "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants," or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1427-28 (9th Cir.1993). "The main sources of entry barriers are: (1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preference; (4) capital market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of scale." *Rebel Oil*, 51 F.3d at 1439. "To justify a finding that a defendant has the power to control prices" sufficient to warrant judicial intervention, "entry barriers must be . . . capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self-correcting." *Id.* (citing *United States v. Syufy Enters.*, 903 F.2d 659, 663 (9th Cir.1990)).

CREXi alleges that competitors cannot increase output in the short run to bring CoStar's prices down due to "their inability to put any downward pressure on CoStar's inflated prices." (FACC ¶ 226.) CREXi also alleges the following barriers to entry: "sunk cost of developing CRE services and software, network effects that favor well-entrenched players, high

switching costs, and other barriers created by CoStar's practices." *Id.* at ¶¶ 166-78. Having found the allegations insufficient to support CoStar's dominant share of the relevant markets, this cause of action does not survive.

Based on the foregoing deficiencies, Claims 1–8 in the Amended Counterclaim for antitrust violations under Section 1 and Section 2 of the Sherman Act and the Cartwright Act fail to state a claim.

B. Intentional Interference with Contract and Prospective Economic Advantage (Claims 10-11)

CREXi alleges two new claims in its amended counterclaims: intentional interference with contract and interference with prospective economic advantage. CoStar takes issue with CREXi's new claims and argues that it is outside the scope of the Court's Order granting leave to amend. Pursuant to Federal Rule of Civil Procedure 15, CREXi may bring new claims "only with the opposing party's written consent or the court's leave." Moreover, "where leave to amend is given to cure deficiencies in certain *specified claims*, courts have agreed that new claims alleged for the first time in the amended pleading should be dismissed or stricken." *DeLeon v. Wells Fargo Bank, N.A.*, 2010 WL 4285006, at *3 (N.D. Cal. 2010). In its Order, the Court identified CREXi's deficiencies as to each claim alleged in its Counterclaims and granted leave to amend as to those claims. Therefore, CREXI's new claims are not permitted. Nonetheless, the Court finds CREXi's new claims do not survive as a matter of law.

To prove intentional interference with contractual relations under California law, CREXi must show:

(1) that there was a valid contract between CREXi and third parties; (2) that CoStar knew of these contracts; (3) that CoStar took intentional acts designed to induce a breach or disruption of these contractual relationships; (4) that an actual breach or disruption of the contractual relationships occurred; and (5) that this conduct resulted in damage to CREXi. *United Nat. Maintenance, Inc. v. San Diego Convention Center, Inc.*, 766 F.3d 1002, 1006 (9th Cir. 2014). To prove intentional interference with prospective economic advantage, CREXi must demonstrate an economic relationship between CREXi and a third party, with a probability of future economic benefit to CREXi, in addition to the elements of CoStar's knowledge, CoStar's intentional acts, CoStar's actual disruption of economic relationships, and damage to CREXi. *O'Connor v. Uber Technologies, Inc.*, 58 F. Supp. 3d 989, 996 (N.D. Cal. 2014).

CREXi alleges that CoStar's conduct impeded, disrupted, and hampered CREXi's ability to provide services to its clients. CREXi cites to the following conduct as disrupting its contractual and economic relationships with its customers: (1) blocking CREXi from brokers' websites hosted by LoopLink; (2) CoStar's alleged claims of copyright ownership over photos flagged by a third-party vendor employed by CREXi; and (3) CoStar's exclusionary contracts leading users to "balk" at continuing to use or invest in CREXi's services. (FACC ¶ 256-261.) CREXi's arguments rest on its underlying claims of anticompetitive conduct. (*See id.* at ¶¶ 257-264.) Moreover, CREXi's reliance on conduct of a third-party vendor cannot be attributed to CoStar for purposes of alleging that CoStar intentionally

engaged in conduct that induced a breach or disruption in CREXi's relationship with its customers. CoStar's conduct has only prevented its competitors including CREXi, from accessing CoStar's own website and services. CREXi's fundamental issue that brokers do not want to spend time re-creating listings is not intentional conduct by CoStar. Accordingly, CREXi's claims for tortious interference with contractual relations and prospective economic advantage fail to state a claim.

C. Unfair and Unlawful Competition Claims

CREXi alleges that CoStar engaged in unfair and unlawful competition under Cal. Bus. & Prof. Code § 17200 based on its underlying antitrust and tortious interference claims. (FCC ¶¶ 373-278.) CREXi alleges that CoStar engaged in unfair business practices by (1) leveraging LoopLink to force customer use of LoopNet and surreptitiously blocking competitors' access to brokers' own listings on brokers' own websites, to prevent brokers from working with competitors; (2) imposing exclusionary contractual restrictions to prevent brokers from using competitors' services; (3) falsely claiming intellectual property ownership over customers' CRE information and photographs to stifle competition; and (4) infringing CREXi's trademark to advertise CoStar's products and services and unfairly compete with CREXi. (*Id.* at ¶ 375.)

Having failed to allege sufficient facts to support the underlying antitrust and tortious interference claims, there can be no unfair competition under the UCL. "If the same conduct is alleged to be both an antitrust violation and an 'unfair' business act . . . for the same reason . . . the determination that the

conduct is not an unreasonable restraint of trade necessarily implies that conduct is not 'unfair'." *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1124 (9th Cir. 2018) (quoting *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001)). Accordingly, CREXi's unfair and unlawful competition claims fail to state a claim.

D. Declaratory Relief

CREXi seeks a declaratory judgment that (i) finds that CREXi is not engaging in unlawful conduct by accessing CoStar's websites, (ii) prohibits CoStar from taking steps to block CREXi's access to its websites, and (iii) finds that CoStar has engaged in unlawful conduct by blocking CREXi's access to CoStar's websites. (FACC ¶ 386.) CREXi's claim for declaratory relief is based upon its antitrust violation claims, and therefore, its request for declaratory relief fails.

IV. CONCLUSION

Accordingly, the Court **GRANTS** CoStar's Motion to Dismiss the First Amended Counterclaims with prejudice. CREXi's ninth claim for trademark infringement and thirteenth claim for unlawful violations of the UCL predicated on CoStar's alleged trademark infringement, which are not the subject of CoStar's Motion or this Order, remain to be adjudicated.

IT IS SO ORDERED.

DATED: FEBRUARY 23, 2023.

s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

[619 F. Supp. 3d 983]

**UNITED STATES DISTRICT COURT,
C.D. CALIFORNIA**

COSTAR GROUP, INC., et al., Plaintiffs,

v.

COMMERCIAL REAL ESTATE EXCHANGE, INC., Defendant.

Case No.: CV 20-8819-CBM(ASx)

Signed June 17, 2022

ORDER RE: COUNTERCLAIM DEFENDANTS' 12(B)(6) MOTION TO DISMISS COUNTERCLAIM [82]

CONSUELO B. MARSHALL, UNITED STATES DISTRICT JUDGE

The matter before the Court is Plaintiffs and Counterclaim Defendants CoStar Group, Inc. and CoStar Realty Information, Inc.'s (collectively "CoStar") Motion to Dismiss the Counterclaim brought by Defendant and Counterclaim Plaintiff Commercial Real Estate Exchange, Inc. ("CREXi"). (Dkt. 82.) The matter is fully briefed.

I. BACKGROUND

CoStar provides commercial real estate ("CRE") services in three relevant markets: CRE information, CRE listings, and CRE auction services. (CC ¶ 1, dkt. 74.) CREXi is a competitor attempting to build its own online CRE marketplace and technology platform. (*Id.* ¶ 2.) CREXi alleges CoStar has 90% market share in each of these three markets and engages in anticompetitive and other illegal conduct in order to

block and bankrupt competition. This conduct includes blocking CREXi from accessing any websites hosted by CoStar, altering information and images on websites it hosts including by adding watermarks and its own logo, and a CoStar subsidiary including CREXi's trademarked name in the header of advertisements placed on Google. The Court has previously ruled on a motion to dismiss in the underlying case. (Dkt. 71.)

The Counterclaim was filed June 23, 2021, and alleges the following[1]: Claims 1–6 are for both monopolization and attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2, for each of the three (3) relevant markets where CREXi and CoStar compete; Claims 7–8 are brought under Section 1 of the Sherman Act, 15 U.S.C. § 1, and California's Cartwright Act, B & P § 16720, respectively, for CoStar's use of exclusionary contract provisions; Claims 9, 10, and 11 are brought under the Lanham Act for trademark infringement, 15 U.S.C. § 1114, false advertising, 15 U.S.C. § 1125(a)(1)(B), and California's False Advertising Law, B & P § 17500, respectively, due to CoStar's use of CREXi's trademark in certain Google ads; Claim 12 is brought under the "unfair" prong of California's Unfair Competition Law ("UCL") based on the anticompetitive conduct, B & P § 17200, and Claim 13 is brought under the unlawful prong of the UCL based on the antitrust, trademark, or false advertising claims; and Claim 14 is for declaratory relief.

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[1] For readability of this Order the Court uses the word claims to refer to the causes of action within the Counterclaim.

II. STATEMENT OF THE LAW

Defendants move to dismiss the entire Counterclaim with prejudice for failure to state a claim pursuant to Fed. R. Civ. Proc. 12(b)(6). Rule 12(b)(6) allows a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. Proc. 12(b)(6). Dismissal of a complaint can be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To survive a motion to dismiss, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'." *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A formulaic recitation of the elements of a cause of action will not suffice. *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. Labels and conclusions are insufficient to meet the plaintiff's obligation to provide the grounds of his or her entitlement to relief. *Id.* "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* On a motion to dismiss for failure to state a claim, courts accept as true all well-pleaded allegations of material fact and construes them in a light most favorable to the non-moving party. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031–32 (9th Cir. 2008). The court may only consider the allegations contained in the pleadings, exhibits attached to or referenced in the complaint, and matters properly subject to judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,

551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007).[2]

III. DISCUSSION

A. Antitrust Claim

CREXi brings a total of eight antitrust claims against CoStar. CREXi brings a total of six claims under Section 2 of the Sherman Act for both monopolization and attempted monopolization in each of the three markets in which they compete. (CC ¶¶ 28–46.) CREXi also brings one claim under Section 1 of the Sherman Act and another under California's Cartwright Act for CoStar's use of exclusionary contractual provisions. (CC ¶¶ 30–316.) All of CREXi's antitrust claims require CoStar to have engaged in anticompetitive conduct; the only difference between the statutory requirements of the Sherman Act claims is that "Whereas § 1 of the Sherman Act targets *concerted* anticompetitive conduct, § 2 targets *independent* anticompetitive conduct." *Qualcomm*, 969 F.3d at 989–90 (emphasis in original); *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001) (explaining that the analysis under the Cartwright Act mirrors the Sherman Act). The Court will therefore conduct a single analysis of the alleged anticompetitive conduct in this case instead of a separate analysis for each statutory provision. *Qualcomm*, 969 F.3d at 991.

The Court starts its analysis of CREXi's antitrust claims by evaluating the alleged conduct in light of

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[2] At the hearing both parties presented and discussed information beyond the allegations in the Counterclaim which the Court declines to consider for purposes of ruling on the instant Motion to Dismiss.

the recognition in antitrust law that a business generally has the right to refuse to deal with its competitors. The Court then evaluates CoStar's alleged market power, a required element for all of CREXi's antitrust claims, based the allegations of CoStar's market dominance in the geographic markets where its anticompetitive conduct occurred.

1. **Alleged Anticompetitive Conduct**

CREXi alleges that in each the relevant product markets (Internet CRE listing services, Internet CRE information services, and Internet CRE auction services) CoStar engaged in three types of anticompetitive conduct: imposing exclusionary contractual and technological measures, falsely claiming ownership over CRE information, and infringing CREXi's trademark.[3] (CC ¶¶ 109(i)-(iii).)

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[3] At least some of the alleged conduct could not plausibly impact all three of the relevant product and geographic markets. For example, the alleged trademark infringement is limited to a CoStar subsidiary's ads on Google for its own Internet CRE auction services, often for specific cities, that also used CREXi's mark. There are no plausible allegations connecting that trademark infringement with anticompetitive results in the other two product markets or any other geographic market. However, the Court does not need to address the relationship between each category of alleged anticompetitive conduct, product market, and hypothetical geographic market because each of these is a required element of CREXi's antitrust claims and each of them is based on deficient allegations.

a. **Refusal to Deal**

"As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 129 S.Ct. 1109, 172 L.Ed.2d 836 (2009) ("*Linkline*"). Likewise, "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.'" *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08, 124 S.Ct. 872, 157 L.Ed.2d 823 (alteration in original) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 63 L.Ed. 992 (1919)); *see also Trinko*, 540 U.S. at 411, 124 S.Ct. 872 ("there is no duty to aid competitors."). "[T]he U.S. Supreme Court has recognized that a market participant's right to refuse to deal with competitors generally serves procompetitive purposes, and that restricting that right can have anticompetitive effects." *Facebook, Inc. v. BrandTotal Ltd.*, No. 20-CV-07182-JCS, 2021 WL 3885981, at *7 (N.D. Cal. Aug. 31, 2021) (quoting *Trinko*, 540 U.S. at 407–08, 124 S.Ct. 872). "This is because the antitrust laws, including the Sherman Act, were enacted for the protection of competition, not competitors." *Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974, 993 (9th Cir. 2020) (quotation omitted) ("*Qualcomm*").

There are also certain "limited exceptions" to a business's right to refuse to deal with its competitors when antitrust laws will in fact require competitors to deal with each other, such as the Essential Facilities doctrine identified by the Ninth Circuit. This doctrine "imposes liability where competitors are

denied access to an input that is deemed essential, or critical, to competition." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1184 (9th Cir. 2016) ("*Aerotec*"). This doctrine requires, among other things, that competitors be "unable reasonably or practically to duplicate the facility," and is limited to where control of a facility "carries with it the power to eliminate competition in the downstream market." *Id.* at 1185 (quoting *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991)). CREXi expressly disclaims reliance on any exception to the refusal to deal doctrine because it argues CoStar is directly liable under antitrust laws, but CREXi seeks to have CoStar's data treated as if it were an Essential Facility even though its current allegations do not satisfy the requirements of that doctrine. Moreover, the existence of such exceptions emphasizes how narrow and rare the circumstances are when antitrust laws will affirmatively require businesses to deal with their competitors such as through sharing access to data. The Court therefore reviews CoStar's alleged conduct to determine whether it was anticompetitive or merely a business's legitimate refusal to provide free aid and assistance to its competitor.

b. **CoStars Blocks Competitors from Accessing CRE Listing Information on its Own Websites**

CREXi argues that CoStar imposes exclusionary contractual provisions and technological measures in order to "block competitors from accessing public CRE information" on CoStar's own website, the website of its subsidiary LoopNet, and the websites of

independent brokers that are hosted by its subsidiary LoopLink.[4] (CC ¶¶ 109, 112, 116.)

CREXi repeatedly alleges CoStar has made the blocked CRE listing information available to the "public" for free and continually describes it as "publicly available" but CREXi fails to explain either of those terms and how they support its antitrust claims. (*E.g., id.* ¶¶ 31, 163 (alleging CoStar "has adopted and enforced anticompetitive contractual and other exclusionary measures to block competitors from accessing publicly available CRE listing information on LoopNet, CoStar, and LoopLink-hosted broker websites.").) But there is an inherent contradiction between the allegations that CoStar chose to make this information available to the public for free and the allegations that CREXi and competitors have been blocked from accessing information available to the public. (*Compare* CC ¶¶ 120–129 *with id.* ¶¶ 130–145.) This is because if CREXi and others have been blocked then, by definition, that information was never available to the public. PUBLIC, Black's Law Dictionary (11th ed. 2019) ("Open or available for all to use, share, or enjoy."). More accurately described, CoStar chose to

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[4] For the purposes of analyzing the sufficiency of CREXi's antitrust counterclaims, the Court ignores any factual disputes and generally finds it unnecessary to distinguish which specific subsidiary's website contained the CRE information because it is undisputed that they were all ultimately hosted by CoStar. The Court recognizes, however, that there may be significant differences in what CoStar is permitted to do contractually or otherwise when the CRE information is located on an independent broker's website that is hosted by a CoStar subsidiary.

make the Internet CRE listing information available for free to the anyone *except its direct competitors.*

CREXi argues that being blocked from CoStar's websites prevents brokers from making "public" listings available to competitors and is analogous to *Lorain Journal Co. v. United States*, where the Supreme Court found that newspapers committed an antitrust violation when they prohibited advertisers from using radio. 342 U.S. 143, 152, 72 S.Ct. 181, 96 L.Ed. 162 (1951). But the analogy fails because CoStar blocking CREXi from its own websites does not forbid brokers from hiring CREXi or even stop brokers from sharing the exact same information to both CREXi and CoStar—it only appears to stop CREXi from accessing broker information through CoStar's own websites. The fundamental problem for CREXi is that "[o]nce brokers prepare listing information for a new property, they do not want to re-create it." (CC ¶ 118.) But this unwillingness by brokers cannot be described as anticompetitive conduct by CoStar.

In effect, CREXi seeks assistance in the form of free access to valuable information solely because CoStar chose to give that information to others for free. But the antitrust laws do not compel CoStar to provide such assistance to a competitor. CREXi argues this is not assistance under the refusal to deal doctrine because it instead merely seeks to stop CoStar's affirmative steps of imposing a vertical input restraint by "chok[ing] off competitors' access to public CRE listing information that CoStar does not own." (Opp'n at 8 (emphasis omitted)). But as explained above, this information was not "public," the fact that CoStar does not own it only highlights that CREXi has not been denied access to anything it

cannot obtain it elsewhere, and it is legally irrelevant because "mandating access . . . shares the same concerns as mandating dealing with a competitor." *See Aerotec*, 836 F.3d at 1185. Therefore, as a matter of law, the information CREXi seeks from CoStar (for free no less) constitutes a form of assistance under the antitrust laws that CoStar is not obligated to provide.

Accordingly, it is not anticompetitive conduct for Costar to block its competitors from accessing CRE listing information hosted on its own websites.

c. CoStar's Claims of Ownership over CRE Information and Photographs on its Own Websites

CREXi next argues that even though CoStar's contracts with brokers do not contain an exclusivity clause, CoStar has established a de facto exclusivity clause that raises costs and creates a barrier to entry for competitors through its claims of ownership over CRE information and photographs, including by altering information and adding watermarks and logos onto some photos it hosts. (CC ¶ 171-189.) This exclusivity clause allegedly constitutes anticompetitive conduct because it raises the costs for CoStar's rivals and creates a barrier to their entry. However, these allegations are insufficient because they do not show how the "de facto" exclusivity clause "substantially foreclosed dealing with a competitor for the same good or service" because brokers expressly retain the rights to the original information and photographs they provided to CoStar. *Aerotec*, 836 F.3d at 1182. This alleged de facto exclusivity clause therefore cannot increase or otherwise impact CREXi's costs when it obtains information directly from the brokers or any other source besides CoStar's

websites. Further, CoStar adding watermarks or logos to the versions hosted on its websites only increases CREXi's costs because it makes copying CoStar less financially appealing, presumably because CREXi is unwilling to host pictures with a competitor's logo or watermark. (CC ¶¶ 114-16.) It is not anticompetitive for CoStar to seek to limit the amount it in effect subsidizes its competitors.

As explained above, CoStar is under no obligation to provide information or photographs to CREXi at all, so its decision in some cases to add watermarks or logos to the information to hosts is not anticompetitive conduct.

d. **CoStar Infringes CREXi's Trademark**

CREXi finally argues that CoStar engaged in anticompetitive conduct by blatantly infringing on its trademark when it purchased CREXi as a Google AdWord as well as when it included CREXi in the header to Google ads for CoStar's Ten-X product. (CC ¶¶ 190-206.) CREXi cites to two cases to argue that trademark infringement in combination with other exclusionary conduct may constitute anticompetitive conduct under Section 2 of the Sherman Act. (Opp'n at 13 (citing *Church & Dwight Co. v. Mayer Labs.*, Inc., 2011 WL 1225912, at *16 (N.D. Cal. Apr. 1, 2011) and *Dodge Data & Analytics LLC v. iSqFt, Inc.*, 183 F. Supp. 3d 855, 868 (S.D. Ohio 2016)).) But neither case reaches that conclusion, and such a holding is contrary to the actual standards applied by those courts. *Church* required the trademark infringement to "establish substantial foreclosure from competition," 2011 WL 1225912, at *16, and *Dodge Data* required "the conduct be designed to have an

anticompetitive effect on the relevant market," 183 F. Supp. 3d at 868. CREXi does not reference either of these holdings, and under either standard the Counterclaim's allegations regarding a relatively limited number of instances of trademark infringement in ads for a CoStar subsidiary are insufficient.

Accordingly, CoStar's alleged infringement of CREXi's trademark does not constitute anticompetitive conduct.

2. **Allegations of Market Power**

"Market power is the ability to raise price profitably by restricting output." *Ohio v. Am. Express Co.*, —— U.S. ——, 138 S. Ct. 2274, 2288, 201 L.Ed.2d 678 (2018) (emphasis removed) (quoting Philip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 5.01 (4th ed. 2017)). "A threshold step in any antitrust case is to accurately define the relevant market, which refers to 'the area of effective competition.'" *Qualcomm*, 969 F.3d at 992 (citing *Am. Express Co.*, 138 S. Ct. at 2285). Under Section 1 and Section 2 of the Sherman Act "the plaintiff must allege both that a 'relevant market' exists and that the defendant has power within that market." *Newcal Indus., Inc. v. Ikon Off. Sol.*, 513 F.3d 1038, 1044, 1044 n.3 (9th Cir. 2008). "The relevant market must include both a geographic market and a product market." *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018). Such allegations need not be pled with specificity. *Newcal Indus.*, Inc., 513 F.3d at 1045. Although the "validity of the 'relevant market' is typically a factual element rather than a legal one," an antitrust complaint may be dismissed under Rule

12(b)(6) "if the complaint's 'relevant market' definition is facially unsustainable." *Id.* In addition, "failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim." *Tanaka v. Univ. of S. California*, 252 F.3d 1059, 1063 (9th Cir. 2001).

CREXi alleges the relevant product markets for its antitrust claims are "Internet CRE listing services, Internet CRE information services, and Internet CRE action services," (CC ¶ 28) and the relevant geographic markets are "individual metropolitan areas." (*Id.* ¶ 47.) In order to establish CoStar's market power, CREXi alleges on information and belief for each product market that CoStar's current share is over either 90% or 95% and that "CoStar is dominant in an overwhelming majority of metropolitan areas." (*Id.* ¶¶ 102–104.) CoStar does not challenge CREXi's identification of the relevant product markets but does challenge its allegations regarding the relevant geographic market and its dominance in that market.

a. **Geographic Market of the Antitrust Violations**

"A geographic market is an area of effective competition where buyers can turn for alternate sources of supply." *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir. 1991) (cleaned up). A geographic market must "'correspond to the commercial realities' of the industry and be economically significant." *Brown Shoe Co. v. United States*, 370 U.S. 294, 336, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962) ("although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single

metropolitan area.") (citation omitted). In other words, "a market is the group of sellers or producers who have the actual or potential ability to deprive each other of significant levels of business." *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (quoting *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989)) (internal quotation marks omitted).

CoStar argues that the allegations of the geographic markets for CREXi's antitrust claims are insufficient because they do not identify a single specific location, provide a definition of what constitutes "individual metropolitan areas," or explain why the claim is limited to those metropolitan areas, and that these deficiencies also prevent it from defending itself. (Mot. at 15; Reply at 6 (quoting *Orchard Supply Hardware LLC v. Home Depot USA, Inc.*, 939 F. Supp. 2d 1002, 1010 (N.D. Cal. 2013)).) While CREXi correctly notes that the factual scope of the geographic market cannot be resolved on a motion to dismiss, an antitrust complaint may be dismissed at the 12(b)(6) stage if the allegations of market power are "facially unsustainable," *Newcal Indus., Inc.*, 513 F.3d at 1044, or "fail[ ] to identify a relevant market," *Tanaka*, 252 F.3d 1059, 1063. "Individual metropolitan areas" is insufficient under either standard. CREXi's three-word allegation is essentially a placeholder that contains virtually no factual details and makes it impossible to know whether any location is part of this lawsuit or not. *Flaa v. Hollywood Foreign Press Ass'n*, No. 2:20-CV-06974-SB (Ex), 2021 WL 1399297, at *6 (C.D. Cal. Mar. 23, 2021) (holding that "vague, confusing, or economically nonsensical market allegations" may be challenged at the pleading stage). None of the cases

CREXi cites contain allegations of a geographic market as undefined as "individual metropolitan areas," and this description fails to provide CoStar with notice of the markets being targeted or the opportunity to defend itself.

CREXi therefore fails to sufficiently allege the geographic market for its antitrust claims.

b. **Market Dominance**

Along with a relevant market definition, a plaintiff must plead that the defendant has power within that market. *Newcal Indus., Inc.*, 513 F.3d at 1052. Market power may be demonstrated through either of two types of proof: (1) "direct evidence of the injurious exercise of market power," i.e., "evidence of restricted output and supracompetitive prices;" or (2) more commonly, "circumstantial evidence pertaining to the structure of the market." *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). "To demonstrate market power circumstantially, a plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." *Id.*

"Direct evidence of anticompetitive effects would be proof of actual detrimental effects on competition." *Am. Express Co.*, 138 S. Ct. at 2284 (quotation and citation omitted). Market power must ordinarily be assessed in the context of a properly defined relevant market, *id.* at 2284–2285, but here the allegations CREXI identifies as direct evidence of CoStar's market power are largely conclusory, anecdotal, implausible, or legally insufficient to establish

detrimental effects to competition such as CoStar's ability to "control prices or exclude competition." (Opp'n at 16–17 (quoting *Cost Mgmt. Servs. v. Washington Natural Gas Co.*, 99 F.3d 937, 950 (9th Cir. 1996)).) For the reasons discussed above, the Court is unable to evaluate the plausibility of CREXi's allegations that CoStar's current share of each product market is over 90% or 95% in the absence of a properly defined geographic market. Finally, CREXi does not allege facts demonstrating that CoStar's competitors "lack the capacity to increase their output in the short run." *Rebel Oil Co., Inc.*, 51 F.3d at 1434. The Counterclaim therefore fails to allege CoStar's market power in the relevant markets.

Based on the foregoing deficiencies, Claims 1–8 in the Counterclaim for antitrust violations under Section 1 and Section 2 of the Sherman Act and the Cartwright Act are dismissed with leave to amend.

B. Trademark Infringement

CREXi's ninth counterclaim alleges that CoStar committed trademark infringement in violation of the Lanham Act, 15 U.S.C. § 1114. "To prevail on a claim of trademark infringement under the Lanham Act, 15 U.S.C. § 1114, a party must prove: (1) that it has a protectible ownership interest in the mark; and (2) that the defendant's use of the mark is likely to cause consumer confusion." *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011) (citation and quotation omitted). CoStar argues that CREXi has not plausibly alleged that its use of CREXi trademark in its Google AdWord ads created a likelihood of confusion among the sophisticated consumers bidding on commercial real

estate, and its alleged infringement would not have resulted in a diverted sale and would have only impacted a consumer's "initial interest." The Court declines to consider these arguments on a motion to dismiss.

The Court rejects as premature CoStar's invitation at this stage to focus only on two of the eight factors discussed in *Sleekcraft, AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979), and conclude its purchase and use of CREXi's mark in ads for Ten-X could not create a likelihood of confusion as a matter of law. CoStar may ultimately prove to be correct on both points, but drawing all factual inferences in CREXi's favor, as the Court must on a motion to dismiss, the Counterclaim alleges sufficient facts to state a claim for trademark infringement under the Lanham Act.

CoStar also argues that "initial interest confusion" provides no basis for relief under the Lanham Act "where the confusion is remedied prior to sale," citing to an opinion from the Southern District of Florida. *Blue Water Innovations, LLC v. Fettig*, 2019 WL 1904589, at *3 (S.D. Fla. Mar. 8, 2019). But the preceding sentence of the opinion notes that the Eleventh Circuit has not expressly decided the issue. *Id.* (quoting *Brain Pharma, LLC v. Woodbolt Distribution, LLC*, No. 12-60141-CIV, 2012 WL 12838277, at *6 (S.D. Fla. May 1, 2012)) (discussing *N. Am. Medical Corp. v. Axiom Worldwide Inc.*, 522 F.3d 1211, 1222 (11th Cir. 2012)). It is well-settled in the Ninth Circuit that even though initial interest confusion is "dispelled before an actual sale occurs, initial interest confusion impermissibly capitalizes on the goodwill associated with a mark and is therefore actionable trademark infringement." *Playboy*

Enterprises, Inc. v. Netscape Commc'ns Corp., 354 F.3d 1020, 1025 (9th Cir. 2004).

Accordingly, CREXi alleges sufficient facts to state a claim for trademark infringement under the Lanham Act.

C. False Advertising

CREXi's tenth claim is for false advertising under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), and its eleventh claim is for false advertising under California's False Advertising Law, Business and Profession Code § 17500. The parties agree that these claims are "substantially congruent" and can be analyzed together. Establishing a false statement in violation of the Lanham Act requires proving:

> (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by lessening of the goodwill associated with its products.

Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc., 758 F.3d 1069, 1071 (9th Cir. 2014). CoStar seeks dismissal for CREXi's failure to satisfy the first three elements listed above: false statement, deception, and materiality.

CREXi's false advertising claims are limited to the same Ten-X ads at issue in its claim for trademark

infringement. The Counterclaim alleges that CoStar's use of CREXi's mark "constitutes false advertisements that misrepresent the nature, characteristics, and qualities of CoStar's products and services." (CC ¶¶ 201–204, 326, 331.) Although CREXi provides no supporting factual details for the Court to review, the Counterclaim does contain screenshots of ads which the Court has reviewed to determine if CREXi has stated claims for false advertising. (*Id.* ¶¶ 200, 202.)

1. **False Statement**

To satisfy the first element an actionable statement must be "a specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact." *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1121 (9th Cir. 2021) (quotation omitted). CREXi alleges that CoStar's ads are false because they use CREXi's mark, but in considering the ads both with and without the offending word, CREXi does not explain how the inclusion of the word "CREXi" in the ads "misrepresents the nature, characteristics, qualities," of CoStar's products and services, as required to state a claim for false advertising under the Lanham Act. 15 U.S.C. § 1125(a)(1)(B). CREXi does not, for example, argue the ads were ambiguous or otherwise implied a false statement. *Prager Univ. v. Google LLC*, 951 F.3d 991, 1000 (9th Cir. 2020) ("Although a false advertising claim may be based on implied statements, those statements must be both specific and communicated as to deceive a significant portion of the recipients."). CREXi also cites to *U-Haul Int'l, Inc. v. Jartran, Inc.*, but the alleged ads do not contain any comparative claims (deliberately false or

otherwise) about CREXi or its products. 793 F.2d 1034, 1040 (9th Cir. 1986). Confusingly, CREXi instead argues that the inclusion of its name renders the ads subject to the "literal falsity" doctrine. (Mot. at 22–23.) As explained by Judge Posner in *Southland Sod Farms v. Stover Seed Co.*, 586 F.3d 500, 513 (7th Cir. 2009) ("*Southland*") the "literal falsity" doctrine creates a presumption of deception for a "patently false statement that means what it says to any linguistically competent person." Here, just as in *Southland*, merely stating a competitor's name cannot render an ad "literally false" because, *inter alia*, "there is no statement in the ordinary sense, because there is no verb." *Id.* (reminding plaintiffs they cannot "just intone 'literal falsity' and by doing so prove a violation of the Lanham Act.").

2. **Likely to Deceive**

On the second element of deception for a false advertising claim under the Lanham Act, CoStar argues that its ads could not have deceived or had a tendency to deceive a substantial segment of their audience. However, in analyzing CREXi's claim for trademark infringement, the Court has already concluded that, at least for the purposes of the Motion to Dismiss, the Counterclaim sufficiently alleges that CoStar's use of CREXi's mark is likely to cause confusion or deceive.

3. **Materiality**

However, not all deceptions are actionable as false advertisements, and CoStar's use of CREXi's mark was not material because it did not influence the purchasing decision of any consumer for two distinct reasons. First, CREXi's argues that the use of its mark created a false belief that CoStar and CREXi

were affiliated, but the Counterclaim's allegations are entirely conclusory and insufficient to plausibly establish an impact to any consumer's decision on which website to use to buy or sell commercial real estate. (*See* CC ¶ 326–27.) Second, in order for a deception to be material a consumer necessarily must have been exposed to it, and CREXi also fails to allege facts establishing that consumers of commercial real estate were ever even exposed to these ads. The Ninth Circuit has held that false statements in a video jacket were immaterial and could not influence a purchasing decision when the video was sold to consumers over the phone who never saw it. *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1181 (9th Cir. 2003), *overruled on other grounds by Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (en banc). Similarly, the Counterclaim simply provides no factual allegations from which the Court can conclude that consumers making decisions regarding buying or selling commercial real estate online could have been exposed to CoStar's ads. (CC ¶ 204.)

Accordingly, CREXi fails to plead sufficient facts to state its tenth claim for false advertising under the Lanham Act and eleventh claim for false advertising under California's False Advertising Law and the Court dismisses them with leave to amend.

D. UCL Claims

The Counterclaim alleges two distinct UCL claims. The Counterclaim's twelfth claim is for violations of the UCL under the unfair prong, while its thirteenth claim is for violations under the unlawful prong. The UCL claim based on the

unlawful prong states a claim predicated on trademark infringement, as discussed above.

CREXi argues that CoStar's practices also constitute unfair competition under California law, relying heavily on the Ninth Circuit's recent opinion in *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1194 (9th Cir. 2022) ("*hiQ*"). But the facts and claims at issue in *hiQ* were very different from those presented by the Counterclaim. *HiQ* involved a data analytics company scraping data from professional profiles available on LinkedIn to create "people analytics" which it sold to business clients. *Id.* at 1187. LinkedIn attempted to electronically block it from accessing its website and data, and hiQ obtained a preliminary injunction based on its claim under California law for intentional interference with contractual relations because being blocked from LinkedIn's data would prevent it from fulfilling its existing contracts with third parties and put it out of business. Significantly, CREXi does not bring a claim for tortious interference with contractual relations or even allege any such contracts exist, and the Ninth Circuit expressly declined to reach hiQ's UCL claim. *Id.* at 1194. The Ninth Circuit's comment that blocking hiQ from accessing otherwise public data on LinkedIn's servers "may well be considered unfair competition under California law" was expressly based on the fact that blocking hiQ would result in the "complete exclusion of the original innovator in aggregating and analyzing the public information." *Id.* at 1193–94. But CREXi is not the "original innovator" in aggregating and analyzing the public information on CoStar's websites, nor has CREXi alleged that being blocked from scraping has completely excluded it from accessing public

information on the relevant markets and therefore put it out of business. CREXi in fact alleges the opposite – it was founded in 2015 (almost thirty years after CoStar) by a group of seasoned CRE professionals who were "astonished by how the CRE industry lagged behind other industries moving into the digital age." (CC ¶¶ 18, 21.) CREXi argues that *hiQ* stands for the proposition that a private website cannot have a property right in information that is public or otherwise owned by the brokers who submitted it. But *hiQ* does not lend itself to such a broad reading that is entirely divorced from the contractual relationships at issue and history between the parties. More importantly, this argument does not appear to help CREXi in establishing a violation of California's Unfair Competition Law because it only highlights that CoStar cannot stop CREXi from obtaining CRE information for itself from other sources such as public records or the brokers themselves, unlike in *hiQ* where LinkedIn was the exclusive source of data.

CREXi therefore fails to plead sufficient facts to establish its thirteenth claim based on violations for the unfair prong of the UCL and the Court dismisses this claim with leave to amend.

E. Declaratory Relief

The Court finds the allegations in the Counterclaim and the surviving claims are sufficient for CREXi to state a request for declaratory relief at this stage.

IV. CONCLUSION

Accordingly, the Court **DENIES** CoStar's Motion to Dismiss the Counterclaim as to the ninth claim for trademark infringement, thirteenth claim for

unlawful violations of the UCL, and the fourteenth claim for declaratory judgment, and **GRANTS** the Motion to Dismiss as to all other claims with leave to amend to correct the deficiencies identified in this Order. Any amended complaint shall be filed **no later than July 12, 2022**.

IT IS SO ORDERED.

[141 F.4th 1075]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COSTAR GROUP, INC.; CoStar Realty Information, Inc., Plaintiffs-counter-defendants-Appellees,

v.

COMMERCIAL REAL ESTATE EXCHANGE, INC., Defendant-counter-claimant-Appellant.

No. 23-55662

Argued and Submitted October 9, 2024
San Francisco, California

Filed June 23, 2025

Before: Lucy H. Koh and Anthony D. Johnstone, Circuit Judges, and Michael H. Simon,* District Judge.

OPINION

JOHNSTONE, Circuit Judge:

CoStar Group, Inc., and CoStar Realty Information, Inc., (collectively, "CoStar") and Commercial Real Estate Exchange, Inc., ("CREXi") are online platforms that compete for brokers in the commercial real estate listing, information, and auction markets. CoStar holds the largest share in

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* The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

these markets. CREXi is a recent entrant. After CoStar sued CREXi for infringing its intellectual property by listing images and other information that CoStar hosts, CREXi counterclaimed on antitrust grounds. The crux of CREXi's antitrust complaint: CoStar is a monopolist that wields its platform licensing and technology to prevent its customers from doing business with its competitors. CREXi argues that CoStar's conduct is: (1) unlawful monopolization and attempted monopolization under § 2 of the Sherman Act, 15 U.S.C. § 2; (2) unlawful exclusive dealing under § 1 of the Sherman Act, 15 U.S.C. § 1, and California's analogous Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 *et seq.*; (3) and "unfair" and "unlawful" under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq*. The district court dismissed CREXi's antitrust counterclaims and directed entry of final judgment on those claims under Rule 54(b), permitting this appeal.

We conclude that CREXi successfully states claims under §§ 1 and 2 of the Sherman Act and under California's Cartwright Act and UCL. It plausibly alleges that CoStar has monopoly power in the relevant markets. And it plausibly alleges that CoStar engaged in anticompetitive conduct by entering exclusive deals with brokers and imposing technological barriers, which prevents brokers from working with competitors. A monopolist wielding its power to exclude competitors and maintain monopoly power in its markets violates § 2 of the Sherman Act. Using exclusive deals to do so is a "contract . . . in restraint of trade" that violates § 1 of the Sherman Act and the Cartwright Act. This same

anticompetitive conduct violates the "unfair" and "unlawful" prongs of the UCL. So we reverse.

I. CoStar's copyright claims and CREXi's antitrust counterclaims

CoStar and its competitor CREXi provide listing, information, and auction services to help brokers research and transact commercial real estate ("CRE"). CoStar, founded in 1987, is the established industry leader. For listing services, CoStar offers LoopNet, an online marketplace, and LoopLink, software that enables brokers to display LoopNet listings on their websites. For information services, CoStar offers the CoStar database, which provides current and historical data about CRE properties. And for auction services, CoStar offers Ten-X, a sales platform for bidding on and selling real estate. CREXi, founded in 2015, offers alternatives to all of CoStar's products.

CoStar sued CREXi for copyright infringement and related claims in September 2020. Among other allegations, CoStar claims that CREXi stole tens of thousands of copyrighted property images, and misappropriated other valuable content from CoStar's services and databases, including listing information from LoopNet. The district court denied CREXi's motion to dismiss CoStar's claims, which are still pending there. CREXi then counterclaimed against CoStar, including the antitrust counterclaims in this appeal. As relevant to this appeal, CREXi asserted counterclaims under § 2 of the Sherman Act for unlawful monopolization and attempted monopolization (claims 1–6); under § 1 of the Sherman Act and the Cartwright Act for exclusive

dealing (claims 7–8); and for unfair and unlawful competition under the UCL (claims 12–13).[1]

CREXi alleges that CoStar perpetrates a "scheme" of anticompetitive conduct to prevent its broker customers from doing business with CoStar's competitors. First, CoStar imposes contract terms on its broker customers that expressly or implicitly prohibit them from providing their own listings to CoStar's competitors. Second, CoStar builds technological barriers into its platforms that prevent brokers from freely transferring their own listings to competing platforms.[2] The effect of this conduct, according to CREXi, is to build "a moat" around CoStar's vast customer base to the exclusion of its competitors.

The district court dismissed most of CREXi's claims—including all of its antitrust claims—with prejudice. The court held that CREXi did not state a

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[1] CREXi also claims that CoStar intentionally interfered with its broker contracts and its prospective economic advantage (claims 10–11). But because CREXi first alleged those claims in its amended counterclaims and they were outside the scope of the district court's order granting leave to amend, the district court properly dismissed them. *See* Fed. R. Civ. P. 15(a)(2).

[2] CREXi also alleges that CoStar falsely claims copyright over data and images that brokers and others own and improperly uses CREXi's trademarked name to advertise and misrepresent that CREXi is affiliated with CoStar's Ten-X auction service. CREXi's false copyright ownership allegations may be related to or overlapping with its technological barriers theory. However, because we hold that CREXi's allegations of exclusive agreements and technological barriers are sufficient to state a § 2 monopolization claim, we do not address CREXi's additional allegations of anticompetitive conduct. On remand, the district court should revisit these allegations in light of our decision.

§ 2 monopolization claim because it failed to show through either direct or indirect evidence that CoStar has monopoly power. And it held that CREXi did not state a § 1 exclusive dealing claim because the agreements at issue were not exclusive. The court also rejected CREXi's UCL counterclaims because they were derivative of its antitrust claims.

CREXi sought final judgment on, and an immediate appeal of, its dismissed claims under Rule 54(b). Fed. R. Civ. P. 54(b) (permitting final judgment on "fewer than all[ ] claims" where a district court "determines that there is no just reason for delay"). The district court directed entry of final judgment as to the dismissed counterclaims, finding that doing so would not lead to duplicative appellate review. Although there is factual overlap between CREXi's claims on appeal and CoStar's and CREXi's unresolved copyright and trademark claims, we agree with the district court that the claims are sufficiently legally severable and will not result in a "piecemeal appeal[ ]." *Wood v. GCC Bend, LLC*, 422 F.3d 873, 878–80 (9th Cir.2005) (quoting *Curtiss–Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 10, 100 S.Ct. 1460, 64 L.Ed.2d 1 (1980)). Nor will CoStar suffer any prejudice from having to defend this antitrust appeal now rather than later. *See Gregorian v. Izvestia*, 871 F.2d 1515, 1519 (9th Cir. 1989). Thus, it is a final judgment under Rule 54(b) over which we have jurisdiction. 28 U.S.C. § 1291.

We review de novo the district court's order of dismissal for failure to state a claim. *Coronavirus Rep. v. Apple, Inc.*, 85 F.4th 948, 954 (9th Cir. 2023). When considering a motion to dismiss, we accept all facts alleged in the complaint as true and construe the pleadings in the light most favorable to the

nonmoving party. *Ass'n for L.A. Deputy Sheriffs v. County of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011). At this stage, a plaintiff need only state a facially plausible claim, such that a court can "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

II. CREXi's claims under Sherman Act §§ 1 and 2 and related laws

CREXi claims that CoStar engages in anticompetitive conduct by itself and through its contracts with brokers. Under the Sherman Act's § 2, which targets unilateral anticompetitive conduct, CREXi claims that CoStar wields or attempts to wield monopoly power to exclude competitors from the market by signing exclusionary contracts with brokers and putting up technical barriers. Under the Sherman Act's § 1, which targets concerted anticompetitive conduct, CREXi claims that those same exclusionary contracts are exclusive agreements that prevent the brokers from doing business with competitors. CREXi's claim under California's Cartwright Act mirrors its § 1 claim. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665 n.8 (9th Cir. 2022) (en banc). And based on all this conduct, CREXi claims that CoStar violated the "unfair" and "unlawful" prongs of California's UCL. *See Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163, 83 Cal.Rptr.2d 548, 973 P.2d 527, 539–40, 544 (1999) (explaining that the "unlawful" prong "'borrows' violations of other laws and treats them as unlawful practices" and that the "unfair" prong targets "conduct that threatens an incipient violation of an

antitrust law, or violates the policy or spirit of one of those laws").

CREXi's §§ 1 and 2 claims are both governed by antitrust law's "rule of reason." *See Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 996 (9th Cir. 2010); *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 998 (9th Cir. 2023). Under the rule of reason, CREXi's §§ 1 and 2 claims converge on the same question: does "the challenged [conduct have] a substantial anticompetitive effect that harms consumers in the relevant market[?]" *Fed. Trade Comm'n v. Qualcomm, Inc.*, 969 F.3d 974, 991 (9th Cir. 2020) (quoting *Ohio v. Am. Express Co.*, 585 U.S. 529, 541, 138 S.Ct. 2274, 201 L.Ed.2d 678 (2018)). So although CREXi's Sherman Act claims have different elements, in this case both claims turn primarily on whether CoStar entered exclusive agreements while holding monopoly power in the markets at issue. Allegations of such anticompetitive conduct, if proven, would show that CoStar harms consumers in violation of the Sherman Act.

We begin by introducing the elements of CREXi's § 2 monopolization claim and its § 1 exclusive dealing claim.

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Section 1 supports several theories of antitrust liability, including CREXi's theory of exclusive dealing. To state an exclusive dealing claim under § 1, a plaintiff must plausibly allege (1) the existence of an exclusive agreement that (2) forecloses competition in a substantial share of the relevant market. *See Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1180 (9th Cir. 2016).

Section 2 of the Sherman Act prohibits "monopoliz[ing] . . . trade or commerce among the several States." 15 U.S.C. § 2. Under § 2, plaintiffs can claim that a defendant both attempted to monopolize and actually monopolized a market. To state an attempted monopolization claim, plaintiffs must start by plausibly alleging that the defendant specifically intended to control prices or destroy competition in the market and has a dangerous probability of achieving monopoly power. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1432–33 (9th Cir. 1995). To state a monopolization claim, plaintiffs must start by plausibly alleging that the defendant has monopoly power in the relevant market. *Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 949 (9th Cir. 1996). For both claims, plaintiffs must then plausibly allege that the defendant engaged in anticompetitive conduct to achieve (or attempt to achieve) monopoly power and caused antitrust injury. *See id.*; *Rebel Oil*, 51 F.3d at 1433.

Here, we can bypass some of these elements at the pleading stage. CoStar does not dispute that CREXi plausibly alleged that it specifically intended to control prices or destroy competition, or that it caused antitrust injury. So for CREXi's attempted monopolization claim, the only remaining elements are whether CoStar has a dangerous probability of achieving monopoly power and engaged in anticompetitive conduct in pursuit of that power. And for its monopolization claim, the only remaining elements are whether CoStar has monopoly power and willfully acquired it through anticompetitive conduct. If CREXi has plausibly alleged that CoStar has monopoly power in the relevant market, it necessarily has alleged that CoStar has a dangerous

probability of achieving monopoly power. Thus, if CREXi plausibly alleges that CoStar has monopoly power and willfully acquired that power through anticompetitive conduct, it will have stated both a monopolization and attempted monopolization claim under § 2.

A. The overlapping Sherman Act elements at issue

We can further simplify our consideration of CREXi's §§ 1 and 2 claims by mapping the overlap of their remaining elements.

First, a § 2 monopolization claim requires monopoly power, while a § 1 exclusive dealing claim does not. But a § 1 exclusive dealing claim requires a substantial foreclosure of competition, and monopoly power establishes such a foreclosure. So if CREXi plausibly alleges that CoStar has monopoly power under § 2, it has also plausibly alleged that any exclusive agreements that CoStar entered into also foreclosed competition in a substantial share of the relevant market under § 1.

By their nature, exclusive agreements can prevent a contracting party's competitors from doing business with respect to the contracted goods or services. Often these agreements have pro-competitive benefits. *Omega Env't, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997). So § 1 only prohibits exclusive agreements if they substantially foreclose competition, that is exclude competitors from so much of the market that they cannot gain a solid foothold to compete. *See Allied Orthopedic*, 592 F.3d at 996; *see also Interface Grp., Inc. v. Mass. Port Auth.*, 816 F.2d 9, 11 (1st Cir. 1987). Because monopoly power "is the substantial ability 'to control prices or exclude

competition,'" *Epic Games*, 67 F.4th at 998 (quoting *United States v. Grinnell*, 384 U.S. 563, 571, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966)), if a monopolist enters into exclusive agreements with its customers, those agreements can substantially foreclose competition, *see ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 284 (3d Cir. 2012) ("[I]f the defendant occupies a dominant position in the market, its exclusive dealing arrangements invariably have the power to exclude rivals."). Thus, even though monopoly power is not a necessary element of a § 1 claim, it is sufficient to allege the substantial foreclosure element of exclusive dealing.

Second, a § 1 exclusive dealing claim requires an exclusive agreement, while a § 2 monopolization claim does not. But a § 2 monopolization claim requires anticompetitive conduct, and exclusive agreements are an example of anticompetitive conduct. So if CREXi plausibly alleges that CoStar entered into exclusive agreements that foreclose competition under § 1, it has also plausibly alleged that CoStar engaged in anticompetitive conduct under § 2.

"The anticompetitive-conduct requirement [of § 2] is 'essentially the same' as the Rule of Reason inquiry applicable to [§ 1] claims." *Epic Games*, 67 F.4th at 998; *see also United States v. Microsoft Corp.*, 253 F.3d 34, 70 (D.C. Cir. 2001).

Exclusive dealing is also an exclusionary practice akin to monopolization. P. Areeda & H. Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application §§ 768b2, 1821b (5th ed. 2018). Thus, even though exclusive dealing is not a necessary element of a § 2 claim, it is sufficient to show anticompetitive conduct.

In short, a monopolist that wields exclusive agreements to foreclose competition violates both §§ 1 and 2 of the Sherman Act. This means we must answer only two questions in this appeal: whether CREXi plausibly alleged that CoStar (1) has monopoly power, including the power to substantially foreclose competition, and (2) entered exclusive agreements, an example of anticompetitive conduct. If CREXi has done so, it will have stated a claim under both §§ 1 and 2 of the Sherman Act. Because CREXi's claim under the Cartwright Act mirrors its § 1 claim, it also will have stated a claim under the Cartwright Act. *See Olean Wholesale*, 31 F.4th at 665 n.8. And because CREXi's claims under the UCL depend on the same underlying conduct as its §§ 1 and 2 claims, it also will have stated a claim under both the "unfair" and "unlawful" prongs of the UCL. *See Cel-Tech*, 83 Cal.Rptr.2d 548, 973 P.2d at 539–40, 544.

B. CREXi's monopoly power allegations

We now consider whether CREXi plausibly alleges that CoStar has monopoly power in the relevant markets. CREXi alleges that there are three relevant product markets—listing services, information services, and auction services—that are further divided into markets for each of fifty metropolitan areas. CoStar does not contest this market definition.

Monopoly power "is the substantial ability 'to control prices or exclude competition.'" *Epic Games*, 67 F.4th at 998 (quoting *Grinnell*, 384 U.S. at 571, 86 S.Ct. 1698). A plaintiff may plead monopoly power in two ways. Either a "predominant share of the market" or an "ability to manage . . . prices with little regard to competition" can "support[ ] an inference of market dominance." *Greyhound Comput. Corp. v.*

Int'l Bus. Machs., 559 F.2d 488, 497 (9th Cir. 1977). Thus, monopoly power can be shown either directly, through evidence of the exercise of monopoly power, or indirectly, through evidence of a firm's predominant market share. *See Rebel Oil*, 51 F.3d at 1434; *Epic Games*, 67 F.4th at 998. CREXi plausibly alleges monopoly power both directly and indirectly.

1. Direct evidence of monopoly power

A plaintiff can plausibly allege that a defendant has monopoly power with "direct evidence of the injurious exercise" of that monopoly power—evidence of either supracompetitive pricing or reduced output. *Rebel Oil*, 51 F.3d at 1434; *see Epic Games*, 67 F.4th at 998 ("Like market power, monopoly power can be established either directly or indirectly."). "A supracompetitive price is simply a 'price[ ] above competitive levels.'" *Epic Games*, 67 F.4th at 984 (omission in original) (quoting *Rebel Oil*, 51 F.3d at 1434); *see also Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475–76 (9th Cir. 1997), *overruled in part on other grounds by Lacey v. Maricopa Cnty.*, 693 F.3d 896 (9th Cir. 2012) (distinguishing high prices from supracompetitive prices). Because monopoly power "is the abilit[y] (1) to price substantially above the competitive level *and* (2) to persist in doing so for a significant period without erosion by new entry or expansion," evidence of supracompetitive pricing is direct proof of the actual exercise of monopoly power. Areeda & Hovenkamp, § 501.

CREXi plausibly alleges that CoStar charged supracompetitive prices and thus has monopoly power. CREXi repeatedly alleges that CoStar has "impose[d] prices much higher than those of its competitors for years, and has not been forced to

reduce them." CREXi provides specific examples of how CoStar has increased its prices as competitors have been either forced from the market by CoStar or acquired by CoStar. For example, CREXi alleges that CoStar hiked its average prices by 80% for new customers several months after CoStar used litigation tactics to drive a former competitor, Xceligent, from the market. CREXi also points to anecdotes from CoStar's customers complaining about CoStar's pricing and the unavailability of alternatives that could drive down prices. For example, one customer complained that after CoStar merged with a former competitor, CoStar "decided to gouge brokers" by "drastically rais[ing] their prices" by 300 to 500%. These allegations are enough to create a plausible inference of long-term supracompetitive pricing—an exercise of monopoly power.

Despite determining that CREXi plausibly alleged supracompetitive pricing, the district court held that CREXi failed to plausibly allege monopoly power because it did not also allege that CoStar restricted output in the relevant markets. But a plaintiff need not allege both output restrictions and supracompetitive pricing to plead direct evidence of monopoly power. As the Supreme Court recently explained, "reduced output, increased prices, *or* decreased quality in the relevant market" may serve as "proof of actual detrimental effects [on competition]." *Am. Express*, 585 U.S. at 542, 138 S.Ct. 2274 (emphasis added) (alteration in original); *see also Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993) ("[A] jury may not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted *or* prices

were above a competitive level." (emphasis added)); *Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 461–62, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986) ("[P]roof of actual detrimental effects, *such as a reduction of output*, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects." (emphasis added) (internal citations omitted)); *Epic Games*, 67 F.4th at 983 ("To prove a substantial anticompetitive effect directly, the plaintiff must provide 'proof of actual detrimental effects [on competition],' such as *reduced output, increased prices, or decreased quality* in the relevant market. Importantly, showing a reduction in output is one form of direct evidence, but it 'is not the only measure.'" (emphasis altered) (citations omitted)). So even if CREXi did not plausibly allege that CoStar restricted output,[3] it still plausibly alleged CoStar has monopoly power.

It makes economic sense that a plaintiff need only allege evidence of supracompetitive pricing to raise a plausible inference of monopoly power. Pricing and output are "two sides of the same coin." *United States v. AMR Corp.*, 335 F.3d 1109, 1115 n.6 (10th Cir. 2003) (citation omitted). "If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too—in other words, output will be restricted." *Calif. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 777, 119 S.Ct. 1604, 143 L.Ed.2d 935 (quoting *Gen. Leaseways, Inc. v. Nat'l*

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[3] Because we conclude that no such showing is necessary, we need not reach the question of whether CREXi has plausibly alleged restricted output. *See INS v. Bagamasbad*, 429 U.S. 24, 25, 97 S.Ct. 200, 50 L.Ed.2d 190 (1976) ("As a general rule courts . . . are not required to make findings on issues the decision of which is unnecessary to the results they reach.").

Truck Leasing Ass'n, 744 F.2d 588, 594–95 (7th Cir. 1984)); *see also Brooke Grp.*, 509 U.S. at 233, 113 S.Ct. 2578 ("Supracompetitive pricing entails a restriction in output."). And if firms restrict output, prices will increase. *See Rebel Oil*, 51 F.3d at 1434 ("Prices increase marketwide in response to the reduced output because consumers bid more in competing against one another to obtain the smaller quantity available." (citing *Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986))). So to allege monopoly power via direct evidence, an antitrust plaintiff need only allege that a firm raised prices to a supracompetitive level *or* restricted output. CREXi does. Thus, the district court erred in dismissing CREXi's monopoly power claim.

2. Indirect evidence of monopoly power

Moreover, CREXi's monopoly power allegations are sufficient at the motion to dismiss stage for an independent reason. The district court overlooked indirect evidence showing that CoStar has a "predominant share of the market" which "support[s] an inference of market dominance" even without direct evidence that it exercises monopoly power. *Greyhound*, 559 F.2d at 497. To establish monopoly power through indirect evidence a plaintiff must, with respect to a defined market, show (1) "that the defendant owns a dominant share of that market," and (2) "that there are significant barriers to entry and . . . that existing competitors lack the capacity to increase their output in the short run." *Rebel Oil*, 51 F.3d at 1434. CREXi also plausibly alleges that CoStar has monopoly power through indirect evidence.

a) Dominant share of the market

"[M]arket shares on the order of 60 percent to 70 percent have supported findings of monopoly power." *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924–25 (9th Cir. 1980); *see also Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997) (explaining that "[c]ourts generally require a 65% market share to establish a prima facie case of market power" to sustain a monopolization claim). Here, CREXi alleges that CoStar has a 90% share of the CRE listing market, a 90% share of the information market, and a 95% share of the auction services market. Those allegations rely on two sources: local estimates of CoStar's market share in fifty metropolitan areas based on property sales, and national data about CRE activity and the number of visitors to CoStar's LoopNet website.

For local market shares, CREXi divided the dollar value of for-sale CRE listings on CoStar's platform by the total value of closed CRE sales transactions in each metropolitan area. Based on these figures, CREXi estimates that CoStar's market share equals or exceeds 90 percent in twelve of the metropolitan areas, 80 percent in thirty-one of the metropolitan areas, 70 percent in thirty-eight metropolitan areas, 60 percent in forty-six metropolitan areas, and 57 percent in all fifty areas. We recognize that these estimates may be inflated; properties can be listed on multiple sites, and the estimates include properties listed but never sold. But the degree of overestimation and its effect on CoStar's overall market share is a fact-intensive inquiry that cannot be resolved on a motion to dismiss. *See Newcal Indus. Inc. v. Ikon Off. Sol.*, 513 F.3d 1038, 1052 (9th Cir.

2008); *Greyhound*, 559 F.2d at 496 n.17. Drawing reasonable inferences in CREXi's favor, any overestimation would not make CREXi's monopoly power allegations implausible.

National data bolsters CREXi's market share estimates: "nearly 90% of all CRE activity occurs on a CoStar Network," and LoopNet receives over 85% of website visitors as compared to listing competitors. Although "CRE activity" and website visitors to LoopNet are unlikely to mirror CoStar's market share in the listing market, it is reasonable to infer that these datapoints are correlated with market share. Taken together, CREXi's local and national data render CREXi's allegation that CoStar holds a dominant share of the listing market facially plausible. It is also facially plausible that CoStar holds a dominant share of the information and auction services markets. While the LoopNet data only relates to the listing market, the CoStar network data could pertain to all three alleged markets. And CoStar's information and auction services are complementary products to its listing services, so it is plausible its shares in all three markets are closely correlated.

b) Significant barriers to entry

We next examine whether there are significant barriers to entry into the defined markets. CREXi plausibly alleges that there are. "Entry barriers are 'additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants,' or 'factors in the market that deter entry while permitting incumbent firms to earn monopoly returns.'" *Rebel Oil*, 51 F.3d at 1439 (citing *L.A. Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1427–28 (9th Cir.

1993)). CREXi alleges that the relevant markets are characterized by "network effects," or economies of scale in consumption, a classic barrier to entry. *See Klein v. Facebook, Inc.*, 580 F. Supp. 3d 743, 779–80 (N.D. Cal. 2022); *Epic Games*, 67 F.4th at 984–85. Services with network effects become more valuable as the number of users increases. *See Klein*, 580 F. Supp.3d at 780. CREXi alleges that an increase in brokers who use CoStar's listing services increases the value of CoStar's listing to those brokers. A new entrant cannot attract sellers' brokers to list properties unless there are enough buyers' brokers using the service to search properties. But a new entrant cannot attract buyers' brokers to search properties unless there are enough sellers' brokers using the service to list properties. This "catch-22" increases the barriers to entry for new competitors.

In sum, CREXi plausibly alleges that CoStar has monopoly power via direct and indirect evidence under § 2. So CREXi has also plausibly alleged that any exclusive agreements CoStar entered substantially foreclosed competition under § 1. That alone violates neither section of the Sherman Act. For its § 2 monopolization claim, CREXi also must plausibly allege that CoStar engaged in anticompetitive actions to acquire or maintain its monopoly. And for its § 1 exclusive dealing claim, CREXi also must plausibly allege that CoStar entered into exclusive agreements that restrained trade. We now turn to those elements.

C. CREXi's allegations of CoStar's exclusive agreements and anticompetitive conduct

CREXi alleges that CoStar engaged in anticompetitive conduct by entering exclusive

contracts with brokers and imposing technological barriers. "Anticompetitive conduct is behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way." *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008). So a firm with monopoly power is "precluded from employing otherwise lawful practices that unnecessarily exclude[ ] competition" from a relevant market. *Greyhound*, 559 F.2d at 498. Usually, exclusionary conduct is costly to firms. For example, most consumers prefer not to enter exclusive deals that prevent them from shopping around. *See Microsoft*, 253 F.3d at 87. Typically, a firm must reduce prices to compensate consumers for an exclusive deal, or else forgo their business. Only those firms with monopoly power can recoup those costs by excluding rivals from the market. *See Rebel Oil*, 51 F.3d at 1434; *see also LePage's Inc. v. 3M*, 324 F.3d 141, 164 (3rd Cir. 2003) ("[E]xclusionary practice has been defined as 'a method by which a firm . . . trades a part of its monopoly profits, at least temporarily, for a larger market share, by making it unprofitable for other sellers to compete with it.'") (alterations in original) (quoting Richard A. Posner, *Antitrust Law: An Economic Perspective* 28 (1976)).

Here, CREXi alleges that the exclusive agreements and technological barriers increase brokers' costs of working with CoStar's competitors. If CoStar had monopoly power, it could engage in this exclusionary conduct. And by exercising its monopoly power in this way, it could exclude competitors, like CREXi, from the market. This, in turn, could allow CoStar to maintain its monopoly power and recoup any losses incurred through its exclusionary conduct.

See Richard A. Posner, *Antitrust Law* 251–54 (2d. Ed. 2001) (explaining the "methods by which a firm that has a monopoly share of some market in a new-economy industry might seek to ward off new entrants," and thereby extend its monopoly). This would be the precise type of conduct that § 2 prohibits. *See Qualcomm*, 969 F.3d at 988–89; *Rebel Oil*, 51 F.3d at 1434.

1. Exclusive agreement allegations

In examining CoStar's contracts with brokers, the district court applied a refusal-to-deal framework, asking whether this was the rare instance where a firm had a duty to deal with its competitor. *Aerotec*, 836 F.3d at 1184; *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 448, 129 S.Ct. 1109, 172 L.Ed.2d 836 (2009) ("There are also limited circumstances in which a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability."). But that is not CREXi's theory of liability under § 2. Instead, CREXi contends that CoStar's exclusionary practices kept CoStar's broker customers—not CoStar itself—from dealing with CREXi. A monopolist's efforts "to limit the abilities of third parties to deal with rivals" is a matter of exclusive dealing with the monopolist's customers, not a refusal to deal with the monopolist's competitors. *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013); *see also Allied Orthopedic*, 592 F.3d at 996 (recognizing that exclusive dealing claims involving "an agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor" can violate antitrust law). Thus, we ask whether CREXi plausibly alleges that the contracts are

exclusive agreements under § 1. And if it does, then it has also plausibly alleged anticompetitive conduct under § 2.

The foundation of "any exclusive dealing claim is an agreement to deal exclusively." *Aerotec*, 836 F.3d at 1181 (citation omitted). CREXi concedes, however, that the agreements of which it complains "expressly disavow[ ] any ownership in or claim to [brokers'] data, agreeing that CoStar's right to use the data will be 'non-exclusive.'" But CREXi alleges that these promises are "illusory and contradicted" by other contractual provisions and by CoStar's conduct. Thus, CREXi frames the agreements as "de facto" exclusive.

We have yet to recognize a de facto exclusive dealing theory. *Aerotec*, 836 F.3d at 1182. But we have "readily acknowledge[d] that tying conditions," a similar restraint of trade, "need not be spelled out in express contractual terms to fall within the Sherman Act's prohibitions." *Id.* at 1179; *see also Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540, 74 S.Ct. 257, 98 L.Ed. 273 (1954) ("To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement."). To dismiss an exclusive dealing claim just because a contract does not expressly require exclusivity would be the type of overly formalistic rule that the Supreme Court has cautioned against in antitrust cases. *See Qualcomm*, 969 F.3d at 1004 (considering the "practical effect" of an exclusive dealing agreement (quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 326, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961))); *see also Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) ("Legal

presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law."). Accordingly, we cannot inquire only into whether an agreement's terms expressly exclude one party from dealing with the other party's competitors.

Other courts of appeals have recognized de facto exclusive agreements. These agreements all contained "specific features" that "effectively coerced" parties to work exclusively with a dominant firm. *Aerotec*, 836 F.3d at 1182–83. "Just as in any exclusive dealing claim . . . the court first had to be satisfied that specific features of the agreement required exclusivity." *Id.* at 1183. For example, in *ZF Meritor, LLC v. Eaton Corp.*, the Third Circuit held that "a dominant supplier enter[ed] into de facto exclusive dealing arrangements with every customer in the market," 696 F.3d at 281, by offering rebate programs—backed by purchase and volume targets—that "induce[d] customers to deal exclusively with the firm offering the rebates," *id.* at 275. And in *McWane, Inc. v. FTC*, the Eleventh Circuit held that a defendant's "Full Support Program"—which required distributors to buy "all of their domestic fittings from [defendant]" or else lose their rebates and access to defendant's supply—was an exclusive agreement even though it was short-term and voluntary. 783 F.3d 814, 819– 20, 833–35 (11th Cir. 2015).

CREXi's allegations are different because the contracts at issue do not contain rebate or discount terms that create de facto exclusivity in those cases. Still, CREXi plausibly alleges that specific provisions of each contract contradict the express promise of non-exclusivity. There are four agreements at issue: the LoopNet and LoopLink terms that both govern

CoStar's listing service; the CoStar terms that govern its information service; and the Ten-X terms that govern its auction service. The LoopNet terms forbid brokers from using or reproducing content available on LoopNet "in connection with any other . . . listing service" and from "integrat[ing] or incorporat[ing] any portion of the Content into any other database." CREXi alleges that the LoopNet terms also require brokers to treat "all information obtained from the Service," including brokers' own listings, as "proprietary" to LoopNet. In their contracts, brokers must also agree that it "shall constitute a prima facie breach" of the LoopNet terms if CoStar determines that "any third party," including a competitor, "has access to property listings" provided by brokers and modified by CoStar. The LoopLink, CoStar, and Ten-X terms all contain similar provisions. CREXi alleges that CoStar leverages its market power to ensure these contract terms are "non-negotiable" for individual brokers.

These contractual provisions are not expressly exclusive, and their terms define "Content" as only material "contained on or provided through" CoStar's platform. But CREXi alleges that, in practice, they require brokers to exclusively use CoStar's services. CREXi alleges that the terms of the contracts condition access to LoopNet and to brokers' own LoopLink-hosted websites on an agreement not to support or share equivalent data with CoStar's competitors. In other words, if brokers provide data to CoStar, the terms forbid brokers from also providing that data to a competitor of CoStar. CREXi alleges that the terms, "by design, limit brokers' ability to use other listing platforms . . . and have a chilling effect on brokers' willingness to work with

competitors, for fear that they will run afoul of CoStar's overbroad terms."

These allegations of actual de facto exclusivity are not speculation: CREXi provides specific examples of brokers who understand CoStar's contract terms to *actually* foreclose their ability to work with CREXi and other CoStar rivals. For example, when CREXi offered to match listings posted on a broker's own website, the broker stated that this would be "problematic in regard to [his] contractual relationship with CoStar." Another broker explained that she could not allow CREXi to post her listings because "from what [she] underst[ood], that would be some sort of breach of contract with [CoStar]." A third broker explained that he could not work with CREXi because it would "conflict with our National CoStar agreement." Further proceedings may show that brokers misunderstand the operation of these contracts. But at the pleading stage, these allegations are sufficient to support an inference that the contracts create an exclusive relationship.

Even if CoStar's contracts do not expressly require brokers to work only with CoStar, CREXi has plausibly alleged that specific provisions in all four of CoStar's contracts in practice lock brokers into exclusive agreements with CoStar. CREXi therefore plausibly alleges that the contracts operate as a de facto exclusive agreements for purposes of § 1, and that they are anticompetitive under § 2.

2. Technological barriers

CREXi's allegations of exclusive dealing are not its only allegations of anticompetitive conduct under § 2 of the Sherman Act. It also alleges that CoStar constructed technological barriers.

CREXi alleges that CoStar constructed technological barriers that impede CREXi's ability to access brokers' listing information that is otherwise available to the public on brokers' own websites. CoStar's LoopLink service powers brokers' personal websites, which commonly function as a comprehensive database for a broker's listings. Listing information may include addresses, sale prices or lease rates, square footage, photographs, narrative descriptions of the properties, and brokers' contact information. When several brokers who worked with CoStar tried to do business with CREXi, they asked CREXi to add listings to its platform by taking their listings from their own websites. But CREXi could not access those listings because, unbeknownst to the brokers, CoStar blocks its competitors—and only its competitors—from viewing them. Because it is costly to maintain a dynamic database of listings on several different platforms at once, many brokers keep their listings only on LoopLink-powered websites. CREXi's inability to access brokers' listings on brokers' own websites frequently means there is no practicable way for brokers to do business with CREXi and other CoStar competitors. For example, one broker explained that he "do[es] not keep lists of our listings on [E]xcel or other platforms as we have over 300 listings that change daily, and I don't have the extra time to keep track on multiple platforms. I can't think of an alternative way to get [CREXi my brokerage]'s listing at this time."

As alleged by CREXi, these technological barriers are particularly problematic because of their deceptive element. It is only after brokers contract with CoStar and build CoStar-powered websites that

the brokers realize that they cannot transmit their own listing information and photographs to other listing companies via their own publicly available websites. At least one broker explained that he was surprised that CREXi was unable to access listings on the brokers' own website, stating: "I'm not sure why you can't access these [listings] because they are on our own website." By blocking only rivals' access to otherwise publicly available listings on brokers' own websites without disclosing such blockage, CoStar deceives its customers and protects its monopoly in a manner not attributable to competition on the merits. *See Microsoft*, 253 F.3d at 76-77 (concluding that Microsoft had engaged in anticompetitive conduct where it led developers to believe they were developing cross-platform applications when, in reality, they were producing applications that would run only on the Windows operating system).

In purpose and effect, CREXi alleges that these barriers "inhibit the free transfer of information from brokers to companies that compete with CoStar" and "prevent competition in the marketplace." This plausibly alleges that the technological barriers are anticompetitive. *See Cascade Health Sols.*, 515 F.3d at 894 (holding that conduct is anticompetitive if its only purpose is to drive up rivals' costs and cut off access to inputs necessary for competition).

III. Conclusion

CREXi plausibly alleges that CoStar has monopoly power in the relevant markets and engaged in anticompetitive conduct by entering de facto exclusive agreements and constructing technological barriers. Because the other elements are also met, CREXi states monopolization and attempted

monopolization claims under § 2. Therefore, we reverse the district court's dismissal of claims 1–6. CREXi also plausibly alleges that CoStar's agreements with brokers are de facto exclusive, and that those agreements may substantially foreclose competition in the relevant market. So CREXi states a claim under both § 1 of the Sherman Act and California's analogous Cartwright Act. Therefore, we reverse the district court's dismissal of claims 7–8. And because CREXi states claims under both §§ 1 and 2 of the Sherman Act, it also states claims under both the "unfair" and "unlawful" prongs of the UCL, which rely on the same allegations. Therefore, we reverse the district court's dismissal of claims 12–13. Lastly, we affirm the district court's dismissal of CREXI's tortious interference claims, claims 10–11, as they were improperly raised in CREXi's amended counterclaims.

Sections 1 and 2 of the Sherman Act consist of different elements and are aimed at different conduct. But at bottom, the Act aims to protect consumers through competition in the marketplace. CREXi has plausibly alleged that CoStar engaged in anticompetitive conduct to protect its monopoly power, and that the conduct is an unreasonable restraint of trade. CREXi must now prove its allegations. And CoStar may raise defenses, such as procompetitive rationales for its conduct. At this stage, however, it is plausible that CoStar's alleged conduct while in possession of monopoly power causes a substantial anticompetitive effect that harms consumers in the CRE listing, information, and auction services markets.

Plaintiffs-counter-defendants-Appellees shall bear all costs on appeal.

AFFIRMED in part; REVERSED in part; REMANDED for further proceedings.

15 U.S.C. § 1

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.