2023 WL 3880421 (Cal.Super.) (Trial Order)
Superior Court of California.
Alameda County

VHS LIQUIDATING TRUST, et al, Plaintiffs/Petitioners,
v.
BLUE CROSS OF CALIFORNIA, et al, Defendants/Respondents.

No. RG21-106600.
June 5, 2023.

***1** CASE MANAGEMENT ORDER
Date: 6/1/23
Time: 3:30 p.m.
Dept.: 21

Order (1) Overruling Demurrer to Second Amended Complaint and (2) Denying Moton to Strike

BARTKO ZANKEL BUNZEL & MILLER: Patrick M. Ryan, pryan@BZBM.com, Chad E. DeVeaux, cdeveaux@BZBM.com, Marisa Livesay, mlivesay@BZBM.com, Brittany N. DeJong, bdejong@BZBM.com, One Embarcadero Center, Suite 800, San Francisco, CA 94111, Phone: 415-956-1900, Fax: 415-956-1152, for plaintiffs.

MAYER BROWN LLP: Christopher J. Kelly,

CRAVATH, SWAINE & MOORE LLP: Evan R. Chesler, Karin A. Demasi, Helam Gebremariam, David K. Korn, Lauren R. Kennedy, Katherine A. Dubois, Silvie Saltzman,

HOGAN LOVELLS US LLP: E. Desmond Hogan,

GOODWIN PROCTER, LLP: Jennifer B. Fisher,

KIRKLAND & ELLIS, LLP: Jeffrey J. Zeiger, P.C., for defendants.

Evelio Grillo, Judge.

The demurrer of defendants to the Second Amended Complaint and the related motion to strike was set for hearing on 6/1/23 in Department 21, the Honorable Evelio Grillo presiding. Plaintiffs and Defendants appeared at the hearing through counsel of record. The Court, after full consideration of all papers submitted in support and opposition to the motion, as well as the oral arguments of counsel, decides as follows: IT IS HEREBY ORDERED: The demurrer of defendants the Second Amended Complaint is OVERRULED. The motion of defendants to strike portions of the Second Amended Complaint is DENIED.

BACKGROUND

In 2012, various plaintiffs filed federal cases alleging antitrust claims under the federal Sherman Act. The cases were made part of the federal MDL. (*In re: Blue Cross Blue Shield Antitrust Litigation* (MDL Panel, 2012) 908 F.Supp.2d 1373.)

In the federal MDL, the federal court denied a motion to dismiss the claims on the pleadings. (*In re Blue Cross Blue Shield Antitrust Litigation* (N.D. Ala., 2014) 26 F.Supp.3d 1172.

In the federal MDL, the parties presented substantial evidence to the court in motions for summary judgment regard the appropriate standard of review (rule of reason or per se) for certain causes of action. (*In re Blue Cross Blue Shield Antitrust Litigation* (N.D. Ala., 2018) 308 F.Supp.3d 1241, 1258.)

The parties in the federal MDL reached an MDL wide class settlement. (*In re Blue Cross Blue Shield Antitrust Litigation* (N.D. Ala., 2020) 2020 WL 8256366.)

The federal court preliminarily approved the class settlement and ordered notice to the putative class so that the putative class members could opt out of the class settlement. Plaintiff VHS opted out of federal MDL settlement. On 7/27/21, Plaintiff VHS filed this case in California state court alleging claims under the state Clayton Act.

On 7/28/21, plaintiffs filed the First Amended Complaint ("1AC"). The defendant Blues filed a demurrer. The court in the order of 6/1/22 sustained the demurer to the 1 AC with leave to amend and stated:

> The court decides that in the interest of clarity of pleadings that plaintiffs must divide their claims based on the BlueCard alleging that it is arguably a horizontal arrangement that has the purpose and effect of a price fixing scheme and group boycott into one claim alleging a per se violation and another claim alleging a rule of reason violation. … If the CACI instructions indicate that they will be separate claims if they are presented to a jury, then it is good practice to identify them as separate claims in the complaint. … The court does not address the adequacy of the allegations in the complaint.

On 12/13/22, plaintiffs filed the Second Amended Complaint ("2AC"). The factual allegations in the 2AC are substantially the same as the factual allegations in the 1 AC. As directed by the court, the legal claims in the 2AC are more clearly separated to permit analysis at the pleading, summary adjudication, and trial stages of the case.

DEMURRER

***2** The demurrer of defendants to the Second Amended Complaint is OVERRULED.

LEGAL STANDARD

This is a challenge to the pleadings. The "court[] must assume the truth of the complaint's properly pleaded or implied factual allegations." (*Denny v. Arntz* (2020) 55 Cal.App.5th 914, 919.) The complaint does not need to allege facts that would "tend[] to exclude the possibility" of lawful independent conduct." (*SmileDirectClub, LLC v. Tippins* (9th Cir. 2022) 31 F.4th 1110, 1118.) In deciding whether the case can go forward at this stage, the court "make[s] no judgment on the merits of the claims and whether those claims will withstand scrutiny in the next phase of the litigation." (*SmileDirectClub, LLC v. Tippins* (9th Cir. 2022) 31 F.4th 1110, 1118.)

FIRST CAUSE OF ACTION – CALIFORNIA HORIZONTAL MARKET ALLOCATION (2AC para 594-607)

Defendants did not file a demurrer to this cause of action.

SECOND AND THIRD CAUSES OF ACTION - LAW ON GROUP BOYCOTT

"The purpose of the Cartwright Act is to protect and foster competition by preventing combinations and conspiracies which unreasonably restrain trade." (*Morrison v. Viacom, Inc.* (1997) 52 Cal.App.4th 1514, 1524.) A group boycott is a "concerted

refusal to deal" With other market participants. (*Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.* (2011) 198 Cal.App.4th 1366.)

For purposes of analysis, case law divides combinations into those that are examined under the "rule of reason" and those that are "per se" unlawful. (*Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.* (2020) 55 Cal.App.5th 381, 399-400.)

The rule of reason analysis is the standard analysis. "In general, only unreasonable restraints of trade are prohibited." (*Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 930.) "[A] court determines whether the practice unreasonably restrains trade by assessing its actual competitive effects under the rule of reason. The rule of reason weighs the anticompetitive effects of the conduct in the relevant market against its procompetitive effects, and determines whether, on balance, the practice harms competition." (*Flagship*, 55 Cal.App.5th at 400.)

The per se analysis applies when the practice is plainly anti-competitive. "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." (*Flagship*, 55 Cal.App.5th at 399.) "Modern United States Supreme Court cases caution, however, that these types of practices are few, and the court has "been slow … to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious."" (*Flagship*, 55 Cal.App.5th at 399.)

In *In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 147, the Court explained "nothing in the text of the Cartwright Act dictates the precise details of the per se and rule of reason approaches; these are but useful tools the courts have developed over time to carry out the broad purposes and give meaning to the general phrases of the antitrust statutes." Similarly, *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma* (1984) 468 U.S. 85, 103 states: "Both per se rules and the Rule of Reason are employed "to form a judgment about the competitive significance of the restraint." *NCAA* at fh 26 then states: "Indeed, there is often no bright line separating per se from Rule of Reason analysis. Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct."

***3** The 2AC's Second Count states: "Defendants' agreement is horizontal group boycott among competitors and is *per se* unlawful under the Cartwright Act." (2AC para 612.) The 2AC's Third Count states: "Defendants' agreement is horizontal group boycott among competitors and violates the Cartwright Act *under the rule of reason*." (2AC para 626.)

The court takes the causes of action out of order because the claim under the rule of reason analysis is the standard analysis and the claim under a per se analysis is the exception.

THIRD CAUSE OF ACTION – CALIFORNIA GROUP BOYCOTT (RULE OF REASON) (2AC para 608-619)

The demurrer to the second cause of action is OVERRULED.

The 2AC alleges that the Blue Plans engage in a "boycott" because with the Market Allocation Agreement they "commit that other than in contiguous areas, they will not contract, solicit or negotiate with providers outside of their Service Areas. The 2AC alleges each Blue agrees with all other Blues to boycott providers outside of their Service Areas. (2AC 420-434.) The 2AC alleges that the Market Allocation Agreement has "denied Plaintiffs the opportunity to sell their healthcare services at a price set by a market free from the anticompetitive agreements, denied Plaintiffs the opportunity to purchase health benefits products free from the anticompetitive agreements, and denied Plaintiffs a wider, lower-cost choice of healthcare products and services as well as of increased innovation." (2AC para 613.)

The Blues argue that the 2AC does not adequately allege a group boycott because the Market Allocation Agreement is not a group boycott "to exclude competing market entrants or deprive a competitor of the ability to compete." Rather, the Blues argue that the Market Allocation Agreement is a lawful horizontal market allocation agreement "among competitors to divide up the relevant market to minimize competition with each other." (Opening at 7:3-22.)

The 2AC does allege a group boycott. The 2AC alleges that that under the Market Allocation Agreement the Blues have agreed that none of them will independently do business directly with a hospital that is outside their geographic area.

The 2AC alleges that the Blues agree that unless a hospital agrees to the Bluecard system that none of the Blues will work directly with (boycott) the hospitals that provide services to the persons they insure if those hospitals are outside their geographic area. The Bluecard system is a contractual agreement among the Blues that is related to the Market Allocation Agreement and sets the terms under which a Blue will provide out-of-state coverage for medical services that are provided out-of-state. The Market Allocation Agreement and the Bluecard system are interrelated because under the Bluecard system, if a person from state A with state A Blue insurance seeks and receives hospital serves in State B, the hospital in state B cannot seek reimbursement at its reasonable and customary rates directly from the state A Blue and must instead seek reimbursement at rate negotiated by the state B Blue. Without the Market Allocation Agreement (the alleged boycott) and the Bluecard system, the state B hospital that provided serves to the state A person negotiate directly with the state A Blue and could charge its reasonable and customary rates to the state A Blue.

SECOND CAUSE OF ACTION – CALIFORNIA GROUP BOYCOTT (PER SE) (2AC para 608-619)

***4** The demurrer to the second cause of action is OVERRULED.

First, the Blues argue that the 2AC does not adequately allege a claim for group boycott under the per se analysis because the hospitals were not competitors of the Blues. (Moving at 9.) The court is not persuaded.

On the law, plaintiff refers the court to *St. Paul Fire & Marine Ins. Co. v. Barry* (1978) 438 U.S. 531, 541. In *St. Paul*, the Court recognized a group boycott claim where three medical malpractice insurers refused to deal on any terms with policyholders of a fourth insurer in order to force the policyholders into agreeing to coverage by the fourth insurer on the fourth insurer's terms. The Supreme Court states: "boycotts are not a unitary phenomenon … the boycotters and the ultimate target need not be in a competitive relationship with each other. … [Antitrust law] makes it an offense for [businessmen] to agree among themselves to stop selling to particular customers."" *St. Paul* concluded that "the term 'boycott' is not limited to concerted activity … against competitors of members of the boycotting group." (*St. Paul Fire*, 438 U.S. at 552.)

Second, the Blues argue that the 2AC does not adequately allege a claim for group boycott under the per se analysis because the Blues did not create the market allocation agreement for the purpose of disadvantaging the Blues' competitors. (Moving at 9-10.) The court is not persuaded. On the law, it is unclear whether the subjective purpose of the defendants to restrain trade is a required element of a claim for a group boycott. Assuming that subjective intent is a required element, on the allegations of the 2AC, the complaint alleges that "the Blues eventually imposed restrictions on non-Blue businesses with the stated purpose of restraining competition." (2AC, para 285.) (See also 2AC para 647)

Third, the Blues argue that the 2AC does not adequately allege a claim for group boycott under the per se analysis because the per se treatment is inappropriate because the Market Allocation Agreement (and their Exclusive Service Areas) are not plainly anticompetitive on their face. (Moving at 10.) The court is not persuaded. This is a demurrer so the "court[] must assume the truth of the complaint's properly pleaded or implied factual allegations." (*Denny v. Arntz* (2020) 55 Cal.App.5th 914, 919.) On the allegations in the 2AC, and taking all factual inferences in the 2AC that the group boycott was anticompetitive, the 2AC does not demonstrate that the group boycott was not anticompetitive.

In the federal MDL, the court on the cross-motions for summary judgment on the standard of review applicable to Plaintiffs' claims decided that the group boycott claims will be decided under the rule of reason. (*In re Blue Cross Blue Shield Antitrust Litigation* (N.D. Ala., 2018) 308 F.Supp.3d 1241, 1277.) The federal order concluded that "BlueCard and other alleged Section 1 violations are due to be analyzed under the Rule of Reason." (308 F.Supp.3d at 1279.) This court might reach the same conclusion if the parties present the same issue at summary judgment. (CCP 437c(t).) But this is a demurrer. The federal MDL order did not grant a defense motion for summary judgment on the claim for group boycott per se, much less grant a defense motion to dismiss the group boycott claim per se on the pleadings.

FOURTH CAUSE OF ACTION – CALIFORNIA HORIZONTAL PRICE FIXING (PER SE) (2AC para 634-642)

***5** The demurrer is OVERRULED.

First, the Blues argue that the 2AC does not adequately allege any agreement among Blue Plans that sets provider reimbursement rates. (Moving at 11.) On the law, there can be a restraint of trade that is categorized as horizontal price fixing even though it does not concern prices or concerns tampering with rather than expressly fixing a market factor. Concerted activity can be analyzed as *per se* price fixing even if the activity does not concern prices. (*Catalano, Inc. v. Target Sales, Inc. (1980)* 446 U.S. 643 [applying *per se* horizontal price fixing standard to horizontal agreement to not provide credit to purchasers].) Concerted activity can be analyzed as *per se* price fixing even if it involves tampering with rather than expressly fixing a market factor. "Under … California …, agreements fixing or tampering with prices are illegal per se. … Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces." (*Oakland-Alameda Cty. Builders' Exch. v. F. P. Lathrop Constr. Co.* (1971) 4 Cal.3d 354, 363.)

On the allegations of the 2AC, plaintiffs allege that the Bluecard system tampered with free market prices. Under the Bluecard system a hospital in state B that provided services in state B could not obtain reimbursement at its reasonable and customary rates directly from the responsible state A Blue and must instead seek reimbursement at rate negotiated by the state B Blue. This system tampered with prices because it forced the state B hospital to use the state B Blue negotiated process and not use the reasonable and customary rates that it would normally charge a state A person for out of network services.

Second, the Blues argue that the 2AC does not adequately allege "the kind of naked horizontal price-fixing agreement courts condemn as per se illegal… because of their pernicious effect on competition and lack of any redeeming virtue." (Moving at 12-13.) The court is not persuaded. On the procedural aspect of the law, a plaintiff is not required to plead the absence of any redeeming virtue. The defendant has the burden of presenting evidence of the procompetitive aspect of a price-fixing agreement. (*Cipro*, 61 Cal.4th at 160.) On the allegations in the 2AC and taking all factual inferences in the 2AC in favor of the assertion that the group boycott was anticompetitive, the 2AC does not demonstrate that the group boycott had obvious countervailing benefits to members, to providers and to competition.

In the federal MDL, the court on the cross-motions for summary judgment on the standard of review applicable to Plaintiffs' claims decided that the price-fixing claims based on BlueCard will be decided under the rule of reason. (*In re Blue Cross Blue Shield Antitrust Litigation* (N.D. Ala., 2018) 308 F.Supp.3d 1241, 1277.) The federal order concluded that "BlueCard and other alleged Section 1 violations are due to be analyzed under the Rule of Reason." (308 F.Supp.3d at 1273-1276.) This court might reach the same conclusion if the parties present the same issue at summary judgment. (CCP 437c(t).) But this is a demurrer. The federal MDL order did not grant a defense motion for summary judgment on the claim for group boycott per se, much less grant a defense motion to dismiss the group boycott claim per se on the pleadings.

FIFTH CAUSE OF ACTION – CALIFORNIA HORIZONTAL PRICE FIXING (RULE OF REASON) (2AC para 643-652)

***6** Defendants did not file a demurrer to this cause of action.

SIXTH CAUSE OF ACTION – CALIFORNIA HORIZONTAL UNLAWFUL EXCHANGE OF COMPETITIVELY SENSITIVE BUSINESS INFORMATION

The demurrer is OVERRULED.

The order of 6/1/22 previously overruled the demurrer to the 1 AC claim for California Horizontal Unlawful Exchange of Competitively Sensitive Business Information)

As a matter of procedure, defendants' notice of motion does not identify the sixth cause of action (California Horizontal Unlawful Exchange of Competitively Sensitive Business Information) as a subject of the demurrer. The Defendants renew their demurrer to the sixth cause of action in a footnote in their memorandum. (Moving at 2:25-28.) (*Requa v. The Regents of the University of California* (2012) 213 Cal.App.4th 213, 226 fn 9 ["we may decline to consider arguments raised only in footnotes"].)

As a matter of procedure, there are no new facts or law that suggest the court should reconsider the order of 6/1/22. (CCP 1008.) The court could on its own initiative reconsider the order of 6/1/22. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1098.) The court will not reconsider that order.

As a matter of substance, the court has reviewed its analysis in the order of 6/1/22 and reaffirms that analysis and the resulting conclusion.

SEVENTH CAUSE OF ACTION – CALIFORNIA UNFAIR COMPETITION (2AC, bara 659-666.)

Defendants did not file a demurrer to this cause of action.

EIGHTH - SIXTEENTH CAUSES OF ACTION

The demurrers to the eighth through sixteenth causes of action are DENIED.

The order of 6/1/22 previously overruled the demurrers to the 1 AC claims for antitrust or similar violations under the laws of other states.

As a matter of procedure, there are no new facts or law that suggest the court should reconsider the order of 6/1/22. (CCP 1008.) The court could on its own initiative reconsider the order of 6/1/22. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1098.) The court will not reconsider that order.

As a matter of substance, the court has reviewed its analysis in the order of 6/1/22 and reaffirms that analysis and the resulting conclusions. If the court has jurisdiction over a defendant (Order of 9/15/22 on MTQ), then the court can hear claims against that defendant. If there is a choice of law issue, then the court can conduct that analysis and apply the law of the appropriate state. (*Chen v. Los Angeles Truck Centers, LLC* (2019) 42 Cal.App.5th 488, 494-495.) If there is no case law in the other state, then there is arguably no conflict of law, and "the law of the forum jurisdiction will usually govern(*Blizzard Energy, Inc. v.*

Schaefers (2021) 71 Cal.App.5th 832, 856.) If there is no case law in the other state, then, as noted in the Order of 6/1/22, this court can look to the well-developed federal antitrust federal law for guidance regarding how the courts of other states would likely decide the state law legal issues.

On the issue of whether the court should exercise its discretion and decline to decide claims that arise under the laws of other states, such an approach would be a novel departure from standard practice. Standard practice is that California courts can apply the law of the court of other states. (*Chen v. Los Angeles Truck Centers, LLC* (2019) 42 Cal.App.5th 488, 494-495.) Standard practice is that non-California courts decide issues of California law based on how those non-California courts predict California courts will decide issues of California law. (*Erie Railroad Co. v. Tompkins* (1938) 304 U.S. 64 [federal courts apply state law in cases that are in federal court under federal diversity jurisdiction]; *In re First Alliance Mortg. Co.* (9th Cir. 2006) 471 F.3d 977, 993 ["[w]hen interpreting state law … a federal court must predict how the highest state court would decide the issue"].)

***7** At the hearing on 6/1/23, counsel for the Blues argued that state antitrust laws are different from other types of laws and that enforcement of those laws involve local context that should be evaluated by local juries. The court is not persuaded. Antitrust laws are not more state specific than other state laws. Juries drawn from the jury pool in one state can resolve claims arising under the laws of other states even where the claims involve local understandings of matters such as "reasonable" conduct.

At the hearing on 6/1/23, counsel for the Blues stated that the Blue entities in Kansas and Michigan have been dismissed and argued that as a result the claims under Kansas and Michigan law should be dismissed. (2AC filed 12/13/22 at Eleventh Count para 683-685; Twelfth Count at para 686-689.) The court is not persuaded. "A plaintiff can prove a conspiracy even if all the alleged co-conspirators are not in the case. "[A] plaintiff may choose to sue any or all of" the alleged conspirators. (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 544.)" (Order of 9/15/22 at p 34.) For purposes of the claims against the Blue entities that are in this case, there is no material distinction between whether plaintiff decided to not name the Blue entities in Kansas and Michigan as defendants or whether it named them as defendants and then dismissed them. In either situation, the plaintiffs can assert claims against the Blue defendants for injuries arising out of actions in Kansas and Michigan that are governed by the laws of those states.

MOTION TO STRIKE

The motion of defendants to strike portions of the Second Amended Complaint is DENIED.

The motion to strike seeks to strike portions of the 2AC so that the claims in the seventh cause of action (UCL) and the eighth through sixteenth causes of action (various states) will allege claims based on the same facts and same legal theories as the first, second, third, fourth, fifth, and sixth cause of action (California Cartwright Act). (Moving at 1:16-2:23:11-14; Reply at 1:8-11; 4:5-8; 8:9-11.) The motion to strike is very reasonable.

The scope of the UCL claim is based on the same facts and unlawful activity as the Cartwright Act claims. The UCL claim will succeed or fail alongside the Cartwright Act claims. "To permit a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty and could lead to the enjoining of procompetitive conduct." (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 375.) "When a statutory claim fails, a derivative UCL claim also fails." (*Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1185.)

The scope of the claims for unconscionable, deceptive, unfair, or anticompetitive action under the laws of the other states are based on the same facts and unlawful activity as the Cartwright Act claims. The law in California and the other states is similar, if not identical. Plaintiff's opposition refers to: "the unremarkable proposition that [Plaintiffs' out-of-state] claims "mirror" or look to the Cartwright Act or Sherman Act for guidance and should be construed in harmony therewith." (Oppo at 7:13-15.) The claims under the laws of the other states will succeed or fail alongside the Cartwright Act claims.

The court DENIES the motion to strike. In the event of any ambiguity, the court ORDERS that the claims in the seventh cause of action (UCL) and the eighth through sixteenth causes of action (various states) are defined to allege claims based on the same facts and same legal theories as the first, second, third, fourth, fifth, and sixth cause of action (California Cartwright Act). Those seventh through sixteenth causes of action are, with the exception of the different statutory bases, parallel to and mirror images of the Cartwright Act claims.

FURTHER PROCEEDINGS

***8** On or before 6/23/23 Defendants must file an answer to Second Amended Complaint. CASE MANAGEMENT ORDER

The parties suggested that the court set a deadline for amending the pleadings. (CMC stmt filed 5/24/23, p 14.) The court will not set a deadline. As a matter of law, a party can seek to amend a pleading up through trial and on appeal. The court can deny a motion for leave to amend where there has been unwarranted delay, there will be prejudice to the adverse party, or the amendment would require a delay in the trial. (*Miles v. City of Los Angeles* (2020) 56 Cal.App.5th 728, 739.)

At the CMC on 6/1/23, counsel for plaintiffs alerted the court that new facts had come to light regarding when the Blues were on notice of certain claims by or regarding ASOs and that the new facts suggest that the court should reconsider and amend one of its prior orders. Plaintiffs may file the appropriate motion. In this order the court does not address or decide the procedural or substantive issues related to any such motion.

Dated: June 5 2023

<<signature>>

Evelio Grillo

Judge of the Superior Court