

FILED
ALAMEDA COUNTY

JUN 01 2022

CLERK OF THE SUPERIOR COURT

By [Signature] Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

VHS LIQUIDATING TRUST, et al,

No. RG21-106600

Plaintiffs/Petitioners,

ORDER SUSTAINING WITH LEAVE TO
AMEND DEMURRER TO FIRST
AMENDED COMPLAINT

v.

Date: 5/24/22

BLUE CROSS OF CALIFORNIA, et al,

Time: 10:00 a.m.

Defendants/Respondents.

Dept.: 21

The demurrer of defendants to the First Amended Complaint was set for hearing on 5/24/22 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 to the First Amended Complaint is SUSTAINED WITH LEAVE TO AMEND.

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1 BACKGROUND

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

5 In the federal MDL, the federal court denied a motion to dismiss the claims on the
6 pleadings. (*In re Blue Cross Blue Shield Antitrust Litigation* (N.D. Ala., 2014) 26 F.Supp.3d
7 1172.

8 In the federal MDL, the parties presented substantial evidence to the court in motions for
9 summary judgment. (*In re Blue Cross Blue Shield Antitrust Litigation* (N.D. Ala., 2018) 308
10 F.Supp.3d 1241.)

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

13 The federal court preliminarily approved the class settlement and ordered notice to the
14 putative class so that the putative class members could opt out of the class settlement. Plaintiff
15 VHS opted out of federal MDL settlement. On 7/27/21, Plaintiff VHS filed this case in
16 California state court alleging claims under the state Clayton Act.
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18 On 7/28/21, plaintiffs filed the First Amended Complaint (“FAC”). The FAC has 687
19 paragraphs and is 149 pages long, plus 189 pages of exhibits for a total of 338 pages.
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21 In the briefing on the demurrer, Defendants assert that the FAC “copies almost verbatim
22 complains in the MDL but styles them under state, rather than federal law.” (Moving at 1:15-
23 15.) In the briefing on the motion to strike, Defendants assert that “Plaintiffs filed the present
24 action against the Blues, asserting claims that are nearly identical to those in the MDL” (Opening
25
26

1 at 3:16-18) and that the FAC is a “carbon copy of the MDL Provider track complaint” (Reply at
2 9:17).

3
4 FIRST CAUSE OF ACTION – CALIFORNIA HORIZONTAL MARKET ALLOCATION
5 (FAC 618-631)

6 Defendants did not file a demurrer to this cause of action. *In re Blue Cross Blue Shield*
7 *Antitrust Litigation* (N.D. Ala., 2018) 308 F.Supp.3d 1241, 1279, concluded that Defendants'
8 aggregation of a market allocation scheme together with certain other output restrictions is due to
9 be analyzed under the per se standard of review.
10

11
12 SECOND CAUSE OF ACTION – CALIFORNIA HORIZONTAL PRICE FIXING AND
13 BOYCOTT (FAC para 632-640)

14 The demurrer is SUSTAINED WITH LEAVE TO AMEND.

15 Plaintiffs’ second cause of action alleges horizontal price-fixing and boycott agreements
16 under which every Blue gets the benefit of the artificially reduced prices each Blue pays to
17 healthcare providers and agrees to collectively boycott all Providers outside of their Service
18 Areas (“Price-Fixing and Boycott Agreements”). (FAC para 28) The FAC alleges that through
19 the Price Fixing and Boycott Agreements, the Blues have agreed to fix reimbursement rates for
20 providers among themselves by reimbursing providers according to the “Host Plan” or
21 “Participating Plan” reimbursement rate through the national programs. (FAC para 442-456)
22 The Second Count states: “The Agreements alleged in this Court also violate the Cartwright Act
23 and are per se violations of the Act.” (FAC para 634.)
24
25
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1 Defendants refer to the agreements as the “BlueCard” rather than the “Price-Fixing and
2 Boycott Agreements.” The nomenclature is immaterial to the analysis.

3 In the federal MDL, the court at MSJ decided that the BlueCard is “analyzed under the
4 rule of reason, even though the Blue Plans arguably have pegged prices for services provided to
5 out-of-state Blue Plans to those negotiated by the in-state Blue Plan,” (*In re Blue Cross Blue*
6 *Shield Antitrust Litigation* (N.D. Ala., 2018) 308 F.Supp.3d 1241, 1276.) The federal MDL did
7 not reach the merits of the claim.
8

9 Defendants’ demurrer argues that the second cause of action asserts that the BlueCard is a
10 per se violation (FAC para 634), that the BlueCard is at most a plausible rule of reason (308
11 F.Supp.3d at 1276), and therefore the claim has no merit. Plaintiff argues that the claim that the
12 BlueCard is horizontal price fixing and boycott and that whether the claim is evaluated as a per
13 se or a rule of reason claim is not material to whether the FAC states a claim.

14 In *In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 147, the Court explained “nothing in
15 the text of the Cartwright Act dictates the precise details of the per se and rule of reason
16 approaches; these are but useful tools the courts have developed over time to carry out the broad
17 purposes and give meaning to the general phrases of the antitrust statutes.” Under *Cipro*, the
18 question is whether the second cause of action regarding the BlueCard states a claim, not
19 whether the trier of fact will consider the merit of the claim as a per se violation or a rule of
20 reason violation. By analogy, a claim for negligence is a claim for negligence whether the duty
21 and standard of care are based on the common law or are based on a statute under Evid Code
22 669. (*Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1353.)
23

24 California law is consistent with *National Collegiate Athletic Ass'n v. Board of Regents of*
25 *University of Oklahoma* (1984) 468 U.S. 85, 103 and fn 26. *NCAA* first states: “Both per se
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1 rules and the Rule of Reason are employed “to form a judgment about the competitive
2 significance of the restraint.” *NCAA* then states: “Indeed, there is often no bright line separating
3 per se from Rule of Reason analysis. Per se rules may require considerable inquiry into market
4 conditions before the evidence justifies a presumption of anticompetitive conduct.”

5
6 Defendants argue that a claim for a per se violation is a distinct claim from a claim for a
7 rule of reason violation. Defendants rely on federal trial court decisions. (E.g. *Jain Irrigation,*
8 *Inc. v. Netafim Irrigation, Inc.* (E.D. Cali., 2019) 386 F.Supp.3d 1308, 1314.) Defendants point
9 to a federal complaint where the plaintiff separated the per se and rule of reason claims. (*NSS*
10 *Labs, Inc. v. Symantec Corporation* (N.D. Cal., 2019) 2019 WL 3804679.)

11 The court will not parse the FAC at para 634 and decide whether it means “The
12 Agreements alleged in this Court also violate the Cartwright Act and [the FAC alleges only that
13 they] are per se violations of the Act” or “The Agreements alleged in this Court also violate the
14 Cartwright Act and [in addition] are per se violations of the Act.” The analysis would lead to
15 leave to amend regardless of the conclusion.

16 The court decides that in the interest of clarity of pleadings that plaintiffs must divide
17 their claims based on the BlueCard alleging that it is arguably a horizontal arrangement that has
18 the purpose and effect of a price fixing scheme and group boycott into one claim alleging a per
19 se violation and another claim alleging a rule of reason violation. The court is in large part
20 guided by the CACI jury instructions at CACI 3400 et seq, which differentiate between per se
21 violations and rule of reason violations. If the CACI instructions indicate that they will be
22 separate claims if they are presented to a jury, then it is good practice to identify them as separate
23 claims in the complaint.

24 The court does not address the adequacy of the allegations in the complaint. The court
25 permits plaintiffs to amend and supplement the facts alleged in any further complaint to address
26 the arguments that defendants make in their briefing. Plaintiffs may also want to, if possible,

1 allege facts that correspond to the CACI elements of the claims that they are asserting. This is
2 not an invitation for an overly prolix complaint. This is a suggestion for a complaint that
3 complies with CCP 425.10 and makes allegations consistent with the elements of the causes of
4 action. SUSTAINED WITH LEAVE TO AMEND.

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6 THIRD CAUSE OF ACTION – CALIFORNIA HORIZONTAL UNLAWFUL EXCHANGE
7 OF COMPETITIVELY SENSITIVE BUSINESS INFORMATION

8 The demurrer is OVERRULED.

9 Plaintiffs allege that Defendants have engaged in an agreement to exchange sensitive in-
10 network, provider price information to BCBSA, BHI, and CHP which are owned and controlled
11 by the Blues. (para 643) (B&P 16720)

12 In the federal MDL, the Plaintiffs asserted that CHP shares data between members, and
13 that data includes provider discounts and differentials. (*In re: Blue Cross Blue Shield Antitrust*
14 *Litigation* (MDL No. 2406) (N.D. Ala., 2016) 2016 WL 6124143 at *5.) In the federal MDL,
15 the court at MSJ decided that defendants National Account Service Company, LLC (“NASCO”)
16 and Consortium Health Plans, Inc. (“CHP”) were not liable for anticompetitive conduct for their
17 alleged roles in furthering the alleged anticompetitive actions of the Blues. The federal MSJ
18 order did not address the liability of the Blues themselves related to the sharing of information.

19
20 “The exchange of price information alone can be “sufficient to establish the combination
21 or conspiracy.” (*In re Static Random Access Memory (SRAM) Antitrust Litigation* (N.D. Cal.,
22 2008) 580 F.Supp.2d 896, 902.) That noted, the public disclosure of statistical information that
23 does not identify specific sales of specific products is not anticompetitive. (*U.S. v. Container*
24 *Corp. of America* (1969) 393 U.S. 333, 334-335.)

25 The FAC alleges
26

1 Para 338. To facilitate the agreements, numerous Blues and the BCBSA have
2 also established Consortium Health Plans, Inc. (“CHP”). CHP describes itself as a
3 “national coalition of 20 leading BCBS Plans, [which] provides a clear and
4 unified voice, as well as effective central coordination, for the Blue System
5 among national accounts . . .” whose “mission is to position Blue Cross Blue
6 Shield as the preferred choice for national accounts.” See Exhibit B. Through
7 CHP, the Blues share claims data reflecting provider reimbursements on a
8 nationwide basis. The Blues leverage that data and their collective market power
9 to impose deep discounts on reimbursements to providers, which they then market
10 to employer groups and other purchasers of health insurance.

11 Para 339. For example, in a marketing brochure dated February 6, 2013 for CHP’s
12 “ValueQuest” analytical tool, CHP as much as admits that the Blues are able to
13 use their shared claims data and collective market power to reduce reimbursement
14 to providers to levels far below their competitors on the national level. In this
15 regard, the brochure describes the ValueQuest tool as follows:

16 ValueQuest is Blue Cross Blue Shield’s leading-edge analytical platform for
17 measuring total health plan value. ValueQuest incorporates sophisticated data
18 analytics with relevant industry benchmarks, new advances in measurement
19 around cost, access to care, and lifestyle and behavioral characteristics.
20 ValueQuest has the ability to compare each carrier’s per-member, per-month
21 (PMPM) cost in markets where employees reside.

22 The brochure further explains that “[t]he ValueQuest data set contains claims and
23 membership data for BCBS nationally. The data is pulled from Blue Health
24 Intelligence (BHI) as well as directly from BCBS Plans.”

25 Para 340. Another brochure sheds light on the extraordinary breadth of the claims
26 data shared by the Blues through CHP. In this regard, the brochure makes the
27 following claims, among others:

- 28 • “ClaimsQuest provides in-network and out-of-network data for all 50 states in
29 three-digit zips and MSAs.”
- 30 • “The ClaimsQuest methodology is the same for every Blue Cross Blue Shield
31 Plan, and the same data criteria are applied across every state, every MSA,
32 every zip code.”
- 33 • “The ClaimsQuest model not only works effectively for every Plan in the Blue
34 System, it also applies to other carriers. Applying the ClaimsQuest cost model to
35 all carriers permits an ‘apples-to-apples’ comparison.”

36 Para 341. Thus, CHP harnesses claims data for the Blues in every state,
37 metropolitan statistical area (“MSA”) and zip code in the country and, using that
38 data, allows the Blues to impose deep discounts on provider reimbursements in
39 order to use the market power of the Blues to reduce the payments to providers.

1 The FAC also attaches Exhibits B and C to substantiate the FAC's allegations.

2 The allegations in support of the claim for the exchange sensitive in-network, provider
3 price information are adequate to state a claim. Defendant's arguments that the information
4 shared is summary in nature is a matter that can be addressed when through discovery there is
5 evidence about what information was actually exchanged. Defendant's arguments that the
6 information shared has pro-competitive benefits is a factual matter, and at the pleading stage the
7 court takes all inferences in favor of plaintiffs. The allegations in this case are different from the
8 allegations in *Derish v. San Mateo-Burlingame Bd. of Realtors* (1982) 136 Cal.App.3d 534,
9 because in this case the allegations are that the Blues are sharing information among themselves
10 but not sharing the information with all insurance companies whereas in *Derish* the allegation
11 was that the MLS system shared information among all realtors. Defendant's arguments that
12 this issue was resolved in the federal MDL order on MSJ misses the mark because that order
13 concerned the liability of NASCO and CHP and not the liability of the Blues. Furthermore, this
14 is a demurrer where the court assumes the allegations to be true and takes inferences in favor of
15 plaintiff and the MDL's order on MSJ was based on evidence. OVERRULED.
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19 FOURTH CAUSE OF ACTION – CALIFORNIA UNFAIR COMPETITION

20 The demurrer is OVERRULED.

21 Plaintiffs allege that Defendants have engaged in unlawful, unfair and/or fraudulent
22 business acts or practices under the UCL (B&P Code § 17200) because Defendants actions
23 violated the antitrust laws, the Cartwright Act, and B&P 16720, et seq. The UCL claim is
24 derivative of the Cartwright Act claim and the B&P 16720, et seq. OVERRULED.
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1 FIFTH-THIRTEENTH CAUSES OF ACTION

2 The demurrers are OVERRULED.

3 Defendants argue that the court should refrain from hearing antitrust claims under the
4 laws of other states. As a general matter, a California court can do a choice of law analysis and
5 hear a claim arising under the laws of another state. (*Chen v. Los Angeles Truck Centers, LLC*
6 (2019) 42 Cal.App.5th 488, 494-495.)

7
8 Defendants rely on *Coca-Cola Co. v. Harmar Bottling Co.* (Sup Ct Tx., 2006) 218
9 S.W.3d 671. *Coca-Cola* states: “We also hold that Texas courts, as a matter of interstate comity,
10 will not decide how another state's antitrust laws and policies apply to injuries confined to that
11 state.” *Coca Cola* first holds that the Texas antitrust law does not have extraterritorial
12 application. (218 SW 3d at 680-684.) *Coca Cola* then holds that a Texas court should not hear
13 an antitrust claim that arises under the laws of another state, stating “Because of the importance
14 of policy in determining and enforcing antitrust laws, we think a state's antitrust laws should be
15 applied by its own courts.” (218 SW 3d at 688.) *Coca Cola* states that this is not a matter of
16 forum non conveniens or venue, but rather that because antitrust concerns state policies that it is
17 not proper as a matter of comity for a Texas court to hear a state law antitrust claim that affects
18 the businesses and residents of another state.

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20 The California law on comity suggests that it would not apply in this situation. “Comity
21 is based on the belief “ “that the laws of a state have no force ..., beyond its territorial limits,
22 but the laws of one state are frequently permitted by the courtesy of another to operate in the
23 latter for the promotion of justice, where neither that state nor its citizens will suffer any
24 inconvenience from the application of the foreign law.” (*Advanced Bionics Corp. v. Medtronic,*
25 *Inc.* (2002) 29 Cal.4th 697, 707.) This situation does not concern the extraterritorial application
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1 of California law. Rather, this situation concerns whether a California court should hear and
2 decide claims under the laws of other states.

3 The most applicable California law is the law on judicial abstention. The court may
4 abstain from deciding claims seeking equitable remedies that would require the court to
5 intervene in an area of complex economic policy that are best handled by the Legislature or an
6 administrative agency. (*Olson v. Hornbrook Community Services District* (2021) 68 Cal.App.5th
7 260,268-269; *Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1362.) This law is
8 not directly applicable because plaintiffs are seeking damages rather than equitable remedies and
9 because there are years of case law provide guidance on the complex economic issues of antitrust
10 law. This law is indirectly applicable because the suggestion of *Coca-Cola* is that state antitrust
11 law is sufficiently uncertain that courts of other states should not try to anticipate how a court of
12 the relevant state would apply that law.
13

14 The court is not persuaded that principles of comity or judicial abstention suggest or
15 compel it to refrain from deciding issues of state antitrust law under the law of other states. This
16 court would be applying the law of another state just as it would in any other choice of law
17 situation. This court would not be in uncharted waters given that antitrust law on the federal
18 level has been well developed in the over 130 years case law since the Sherman Antitrust Act of
19 1890 and the laws of the states tend to follow the federal law. If the law in the other states is
20 unclear, then court would need to anticipate the evolution of the laws of the other states just as
21 federal courts anticipate the evolution of the law in this state under *Erie*. The court is not
22 persuaded by defendant's arguments. The court may hear antitrust claims under the laws of
23 other states just as the court can hear other claims under the laws of other states.
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1 Defendants argue that plaintiffs lack standing to assert claims under the laws of other
2 states. Defendants rely on *Carpenter v. PetSmart, Inc.* (S.D. Cal., 2020) 441 F.Supp.3d 1028,
3 1038, but that analysis concerns federal Article III standing for federal courts, which are courts
4 of limited jurisdiction and not California CCP 367 standing for California courts, which are
5 courts of general jurisdiction. Defendants also seem to commingle standing, which is the ability
6 to seek relief in a court (CCP 367), and the law that is applied to the claim (choice of law).
7 Plaintiffs have alleged facts that are adequate to demonstrate standing. Whether any particular
8 claim by any particular plaintiff is under California law or the law of another state is a different
9 issue.
10

11 Defendants' concerns that a California court will hear claims arising under the laws of
12 other states will be addressed in part by the resolution of the motion to quash based on lack of
13 personal jurisdiction. If plaintiffs are asserting a claim against an out of state defendant based on
14 a claim that does not arise out of or relate to the defendant's activity in California, then the court
15 might not have jurisdiction over the out of state defendant. The plaintiffs can then bring their
16 claims against the out of state defendant in that defendant's home state under the law of the
17 home state. The law on personal jurisdiction, forum non conveniens, choice of law, and
18 extraterritorial application of a state's laws are distinct, but they share certain concepts.
19

20 Plaintiffs are concerned that "taking Defendants' arguments to their logical conclusion
21 would result in piecemeal litigation that would require a single plaintiff to pursue claims based
22 on the same pattern of conduct in violation of statutes that are the same or substantially similar,
23 in multiple forums, creating a substantial drain on both the parties' and judiciary's resources."
24 (Oppo a 36:5-8) Plaintiffs had the opportunity to resolve their nationwide claims in a single case
25 in the federal MDL settlement. Plaintiffs chose to opt out and bring a case in a California state
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1 court. This court will manage the claims against the defendants who are properly in this court on
2 the claims that are properly in this court under the appropriate state laws. The court will not
3 expand the reach of the court to make the case a substitute for the federal MDL.

4 Defendants argue that the claims under the antitrust laws of other states do not identify
5 the relevant market. The FAC alleges that the Blues divided up the national market by Service
6 Areas and that the relevant markets for purposes of the claims are the Service Areas. (FAC
7 paras 4, 5, 28, 31-35, 430-436.)
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9
10 FIFTH CAUSE OF ACTION – ALABAMA DECEPTIVE TRADE PRACTICES ACT

11 Plaintiffs allege violations of the Alabama Deceptive Trade Practices Act, Code of
12 Alabama, 1975, §§ 8-19-10, 8-19-5(27). The demurrer is OVERRULED.
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14 SIXTH CAUSE OF ACTION – FLORIDA ANTITRUST ACT AND FLORIDA DECEPTIVE
15 AND UNFAIR TRADE PRACTICES ACT

16 Plaintiffs allege a violation of the Florida Antitrust Act, Section 542.18, and the Florida
17 Deceptive and Unfair Trade Practices Act, Section 501.201, et seq. The demurrer is
18 OVERRULED.
19

20
21 SEVENTH CAUSE OF ACTION – INDIANA ANTITRUST ACT

22 Plaintiffs allege violations of Chapter Two of the Indiana Antitrust Act, Indiana Code
23 Section 24-1-2-1, and Plaintiffs seek recovery pursuant to Indiana Code Section 24-1-2-7.
24 668. The demurrer is OVERRULED.
25
26

1 EIGHTH CAUSE OF ACTION – KANSAS RESTRAINT OF TRADE ACT

2 Plaintiffs allege violations of the Kansas Restraint of Trade Act, Kan. Stat. Ann. §§ 50-
3 101, *et seq.* The demurrer is OVERRULED.

4
5 NINTH CAUSE OF ACTION – MICHIGAN ANTITRUST REFORM ACT

6 Plaintiffs allege violation of the Michigan Antitrust Reform Act, Mich. Comp. Laws §§
7 445.771, *et seq.* The demurrer is OVERRULED.

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10 TENTH CAUSE OF ACTION – NEVADA UNFAIR TRADE PRACTICES ACT

11 Plaintiffs allege violations of the Nevada Unfair Trade Practices Act, Nev. Rev. Stat. §§
12 598A.010, *et seq.*, and specifically Nev. Rev. Stat. §§ 598A.060(a), (b) and (c). The demurrer is
13 OVERRULED.

14
15 ELEVENTH CAUSE OF ACTION – NEW JERSEY ANTITRUST ACT

16 Plaintiffs allege violations of the New Jersey Antitrust Act, N.J.S.A. 56:9-1, *et seq.* The
17 demurrer is OVERRULED.

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20 TWELFTH CAUSE OF ACTION – OHIO LAW

21 Plaintiffs allege violations of Ohio Revised Code Section 1331.01, *et seq.* The demurrer
22 is OVERRULED.

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1 THIRTEENTH CAUSE OF ACTION – RHODE ISLAND ANTITRUST ACT

2 Plaintiffs allege violations of the Rhode Island Antitrust Act, R.I. Gen. Laws § 6-36-1, et
3 seq. The demurrer is OVERRULED.

4
5 FURTHER PROCEEDINGS

6 The court does not order the filing of a Second Amended Complaint at this time. In the
7 interest of efficient case management the court expects to order that after the orders on the
8 motion to strike, the demurrer, and the motions to quash set for 7/26/22 that the court will at that
9 time order plaintiffs to file a Second Amended Complaint against the defendants who are subject
10 to the court’s jurisdiction on the claims where the court has general or specific jurisdiction
11 asserting the claims that survive the motion to strike and demurrer.

12 The court’s order to delay the filing of a Second Amended Complaint in the interest of
13 efficient case management is not an order staying discovery. The parties who have appeared in
14 the case may pursue discovery and must respond to discovery on the claims and defenses in the
15 case. (CCP 2025.210(b); 2030.020(b), 2031.020(b).) “Pleading deficiencies generally do not
16 affect either party’s right to conduct discovery [case] and this right (and corresponding obligation
17 to respond) is particularly important to a plaintiff in need of discovery to amend its complaint
18 [case].” (*Mattco Forge, Inc. v. Arthur Young & Co.* (1990) 223 Cal.App.3d 1429, 1436 fn 3.)

19
20 Dated: June 1, 2022

21 Evelio Grillo
22 Judge of the Superior Court
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