2022 WL 2073533 (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 1, 2022.

***1** Date: 5/24/22
Time: 10:00 a.m.
Dept.: 21

Order Sustaining with Leave to Amend Demurrer to First Amended Complaint

Patrick M. Ryan, Marisa C. Livesay, Brittany N. DeJong, and Chad E. DeVeaux, Bartko Zankel Bunzel & Miller, One Embarcadero Center, Suite 800, San Francisco, California 94111, for plaintiffs.

Christopher K. Kelly, Mayer Brown LLP, 3000 El Camino Real, Suite 300, Palo Alto, California 94306, for defendant Blue Cross Blue Shield Association.

Karin A. Demasi, Helam Gebremariam, David A. Markewitz, and Emma K. Kolesar, Cravath, Swaine & Moore, LLP, Worldwide Plaza, 825 Eighth Avenue, New York, New York 10019, for defendant Blue Cross Blue Shield Association.

W. David Maxwell, Hogan Lovells US LLP, Columbia Square, 555 Thirteenth Street, NW Washington, D.C. 20004, for defendant Anthem, Inc. f/k/a Wellpoint, Inc.

Evelio Grillo, Judge.

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.

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. (*In re Blue Cross Blue Shield Antitrust Litigation* (N.D. Ala., 2018) 308 F.Supp.3d 1241.)

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 ("FAC"). The FAC has 687 paragraphs and is 149 pages long, plus 189 pages of exhibits for a total of 338 pages.

In the briefing on the demurrer, Defendants assert that the FAC "copies almost verbatim complains in the MDL but styles them under state, rather than federal law." (Moving at 1:15-15.) In the briefing on the motion to strike, Defendants assert that "Plaintiffs filed the present action against the Blues, asserting claims that are nearly identical to those in the MDL" (Opening at 3:16-18) and that the FAC is a "carbon copy of the MDL Provider track complaint" (Reply at 9:17).

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

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

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

The demurrer is SUSTAINED WITH LEAVE TO AMEND.

Plaintiffs' second cause of action alleges horizontal price-fixing and boycott agreements under which every Blue gets the benefit of the artificially reduced prices each Blue pays to healthcare providers and agrees to collectively boycott all Providers outside of their Service Areas ("Price-Fixing and Boycott Agreements"). (FAC para 28) The FAC alleges that through the Price Fixing and Boycott Agreements, the Blues have agreed to fix reimbursement rates for providers among themselves by reimbursing providers according to the "Host Plan" or "Participating Plan" reimbursement rate through the national programs. (FAC para 442-456) The Second Count states: "The Agreements alleged in this Court also violate the Cartwright Act and are per se violations of the Act." (FAC para 634.)

***2** Defendants refer to the agreements as the "BlueCard" rather than the "Price-Fixing and Boycott Agreements." The nomenclature is immaterial to the analysis.

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

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

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." Under *Cipro,* the question is whether the second cause of action regarding the BlueCard states a claim, not whether the trier of fact will consider the merit of the claim as a per se violation or a rule of reason violation. By analogy, a claim for negligence is a claim for negligence whether the duty and standard of care are based on the common law or are based on a statute under Evid Code 669. (*Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1353.)

California law is consistent with *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma* (1984) 468 U.S. 85, 103 and fn 26. *NCAA* first states: "Both per se rules and the Rule of Reason are employed "to form a judgment about the competitive significance of the restraint." *NCAA* 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."

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

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

***3** 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. The court is in large part guided by the CACI jury instructions at CACI 3400 et seq, which differentiate between per se violations and rule of reason violations. 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. The court permits plaintiffs to amend and supplement the facts alleged in any further complaint to address the arguments that defendants make in their briefing. Plaintiffs may also want to, if possible, allege facts that correspond to the CACI elements of the claims that they are asserting. This is not an invitation for an overly prolix complaint. This is a suggestion for a complaint that complies with CCP 425.10 and makes allegations consistent with the elements of the causes of action. SUSTAINED WITH LEAVE TO AMEND.

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

The demurrer is OVERRULED.

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

In the federal MDL, the Plaintiffs asserted that CHP shares data between members, and that data includes provider discounts and differentials. (*In re: Blue Cross Blue Shield Antitrust Litigation* (MDL No. 2406) (N.D. Ala., 2016) 2016 WL 6124143 at *5.) In the federal MDL, the court at MSJ decided that defendants National Account Service Company, LLC ("NASCO")

and Consortium Health Plans, Inc. ("CHP") were not liable for anticompetitive conduct for their alleged roles in furthering the alleged anticompetitive actions of the Blues. The federal MSJ order did not address the liability of the Blues themselves related to the sharing of information.

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

The FAC alleges

> Para 338. To facilitate the agreements, numerous Blues and the BCBSA have also established Consortium Health Plans, Inc. ("CHP"). CHP describes itself as a "national coalition of 20 leading BCBS Plans, [which] provides a clear and unified voice, as well as effective central coordination, for the Blue System among national accounts …" whose "mission is to position Blue Cross Blue Shield as the preferred choice for national accounts." See Exhibit B. Through CHP, the Blues share claims data reflecting provider reimbursements on a nationwide basis. The Blues leverage that data and their collective market power to impose deep discounts on reimbursements to providers, which they then market to employer groups and other purchasers of health insurance.
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> Para 339. For example, in a marketing brochure dated February 6, 2013 for CHP's "ValueQuest" analytical tool, CHP as much as admits that the Blues are able to use their shared claims data and collective market power to reduce reimbursement to providers to levels far below their competitors on the national level. In this regard, the brochure describes the ValueQuest tool as follows:
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> ***4** ValueQuest is Blue Cross Blue Shield's leading-edge analytical platform for measuring total health plan value. ValueQuest incorporates sophisticated data analytics with relevant industry benchmarks, new advances in measurement around cost, access to care, and lifestyle and behavioral characteristics. ValueQuest has the ability to compare each carrier's per-member, per-month (PMPM) cost in markets where employees reside.
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> The brochure further explains that "(t]he ValueQuest data set contains claims and membership data for BCBS nationally. The data is pulled from Blue Health Intelligence (BHI) as well as directly from BCBS Plans."
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> Para 340. Another brochure sheds light on the extraordinary breadth of the claims data shared by the Blues through CHP. In this regard, the brochure makes the following claims, among others:
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> • "ClaimsQuest provides in-network and out-of-network data for all 50 states in three-digit zips and MSAs."
>
> • "The ClaimsQuest methodology is the same for every Blue Cross Blue Shield Plan, and the same data criteria are applied across every state, every MSA, every zip code."
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> • "The ClaimsQuest model not only works effectively for every Plan in the Blue System, it also applies to other carriers. Applying the ClaimsQuest cost model to all carriers permits an 'apples-to-apples' comparison."

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

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

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

FOURTH CAUSE OF ACTION – CALIFORNIA UNFAIR COMPETITION

The demurrer is OVERRULED.

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

FIFTH-THIRTEENTH CAUSES OF ACTION

***5** The demurrers are OVERRULED.

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

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

The California law on comity suggests that it would not apply in this situation. "Comity is based on the belief" ' "that the laws of a state have no force …, beyond its territorial limits, but the laws of one state are frequently permitted by the courtesy of

another to operate in the latter for the promotion of justice, where neither that state nor its citizens will suffer any inconvenience from the application of the foreign law. " (*Advanced Bionics Corp. v. Medtronic, Inc.* (2002) 29 Cal.4th 697, 707.) This situation does not concern the extraterritorial application of California law. Rather, this situation concerns whether a California court should hear and decide claims under the laws of other states.

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

The court is not persuaded that principles of comity or judicial abstention suggest or compel it to refrain from deciding issues of state antitrust law under the law of other states. This court would be applying the law of another state just as it would in any other choice of law situation. This court would not be in uncharted waters given that antitrust law on the federal level has been well developed in the over 130 years case law since the Sherman Antitrust Act of 1890 and the laws of the states tend to follow the federal law. If the law in the other states is unclear, then court would need to anticipate the evolution of the laws of the other states just as federal courts anticipate the evolution of the law in this state under *Erie.* The court is not persuaded by defendant's arguments. The court may hear antitrust claims under the laws of other states just as the court can hear other claims under the laws of other states.

***6** Defendants argue that plaintiffs lack standing to assert claims under the laws of other states. Defendants rely on *Carpenter v. PetSmart, Inc.* (S.D. Cal., 2020) 441 F.Supp.3d 1028, 1038, but that analysis concerns federal Article III standing for federal courts, which are courts of limited jurisdiction and not California CCP 367 standing for California courts, which are courts of general jurisdiction. Defendants also seem to commingle standing, which is the ability to seek relief in a court (CCP 367), and the law that is applied to the claim (choice of law). Plaintiffs have alleged facts that are adequate to demonstrate standing. Whether any particular claim by any particular plaintiff is under California law or the law of another state is a different issue.

Defendants' concerns that a California court will hear claims arising under the laws of other states will be addressed in part by the resolution of the motion to quash based on lack of personal jurisdiction. If plaintiffs are asserting a claim against an out of state defendant based on a claim that does not arise out of or relate to the defendant's activity in California, then the court might not have jurisdiction over the out of state defendant. The plaintiffs can then bring their claims against the out of state defendant in that defendant's home state under the law of the home state. The law on personal jurisdiction, forum non conveniens, choice of law, and extraterritorial application of a state's laws are distinct, but they share certain concepts. Plaintiffs are concerned that "taking Defendants' arguments to their logical conclusion would result in piecemeal litigation that would require a single plaintiff to pursue claims based on the same pattern of conduct in violation of statutes that are the same or substantially similar, in multiple forums, creating a substantial drain on both the parties' and judiciary's resources." (Oppo a 36:5-8) Plaintiffs had the opportunity to resolve their nationwide claims in a single case in the federal MDL settlement. Plaintiffs chose to opt out and bring a case in a California state court. This court will manage the claims against the defendants who are properly in this court on the claims that are properly in this court under the appropriate state laws. The court will not expand the reach of the court to make the case a substitute for the federal MDL.

Defendants argue that the claims under the antitrust laws of other states do not identify the relevant market. The FAC alleges that the Blues divided up the national market by Service Areas and that the relevant markets for purposes of the claims are the Service Areas. (FAC paras 4, 5, 28, 31-35, 430-436.)

FIFTH CAUSE OF ACTION – ALABAMA DECEPTIVE TRADE PRACTICES ACT

Plaintiffs allege violations of the Alabama Deceptive Trade Practices Act, Code of Alabama, 1975, §§8-19-10, 8-19-5(27). The demurrer is OVERRULED.

SIXTH CAUSE OF ACTION – FLORIDA ANTITRUST ACT AND FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

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

SEVENTH CAUSE OF ACTION – INDIANA ANTITRUST ACT

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

EIGHTH CAUSE OF ACTION – KANSAS RESTRAINT OF TRADE ACT

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

NINTH CAUSE OF ACTION – MICHIGAN ANTITRUST REFORM ACT

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

TENTH CAUSE OF ACTION – NEVADA UNFAIR TRADE PRACTICES ACT

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

ELEVENTH CAUSE OF ACTION – NEW JERSEY ANTITRUST ACT

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

TWELFTH CAUSE OF ACTION – OHIO LAW

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

THIRTEENTH CAUSE OF ACTION – RHODE ISLAND ANTITRUST ACT

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

FURTHER PROCEEDINGS

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

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

Dated: June 1, 2022

Evelio Grillo

Judge of the Superior Court

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