SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 206

VHS LIQUIDATING TRUST, liquidating trust for Verity Health System of California, Inc.,

Plaintiff,

v.

MULTIPLAN CORPORATION, et al.,

Defendants.

Case No. CGC-21-594966

ORDER SUSTAINING MULTIPLAN DEFENDANTS' DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT

MultiPlan Defendants' Demurrer to Plaintiff's First Amended Complaint came on regularly for hearing on July 16, 2024. Counsel for the parties were present. The appearances are as stated in the record. The matter was reported. Having considered the argument and written submissions of the parties and being fully advised, MultiPlan Defendants' Demurrer to Plaintiff's First Amended Complaint is sustained without leave to amend.

BACKGROUND

On September 8, 2021, Plaintiff VHS Liquidating Trust ("Plaintiff") brought this action against Defendants MultiPlan Corporation; MultiPlan, Inc.; Viant, Inc.; Churchill Capital Corp.; Churchill Capital III; Cigna Corp.; Centene Corp.; Humana, Inc.; United Health Group, Inc.; United Healthcare; Wells Fargo & Company; Esurance Holdings, Inc.; Esurance Insurance Services, Inc.; Inphi Corporation;

Viant Payment Systems, Inc.; Data Isight; National Care Network, LP; National Care Network, LLC; Blue Cross and Blue Shield Association; Anthem, Inc.; United Healthcare Services, Inc.; Aetna, Inc.; Aetna Health of California, Inc.; Anthem Blue Cross of California; Blue Shield of California/California Physicians' Service; Blue Shield of California Life and Health Insurance Company; Cigna Healthcare of California, Inc.; Health Net of California; Humana Health Plan of California, Inc.; and Warner Brothers Theatre Ventures. On August 10, 2022, the Court granted motions to compel arbitration brought by Defendants Centene Corporation; Health Net of California, Inc.; United Healthcare Services, Inc.; United Health Group, Inc.; United Healthcare; Aetna, Inc.; Aetna Health of California, Inc.; Anthem, Inc.; and Anthem Blue Cross of California. On the same day, the Court also granted Defendants Cigna Corporation's and Cigna Healthcare of California, Inc.'s motion to compel arbitration as to the St. Vincent Medical Center and St. Francis Medical Center. On October 8, 2022, Plaintiff filed a petition for writ of mandate, which was denied on December 1, 2022. On February 15, 2023, the Supreme Court of California denied Plaintiff's petition for review.

On January 11, 2024, Plaintiff filed a First Amended Complaint ("FAC") against Defendants MultiPlan Corporation; MultiPlan, Inc.; Viant, Inc.; Churchill Capital Corp.; Churchill Capital III; Viant Payment Systems, Inc.; National Care Networks, LP; and National Care Network, LLC.[1] Plaintiff seeks to state six causes of action: (1) Horizontal price fixing through a hub-and-spoke agreement; (2) Horizontal price fixing; (3) Horizontal price tampering; (4) Horizontal unlawful exchange of competitively sensitive business information; (5) Vertical unlawful exchange of competitively sensitive business information; and (6) Unfair Competition. (FAC ¶¶ 494-575.) Plaintiff alleges as follows.

Plaintiff is the bankruptcy liquidator for Verity Health System of California, Inc. ("Verity"), a not-for-profit health care system. (*Id.* at 1 fn. 1 & ¶ 50.) Verity operated six hospitals: Seton Medical Center in Daly City, Seton Coastside in Moss Beach, St. Vincent Medical Center in Los Angeles, O'Connor Hospital in San Jose, St. Louise Regional Hospital in Gilroy, and St. Francis Medical Center in Lynwood. (*Id.* ¶ 52.) "Various entities reimbursed Verity and other healthcare providers for the services they

[1] Defendants Churchill Capital III, Churchill Capital Corp., and National Care Network, LP have since been dismissed without prejudice by stipulation and order. (Mar. 13, 2024 Order, 3; July 1, 2024 Order, 2.)

provided to their patients. Those entities include MultiPlan and its Co-Conspirator Insurers, SFPs [self-funded payers], and government payers, like Medicare and Medi-Cal." (*Id.* ¶ 88.)[2]

"Defendant MultiPlan Corporation is a provider of healthcare data and analytics products and services." (*Id.* ¶ 60.) In particular, Multiplan is a

> for-profit reimbursement claim "repricer", [that] orchestrated unlawful agreements with commercial health insurers to abide by MultiPlan's data-driven repricing algorithms in order to fix and reduce out-of-network ("OON") reimbursement payments to U.S. healthcare providers, including Verity's non-profit hospitals. To do so, MultiPlan aided and abetted in the sharing of competitively sensitive information by over 700 such health insurers, effectively stifling natural competition in the health insurance reimbursement market. In turn, each of the insurers that collaborated with MultiPlan eliminated their independent decision making to obtain a shared "cost savings"—in essence, a kickback for using MultiPlan's software algorithm. This was accomplished with the common understanding that they would reduce reimbursement rates collectively by doing so. This is because contributing their sensitive pricing data for MultiPlan's use to recommend prices to other insurer-competitors is in their economic self-interest if, and only if, they know they will receive in return the benefit of their competitors' data via the repricing set by MultiPlan.

(*Id.* ¶ 1; see, e.g., *id.* ¶¶ 2 ["In its marketing materials, MultiPlan repeatedly trumpeted a goal of reducing reimbursement rates for insurers, and incentivized the use of their data algorithms to do so. As a result, in 2022 those nationwide reductions totaled approximately $22 billion, securing MultiPlan $1 billion in revenue."], 9-10, 13, 343 ["MultiPlan's repricing output to insurers is designed to produce only one 'price,' which does not differ by insurer."].) "MultiPlan has estimated that healthcare providers accept the algorithm calculated reimbursement amounts imposed for OON inpatient services 93% to 99.4% of the time." (*Id.* ¶ 4; see *id.* ¶ 150; see also *id.* ¶¶ 291, 311, 348-349, 376.) "No other company like MultiPlan has a comparable collection of data between competing insurers." (*Id.* ¶ 36.)

MultiPlan "directly communicated with commercial health insurance payors to solicit those payors to join the conspiracy, and successfully reached agreements with nearly all commercial healthcare insurers in the country to use MultiPlan's repricing tools to collectively suppress the OON reimbursement rates paid to healthcare providers." (*Id.* ¶ 11.)

> MultiPlan and insurers agreed to share their confidential, highly detailed claims data with MultiPlan in real time, and those insurers agreed to the methodology by which MultiPlan would

[2] The "Co-Conspirator Insurers" are "those large and powerful for-profit commercial health insurers listed in MultiPlan's own marketing, including United Health, Cigna, Anthem, Centene (Health Net), Humana, Aetna, and Blue Shield—many of which are Fortune 500 regulars." (*Id.* ¶ 15.)

> reprice their OON claims. Pursuant to this agreement, when a payor receives a provider's claim for reimbursement of OON services, it sends the claim to MultiPlan, and MultiPlan uses its repricing algorithm to generate a reimbursement amount that is far lower than the payor would otherwise pay on the claim. MultiPlan then imposes the new price on the healthcare provider, giving the provider just days to respond to the "repriced" claim. As a condition of accepting the repriced claim, providers may be unable to seek reimbursement from any other source—effectively locking in the harm caused by the collusive underpayment. MultiPlan then takes a cut of the money that the payor withholds from the healthcare provider, while the insurer and MultiPlan reap the benefit of a highly discounted reimbursement rate driven by the application of MultiPlan's algorithm.

(*Id.* ¶ 12; see, e.g., *id.* ¶¶ 14 ["the specific purpose and actual effect of this scheme was to reduce commercial-insurer reimbursements to healthcare providers like Verity to low levels, all while directly increasing MultiPlan's own profits."], 27, 34-35, 145-146, 147 ["MultiPlan makes money on its claims' repricing services by charging the insurers a fee based on the difference between a provider's original claim and the amount the provider 'accepts' following MultiPlan's repricing of the claim." Thus, "MultiPlan is incentivized to recommend the lower reimbursement price possible."], 149 ["In many cases, the payor authorizes MultiPlan to make the repricing offer and negotiate the out-of-network claim on its behalf—completely abdicating all pricing authority to MultiPlan as the leader of the conspiracy."], 150-153, 255.) "In addition, because the insurers horizontally agreed to directly fix OON prices through MultiPlan, their collective conduct indirectly suppressed in-network prices as well since those are set at a discount from OON prices." (*Id.* ¶ 3; see *id.* ¶¶ 7, 16, 114-115, 205, 446, 459, 504, 530, 564, 573.) Furthermore, "MultiPlan's price fixing and unlawful exchange of competitively sensitive business information among competing insurers also stems from independently unlawful vertical agreements MultiPlan has entered into with commercial insurers and SFPs, to which MultiPlan readily admits." (*Id.* ¶ 38.)

Here, "[t]he agreement is a traditional 'hub, spoke, and rim' agreement, in which [the] Co-Conspirator Insurers are the spokes and MultiPlan is the Hub." (*Id.* ¶ 268; see, e.g., *id.* ¶¶ 270 [Churchill/MultiPlan investor presentations], 281 [horizontal agreement reflected in Churchill/MultiPlan investor presentations and FAC], 313 [evidence of horizontal agreement in MultiPlan's "public offering investor materials"]; see also *id.* ¶ 321.) MultiPlan acts "as a 'hub' to facilitate the fixing of prices and the unlawful exchange of competitively sensitive business information among insurers." (*Id.* ¶ 14; see also *id.* ¶¶ 218, 320, 370, 496, 528, 541, 555.) "The Co-Conspirator Insurers agreed with each other to fix

their prices to Verity and other provides for the OON services they provide" while "MultiPlan served as the key conduit and mechanism for the communications, assurances, and actions needed to establish and maintain this agreement." (*Id.* ¶¶ 266-267; see also *id.* ¶¶ 278 ["Co-Conspirator Insurers are horizontal competitors in the Reimbursement Market"], 496.) The horizontal agreements "also included commitments to submit massive amounts of competitively sensitive data and information from Co-Conspirator Insurers and SFPs, and others, to MultiPlan. In return, Co-Conspirator Insurers and SFPs, and others, received as the output of the exchange granular future pricing information for their use in extracting more money from providers such as Verity through lower reimbursements for the OON services those hospitals provided." (*Id.* ¶¶ 281-282; see also *id.* ¶ 497.) "This type of information exchange itself is circumstantial evidence of 'the rim,' here a horizontal agreement among health insurers." (*Id.* ¶ 377.)

MultiPlan also "engaged in the same conduct [] through vertical agreements it has with the Co-Conspirator Insurers and SFPs, and other customers." (*Id.* ¶ 285; see also *id.* ¶¶ 286 ["evidenced in the [] Churchill/MultiPlan investor presentations"], 287-288, 308-309, 500.) "[T]hese vertical agreements further entrenched, facilitated, and otherwise constituted overt acts in support of MultiPlan's unlawful monopolization of the Repricing Markets in order to control the conspiracy to control and maintain lower reimbursement rates to providers." (*Id.* ¶ 295; see also *id.* ¶¶ 43, 387.) "MultiPlan dominates the market to provide commercial OON repricing to commercial health insurers and self-funded payers, including other conspirators, and has no meaningful horizontal competitors." (*Id.* ¶ 42; see also *id.* ¶¶ 386, 400.) To maintain its "market dominance, "MultiPlan commenced a series of acquisitions of actual and potential competitors beginning as early as 2010 and 2011 with Viant, Inc. and National Care Network (the owner of the 'Data iSight' repricing tool), continued in 2014 with Medical Audit & Review Solutions, and extended with HST in 2020, Discovery Health Partners in 2021, and Benefit Science LLC (another data and analytics company dedicated to reducing the costs of healthcare) in 2023." (*Id.* ¶ 45; see also *id.* ¶¶ 61-62, 140, 142, 206-208, 210-213, 300, 430.) "Defendant Viant, Inc. is a healthcare payment solutions company" that "offers to commercial and public health insurance customers in the United States auditing and reimbursement for medical claims and costs, as well as pre-payment services

such as facility bill review and professional negotiation." (*Id.* ¶ 61.) "National Care Network, LP and its affiliate [Defendant] National Care Network, LLC are healthcare cost management companies." (*Id.* ¶ 63.) When MultiPlan acquired "National Care Network, MultiPlan was able to add its Data iSight repricing tool to its offerings, which provides reimbursement pricing information to health insurers and other payers and customers, and it claims to utilize a patented methodology in evaluating health care reimbursement claims when doing so." (*Id.*) "Both Viant and Data iSight functioned as meaningful competing services to MultiPlan until their acquisition." (*Id.* ¶ 141.) Indeed, "MultiPlan currently has no meaningful, actual commercial OON reimbursement repricing competitors." (*Id.* ¶ 209.)

MultiPlan also "owns and operates several PPO health insurance networks." (*Id.* ¶ 154; see also *id.* ¶¶ 156-162.) "All of MultiPlan's PPO networks compete with other commercial health insurance payors to secure contracts with medical providers." (*Id.* ¶ 164; see also *id.* ¶ 511.) As a result, "MultiPlan also participates in the horizontal agreement as one of the 'spokes' through its PPO networks that directly complete with the insurers for providers." (*Id.* ¶ 371.)

"In a competitive market, but for MultiPlan's conduct, Verity and other providers would have received up to 100% of the amounts they billed for their OON services or arguably, in some instances, no less than what is the usual and customary reimbursement [UCR] in the area for such OON services." (*Id.* ¶ 111; see also *id.* ¶ 202 ["In a competitive market free from MultiPlan's unlawful conduct, hospitals like Verity would be reimbursed at competitive market rates for their OON services, and those reimbursements should be substantially higher than those for in-network services."].)

Defendants now demur to the FAC on the ground that Plaintiff fails to state sufficient facts to constitute a cause of action. (Demurrer, 2, 4-5.) Plaintiff opposes the demurrer.[3]

LEGAL STANDARD

A demurrer lies where "the pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc. § 430.10.) A demurrer admits "all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The complaint

[3] Plaintiff's Request for Judicial Notice is denied as the documents are irrelevant to any issue before the Court on the instant demurrer. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1065, overruled on other grounds, *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276.)

is given a reasonable interpretation, reading it as a whole and its parts in their context. (*Id.*) The Court accepts as true, and liberally construes, all properly pleaded allegations of material fact, as well as those facts which may be implied or reasonably inferred from those allegations; its sole consideration is whether the plaintiff's complaint is sufficient to state a cause of action under any legal theory. (*O'Grady v. Merchant Exchange Prods., Inc.* (2019) 41 Cal.App.5th 771, 776-777.)

California courts require a "high degree of particularity in the pleading of Cartwright Act violations," such that "the lack of factual allegations of specific conduct directed toward furtherance of the conspiracy to eliminate or reduce competition renders the complaint legally insufficient." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 265-266; see also *Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1236.) "At the same time, as with any demurrer, the material allegations of an antitrust cause of action are deemed admitted and assumed to be true, while the general rule of pleading that a complaint must be given liberal construction in order to achieve substantial justice between the parties is applicable." (*G.H.I.I.*, 147 Cal.App.3d at 266 (cleaned up).)

A cause of action under the Unfair Competition Law, Business and Professions Code section 17200, *et seq.* ("UCL") must be pled "with reasonable particularity, which is a more lenient pleading standard than is applied to common law fraud claims." (*Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1261.)

DISCUSSION

I. Plaintiff Does Not Allege Sufficient Facts to State a Cause of Action for Violation of the Cartwright Act.

A. Background Law

The Cartwright Act is California's principal antitrust law. (*In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 136.) The act's principal goal is the preservation of consumer welfare. (*Id.*) "At its heart is a prohibition against agreements that prevent the growth of healthy, competitive markets for goods and services and the establishment of prices through market forces. 'The act 'generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices', and declares that, with certain exceptions, 'every trust is unlawful, against public policy and void.'" (*Id.* (cleaned up).) Under the Cartwright Act,

> [a] trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: . . . (c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity. (d) to fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State. (e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following: . . . (2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure. (3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity. (4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

(Bus. & Prof. Code, § 16720.)

"Though the Cartwright Act is written in absolute terms, in practice not every agreement within the four corners of its prohibitions has been deemed illegal." (*In re Cipro Cases I & II*, 61 Cal.4th at 136.) Instead, based on common law prohibitions against restraints of trade, the broad prohibitions in the act are subject to an implied exception similar to one that validates reasonable restraints of trade under the federal Sherman Antitrust Act. (*Id.* at 136-137, 146.) Put differently, "the Cartwright Act and the Sherman Act carry forward the common law understanding that 'only unreasonable restraints of trade are prohibited.'" (*Id.* at 146 (cleaned up).)

The manner in which courts evaluate a restraint of trade to determine whether it is unreasonable is nuanced. (See *id.* at 147.) First, under a traditional rule of reason analysis, the inquiry is limited to whether the challenged conduct promotes or suppresses competition. (*Id.* at 146.) This entails a determination of whether the challenged restraint hurts competition more than it helps. (*Id.*) However, a rule of reason analysis is not required in every case. (*Id.*)

Second, "[the California Supreme Court] and the United States Supreme Court have partially simplified the analysis by identifying categories of agreements or practices that can be said to always lack redeeming value and thus qualify as per se illegal." (*Id.*) "The per se rule reflects an irrebuttable presumption that, if the court were to subject the conduct to a full-blown inquiry, a violation would be found under the traditional rule of reason." (*Id.* (cleaned up).) Application of the per se rule establishes

illegality "without any regard to their economic effects or possible justification." (*Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 931.)

"More recently, a third category, quick look rule of reason analysis, has emerged." (*In re Cipro Cases I & II*, 61 Cal.4th at 146.) "Under the quick look approach, applicable to cases where 'an observer with even a rudimentary understanding of economics could conclude that the arrangements would have an anticompetitive effect on customers and markets,' a defendant may be asked to come forward with procompetitive justifications without the plaintiff having to introduce elaborate market analysis first." (*Id.* at 146-147.)

The three approaches do not form a "trichotomy." (*Id.* at 147.) Rather, the approaches are "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." (*Id.*) The appropriate analytic approach involves a "continuum," with the "'circumstances, details, and logic' of a particular restraint dictating how the courts that confront the restraint should analyze it. In lieu of an undifferentiated one-size-fits-all rule of reason, courts may 'devise rules ... for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.'" (*Id.* (cleaned up).)

A plaintiff alleging a violation of the Cartwright Act must plead: (1) formation and operation of a conspiracy; (2) illegal acts pursuant to the conspiracy; (3) purpose to restrain trade; and (4) damages. (*G.H.I.I.*, 147 Cal.App.3d at 265.) "Two forms of conspiracy may be used to establish a violation of the antitrust laws: a *horizontal* restraint, consisting of a collaboration among competitors; or a *vertical* restraint, based upon an agreement between business entities occupying different levels of the marketing chain." (*Id.* at 267 (emphasis in original).)

B. Reimbursement Rates for OON Services Are Not Subject to Price Fixing or Tampering.

Defendants assert that "no allegations in the FAC establish that the services provided by MultiPlan included any ability to change or alter the 'price' charged for any product or service. In any case, the 'price' relevant to the 'Repricing Market' is not the 'price' for the delivery of medical services by providers to patients (neither of whom participate in the 'Repricing Markets'). Rather, it is the 'price'

paid for the delivery of services (including the use of MultiPlan's confidential and proprietary reimbursement algorithms) designed to help insurers administer the reimbursement obligations those insurers owe to their subscribers." (Opening Brief, 26-27.) Defendants argue "Plaintiff is not challenging conduct that impacts competition for Verity's services—***medical treatment to patients***." (*Id.* at 28 (emphasis in original).) Rather, Defendants argue that "[a]t most, Verity's interaction with a health plan is simply a matter of the payment that the bilateral parties (with or without MultiPlan's tools and services) will agree to for a service that has already been bought and sold (at the 'price' set unilaterally by Verity in the medical services market)." (*Id.* at 28-29.) Thus, Defendants argue that price-fixing liability cannot attach here in the absence of "a discrete product (or service) that can be bought and the price of which can be fixed through an unlawful agreement." (*Id.* at 29; see also Reply, 3-4, 10.) The Court agrees.

"Application of per se rules of illegality rather than the [] 'rule-of-reason,' which is the prevailing standard of analysis to determine whether a plaintiff has shown a combination or conspiracy in restraint of trade, is appropriate only when it relates to 'conduct that is manifestly anticompetitive.'" (*Bert G. Gianelli Distributing Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1044, disapproved of on other grounds in *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384 (cleaned up).) "Under both California and federal law, agreements fixing or tampering with prices are illegal per se." (*Oakland-Alameda County Builders' Exchange v. F.P. Lathrop Constr. Co.* (1971) 4 Cal.3d 354, 363; see *Mailand v. Burckle* (1978) 20 Cal.3d 367, 376 ["Certain violations of the antitrust laws are deemed to constitute an illegal restraint of trade as a matter of law. Among these are price fixing."]; *Asahi Kasei Pharma Corp. v. CoTherix, Inc.* (2012) 204 Cal.App.4th 1, 13 & fn. 15 [price fixing or tampering are per se antitrust violations].) "Price fixing is an agreement to set, raise, lower, maintain, or stabilize the prices or other terms of trade charged or to be charged for a product or service, whether the prices agreed on were high or low, reasonable or unreasonable." (CACI 3400.) "A complaint for unlawful price fixing must allege facts demonstrating that separate entities conspired together." (*Freeman v. San Diego Ass'n of Realtors* (1999) 77 Cal.App.4th 171, 188.) "Price-fixing agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have the power to control the market. But the fact that the group cannot control the market prices does not necessarily mean

that the agreement as to prices has no utility to members of the combination." (*U.S. v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150, 224 fn. 59.)

Plaintiff seeks to state two causes of action for horizontal price fixing and one cause of action for horizontal price tampering. Plaintiff alleges as follows. MultiPlan engaged in horizontal price fixing through a hub-and-spoke agreement by facilitating "a horizontal combination, agreement and/or contract with and among competing U.S. health insurers and payers to unreasonably restrain trade in violation of the Cartwright Act." (FAC ¶ 495; see also *id.* ¶ 527.) In particular, Plaintiff alleges there was "a continuing agreement, understanding, or concert of action by Co-Conspirator Insurers to enter into an agreement with each other and through MultiPlan, whereby MultiPlan would act as a 'hub' to fix, set, establish, and control the reimbursement amounts paid by the Co-Conspirator Insurers and SFPs, and others, for OON services to Verity and other providers." (*Id.* ¶ 496; see also *id.* ¶¶ 513, 528.) In turn, "Co-Conspirator Insurers and SFPs, and others, joined this combination, agreement, and/or contract, engaged in the unlawful submission of competitively sensitive information in exchange for granular prices, declared their intentions to follow those prices and acted in substantial conformance with those intentions." (*Id.* ¶ 497; see also *id.* ¶¶ 500 ["All of the Co-Conspirators participated in this unlawful agreement, including through their vertical agreements with MultiPlan, and other conduct."], 514 ["MultiPlan also explicitly recommended prices to its Co-Conspirators that were consistent with and made in reference to the prices of their competitive rivals. MultiPlan's Co-Conspirators agreed to accept those price recommendations generated by MultiPlan's algorithm in full knowledge that other conspirators had adopted similar prices."], 515 ["MultiPlan joined this combination, agreement, and/or contract"], 529.) MultiPlan is also a horizontal competitor because its "PPO networks compete against commercial insurers to induce providers to provide OON services to their members by paying competitive rates." (*Id.* ¶¶ 510-511; see also *id.* ¶ 511 ["Alternatively, MultiPlan's PPO networks are a potential competitor to those offered by its Co-Conspirators because it could compete against commercial insurers that market their networks directly to subscribers."].) "The intent, purpose, and effect of MultiPlan and its Co-Conspirators' agreement to fix and set reimbursement rates through MultiPlan was to cause under-reimbursement for commercial OON services." (*Id.* ¶ 502; see *id.* ¶ 520.) "Through this price-fixing

agreement, MultiPlan has fixed and set reimbursement rates for OON services from Verity and other providers at unreasonably low anticompetitive levels and caused a decrease in reimbursements." (*Id.* ¶ 503; see *id.* ¶ 521; see also *id.* ¶¶ 504 [impacts reimbursement rates for in-network services], 522 [same], 530.)

The parties did not cite to, and the Court is unaware of, any California authorities that are directly on point. Thus, the Court must turn to federal authorities for guidance. (See *Marin County Bd. of Realtors, Inc.*, 16 Cal.3d at 925 ["federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act."]; *Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 369 ["Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance."].) Defendants rely on three cases where they claim "the courts rejected OON price-fixing claims as a matter of law." (Opening Brief, 29-30; see also Reply, 4.) The Court addresses each in turn.

First, in *Franco v. Connecticut General Life Ins. Co.* (D.N.J. 2011) 818 F.Supp.2d 792, "[t]he challenged conduct consist[ed] of an alleged horizontal conspiracy among CIGNA, UnitedHealth together with its 'alter ego' Ingenix and other insurers to depress UCRs and thus cap reimbursement rates for ONET [out-of-network providers] claims." (*Franco*, 818 F.Supp.2d at 831, affirmed in part in *Franco v. Connecticut General Life Ins. Co.* (3rd Cir. 2016) 647 Fed.Appx. 76; see also *Franco*, 818 F.Supp.2d at 830-831 ["Plaintiffs []in this case have attempted to plead both a *per se* antitrust violation (horizontal agreement among competing insurers to fix the reimbursement of ONET claims) and a restraint of trade under the rule of reason (manipulation of data market to affect UCR)."].) The plaintiffs, a group of health professionals, physician organizations, and insureds, alleged the defendants' "scheme was accomplished by the insurers' similar conduct of providing fee data solely to Ingenix and exclusive use of the Ingenix database, making Ingenix UCR schedules the industry standard." (*Id.* at 831.) The court concluded: "Fatal to the price-fixing claim is that, even reading the Complaints in the light most favorable to Plaintiffs, the purported agreement among CIGNA, UnitedHealth and the other 'conspirators' to cap ONET reimbursements does not pertain to the pricing of anything. Plaintiffs have tried to distort conduct which allegedly resulted in the determination of artificially low ONET benefit payments into a 'price

fixing agreement' but have failed to articulate what product's or service's price has been manipulated." (*Id.* at 832.) The court reasoned that "there is no indication in the complaints that coverage ONET services—that is, services by providers who are out of CIGNA's preferred provider network—is a discrete product available for purchase and sale apart from the rest of a subscriber's insurance policy, at its own price." (*Id.*) The court further reasoned that "[d]espite Plaintiffs' attempt to characterize the amount payable as an insurance benefit for ONET services as the 'price' of the ONET service coverage, benefits paid by the insurance company to the insured pursuant to a health benefits plan do not express the price of any discrete good or service. They represent one aspect of the product sold." (*Id.* at 834.)

Second, *In re Aetna UCR Litigation* (D.N.J. June 30, 2015) 2015 WL 3970168 involved allegations by subscribers, who were insured by Aetna, "that defendants Aetna, Ingenix, and UHG acted in concert to artificially suppress reimbursement for ONET services, and that such conduct amounted to price-fixing." (*Id.* at *1, *23; see also *id.* at *24.) The court reasoned that "while labelling such conduct as an agreement to fix *price*, plaintiffs actually fail to allege that the price of any product or service has been fixed or restrained. Instead, they allege that 'Aetna paid less than it was contractually obligated to pay for' out-of-network benefits." (*Id.* at *24.) "As many courts have noted, however, the price of health insurance is the premium." (*Id.*) "Given this complexity in determining the premium charged, the Court conclude[d] that the connection between defendants' alleged conduct and the premium charged is too attenuated to support a finding of price-fixing," therefore, the plaintiffs failed to allege a price-fixing agreement. (*Id.* at *25.)

Lastly, in *Pacific Recovery Solutions v. Cigna Behavioral Health, Inc.* (N.D. Cal. Mar. 29, 2021) 2021 WL 1176677, the plaintiffs were "a group of four out-of-network [] behavioral health care providers that provide Intensive Outpatient Program treatment ('IOP') in the United States." (*Id.* at *1.) The plaintiffs sought "to represent a class of similarly situated providers against Cigna . . . and Viant, Inc. [], a third-party 'repricer'" for violations of the Sherman Act, among other claims. (*Id.* at *1, *3.) The defendants moved to dismiss the plaintiffs' Sherman Act claim on the grounds that the plaintiffs lacked antitrust standing and failed to plead sufficient facts to plausibly allege an antitrust violation. (*Id.* at *12.) The court concluded the plaintiffs "have not plausibly alleged a product or service capable of being price-

fixed." (*Id.* at *13.) The plaintiffs "allege[d] that Cigna and Viant conspired to fix the price of coverage for OON providers' OON services." (*Id.*) Relying on *Franco*, the court found the plaintiffs "do not allege that insurance benefits for OON providers' IOP services are available for purchase as a distinct product or service, at their own price, such that they can be subject to price fixing." (*Id.*) Thus, the plaintiffs' "antitrust claim [] fails because as a matter of law, insurance benefits for OON providers' IOP services are not products that can be price-fixed." (*Id.*)

The Court finds each of the three cases persuasive and adopts their reasoning here as the gravamen of Plaintiff's allegations of price-fixing and tampering is reimbursement rates. In particular, Plaintiff alleges there was "a continuing agreement, understanding, or concert of action by Co-Conspirator Insurers to enter into an agreement with each other and through MultiPlan, whereby MultiPlan would act as a 'hub' to fix, set, establish, and control the *reimbursement amounts* paid by the Co-Conspirator Insurers and SFPs, and others, *for OON services* to Verity and other providers." (FAC ¶ 496 (emphases added); see also *id.* ¶¶ 513, 528.) Plaintiff alleges "[t]he intent, purpose, and effect of MultiPlan and its Co-Conspirators' agreement to fix and set reimbursement rates through MultiPlan was to cause *under-reimbursement for commercial OON services*." (*Id.* ¶ 502 (emphasis added); see *id.* ¶ 520.) Plaintiff further alleges that "[t]hrough this price-fixing agreement, MultiPlan has *fixed and set reimbursement rates for OON services* from Verity and other providers at unreasonably low anticompetitive levels and caused a decrease in reimbursements." (*Id.* ¶ 503 (emphasis added); see *id.* ¶ 521 see also *id.* ¶¶ 504 [impacts reimbursement rates for in-network services], 522 [same], 530.)

Indeed, Plaintiff alleges that "[r]eimbursement agreements between commercial insurers and hospitals, including Verity, typically define the specific services for which the hospital has agreed to accept lower reimbursements from the insurer . . . as 'in-network' services." (*Id.* ¶ 100.) The "[r]emaining services hospitals provide to commercially insured patients are [OON] services." (*Id.* ¶ 102.) Plaintiff alleges that "[m]any hospital contracts with commercial insurers, including many of Verity's contracts with Co-Conspirator Insurers, do not provide any discount or payment for—or even address—[OON] services." (*Id.* ¶ 103.) "Consequently, in these instances, neither a contractual, negotiated discount nor specific reimbursement amount applies to the OON services that hospitals,

including Verity, provide to commercially insured patients." (*Id.* ¶ 104.) However, "commercial insurers and SFPs are bound to reimburse hospitals, including Verity, for the OON services those hospitals provided to their commercially insured patients." (*Id.* ¶ 105.)

As in *Franco*, Plaintiff fails "to articulate what product's or service's price has been manipulated." (*Franco*, 818 F.Supp.2d at 832.) Reimbursement for OON services are part and parcel of a health insurance policy rather than a standalone product or service. At the hearing, Plaintiff argued the relationship and facts here are fundamentally different than in *Franco*, *Aetna*, and *Pacific Recovery* because Verity provided care to patients and did not receive or negotiate premiums for patients. Plaintiff asserted the Court must analyze the allegations under the provider-patient relationship rather than the patient-insurer relationship because here, the product or service had already been provided and Verity was waiting for reimbursement. Plaintiff contends a provider reimbursement is distinct from a patient reimbursement. However, whether under a patient-insurer relationship or a provider-patient relationship, Plaintiff does not address how OON reimbursement rates constitute a "price" that can be fixed or tampered with under the Cartwright Act.[4] (See *id.* ["The *per se* antitrust violation of agreeing to fix prices refers to concerted action for the purpose of 'raising, depressing, fixing, pegging, or stabilizing the price of a *commodity* in interstate or foreign commerce.' In other words, it must involve competing products or services."], quoting *Socony-Vacuum Oil Co.*, 310 U.S. at 223 (emphasis in original).) Plaintiff argues *In re WellPoint, Inc. Out-of-Network UCR Rates Litigation* (C.D. Cal. 2011) 865 F.Supp.2d 1002 is directly on point. (Opposition, 26.)

There, "subscriber, provider and association plaintiffs . . . filed lawsuits against WellPoint, its subsidiaries, UHG, and Ingenix, challenging WellPoint's use of the Ingenix Database and the adequacy of WellPoint's ONS [out-of-network services] reimbursements." (*In re WellPoint, Inc.*, 865 F.Supp.2d at 1017-1018.) "WellPoint, Inc. [] is the largest health insurer in the United States." (*Id.* at 1015.) WellPoint "promise[d] to reimburse subscribers for ONS obtained from out-of-network providers at a percentage of the lesser of either (1) the actual amount of the subscribers' medical bills or (2) the UCR

[4] At the hearing, Plaintiff argued providers do not have the opportunity to negotiate reimbursements as reimbursements are presented on a take-it-or-leave-it basis and providers do not have the option to balance bill. However, this argument is not relevant to the analysis as it does not cure the pleading defect as to the "price" subject to fixing or tampering.

rate charged by providers in the same or similar geographic area for substantially the same service." (*Id.* at 1016 (cleaned up).) WellPoint contracted with Ingenix, a subsidiary of UnitedHealth Group, Inc. to obtain ONS reimbursement data. (*Id.*) Ingenix "maintains a proprietary database, which compiles ONS reimbursement data provided by various health insurance companies and provides billing rates back to those same insurance companies." (*Id.*) Ingenix had purchased the Prevailing Health Charges System, which was a database developed by the Health Insurance Association of America, a trade group for the health insurance industry, "to obtain charging information for various medical procedures" and "eventually became the largest pool of charge data for medical services in the country." (*Id.*) When Ingenix purchased the Prevailing Health Charges System, it "was in the process of acquiring more than 50 medical databases in order to acquire a dominant position in the market for the provision of data services used to calculate UCR." (*Id.* (cleaned up).) After the acquisition, Ingenix began disseminating "uniform pricing schedules that provide billing ranges for given medical procedures in various geographic locations" to participating insurers based on flawed methodology. (*Id.* at 1017.) In addition to using "purportedly flawed methodology, Ingenix and the participating insurers allegedly manipulate[d] the data in order to populate the Ingenix Database with deflated UCR figures." (*Id.*) In particular, "participating insurers 'scrub' their submissions to Ingenix by removing the highest value claims," then "Ingenix pools all of the claims submissions and removes 'high-end' values as statistical outliers." (*Id.*) Moreover, "Ingenix allegedly fails to accurately tabulate data according to geographic area" before producing pricing schedules to participating insurers. (*Id.*) "Plaintiffs allege[d] that Defendants conspired to fix ONS reimbursement rates." (*Id.* at 1025 (cleaned up).) The Court concluded "that all the alleged facts, taken as true, sufficiently allege the existence of a plausible conspiracy among Defendants and other participating insurers to use the Ingenix Database to coordinate maximum ONS reimbursements." (*Id.* at 1026; see also *id.* at 1027 ["Plaintiffs allege that participating insurers 'adopted a standard formula for making UCR determinations, based on a database that is designed and intended to reduce reported charges artificially.'"].)

WellPoint is readily distinguishable as the defendants there did not challenge the sufficiency of the allegations in the complaint on the same grounds as Defendants here. Namely, the defendants did not

raise the issue that reimbursement rates do not constitute a "price" to maintain a price-fixing or tampering claim.

Accordingly, Defendants' demurrer is sustained without leave to amend as to the first through third causes of action.[5]

C. Plaintiff Does Not Sufficiently Allege Unlawful Exchanges of Competitively Sensitive Business Information.

Defendants assert Plaintiff cannot state a cause of action for unlawful exchange of competitively sensitive business information on two grounds. (Opening Brief, 46-47.) First, Defendants argue "the submission of claims data by MultiPlan's clients to obtain OON reimbursement recommendations that are derived from its reference-based pricing methodologies and from which they make independent payment determinations, is not actionable." (*Id.* at 46.) Second, Defendants argue "Plaintiff fails to allege that the commercial insurers ever shared claims data or any other competitively-sensitive information with each other – either directly or through MultiPlan – ***much less that there was an agreement to share such data***." (*Id.* at 46-47 (emphasis in original); see also Reply, 13.)

Plaintiff seeks to state causes of action for horizontal and vertical unlawful exchanges of competitively sensitive business information. Plaintiff alleges as follows. "MultiPlan facilitated and entered into a horizontal [or vertical] combination, agreement, and/or contract with and among its Co-Conspirators" where "MultiPlan would act as a 'hub' to facilitate the submission of competitively sensitive business information, including competitively sensitive claims data, in exchange for analyses of that data and granular prices." (FAC ¶¶ 540-541, 554-555.) "The intent, purpose, and effect of this unlawful exchange of competitively sensitive information was to cause under-reimbursement for OON services, and thereby minimize reimbursement payments made on such claims among the Co-Conspirator Insurers and SFPs, and others." (*Id.* ¶ 547; see also *id.* ¶ 545 ["The exchange of competitively sensitive granular data had the purpose and effect of fixing, setting, establishing, and controlling the reimbursement amounts paid by the Co-Conspirator Insurers and SFPs, and others, for OON services to Verity and other providers."].) "The exchange of competitively sensitive information actually caused reimbursement rates

[5] As the Court finds there is no "price" that can be fixed or tampered, the Court need not reach Defendants' challenge to Plaintiff's antitrust standing and the statute of limitations. (See Opening Brief, 16-17, 23, 31-35, 48; Reply, 2, 5-9, 14, 17.)

to drop to unreasonably low anticompetitive levels and caused a decrease in reimbursement or payments for OON services that would not have occurred but for their anticompetitive conduct. Additionally, MultiPlan's anticompetitive conduct via their agreements with health insurers to fix reimbursement rates for OON services also impacted the market of reimbursement rates for in-network services." (*Id.* ¶ 548.)

"Courts have consistently found that information exchanges are sufficient circumstantial evidence of conspiracy where the exchanges are closely followed in time by price increases." (*Persian Gulf Inc. v. BP West Coast Products LLC* (S.D. Cal. 2022) 632 F.Supp.3d 1108, 1145.) However, "[t]he exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive." (*In re Static Random Access Memory (SRAM) Antitrust Litigation* (N.D. Cal. Dec. 10, 2010), 2010 WL 5138859 *6, quoting *United States v. United States Gypsum Co.* (1978) 438 U.S. 422, 441 n. 16.) "The Supreme Court has recognized the danger of collusion posed by the exchange of pricing information. Nevertheless, there is nothing inherently improper with competitors communicating with one another. Accordingly, information exchanges help to establish an antitrust violation only when either (1) the exchange indicates the existence of an express or tacit agreement to fix or stabilize prices, or (2) the exchange is made pursuant to an express or tacit agreement that is itself a violation of § 1 [of the Sherman Act] under a rule of reason analysis." (*In re Flash Memory Antitrust Litigation* (N.D. Cal. 2009) 643 F.Supp.2d 11133, 1143 (cleaned up) [finding the plaintiffs specifically alleged the "Defendants routinely exchanged highly sensitive competitive information, including pricing and production data, to facilitate and monitor their price fixing conspiracy."].)

Here, as Plaintiff does not sufficiently allege price fixing or tampering, Plaintiff likewise does not sufficiently allege an unlawful exchange of competitively sensitive business information, which is derivative of Plaintiff's price fixing and tampering allegations. (See, e.g., Opposition, 45.) "[T]he exchange of price and other business information is not invariably anticompetitive. Without more, the exchange of price information does not raise an inference of a collusive agreement to fix prices." (*In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5138859 *8 (cleaned up); see, e.g., *U.S. v. Container Corp. of America* (1969) 393 U.S. 333, 336 ["The result of this reciprocal exchange of

prices was to stabilize prices though at a downward level"].)

Accordingly, Defendants' demurrer to the fourth and fifth causes of action is sustained without leave to amend.

II. Plaintiff Does Not Sufficiently Allege a Violation of the UCL.

Defendants argue its demurrer must be sustained as to Plaintiff's UCL claim if its demurrer is sustained as to the underlying antitrust claims. (Opening Brief, 48.) At the hearing, Plaintiff conceded its UCL claim "rises and falls" with its Cartwright Act claim. Therefore, Defendants' demurrer is sustained without leave to amend as to the sixth cause of action.

CONCLUSION AND ORDER

MultiPlan Defendants' Demurrer to Plaintiff's First Amended Complaint is sustained without leave to amend.

IT IS SO ORDERED.

Dated: August 9, 2024

Anne-Christine Massullo
Judge of the Superior Court

VHS LIQUIDATING TRUST, vs. MULTIPLAN CORPORATION, et al.,	Case No: CGC-21-594966

CERTIFICATE OF ELECTRONIC SERVICE
(CCP §1010.6 & CRC §2.251)

I, Jhulie I. Roque, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am over the age of 18 years, employed in the City and County of San Francisco, California and am not a party to the within action.

On August 9, 2024, I electronically served the attached **ORDER SUSTAINING MULTIPLAN DEFENDANTS' DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT** via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: August 9, 2024

Brandon Riley, Clerk

By: _____
Jhulie I. Roque, Deputy Clerk