IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PACIFIC RECOVERY SOLUTIONS, ET AL.,

Plaintiffs,

v.

UNITED BEHAVIORAL HEALTH, ET AL.,

Defendants.

CASE NO. 4:20-cv-02249 YGR

ORDER GRANTING MOTIONS TO DISMISS WITH LEAVE TO AMEND

Re: Dkt. Nos. 38, 39

Plaintiffs[1] bring this putative class action against defendants United Behavioral Health ("United") and Viant, Inc. for claims arising out of United's alleged failure to reimburse plaintiffs "a percentage" of the Usual, Customary, and Reasonable Rates ("UCR") for Intensive Outpatient Program ("IOP") services, which plaintiffs provided to patients with health insurance policies administered by United. In the complaint, plaintiffs assert, on their own behalf and on behalf of a proposed class of similarly-situated out-of-network IOP providers, claims under Section 1 of the Sherman Act and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and multiple claims under California law.

Now pending are two motions to dismiss all claims in the complaint under Federal Rule of Civil Procedure 12(b)(6) on the grounds that: (1) plaintiffs' claims under Section 1 of the Sherman Act and RICO fail for lack of statutory standing; (2) plaintiffs' state-law claims are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"); and (3) all claims in the complaint are inadequately pleaded.

[1] Plaintiffs are Pacific Recovery Solutions d/b/a Westwind Recovery, Miriam Hamideh PhD Clinical Psychologist Inc. d/b/a PCI Westlake Centers, Bridging the Gaps, Inc., and Summit

Having carefully considered the pleadings and the parties' briefs, and for the reasons set forth below, the Court **GRANTS** the motions to dismiss **WITH LEAVE TO AMEND**.

I. BACKGROUND

Plaintiffs allege as follows. Plaintiffs are out-of-network healthcare providers who provided IOP services to patients who had health insurance policies that United administered. Compl. ¶ 2, Docket No. 1. Before providing treatment to these patients, "each of the Plaintiffs confirmed with United that the patients had active coverage and benefits for out of network IOP treatment services" through verification-of-benefits ("VOB") calls, during which United "represented" that it would pay the patients' claims in connection with such services. *Id.* ¶¶ 3, 17, 188, 195, 202, 209. The complaint references payment both "at a percentage" of the UCR and "at the UCR rate." *See, e.g.*, *id.* ¶¶ 16, 25, 74. Due to the communications in question, plaintiffs and United "understood" UCR to be "consistent with United's published definition of UCR rates." *Id.* ¶ 324; *id.* ¶ 17 n.6 (alleging that United published a definition of UCR on its webpage describing out-of-network benefits). Thus, plaintiffs provided IOP services to the patients in reliance of United's representations. *Id.* ¶¶ 3, 17, 188, 195, 202, 209.

United's representations that it would pay a percentage of the UCR were false, because "United did not pay UCR amounts for any of the patient claims at issue in this litigation." *Id.* ¶ 13. Instead, United engaged defendant Viant, a third-party "repricer," to "negotiate" reimbursements with Plaintiffs. *Id.* United has a contract with Viant pursuant to which Viant has "financial incentives" to negotiate reimbursements "at well below the UCR rate." *Id.* ¶ 33. During its negotiations with plaintiffs, Viant represented that it had authority to negotiate with providers on the patients' behalf and that "the rate it offers is based on the UCR for the provider's geographic location." *Id.* ¶¶ 34, 48, 52. Viant's negotiations with plaintiffs resulted in offers to reimburse them for IOP services at an amount below the UCR, and United paid the patients' claims at the "reduced Viant amount." *Id.* ¶¶ 13-14. Neither United nor Viant disclosed to Plaintiffs the methodology they used for calculating the reimbursement rates for IOP services. *Id.* ¶ 54. United "unjustly retained" the difference between the amounts it "should have paid" to

plaintiffs for the IOP services at issue and the amount that United actually did pay based on Viant's negotiated reimbursements. *Id.* ¶ 15.

"[L]iability for the cost of care" that plaintiffs provided to patients ultimately falls on the patients. *Id.* ¶¶ 55, 155, 4. Plaintiffs "make every effort to recover unpaid amounts, first from United, then from patients." *Id.* ¶ 55. Plaintiffs "balance bill" patients for the amounts that the patients owe after taking into account any amounts that United reimbursed. *Id.* ¶¶ 155, 4.

Further, United and other insurers were required as part of the settlement of an unrelated litigation ("*Ingenix* litigation") to underwrite the creation of a database called the "FAIR health" database, which contains rates for the reimbursement for IOP treatment. *Id.* ¶ 20. However, United and the other insurers were *not* required by the *Ingenix* litigation settlement to use the FAIR health database.[2] *Id.*

Plaintiffs assert the following claims on their own behalf and on behalf of a proposed class of similarly-situated out-of-network IOP providers in the United States: (1) a claim for violations of the Unfair Competition Law ("UCL"), Bus. & Prof. Code § 17200 *et seq.*; (2) intentional misrepresentation and fraudulent inducement; (3) negligent misrepresentation; (4) civil conspiracy; (5) breach of oral or implied contract; (6) promissory estoppel; (7) a claim under RICO, 18 U.S.C. § 1962(c); and (8) a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1.

II. LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter that, when accepted as true, states a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* While this standard is not a probability requirement, "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks and

[2] Plaintiffs argue in their opposition that United represented to them that it would reimburse them based on UCR rates in the FAIR health database. Opp'n at 9, Docket No. 47. But

citation omitted). In determining whether a plaintiff has met this plausibility standard, the Court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable" to the plaintiff. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). "[A] court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss." *Schneider v. California Dep't of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). A court should grant leave to amend unless "the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990).

III. DISCUSSION

As noted, defendants move to dismiss all claims in the complaint on the grounds that (1) plaintiffs' claims under Section 1 of the Sherman Act and RICO fail for lack of statutory standing; (2) plaintiffs' state-law claims are preempted by ERISA; and (3) all claims in the complaint are inadequately pleaded.

The Court addresses each of these arguments in turn.

A. Section 1 of the Sherman Act

Section 1 of the Sherman Act makes it unlawful to form a "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States[.]" 15 U.S.C. § 1. "To establish a claim under Section 1 of the Sherman Act, Plaintiffs must show 1) that there was a contract, combination, or conspiracy; 2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and 3) that the restraint affected interstate commerce." *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1155 (9th Cir. 2001) (citation and internal quotation marks omitted). In addition to these elements, plaintiffs also must show that they were "harmed by the defendant's anti-competitive contract, combination, or conspiracy, and that this harm flowed from an anti-competitive aspect of the practice under scrutiny." *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012) (citation and internal quotation marks omitted). This requirement is generally referred to as "antitrust standing." *Id.* (citation omitted).

Plaintiffs assert a Section 1 claim for damages and injunctive relief against defendants, which is predicated on the theory that defendants entered into a horizontal conspiracy to fix the amount that United reimbursed plaintiffs for the IOP services they provided to patients. Compl. ¶¶ 395-98. Plaintiffs allege that they were injured by the alleged conspiracy because it caused them to be "underpaid" for their services and to incur "significant additional expenses in seeking proper payment." *Id.* ¶ 406.

Defendants move to dismiss plaintiffs' Section 1 claim on the grounds that plaintiffs lack antitrust standing because the injuries they allegedly suffered are derivative of their patients' injuries, and that plaintiffs have not alleged that competition in any market was restrained, or that plaintiffs' injuries resulted from any such injury to competition.

1. Damages

a. Standing

Section 4 of the Clayton Act permits private parties to sue for damages arising out of injuries caused by violations of the federal antitrust laws. 15 U.S.C. § 15. In determining whether a private party has "antitrust standing" to sue under Section 4, courts consider the following factors: "(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages." *American Ad Management, Inc. v. General Tel. Co.*, 190 F.3d 1051, 1054-55 (9th Cir. 1999).

Here, the first factor is not met, because plaintiffs' allegations do not raise the reasonable inference that the type of injury they suffered is of the type that the antitrust laws were intended to prevent. "[T]he central purpose of the antitrust laws, state and federal, is to preserve competition." *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000). Plaintiffs allege that their patients are liable for the difference between the amount reimbursed by United and the amount owed for the cost of the IOP services at issue. Plaintiffs are "injured" only to the extent that their patients fail to pay them that difference. It appears that any such injury would arise directly from the patients' failure to comply with their financial obligations to plaintiffs, and not from defendants' conduct. Plaintiffs have cited no case that shows that the antitrust laws were

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