

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 8 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NORTHBAY HEALTHCARE GROUP,
INC.; NORTHBAY HEALTHCARE
CORPORATION,

Plaintiffs-Appellants,

v.

KAISER FOUNDATION HEALTH PLAN,
INC.; et al.,

Defendants-Appellees.

No. 18-16769

D.C. No. 3:17-cv-05005-LB

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Laurel D. Beeler, Magistrate Judge, Presiding

Argued and Submitted February 3, 2020
San Francisco, California

Before: PAEZ and BEA, Circuit Judges, and JACK,** District Judge.

Dissent by Judge BEA

Plaintiffs-Appellants NorthBay Healthcare Group, Inc. and NorthBay

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Janis Graham Jack, United States District Judge for the Southern District of Texas, sitting by designation.

Healthcare Corporation (collectively, “NorthBay”) appeal the district court’s dismissal of their antitrust claim under § 2 of the Sherman Act against Defendants-Appellees Kaiser Foundation Health Plan (“Kaiser Health”), Kaiser Foundation Hospitals, Inc. (“Kaiser Hospitals”), and The Permanente Medical Group (“Permanente”) (collectively, “Defendants”). The district court dismissed NorthBay’s antitrust claim for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). We have jurisdiction under 28 U.S.C. § 1291. Reviewing de novo, *Camacho v. Bridgeport Fin. Inc.*, 430 F.3d 1078, 1079 (9th Cir. 2005), we reverse.¹

NorthBay alleges that, amid its unprecedented investment campaign to improve its hospital facilities and services, Defendants monopolized and conspired to monopolize the healthcare-insurance market in Solano County by injuring NorthBay, in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. NorthBay identifies two campaigns Defendants undertook to achieve this goal. The first is that Permanente physicians at Kaiser’s trauma center instructed emergency personnel to “steer” uninsured and indigent patients away from two Kaiser hospitals² and toward NorthBay’s hospitals; and to “steer” insured trauma patients

¹ Because the parties are familiar with the facts and procedural history, we recount only the most pertinent ones.

² Those hospitals are Kaiser Permanente Vallejo Medical Center and Kaiser Permanente Vacaville Medical Center, each owned and operated by Kaiser Hospitals.

away from NorthBay’s hospitals and toward the same two Kaiser hospitals (the “steering” allegation). The second is that Permanente terminated a 2010 reimbursement agreement with NorthBay and began reimbursing NorthBay at less than half the previously reimbursed rate (the “reimbursement” allegation).

NorthBay further alleges that with these anticompetitive acts, Defendants would have succeeded in driving out their competitor, non-party Western Health Advantage (“Western”), whose network includes NorthBay’s hospitals. Such conduct, if true—as we must assume it to be, *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009)—is sufficient to survive the strictures under Federal Rule of Civil Procedure 8.

The district court dismissed NorthBay’s complaint on the ground that it failed to allege four essential elements of “causal antitrust injury”—an essential ingredient to both its monopolization and conspiracy to monopolize claims. We disagree.

Unlawful Conduct. Contrary to the district court’s conclusion, NorthBay sufficiently alleges Defendants engaged in “unlawful conduct.” See *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013). NorthBay asserts Permanente’s physicians at Kaiser Hospitals directed lucrative patients away from its hospitals and indigent patients towards them to drain NorthBay of its revenue. NorthBay thus goes beyond merely “recit[ing] . . . the elements” of a § 2 antitrust claim

because it describes the facts that form the alleged unlawful conduct. *See Iqbal*, 556 U.S. at 681. However “fanciful” these facts may seem is irrelevant. *See id.* (“It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (stating a court must proceed “on the assumption that all the allegations in the complaint are true (even if doubtful in fact)”). Given that only the *claim* needs to be plausible, and not the facts themselves, we disagree with the district court’s conclusion that any further factual enhancement was necessary. *See NorthBay Healthcare Grp. v. Kaiser Found. Health Plan, Inc.*, No. 17-CV-05005-LB, 2018 WL 4096399, at *7 (N.D. Cal. Aug. 28, 2018).

Similarly, the reimbursement allegations are also sufficient to meet the element of “unlawful conduct.” By terminating the 2010 reimbursement agreement and reimbursing NorthBay at substantially lower rates than originally agreed upon, Defendants exposed themselves to potential liability under California law and engaged in business activities that appear contrary to its own interests down the line, unless to achieve the immediate—and anticompetitive—goal of injuring NorthBay. *See* Cal. Health & Safety Code § 1317.2a(d) (stating third party-payor must pay the “reasonable charges” of the transferring hospital); *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610–11

(1985); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004).

Injury. NorthBay also pleads facts that are sufficient for the second element to demonstrate causal antitrust injury—that it suffered “some credible injury” caused by Defendants’ unlawful conduct. *Am. Ad Mgmt. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1056 (9th Cir. 1999). The operative complaint describes at length the financial injuries NorthBay suffered because of Defendants’ alleged steering and reimbursement practices.

Injury Flowing from Anticompetitive Conduct. Relatedly, NorthBay has adequately alleged the third element of causal antitrust injury—that its injuries “flow[ed] from an *anticompetitive* aspect or effect of the defendant’s behavior” *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001) (quotation marks omitted). NorthBay’s steering and reimbursement allegations caused financial injuries that go to the heart of anticompetitive conduct. Each campaign, according to NorthBay, was undertaken to prevent NorthBay from following through with “procompetitive investments in its hospital facilities and services.” And NorthBay alleges that Defendants’ unlawful conduct has worked because, to date, it has had to curb future investment plans, close departments, lay off employees, and reduce services available to the public. These alleged injuries to NorthBay undoubtedly “hurt competition.” *See id.* As NorthBay describes it,

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.