IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

GOLDENE SOMERVILLE,

Plaintiff,

v.

STRYKER ORTHOPAEDICS ET AL,

Defendants.
/

No. C 08-02443 JSW

ORDER GRANTING MOTION TO DISMISS WITH LEAVE TO AMEND

Now before the Court is defendant Stryker Orthopaedics and its related corporations (collectively "Stryker")'s motion to dismiss. Having carefully reviewed the parties' papers, considered their arguments and the relevant legal authority, the Court hereby GRANTS Stryker's motion to dismiss.

BACKGROUND

According to the complaint, this action arises out of an allegedly pervasive kickback scheme orchestrated by defendant Stryker, one of the largest manufacturers of artificial hip and knee replacement devices. (Complaint at ¶ 1.) The alleged scheme involved Stryker's use of phony consulting agreements with orthopedic surgeons to disguise kickbacks paid to doctors and/or hospitals in return for their use of Stryker products in patients undergoing hip and/or knee replacement surgery.

Plaintiff, Goldene Sommerville, underwent hip replacement surgery for her right hip in June 2003 and the left hip in May 2005. One or more of the Stryker products were implanted or

otherwise used during the surgeries. (*Id.* at ¶ 32.)[1] Plaintiff alleges that, as a result of the alleged kickback scheme, she incurred higher out-of-pocket costs, including an increase in co-payments and health care premiums, for hip and/or knee surgery. (*Id.* at ¶ 49.) This purported class action seeks damages based upon theories of violation of the Cartwright Act and California's Unfair Practices Act. (*Id*. at ¶ 3.)

The Court shall refer to additional facts as necessary in the remainder of this Order.

ANALYSIS

A. Legal Standard for Motion to Dismiss.

A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. The complaint is construed in the light most favorable to the non-moving party and all material allegations in the complaint are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). The court, however, is not required to accept legal conclusions cast in the form of factual allegations, if those conclusions cannot reasonably be drawn from the facts alleged. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim upon which relief may be granted. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). Even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), a plaintiff must do more than recite the elements of the claim and must "provide the grounds of [its] entitlement to relief." *Bell Atlantic Corporation v. Twombly*, 127 S. Ct. 1955, 1959 (2007) (citations omitted). In addition, the pleading must not merely allege conduct that is conceivable, but it must also be plausible. *Id.* at 1974.

B. Claim Under the Cartwright Act.

In order to set out a claim for violation of the Cartwright Act, California Business and Professions Code § 16700, *et seq*., a plaintiff must allege: (1) the formation and operation of a conspiracy; (2) illegal acts done pursuant to the conspiracy; (3) a purpose to restrain trade; and

[1] Plaintiff Claire C. Haggarty in the related, and practically identically-pled suit, *Haggarty v. Stryker*, C08-160 JSW, underwent hip replacement surgery as well and her case is adjudicated by this Order. To the extent the facts differ, the Court will so note throughout.

(4) damages caused by these acts. *See Chicago Title Ins. Co. v. Great Western Financial Corp.*, 69 Cal. 2d 305, 318 (1968) ("General allegations of the existence and purpose of the conspiracy are insufficient and appellants must allege specific overt acts in furtherance thereof.") Without sufficient allegations of the existence of an unlawful trust, combination or agreement, there cannot be a violation of the Cartwright Act. *Id.* Furthermore, there can be no conspiracy between related entities, parents and their subsidiaries, because the agreement must be between separate, independent entities capable of combining their efforts to restrain trade. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769-771 (1984) (dismissing antitrust conspiracy claim because a wholly owned subsidiary could not conspire with its parents because they have a "complete unity of interest" and "share a common purpose whether or not the parent keeps a tight rein over the subsidiary...")

Here, both parties agree that the named defendants, related parties and subsidiaries, cannot conspire amongst themselves. However, the complaint alleges that the Stryker defendants conspired with unnamed co-conspirators, surgeons performing orthopedic surgeries, in order to reap the rewards of the allegedly pervasive kickback scheme. Plaintiff alleges that the "scheme involves Stryker's use of phony consulting agreements with orthopedic surgeons to disguise kickbacks paid to doctors and/or hospitals in return for their use of Stryker products in patients undergoing hip and/or knee replacement surgery. It was through this scheme that Stryker was able to reduce competition and artificially inflate the price and cost of it [sic] hip and knee surgery products. Thus, Stryker not only created an environment where the choice of medical devices was not drive by safety, effectiveness or the needs of patients, but also one where patients actually had to pay more for the device than they otherwise should have paid." (Complaint at ¶ 1.) The claim under the Cartwright Act alleges that "Stryker and its unnamed co-conspirators have violated California's Cartwright Act ..., by forging one or more combinations to accomplish purposes prohibited by and contrary to the Cartwright Act. They engaged in one or more agreements, contracts, combinations, trusts, and or [*sic*] conspiracies to create and maintain market dominance, resulting in artificially high prices for Stryker hip and

knee surgery products, including without limitation implant devices and related products, such as bone cement." (*Id.* at ¶ 47.)

It is clear, therefore, from the allegations of the complaint, that Plaintiff alleges the conspiracy or agreement is between the various Stryker defendants and the various unnamed orthopedic surgeons (and, perhaps, hospitals) who engaged in the alleged scheme of promoting the manufacturer's orthopedic products, thereby increasing the costs. There can be, and there is no allegation that there exists a conspiracy among the various named defendants. Therefore, the sole issue is whether Plaintiff has pled sufficient allegations of the existence of an unlawful trust, combination or agreement between the various named Stryker entities and unnamed co-conspirators. *See Copperweld*, 467 U.S. at 769-771; *see also Chicago Title*, 69 Cal. 2d at 318.

In order to maintain a cause of action under the Cartwright Act, Plaintiff must "not only allege and prove the existence of an unlawful trust or combination, but also has to allege and prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination." *Chicago Title*, 69 Cal. 3d at 318 (citation omitted). "General allegations of the existence and purpose of the conspiracy are insufficient and appellants must allege specific overt acts in furtherance thereof." *Id.* Even conceding "the formation of a conspiracy is charged, having for its object a common design and purpose, still we find no statement ... as to any specific overt acts done by defendants in pursuance of that design and purpose." *Id.* (citation omitted).

The complaint fails to allege the time, place or the co-conspirators actually involved in the alleged conspiracy. There are no factual allegations regarding the contents or terms of the alleged agreements or outlining any concerted action among any unnamed co-conspirators and defendant Stryker and its related companies. There is some allusion to hospitals in the complaint and institutions in the briefing on this motion, but no factual allegations suggesting the existence of an agreement or concerted action among any hospitals or institutions and the various Stryker defendants. There are no facts indicating the identities of any of the surgeons or institutions either involved in Plaintiff's case or any other instance. There are no factual allegations indicating when or where Stryker entered any of the alleged illegal agreements with

the unnamed co-conspirators. There are no factual allegations indicating the terms of any such agreements. Without any specific allegations of an agreement, the complaint fails to comply with Federal Rule of Civil Procedure 8. *See Twombly*, 127 S. Ct. at 1971 n.10 (stating that a complaint that "mention[s] no specific time, place, or person involved in the alleged conspiracies" and "furnish[es] no clue as to ... [who] supposedly agreed, or when and where the illicit agreement took place" does not comply with Federal Rule of Civil Procedure 8.)[2]

Plaintiff's claim under the Cartwright Act fails to allege any particular wrongdoing and therefore fails to state a cause of action. However, it is conceivable that Plaintiff could amend the complaint to add facts to support an antitrust conspiracy claim. Therefore, the Court GRANTS Stryker's motion to dismiss the Cartwright Act claim with leave to amend.

C. Claim Under California Business and Professions Code Section 17200.

California's Unfair Competition Law, California Business & Professions Code § 17200 ("17200"), establishes three varieties of unfair competition – acts or practices that are unlawful or unfair or fraudulent. Because the law is stated in the disjunctive, it contemplates three distinct categories of unfair competition and a plaintiff must plead the specific rubric under which the proscribed conduct falls. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 180 (Cal. 1999).

When "a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 180 (Cal. 1999).

[2] To the extent Plaintiff relies on the Congressional testimony, it is not clear that such testimony actually referenced Stryker, as opposed to the other four hip and knee replacement products manufacturers. (*See* Supplemental Declaration of William M. Goodman, testimony of Gregory E. Demske, at 4.)

Because the Court has found that Plaintiff's antitrust claim fails, the state unfair competition claim fails as well on the same basis. The complaint, as currently drafted, does not specify conduct that threatens an incipient violation of an antitrust law.

In addition, Plaintiff alleges that the alleged conspiracy caused her to suffer financial injury by incurring out-of-pocket costs, including an increase in co-payments and health care premiums, for hip and/or knee surgery. (Complaint at ¶ 49.) The only specific amount Plaintiff asserts she incurred during her two hip replacement surgeries in June 2003 and May 2005 was the payment of "approximately $1,500 or more in out-of-pocket expenses for the surgeries." (*Id*. at ¶ 32.)[3] It is unclear from the complaint as drafted whether or what portion of those out-of-pocket expenses are attributable to increased costs of the replacement products and whether or if any of that increased cost is passed along to Stryker.

As currently drafted, the complaint does not establish either an antitrust violation or injury. Accordingly, the Court GRANTS Stryker's motion to dismiss the cause of action for violation of California's unfair competition law.[4]

D. Class Action Claims.

Lastly, Plaintiff must establish that she is actually a member of the class she purports to represent. According to the complaint, the class consists of "[a]ll individuals who are, or at the relevant time were, residents of California who either were uninsured *or had a private health care insurance policy pursuant to which they paid a percentage of the total costs of surgical procedures*, and who had hip or knee implant surgery during the Class Period that involved the use of Stryker products." (Complaint at ¶ 33 (emphasis added).) The complaint does not explicitly set out that Plaintiff has a private health care insurance policy. Even more troubling, however, is that the complaint fails to set out whether the out-of-pocket expenses incurred by Plaintiff represent a fixed co-payment or a percentage of the surgeries. Should Plaintiff seek to

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[3] Plaintiff Haggarty, in the related suit, alleges that she incurred $3,600 in out-of-pocket expenses for her surgeries. (Haggarty Complaint at ¶ 30.)

[4] The Court is not persuaded by Stryker's argument that the Court should abstain from adjudicating whether an injunction would be appropriate relief for a well-drafted claim under California's unfair competition law. The Court does not find the issue mooted as a matter of law.

amend her complaint, such facts must be alleged in order to qualify as a member of the class she purports to represent.

CONCLUSION

For the foregoing reasons, the Court GRANTS Stryker's motion to dismiss with leave to amend. Plaintiff shall file an amended complaint in compliance with this Order by no later than February 6, 2009. Stryker shall have twenty days thereafter to file their responsive pleading. If Plaintiff fails to file an amended complaint by February 6, 2009, the Court will dismiss this action with prejudice.

IT IS SO ORDERED.

Dated: January 16, 2009

JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE