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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GREENCYCLE PAINT, INC.,
Plaintiff,
v.
PAINTCARE, INC., et al.,
Defendants.

Case No. [15-cv-04059-MEJ](#)

**ORDER RE: SECOND MOTIONS TO
DISMISS**

Re: Dkt. Nos. 50-52

INTRODUCTION

Plaintiff GreenCycle Paint, Inc. (“Plaintiff”) alleges Defendants PaintCare, Inc. (“PaintCare”); Clean Harbors Environmental Services, Inc. (“Clean Harbors”); and Stericycle Environmental Solutions (“Stericycle”) (collectively, “Defendants”) violated California’s antitrust and unfair competition laws by conspiring to exclude Plaintiff from the recycled paint market. The Court dismissed Plaintiff’s initial complaint but granted Plaintiff leave to amend on all claims, which Plaintiff has done. Order, Dkt. No. 47; *see* First Am. Compl. (“FAC”), Dkt. No. 48. Defendants now again move to dismiss all claims. Clean Harbors Mot., Dkt. No. 50; PaintCare Mot., Dkt. No. 51; Stericycle Mot., Dkt. No. 52. Plaintiff filed a single Opposition to Defendants’ Motions. Opp’n, Dkt. No. 57. Clean Harbors and PaintCare each filed a Reply (Clean Harbors Reply, Dkt. No. 62; PaintCare Reply, Dkt. No. 63); Stericycle joins both Replies (Dkt. No. 65). Having considered the parties’ positions, the relevant legal authority, and the record in this case, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants’ Motions for the following reasons.

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1 **BACKGROUND**

2 **A. Defendants and the PaintCare Program**

3 The American Coatings Association (“ACA”) is the primary trade association of the paint
4 and coatings industry and represents, among other things, paint and coatings manufacturers. FAC
5 ¶ 10. The ACA created and is the sole member of PaintCare, which represents paint
6 manufacturers in their efforts to plan and operate paint stewardship programs. *Id.*

7 In 2010, California enacted the statewide Architectural Paint¹ Recovery Program (the
8 “Program”), Cal. Pub. Res. Code § 48700 et seq., to reduce leftover paint, promote its reuse and
9 recycling, and properly manage unwanted leftover paint. *Id.* ¶¶ 8, 13. The California Department
10 of Resources Recycling and Recovery (“CalRecycle”) is the state agency that oversees the
11 Program. *Id.* ¶ 9. In 2012, CalRecycle designated PaintCare as the sole steward for the Program;
12 PaintCare was the only stewardship organization that submitted a paint stewardship plan to
13 CalRecycle to implement a paint recovery program (the “PaintCare Program”). *Id.* ¶ 8. Clean
14 Harbors and Stericycle (together, the “Hauler Defendants”) are haulers that work with PaintCare
15 to transport post-consumer paint collected under the PaintCare Program. *Id.* ¶ 23.

16 To fund the PaintCare Program, consumers pay an additional \$0.35 to \$1.60 assessment on
17 all architectural paint sold in California. *Id.* ¶ 11. PaintCare receives 100% of these assessments,
18 and uses them to pay for collection bins, training materials, transportation of paint from collection
19 sites, and paint processing. *Id.* In 2015, PaintCare collected approximately \$34 million in
20 assessments. *Id.* ¶ 12.

21 **B. Plaintiff’s Efforts to Join the PaintCare Program**

22 Plaintiff was founded in 2012 as a latex paint processor and manufacturer. *Id.* ¶ 21. It
23 opened a latex paint recycling facility in Oakland, California; while operating, it was the only
24 latex paint recycler in the San Francisco Bay Area. *Id.*; *see id.* ¶¶ 19, 43.

25
26 _____
27 ¹ “Architectural paint” is defined as “interior and exterior architectural coatings, sold in containers
28 of five gallons or less for commercial or homeowner use, but does not include aerosol spray paint
or coatings purchased for industrial or original equipment manufacturer use.” Cal. Pub. Res. Code
§ 48701(a).

1 In April 2012, Plaintiff's Chief Executive Officer, Alan Beilke, entered into discussions
2 with PaintCare about participating in the PaintCare Program as a latex paint processor. *Id.* ¶ 22.
3 PaintCare introduced Plaintiff to Stericycle and Clean Harbors (together, the "Hauler
4 Defendants"). *Id.* ¶ 23. Plaintiff thereafter received contradictory information about the approval
5 process from Defendants. *See id.* ¶ 24. PaintCare advised Plaintiff to go through the Hauler
6 Defendants to facilitate receipt of paint under the PaintCare Program. *Id.* PaintCare represented
7 that recyclers had to enter into contracts with the Hauler Defendants and that the Hauler
8 Defendants decided which recycling facilities received post-consumer paint. *Id.* ¶¶ 23-24. But
9 according to Fred Gabriel of Clean Harbors, PaintCare had to approve Plaintiff as a recycler
10 before Clean Harbors could audit or approve Plaintiff for the receipt of paint. *Id.* ¶ 24.

11 In September 2012, Plaintiff again met with Defendants' representatives to discuss
12 Plaintiff's desire to participate in the PaintCare Program as a recycler. *Id.* ¶ 25. Glen Dilman of
13 Stericycle informed Beilke that Plaintiff needed to establish a paint recycling facility that was
14 ready to receive post-consumer paint before Stericycle would arrange an audit, which was required
15 prior to Plaintiff's approval to receive used paint. *Id.*

16 That month, Plaintiff moved into a 5,000 square foot facility. *Id.* ¶ 26. It was ready to
17 receive and process paint in November 2012. *Id.* By December 2012, Plaintiff had done
18 everything Defendants required to become an approved latex paint recycling facility and receive
19 paint under the PaintCare Program. *Id.* ¶ 27. Plaintiff also established its own relationship with a
20 household hazardous waste program to receive post-consumer paint and began to receive and
21 process paint from this source. *Id.* ¶¶ 27-28. Prior to closing, Plaintiff was in discussions with the
22 cities of Hayward and Emeryville, Alameda County, and the Bay Area Rapid Transit ("BART")
23 district to sell recycled paint to them. *Id.* ¶ 17.

24 Between April 2012 and April 2015, Plaintiff repeatedly met with and spoke to each
25 Defendant about receiving paint under the PaintCare Program, and Defendants took actions that
26 led Plaintiff to believe that it would be approved to receive post-consumer paint. *Id.* ¶¶ 21-40.
27 Over the course of dozens of discussions and meetings, Plaintiff was led to believe that it would
28 receive paint under the PaintCare Program. *See id.* ¶ 30 (Mark "Winkler of Stericycle told

1 GreenCycle that Stericycle had 3-4 truckloads of paint per month that needed a processor, and that
2 GreenCycle would be a suitable processor.”). Defendants’ message was that as long as Plaintiff
3 complied with certain requirements first, then it would receive paint under the PaintCare Program.
4 *Id.* ¶¶ 29, 46. Despite meeting those requirements, Plaintiff did not receive paint from Defendants.
5 *See id.* ¶¶ 27, 29.

6 Plaintiff raised its concerns at a July 2014 meeting with Defendants, CalRecycle, and
7 CalEPA. *Id.* ¶ 32. CalRecycle’s Howard Levensen urged Defendants to increase the amount of
8 paint being recycled in the Bay Area by using facilities like Plaintiff’s for paint that is collected in
9 Alameda, Contra Costa, and other Bay Area counties. *Id.* Bill Pollock, the Program Director of
10 the Alameda County Household Hazardous Waste Program, spoke directly with Gabriel about
11 using Plaintiff instead of shipping paint to an out-of-state facility. *Id.* ¶ 33. Gabriel and Kurt
12 Locke, also with Clean Harbors, immediately visited Plaintiff’s facility to make sure Plaintiff
13 could receive Clean Harbors’ roll-off bins and, in August 2014, told Plaintiff that Clean Harbors
14 would mail an audit package for it to complete. *Id.* ¶¶ 33-34. Plaintiff did not receive the
15 package. *Id.* ¶ 34.

16 In April 2014, Stericycle approved Plaintiff as a recycler for used latex paint. *Id.* ¶ 31.
17 But Plaintiff did not receive its first shipment of paint under the PaintCare Program until January
18 2015; it received its second and final shipment in March 2015. *Id.* ¶¶ 31, 40. Plaintiff received
19 only two shipments despite the fact that the amount of latex paint collected in California has
20 increased by approximately 1.4 million gallons—approximately 700 truckloads—since the first
21 year after the adoption of the Architectural Paint Recovery Program. *Id.* ¶ 41. The lack of used
22 latex paint and the realization that it was not going to receive paint under the PaintCare Program
23 forced Plaintiff to shut down its paint recycling operations in April 2015. *Id.*

24 **C. The Alleged Conspiracy**

25 Plaintiff contends it was unable to obtain paint because Defendants entered into a secret
26 agreement to exclude Plaintiff as a recycler under the PaintCare Program in order to reduce the
27 amount of recycled paint that was available in the San Francisco Bay Area market. *Id.* ¶¶ 29, 36,
28 40. PaintCare knew that the availability of recycled paint was a threat to the profits of its

1 members—the largest paint manufacturers in the country. *Id.* ¶¶ 10, 14-16, 18. The ACA,
2 PaintCare, and paint manufacturers are concerned about the negative impact that the sale of
3 recycled paint, which sells at a discount compared to mid and high-grade paint products, has on
4 their revenue and profits. *Id.* ¶¶ 15-18. Although collection facilities are concentrated in urban
5 areas, the paint collected in the Bay Area is shipped out of state, which increases total program
6 costs. *Id.* ¶ 13. The Hauler Defendants agreed to go along with PaintCare’s plan to exclude
7 Plaintiff from the market because they received larger payments for transporting paint to more
8 distant facilities in Sacramento and out-of-state. *Id.* ¶¶ 20, 48, 53. This also reduced competition
9 for paint sales in the Bay Area and maintained sales and profits of PaintCare’s members. *Id.* ¶ 48.
10 Defendants knew that they were excluding an otherwise qualified recycler from the market. *Id.* ¶
11 41.

12 Defendants’ actions also harmed Bay Area consumers by depriving them of the
13 opportunity to purchase as much as 100,000 gallons of recycled paint per year, and misled all
14 California consumers by increasing costs over those necessary to run the program. *Id.* ¶ 13.
15 Recycled paint sells for significantly less than newly-produced, or “virgin” paint; for instance,
16 Plaintiff had a contract to sell recycled paint to the City of Oakland for \$10 per gallon, while the
17 cost of virgin paint typically sells for \$25 to \$75 per gallon. *Id.* ¶ 17. Moreover, consumers pay
18 the costs for increased transportation through the recycling fee assessed on each gallon of virgin
19 paint; if Defendants used local paint recyclers, that assessment could be reduced. *Id.* ¶ 48.

20 LEGAL STANDARD

21 A court may dismiss a complaint under Rule 12(b)(6) when it does not contain enough
22 facts to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S.
23 544, 570 (2007) (internal quotation marks and citation omitted). “A claim has facial plausibility
24 when the plaintiff pleads factual content that allows the court to draw the reasonable inference that
25 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
26 “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a
27 sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 557).
28 “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual

1 allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires
2 more than labels and conclusions, and a formulaic recitation of the elements of a cause of action
3 will not do. Factual allegations must be enough to raise a right to relief above the speculative
4 level.” *Twombly*, 550 U.S. at 555 (internal citations and parentheticals omitted). In considering a
5 motion to dismiss, a court must accept all of the plaintiff’s allegations as true and construe them in
6 the light most favorable to the plaintiff. *Id.* at 550.

7 DISCUSSION

8 The FAC asserts two claims, the first under the Cartwright Act, Cal. Bus. & Prof. Code §
9 16720, and the second under California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof.
10 Code § 17200. *Id.* ¶¶ 44-57. Defendants seek to dismiss both claims.

11 A. Cartwright Act Claim

12 1. Standard of Pleading

13 The Cartwright Act makes unlawful a “trust,” defined as a combination of capital, skill, or
14 acts by two or more persons or businesses to restrict trade, limit production, increase or fix prices,
15 or prevent competition. Cal. Bus. & Prof. Code §§ 16702, 16720. The purpose of the Cartwright
16 Act is to prevent any action which “has as its *purpose* or *effect* an unreasonable restraint of trade.”
17 *Corwin v. L.A. Newspaper Serv. Bureau, Inc.*, 22 Cal. 3d 302, 314 (1978) (emphasis in original)
18 (citations omitted); *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1000 (9th Cir.
19 2008) (recognizing same).

20 “California courts” demand a “high degree of particularity in the pleading of Cartwright
21 Act violations.” *Facebook Inc. v. Power Ventures, Inc.*, 2009 WL 3429568, at *2 (N.D. Cal. Oct.
22 22, 2009) (internal quotation marks omitted) (discussing and applying *Twombly* to Cartwright Act
23 claims). “It is not enough merely to include conclusory allegations that certain actions were the
24 result of a conspiracy; the plaintiff must allege facts that make the conclusion plausible.”
25 *Name.Space*, 795 F.3d at 1129 (citing *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047-48 (9th
26 Cir. 2008)). “This standard does not impose a ‘probability requirement,’ but ‘simply calls for
27 enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal
28 agreement.’” *Id.* (quoting *Twombly*, 550 U.S. at 556).

1 As such, “Cartwright Act claims are properly dismissed ‘where the complaint makes
2 conclusory allegations of a combination and does not allege with factual particularity that separate
3 entities maintaining separate and independent interests combined for the purpose to restrain
4 trade.’” *In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308, 320 (N.D. Cal. 2007) (quoting
5 *Freeman v. San Diego Ass’n of Realtors*, 77 Cal. App. 4th 171, 189 (1999)). Among other things,
6 when faced with two possible explanations for a defendant’s behavior, a plaintiff cannot offer
7 allegations that are “merely consistent with” their favored explanation but are also consistent with
8 the defendant’s alternative explanation. *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104,
9 1108 (9th Cir. 2013) (citing *Iqbal*, 556 U.S. at 678). “Something more is needed, such as facts
10 tending to exclude the possibility that the alternative explanation is true, . . . in order to render
11 plaintiffs’ allegations plausible within the meaning of *Iqbal* and *Twombly*.” *Id.* But where a
12 plaintiff’s allegations are stuck in “neutral territory,” i.e., they do not tend to exclude the innocent
13 explanation, such allegations fall short of what *Iqbal* and *Twombly* require. *See id.* at 1108-10
14 (affirming dismissal of Securities Act claim where plaintiffs’ allegations were “merely consistent
15 with both their explanation and the defendants’ competing explanation”); *see also Gonzalez v.*
16 *Planned Parenthood of L.A.*, 759 F.3d 1112, 1116 (9th Cir. 2014), *cert. denied sub nom. Gonzalez*
17 *v. Planned Parenthood of L.A., Cal.*, 135 S. Ct. 2313 (2015) (affirming dismissal where plaintiff’s
18 allegation that defendant knowingly submitted false claims was only “merely *possible* rather than
19 plausible,” and could not overcome the plausible and obvious explanation that defendant did not
20 knowingly submit false claims (internal quotation marks omitted; emphasis in original)); *Eclectic*
21 *Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014) (explaining that
22 courts “must consider” “obvious alternative explanation[s]” for a defendant’s behavior when
23 analyzing plausibility); *Somers v. Apple, Inc.*, 729 F.3d 953, 965 (9th Cir. 2013) (affirming
24 dismissal of antitrust claim in part due to an obvious alternative explanation for music pricing).

25 2. Analysis

26 To establish liability under Section 1 of the Sherman Act (and consequently, the
27 Cartwright Act), “a plaintiff must prove (1) the existence of an agreement, and (2) that the
28 agreement was in unreasonable restraint of trade.” *Aerotec Int’l, Inc. v. Honeywell Int’l, Inc.*, 836

1 F.3d 1171, 1178 (quoting *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 189-90
2 (2010)).²

3 a. *Agreement*

4 Plaintiff alleges facts to show that Defendants' acts were concerted. To plausibly plead a
5 conspiracy, an antitrust plaintiff must allege "parallel behavior that would probably not result from
6 chance, coincidence, independent responses to common stimuli, or mere interdependence unaided
7 by an advance understanding among the parties." *Twombly*, 550 U.S. at 556 n.4 (quoting 6
8 Areeda & Hovenkamp, *Antitrust Law* § 1425, at 167-85 (2d ed. 2003)). The conspirators must
9 have a unity of purpose or a common design and understanding. *Am. Tobacco Co. v. United*
10 *States*, 328 U.S. 781, 810 (1946); *see also William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 588
11 F.3d 659, 663 (9th Cir. 2009) ("Whether a plaintiff pursues a per se claim or a rule of reason claim
12 . . . , the first requirement is to allege a 'contract, combination in the form of trust or otherwise, or
13 conspiracy.'").

14 Plaintiff has now "plead[ed] not just ultimate facts (such as a conspiracy), but evidentiary
15 facts" in support of the elements of its claims. *William O. Gilley Enters.*, 588 F.3d at 659.
16 Plaintiff alleges that PaintCare—the sole stewardship organization of California's Architectural
17 Paint Recovery Program—was created by the ACA, which is owned by the largest paint
18 manufacturers in the country. FAC ¶¶ 8-10. The FAC alleges PaintCare considers recycled paint
19 to be a threat to its owners' profits because virgin paint, sells for significantly more than recycled
20 paint. *Id.* ¶¶ 14-18, 48. Plaintiff contends that to prevent cheaper recycled paint from competing
21 with more expensive virgin paint in the lucrative Bay Area market, Defendants agreed that Clean
22 Harbors and Stericycle would ship paint to more distant recycling facilities, thus removing the
23 threat of recycled paint in the Bay Area to PaintCare's owners. *Id.* ¶ 20. In doing so, Defendants

24 _____
25 ² "The analysis under [the Cartwright Act] mirrors the analysis under federal law because [it] was
26 modeled after the Sherman Act." *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160
27 (9th Cir. 2001) (citations omitted); *Name.Space, Inc. v. Internet Corp. for Assigned Names &*
28 *Numbers*, 795 F.3d 1124, 1131 n.5 (9th Cir. 2015) ("Because analysis under the Cartwright Act is
identical to that under the Sherman Act, we also affirm the district court's dismissal of the
Cartwright Act claim." (citations omitted)).

1 also agreed to refuse to do business with Plaintiff to prevent it from recycling paint in the Bay
 2 Area (so Stericycle and Clean Harbors could collect higher payments for shipping³) and to prevent
 3 additional recycled paint from entering the Bay Area market (and risk competition with
 4 PaintCare’s owners). *Id.* ¶¶ 20-21, 41. Plaintiff lists numerous examples where Defendants
 5 plausibly appear to have coordinated their efforts to prevent Plaintiff from entering the market and
 6 competing (*id.* ¶¶ 19-20, 23-25, 27, 29, 31, 33-34, 36, 39), which “reasonably tends to prove that
 7 the [defendant] and others had a conscious commitment to a common scheme designed to achieve
 8 an unlawful objective.” *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764
 9 (1984) (internal quotation marks omitted); *see also Beltz Travel Serv. Inc. v. Int’l Air Transp.*
 10 *Ass’n*, 620 F.2d 1360, 1366-67 (9th Cir. 1980) (“Participation by each conspirator in every detail
 11 in the execution of the conspiracy is unnecessary to establish liability, for each conspirator may be
 12 performing different tasks to bring about the desired result.”).

13 b. *Unreasonable Restraint of Trade*

14 Plaintiff’s FAC provides plausible allegations establishing both of these elements. While
 15 Plaintiff does not explicitly articulate a specific theory of antitrust liability (e.g., group boycott,
 16 refusal to deal, price-fixing, etc.)⁴, it now provides sufficient factual allegations plausibly
 17 establishing Defendants agreed not to do business with Plaintiff with the “rationale or purpose” to
 18 exclude competition. *See Aerotec*, 2016 WL 4709868, at *9; *see also In re High-Tech Emp.*
 19 *Antitrust Litig.*, 856 F. Supp. 2d 1103, 1118 (N.D. Cal. 2012) (in antitrust conspiracy cases,
 20 “plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the
 21 various factual components and wiping the slate clean after scrutiny of each [T]he character
 22 and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts,
 23

24 ³ PaintCare and Clean Harbors dispute this allegation. *See PaintCare Mot.* at 3; *Clean Harbors*
 25 *Mot.* at 7. On a motion to dismiss, resolution of such disputes of fact is inappropriate.

26 ⁴ The precise antitrust theory impacts whether the alleged conspiracy is properly considered as a
 27 vertical or horizontal restraint of trade and whether to apply a *per se* illegality analysis or “rule of
 28 reason” analysis. The Court need not decide now whether *per se* or rule of reason analysis
 applies; “that decision is more appropriate on a motion for summary judgment.” *In re High-Tech*
Emp. Antitrust Litig., 856 F. Supp. 2d at 1122 (citing cases).

1 but only by looking at it as a whole. . . .” (quoting *Continental Ore Co. v. Union Carbide &*
2 *Carbon Corp.*, 370 U.S. 690, 699 (1962)).

3 Although it is not necessary to determine whether the *per se* or rule of reason analysis
4 applies at this stage, Plaintiff has alleged a theory of antitrust injury as well. *See In re High-Tech*
5 *Empl. Antitrust Litig.*, 856 F. Supp. 2d at 1122 (inappropriate to determine whether rule of reason
6 or *per se* analysis applies until summary judgment); *Pecover v. Elecs. Arts Inc.*, 633 F. Supp. 2d
7 976, 983 (N.D. Cal. 2009) (for Cartwright Act claim, deferring market analysis under rule of
8 reason until after deciding motion to dismiss). “[T]he Cartwright Act, like all antitrust laws, is
9 about the protection of *competition*, not *competitors*.” *Asahi Kasei Pharma Corp. v. CoTherix,*
10 *Inc.*, 204 Cal. App. 4th 1, 20 (2012) (internal quotation marks and citations omitted; emphasis in
11 original); *see also Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.*, 198 Cal.
12 App. 4th 1366, 1378 (2011), *as modified on denial of reh’g* (Sept. 29, 2011) (“[T]he antitrust
13 injury requirement applies to cases alleging conduct that is per se unlawful as well as to cases
14 governed by the rule of reason.”). “The antitrust injury requirement ensures that a plaintiff can
15 recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant’s
16 behavior.” *Flagship Theatres*, 198 Cal. App. 4th at 1379 (emphasis in original) (quoting *Atl.*
17 *Richfield Co.*, 495 U.S. at 344). “Vertical agreements that foreclose competitors from entering or
18 competing in a market can injure competition by reducing the competitive threat those competitors
19 would pose.” *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir. 2012).
20 Additionally, “[s]ome types of vertical agreements can also injure competition by facilitating
21 horizontal collusion.” *Id.* (citation omitted); *see also In re Musical Instruments & Equip. Antitrust*
22 *Litig.*, 798 F.3d 1186, 1199 n.3 (9th Cir. 2015) (antitrust conspiracy may include a so-called
23 “rimless hub-and-spoke conspiracy” where “various defendants enter into separate agreements
24 with a common defendant, but where the defendants have no connection with one another other
25 than the common defendant’s involvement in each transaction.”).

26 c. *Beyond Neutral Territory*

27 Taking the allegations in the light most favorable to Plaintiff, the FAC now takes
28 Plaintiff’s allegations out of “neutral territory” and excludes the innocent explanations Defendants

1 offered that Plaintiff was somehow unqualified to accept recycled paint. *See In re Century*
2 *Aluminum*, 729 F.3d at 1108. Plaintiff affirmatively alleges that even after it had done “everything
3 that had been asked of it, and had continued to make efforts to meet each new requirement
4 imposed upon it” Defendants still would not allow it to recycle paint. FAC ¶¶ 27, 29. Plaintiff
5 alleges that “while it was in operation it was the only latex paint recycler in the San Francisco Bay
6 Area” and other entities had successfully used it to recycle paint. *Id.* ¶¶ 21, 27, 38; *see also id.* ¶¶
7 19-20, 41 (alleging Defendants shipped paint out of state for recycling, which all Defendants stand
8 to profit from). But even after Stericycle approved Plaintiff as a recycler for used latex paint,
9 Plaintiff did not receive a single gallon of used paint from Stericycle or any other hauler in the
10 PaintCare program for eight months. *Id.* ¶¶ 31, 41 (“[D]efendants were aware of GreenCycle’s
11 successful track record in processing post-consumer paint, had visited the facility and had
12 approved of its operations” but still did not send it paint). The Court previously noted Plaintiff’s
13 allegations that PaintCare was conspiring to suppress the recycling of latex paint “lack[ed]
14 plausibility as it appears to run counter to the whole purpose of PaintCare’s mission under the
15 Program and for which CalRecycle has selected PaintCare.” Order at 9. Plaintiff’s new
16 allegations clarifies PaintCare’s motivation to allow its owners to sell the more expensive virgin
17 paint and not having to compete with Plaintiff for selling more affordable recycled paint and makes
18 the alleged conspiracy sufficiently plausible. This is particularly true as Plaintiff has plausibly
19 pled it had done all Defendants asked of it to be qualified to receive paint for processing. *See*
20 *Aerotec*, 2016 WL 4709868, at *9 (there is “no duty to deal under the terms and conditions
21 preferred by a competitor’s rivals,” but there is a duty not to refrain from dealing where the “only
22 conceivable rationale or purpose” is “to obtain higher profits in the long run from the exclusion of
23 competition” (internal quotation marks and brackets omitted)); *cf. Name.Space, Inc.*, 795 F.3d at
24 1130 (9th Cir. 2015) (“[A]bsent allegations that suggest [defendant’s] decisions were illogical or
25 suspicious” rational, independent business decisions not subject to antitrust liability). PaintCare
26 attempts to argue the “uncontested facts” show other recyclers had “much more experience and a
27 proven track record of success.” PaintCare Mot. at 11 n.4. This is a consideration for summary
28 judgment—not a motion to dismiss. Consequently, taking Plaintiff’s well-pleaded allegations as

1 true, it plausibly alleges an antitrust conspiracy.

2 The FAC alleges Defendants’ conspiracy prevented Plaintiff from participating in the
3 PaintCare Program, which in turn prevented millions of dollars of lower-priced recycled paint
4 from entering the Bay Area market. FAC ¶¶ 17, 21, 47-48; Opp’n at 14. Plaintiff alleges it could
5 have sold its recycled paint directly to consumers, had a contract with the City of Oakland, and
6 was in discussion to sell to several other government entities in the Bay Area. FAC ¶¶ 17, 21⁵; *see*
7 *Brantley*, 675 F.3d at 1198 (“[P]laintiffs must plead an injury to competition beyond the impact on
8 the plaintiffs themselves.”). Plaintiff has also alleged plausible facts that the market itself was
9 injured by Defendants’ anticompetitive conduct when they refused to allow Plaintiff to participate
10 in the PaintCare program. *See Flagship Theatres*, 198 Cal. App. 4th at 1379-80 (conduct that is
11 otherwise forbidden by the Cartwright Act “is not to be tolerated merely because the victim is just
12 one merchant whose business is so small that his destruction makes little difference to the
13 economy”—an antitrust plaintiff “need not show that the market has actually become less
14 competitive than it would have been without the defendant’s conduct”).

15 PaintCare’s citation to its agreement with the City and County of San Francisco (“San
16 Francisco”) to make some reprocessed paint available to the public for free does not necessarily
17 diminish the potential injury to competition and Bay Area consumers so as to make Plaintiff’s
18 claim implausible. *See* PaintCare Mot. at 1 (contending that under an agreement between
19 PaintCare and San Francisco, reprocessed paint is made available to the public for free by San
20 Francisco-managed facilities, *citing* PaintCare Request for Judicial Notice, Ex. K at p.6; Ex. M;
21 Ex. N). As discussed above, the FAC alleges Plaintiff had the capacity to recycle large amounts of
22 paint and to sell that paint to consumers in the Bay Area at a much lower cost than PaintCare’s
23 members sold virgin paint—but “Defendants conspired to exclude Plaintiff in order *to reduce and*
24 _____

25 ⁵ These allegations counter PaintCare’s arguments that (1) Plaintiff has not shown how its
26 presence in the market would increase the amount of paint available (PaintCare Mot. at 14); (2)
27 Plaintiff “does not allege any facts to support its speculation that without Plaintiff’s particular
28 Oakland recycling plant, there would be less recycled paint available to consumers in the Bay
Area to compete with virgin paint” (PaintCare Reply at 2); and (3) “Plaintiff pleads
no facts suggesting that the location of a recycler has any relationship to the availability of
recycled paint in that same geographic area” (PaintCare Mot. at 9 (emphasis omitted)).

1 control the supply of recycled paint in the Bay Area market.” Opp’n at 16 (emphasis added).
2 Even if the Court relied on PaintCare’s evidence about the contract with the City and County of
3 San Francisco, as *Twombly* explicitly acknowledges, “a well-pleaded complaint may proceed even
4 if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very
5 remote and unlikely.” 550 U.S. at 556 (internal quotation marks omitted).

6 At this point, Plaintiff’s FAC adequately states a Cartwright Act claim.

7 **B. UCL**

8 California’s UCL proscribes three types of unfair competition: “practices which are
9 unlawful, unfair or fraudulent.” *In re Tobacco II Cases*, 46 Cal. 4th 298, 311 (2009) (internal
10 quotation marks and citation omitted); *see also* Cal. Bus. & Prof. Code § 17200 (defining unfair
11 competition to include “any unlawful, unfair or fraudulent business act or practice”). “Each prong
12 of the UCL is a separate and distinct theory of liability,” and “an independent basis for relief.”
13 *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir. 2007) (citation omitted).
14 Plaintiff alleges Defendants’ conduct violates all three prongs.

15 1. Unlawful and Unfair Prongs

16 “By proscribing ‘any unlawful’ business practice, § 17200 borrows violations of other laws
17 and treats them as unlawful practices that the unfair competition law makes independently
18 actionable.” *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999)
19 (internal quotation marks omitted). In other words, claims raised under the UCL’s unlawful prong
20 rise or fall with the Court’s determination of liability with respect to the underlying violation. *See*
21 *Krantz v. BT Visual Images*, 89 Cal. App. 4th 164, 178 (2001).

22 “[W]ith respect to business-competitor cases, to state a claim under the UCL’s ‘unfair’
23 prong the alleged unfairness must ‘be tethered to some legislatively declared policy or proof of
24 some actual or threatened impact on competition.’” *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1136 (9th
25 Cir. 2014) (quoting *Cel-Tech Commc’ns*, 20 Cal. 4th at 186-87 (an act or practice is “unfair” under
26 the UCL only if the conduct “threatens an incipient violation of an antitrust law, or violates the
27 policy or spirit of one of those laws because its effects are comparable to or the same as a violation
28 of the law, or otherwise significantly threatens or harms competition.”)). “[W]here the same

1 conduct alleged to be unfair under the UCL is also alleged to be a violation of another law, the
2 UCL claim rises or falls with the other claims.” *Hicks v. PGA Tour, Inc.*, 165 F. Supp. 3d 898,
3 911 (N.D. Cal. Feb. 9, 2016) (citation omitted).

4 Because the Court has found Plaintiff properly alleges a Cartwright Act violation, it finds
5 Plaintiff has also sufficiently stated a UCL claim under the unlawful and unfair prongs. *See*
6 *Prakashpalan v. Engstrom, Lipscomb & Lack*, 223 Cal. App. 4th 1105, 1133 (2014), *as modified*
7 *on denial of reh’g* (Feb. 27, 2014) (“[A] violation of another law is a predicate for stating a cause
8 of action under the UCL’s unlawful prong.”); *Scripps Clinic v. Superior Court*, 108 Cal. App. 4th
9 917, 940 (2003) (UCL unfair prong claim “must be ‘tethered’ to specific constitutional, statutory
10 or regulatory provisions.” (citations omitted)). While Defendants challenge Plaintiff’s allegations
11 of injury under the UCL, the Court finds Plaintiff has also alleged sufficient injury to support its
12 UCL claim: as a result of Defendants’ agreement and concerted action to exclude Plaintiff from
13 receiving paint under the PaintCare Program, Plaintiff suffered financial losses and consumers in
14 the San Francisco Bay Area have been harmed. *See* FAC ¶¶ 17, 21, 47-48; Opp’n at 21.

15 3. Fraudulent Prong

16 “To establish an unfair competition claim under the fraudulent prong, plaintiffs must show
17 that [the defendant’s] representations were false or were likely to have misled reasonable
18 consumers.” *Belton v. Comcast Cable Holdings, LLC*, 151 Cal. App. 4th 1224, 1241 (2007)
19 (internal quotation marks omitted); *see also State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal.
20 App. 4th 1093, 1105 (1996) (“The test is whether the public is likely to be deceived. [Citation.]
21 This means that a section 17200 violation, unlike common law fraud, can be shown even if no one
22 was actually deceived, relied upon the fraudulent practice, or sustained any damage. [Citation.]”).
23 “The standard for finding a likelihood of deception is that of a reasonable consumer who is neither
24 the most vigilant and suspicious of advertising claims nor the most unwary and unsophisticated,
25 but instead is ‘the ordinary consumer within the target population.’” *Ehret v. Uber Techs., Inc.*, 68
26 F. Supp. 3d 1121, 1137 (N.D. Cal. 2014) (internal quotation marks omitted).

27 Defendants argue the FAC does not allege Defendants made representations to consumers,
28 upon which consumers relied to their detriment. PaintCare Mot. at 18. As the Court pointed out

1 in its prior Order,

2 Plaintiff is not clear about which Defendants made what
3 misrepresentations to the public or how specifically they misled
4 consumers regarding the costs of the Program or its benefits. *See*
5 Fed. R. Civ. P. 9(b) ('a party must state with particularity the
6 circumstances constituting fraud'). Without more, it cannot
7 maintain its UCL claims under the fraud prong.

8 Order at 19. Plaintiff has not clarified these claims in its FAC, noting only in a conclusory fashion
9 that "[D]efendants' actions violated state law, including California Public Resources Code §
10 48703(b)(4), resulted in an unfair competitive market for the sale of paint, reduced the choices that
11 Bay Area consumers had when purchasing paint, and was conducted in an effort to mislead
12 GreenCycle and the public." FAC ¶ 54. But there are no allegations about what representations
13 Defendants made and when or how such representations were likely to mislead the public. While
14 the Court can speculate about how Plaintiff may be able to assert such claims, at this point, it has
15 failed to do so despite having an opportunity to cure the initial Complaint's deficiencies. As such,
16 the Court DISMISSES Plaintiff's UCL fraudulent practices claim WITHOUT LEAVE TO
17 AMEND.

18 4. Standing

19 Clean Harbors also challenges Plaintiff's standing to bring a UCL claim. Clean Harbors
20 Mot. at 10. In order to have standing under the UCL, a plaintiff must show that it "has suffered
21 injury in fact and has lost money or property as a result of such unfair competition." Cal. Bus. &
22 Prof. Code § 17204. In addition, where a plaintiff alleges a UCL claim against multiple
23 defendants, it must allege that it "suffered injury in fact or lost money or property as a result of
24 alleged unfair competition" of each defendant. *Schulz v. Neovi Data Corp.*, 152 Cal. App. 4th 86,
25 92 (2007) (brackets omitted). Clean Harbors contends "Plaintiff merely alleges that it 'lost time
26 and effort, lost profits and eventually GreenCycle was required to shut down because it was unable
27 to obtain sufficient used paint . . . to continue to viably operate its recycling facility.'" Clean
28 Harbors Mot. at 10 (quoting FAC ¶ 55). But it contends this allegation is insufficient, "as Plaintiff
does not allege the loss of money or Property as a direct result of [Clean Harbor]'s alleged
conduct." *Id.*

1 The Court disagrees. As discussed above, Plaintiff alleges Clean Harbors and the other
2 Defendants violated California’s Cartwright Act and conspired to exclude Plaintiff from the
3 recycled latex paint market. As a result of the exclusion, Plaintiff was allegedly unable to obtain
4 used paint and had to close its business. These allegations are sufficient to show Plaintiff lost
5 money or property as a result of all Defendants’ acts. *See Hinojos v. Kohl’s Corp.*, 718 F.3d 1098,
6 1104 (9th Cir. 2013), *as amended on denial of reh’g and reh’g en banc* (July 8, 2013) (“The ‘lost
7 money or property’ requirement . . . requires a plaintiff to demonstrate some form of economic
8 injury as a result of his transactions with the defendant, . . . although the quantum of lost money or
9 property necessary to show standing is only so much as would suffice to establish Article III
10 injury in fact[.]” (internal quotation marks, citation, and brackets omitted)).

11 **C. Safe Harbor Provision**

12 PaintCare argues Plaintiff’s Cartwright Act and UCL claims are barred by the Safe Harbor
13 Provision of California Public Resources Code (“PRC”) section 48706. PaintCare Mot. at 18-21.
14 PaintCare raised this issue in its first Motion to Dismiss; however, because the Court did not find
15 Plaintiff stated a claim for either its Cartwright Act or UCL claim, it did not consider the
16 applicability of the Safe Harbor Provision. Order at 5. The Court also noted that no other court
17 had yet interpreted this provision and none of the parties had provided any legislative history and
18 other materials that may have assisted the Court in interpreting this provision. *Id.* Now, as the
19 Court has found Plaintiff has stated a claim for violations of the Cartwright Act and UCL against
20 PaintCare, the Court must consider the Safe Harbor Provision.

21 1. Interpretation of State Law

22 Federal courts interpreting a state law look to the state’s rules of statutory interpretation
23 and attempt to determine what meaning the state’s highest court would give it. *See Turnacliff v.*
24 *Westly*, 546 F.3d 1113, 1117-18 (9th Cir. 2008). The “ultimate task” in statutory interpretation “is
25 to ascertain the legislature’s intent.” *People v. Massie*, 19 Cal. 4th 550, 569 (1998). California
26 courts have established a three-step process of statutory interpretation to determine legislative
27 intent. *See MacIsaac v. Waste Mgmt. Collection & Recycling, Inc.*, 134 Cal. App. 4th 1076, 1082
28 (2005) (“[T]he key to statutory interpretation is applying the rules of statutory construction in their

1 proper sequence.”).

2 First, courts “scrutinize the actual words of the statute, giving them a plain and
3 commonsense meaning.” *Gomez v. Superior Court*, 54 Cal. 4th 293, 300 (2012) (quoting
4 *Goodman v. Lozano*, 47 Cal. 4th 1327, 1332 (2010)). If the “language of the statute is not
5 ambiguous, the plain meaning controls and resort to extrinsic sources to determine the
6 Legislature’s intent is unnecessary.” *Id.* (quoting *Ste. Marie v. Riverside Cty. Reg’l Park & Open-*
7 *Space Dist.*, 46 Cal. 4th 282, 288 (2009)). When the wording of the statute is ambiguous or
8 permits more than one reasonable interpretation, courts move to the second step of the inquiry.
9 *See Alejo v. Torlakson*, 212 Cal. App. 4th 768, 787 (2013). In this step, a court may turn to
10 secondary rules of interpretation, such as “maxims of construction,” *People v. Smith*, 32 Cal. 4th
11 792, 798 (2004), “the statutory scheme of which the provision is a part, the history and
12 background of the statute, the apparent purpose, and any considerations of constitutionality,”
13 *Hughes v. Bd. of Architectural Exam’rs*, 17 Cal. 4th 763, 776 (1998). “If ambiguity remains after
14 resort to secondary rules of construction . . . then [courts] must cautiously take the third and final
15 step in the interpretive process.” *Alejo*, 212 Cal. App. 4th at 788. In this step, courts apply
16 “reason, practicality, and common sense to the language at hand.” *Id.*

17 2. Statutory Language & Analysis

18 The Court finds the Safe Harbor Provision’s plain language does not bar Plaintiff’s claims.
19 PRC section 48706 states:

- 20 (a) Except as provided in subdivision (c), an action solely to
21 increase the recycling of architectural paint by a producer,
22 stewardship organization, or retailer that affects the types or
23 quantities being recycled, or the cost and structure of any return
24 program, is not a violation of the statutes specified in
25 subdivision (b).
- 26 (b) The following statutes are not violated by an action specified in
27 subdivision (a):
- 28 (1) The Cartwright Act (Chapter 2 (commencing with
Section 16700) of Part 2 of Division 7 of the Business
and Professions Code).
 - (2) The Unfair Practices Act (Chapter 4 (commencing with
Section 17000) of Part 2 of Division 7 of the Business
and Professions Code).

1 (c) Subdivision (a) shall not apply to any agreement establishing or
2 affecting the price of paint, except for the architectural paint
3 stewardship assessment, or the output or production of paint, or
4 any agreement restricting the geographic area or customers to
5 which paint will be sold.

6 Cal. Pub. Res. Code § 48706.

7 PaintCare interprets section 48706 to protect it from both of Plaintiff’s claims. It contends
8 Plaintiff’s allegations concern the “types or quantities [of paint] being recycled, or the cost and
9 structure” of the “return program.” PaintCare Mot. at 20 (quoting Cal. Pub. Res. Code §
10 48706(a)). As such, PaintCare argues “Plaintiff []cannot avoid the Safe Harbor unless it alleges
11 facts showing an ‘agreement establishing or affecting the price of paint, except for the
12 architectural paint stewardship assessment, or the output or production of paint, or any agreement
13 restricting the geographic area or customers to which paint will be sold.’” *Id.* (quoting Cal. Pub.
14 Res. Code § 48706(c)). PaintCare contends this must involve agreements to engage in the type of
15 price fixing, supply manipulation, or territorial market allocations that are the standard target of
16 the Cartwright Act. *Id.* (citing Cal. Anti. & Unfair Comp. L. § 2.07, *Market Allocation*
17 *Agreements*). PaintCare avers Plaintiff has not alleged such facts and urges the Court to prohibit
18 Plaintiff’s claims under the Safe Harbor, arguing “Plaintiff’s attempt through this litigation to
19 change this important statutory program so as to advance its own private financial interests is
20 exactly what the Safe Harbor Provision is designed to prevent.” *Id.* at 21.

21 Plaintiff does not disagree that it is challenging an action related to “types or quantities [of
22 paint] being recycled, or the cost and structure” of the “return program.” Plaintiff instead focuses
23 on the first part of section 48706(a), which limits application of the safe harbor protections to “an
24 action solely to increase the recycling of architectural paint by a . . . stewardship organization[.]”
25 Cal. Pub. Res. Code § 48706(a). As Plaintiff points out, PaintCare’s Motion “ignores the initial
26 clause of Section 48706(a) (providing protection only to actions ‘solely to increase the recycling
27 of architectural paint’)[.]” Opp’n at 20. Plaintiff interprets the Safe Harbor to “only appl[y] to
28 actions taken in order to increase the amount of recycled paint that also affect the types or
quantities of paint that is being recycled or the cost structure of the return program.” *Id.*

Plaintiff emphasizes that it has alleged “that rather than taking action solely to increase the

1 recycling of architectural paint, PaintCare’s actions excluded GreenCycle and other latex paint
2 recycling facilities from entering the San Francisco Bay Area market.” Opp’n at 20 (citing FAC
3 ¶¶ 45, 53). This, “even when viewed in a light most favorable to PaintCare, either reduced or had
4 no overall impact on the recycling of architectural paint.” *Id.* Put another way, Plaintiff contends
5 the Safe Harbor Provision is implicated “if PaintCare modifies the surcharge on all paint sold
6 across the state in order to increase recycling[;] that action would be protected by the safe harbor
7 provision.” *Id.* “But[] entering into a conspiracy with the haulers to prevent a recycling facility
8 from operating in the Bay Area is not an act solely to increase the recycling of architectural paint
9 and, for that simple reason, is not covered by the safe harbor provision.” *Id.*

10 PaintCare appears to attack Plaintiff’s interpretation of the Safe Harbor’s limitation to
11 discrete actions “solely” to increase the recycling of architectural paint. *See* PaintCare Reply at
12 13-14. PaintCare states:

13 Plaintiff argues that its claims do not fall within the scope of the safe
14 harbor provision because it has not alleged conduct that was taken
15 by “a producer, stewardship organization, or retailer” “solely to
16 increase the recycling of architectural paint . . . that affects the types
17 or quantities being recycled, or the cost and structure of the return
18 program.” Opp. at 19 (*quoting* PRC § 48706). Plaintiff cannot
19 escape the safe harbor so easily. As this Court found, Plaintiff’s
20 allegations “appear[] to run counter to the whole purpose of
21 PaintCare’s mission under the Program and for which CalRecycle
22 has selected PaintCare.” Order at 9:13-15. Theoretically, any one
component of the Program – whether it be, *e.g.*, the selection of
recyclers or the location of collection bins or the terms of
PaintCare’s contracts with the haulers – could be claimed in
isolation to not be necessary to increase recycling. But the Program
as a whole – as confirmed by CalRecycle – is designed solely to
increase recycling, and PaintCare’s decisions in implementing the
components of that Program must be covered by the safe harbor for
that provision to have any meaning.

23 PaintCare Reply at 13 (*italics in original*). PaintCare thus contends the Safe Harbor Provision
24 protects any actions taken pursuant to the Program, which it asserts “is designed to increase the
25 recycling of architectural paint.” Suppl. Br. at 3, Dkt. No. 67. PaintCare argues without citation
26 that its “decisions in implementing the components of that Program must be covered by the safe
27 harbor for that provision to have any meaning.” PaintCare Reply at 13; *see* Suppl. Br. at 4 (“To
28 provide any possible safe harbor; *i.e.*, to have any possible meaning or effect, the words ‘an action

1 solely to increase the recycling of architectural paint’ must refer to the paint stewardship program
2 as a whole.”).

3 The Court disagrees that the Safe Harbor Provision should be interpreted so broadly.
4 Courts “presume the Legislature intended everything in a statutory scheme, and . . . do not read
5 statutes to omit expressed language or to include omitted language.” *Tyrone W. v. Superior Court*,
6 151 Cal. App. 4th 839, 850 (2007). Section 48706 does not define “an action” to mean any action
7 taken to implement the paint stewardship program, and PaintCare provides no support for this
8 interpretation. Section 48706 does, however, set specific parameters as to what actions are
9 protected. The Safe Harbor Provision identifies only one type of protected action and the laws
10 which such an action does not violate: it shields “[1] an action solely to increase the recycling of
11 architectural paint [2] by a producer, stewardship organization, or retailer that [3] affects the types
12 or quantities being recycled, or the cost and structure of any return program” from Cartwright Act
13 or the UCL claims. Cal. Pub. Res. Code § 48706(a)-(b).

14 Indeed, PaintCare’s interpretation ignores the Safe Harbor’s requirement that the action
15 must be one “solely to increase the recycling of architectural paint.” This limitation suggests only
16 certain actions are protected, namely, those that increase the amount of recycled paint. If
17 PaintCare engaged in acts that increased the amount of recycled paint, such conduct would be
18 consistent with the purpose of the Program; in that case, protection from antitrust lawsuits is
19 appropriate. But that is not what Plaintiff alleges occurred. Taking Plaintiff’s well-pleaded
20 allegations as true as the Court must in considering Defendants’ Motions to Dismiss, PaintCare
21 took steps to *decrease* the availability of recycled paint, which Plaintiff alleges is contrary to the
22 Program’s purpose.⁶ See FAC ¶ 13 (shipping paint out of state “violate[s] the statutory program
23 goals”). Moreover, Plaintiff alleges PaintCare’s sole purpose in diverting paint away from
24 Plaintiff was to “prevent[] a recycling facility from operating in the Bay Area and [to] limit[] the
25 amount of paint being recycled for sale in California.” FAC ¶ 31. The Safe Harbor Provision is

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27 ⁶ To the extent PaintCare relies on CalRecycle’s approval of its plans as proof that it sought to
28 fulfill the Program’s goal, the Court declines to consider such evidence at the motion to dismiss
stage.

1 silent as to a stewardship organization’s actions taken to decrease the recycling of architectural
2 paint.

3 PaintCare cannot hide behind the stated purpose of the Program. *See* PaintCare Reply at
4 13 (“But the Program as a whole . . . is designed solely to increase recycling, and PaintCare’s
5 decisions in implementing the components of that Program must be covered by the safe harbor for
6 that provision to have any meaning.”). It is undisputed that “[t]he purpose of the architectural
7 paint recovery program . . . is to require paint manufacturers to develop and implement a program
8 to collect, transport, and process postconsumer paint to reduce the costs and environmental
9 impacts of the disposal of postconsumer paint in this state.” Cal. Pub. Res. Code § 48700. Simply
10 because the Program has a purpose does not mean PaintCare’s decisions were in accordance with
11 that goal. Again, this is what Plaintiff alleges: by conspiring to exclude Plaintiff from the
12 PaintCare Program, PaintCare sought to decrease the amount of recycled paint—contrary to the
13 purpose of the Program.

14 In short, the Court cannot find the Safe Harbor Provision’s plain language is meant to
15 immunize any action taken pursuant to the Program from claims under the Cartwright Act or the
16 UCL. Rather, the plain language indicates only “actions solely to increase the recycling of
17 architectural paint” are protected from antitrust suits. The Safe Harbor Provision therefore does
18 not apply where, as here, the defendant allegedly took steps to decrease paint recycling.

19 3. Legislative History

20 The legislative history of the Architectural Paint Recovery Program supports the preceding
21 analysis. Initial drafts of the Safe Harbor Provision were significantly broader than the current
22 version. On February 27, 2009, Assembly Member Huffman introduced AB 1343, which
23 established the Program. Dkt. No. 51-2 at ECF p.2; *see id.* at ECF p.200. AB 1343 contained a
24 safe harbor provision that provided that

25
26 [a]ny action taken by a manufacturer or representative organization
27 regarding the cost recovery system or the collecting, transporting, or
28 processing of postconsumer paint, pursuant to the requirements of
this chapter and only to the extent necessary to plan and implement
the cost recovery system, collection system, or recycling system, is
not a violation of the Cartwright Act (Chapter 2 (commencing with

1 Section 16700) of Part 2 of Division 7 of the Business and Practices
2 Code), the Unfair Practices Act (commencing with Section 17000)
3 of Part 2 of Division 7 of the Business and Professions Code), or
any other state law relating to antitrust, regulation of trade, or
regulation of commerce.

4 Dkt. No. 51-2 at ECF pp.4-5. This version remained unchanged when the California Assembly
5 amended the bill on May 2, 2009. *See id.* at ECF pp.8-9. The Senate's June 24, 2009
6 amendments left this provision substantively the same as well. *See id.* at ECF pp.18-19.

7 Several local governments and agencies supported a limited antitrust exemption. The City
8 and County of San Francisco, Sonoma County Waste Management Agency, and the City of
9 Buena Ventura opined that "[t]he bill should . . . include language providing the paint
10 manufacturers protection from any anti-trust violation claims to allow them to work together to
11 develop a stewardship organization solely for the purposes of establishing a statewide stewardship
12 program for paint. *The exemptions should be very limited only to compliance with this program.*"
13 Dkt. No. 51-3 at ECF pp.25, 48, 56 (emphasis added). Napa County similarly supported AB 1343
14 provided it were amended to "include language providing the paint manufacturers protection from
15 any anti-trust violation claims to allow them to work together to develop a stewardship
16 organization solely for the purposes of establishing a statewide stewardship program for paint."
17 *Id.* at ECF p.53 (emphasis in original).

18 In conjunction with a July 6, 2009 hearing on the bill, the Senate Committee on
19 Environmental Quality recommended the "[r]emov[al] of the provisions related to anti-trust and
20 trade issues . . . [to] allow the author to find another approach to address these issues." Dkt. No.
21 51-2 at ECF p.198. The July 13, 2009 amendment eliminated the safe harbor provision in its
22 entirety. *Id.* at ECF p.27.

23 A safe harbor provision was reintroduced on January 7, 2010. *See* Dkt. No. 51-4 at ECF
24 p.103. This version provided a narrower exemption than the initial iteration; it set forth in
25 subdivision (a) two specific actions that would not constitute an antitrust violation:

- 26 (1) Establishing and levying an architectural paint stewardship
27 assessment for each container of architectural paint sold by a
28 manufacturer in this state.
(2) Developing and implementing a recovery program to reduce the
generation of postconsumer architectural paint, to promote the use

1 of postconsumer architectural paint, and to manage the end-of-life of
2 postconsumer architectural paint, including collection,
transportation, processing, and disposal.

3 *Id.* It also added for the first time a provision that “Subdivision (a) shall not apply to any
4 agreement establishing or affecting the price of paint, except for the architectural paint
5 stewardship assessment, or the output or production of paint, or any agreement restricting the
6 geographic area or customers to which paint will be sold.” *Id.*

7 On August 10, 2010, the Senate amended AB 1343 to contain the current version of the
8 safe harbor provision.⁷ Dkt. No. 51-2 at ECF p.39. It “[l]imit[ed] the anti-trust exemption for
9 stewardship activities related to the product stewardship assessment or the output or production for
10 paint or any agreement restricting the geographic area or customers to which paint will be sold.”
11 Dkt. No. 51-4 at ECF p.119. Governor Arnold Schwarzenegger approved AB 1343 on September
12 28, 2010. Dkt. No. 51-2 at ECF pp.40-46; *see id.* at ECF p.48.

13 PaintCare asserts without citation that “[t]he purpose of the safe harbor is to protect
14 stewardship organizations from having to defend against legal claims by private parties that would
15 challenge how the Program is being implemented.” PaintCare Reply at 14. PaintCare further
16 argues—again without citation—that “[t]he Legislature . . . was concerned with exempting the

17 _____
18 ⁷ The August 10, 2010 amendment of AB 1343 stated:

19 (a) Except as provided in subdivision (c), an action solely to
20 increase the recycling of architectural paint by a producer,
21 stewardship organization, or retailer that affects the types or
quantities being recycled, or the cost and structure of any return
22 program, is not a violation of the statutes specified in subdivision
(b).

(b) The following statutes are not violated by an action specified in
subdivision (a):

23 (1) The Cartwright Act (Chapter 2 (commencing with
24 Section 16700) of Part 2 of Division 7 of the Business and
Professions Code).

25 (2) The Unfair Practices Act (Chapter 4 (commencing with
26 Section 17000) of Part 2 of Division 7 of the Business and
Professions Code).

27 (c) Subdivision (a) shall not apply to any agreement establishing or
affecting the price of paint, except for the architectural paint
28 stewardship assessment, or the output or production of paint, or any
agreement restricting the geographic area or customers to
which paint will be sold.

Dkt. No. 51-2 at ECF p.39.

1 paint stewardship program from having to defend antitrust lawsuits. That intent is only
2 effectuated if the ‘action’ in question is the paint stewardship program itself.” Suppl. Br. at 4
3 (emphasis in original); *see id.* (“To provide any possible safe harbor; *i.e.*, to have any possible
4 meaning or effect, the words ‘an action solely to increase the recycling of architectural paint’ must
5 refer to the paint stewardship program as a whole.”).

6 The legislative history suggests otherwise: the amendments to section 48706 show a
7 progressive narrowing of the Safe Harbor Provision. Whereas the first version of AB 1343
8 broadly provided that “[a]ny action taken by a manufacturer or representative organization
9 regarding the cost recovery system or the collecting, transporting, or processing of postconsumer
10 paint” (Dkt. No. 51-2 at ECF p.4-5) was immune from antitrust actions, the current version limits
11 that protection to “an action solely to increase the recycling of architectural paint by a producer,
12 stewardship organization, or retailer that affects the types or quantities being recycled or the cost
13 and structure of any return program” (Cal. Pub. Res. Code § 48706(a)). Indeed, in a corrected
14 Report on Enrolled Bill submitted to Governor Schwarzenegger clarified that section 48706
15 “would provide that certain actions taken pursuant to the program . . . do not violate the
16 Cartwright Act or the Unfair Practices Act.” Dkt. No. 51-5 at ECF p.61. By noting that only
17 “certain actions” would fall under the Safe Harbor Provision, it is clear that the Safe Harbor was
18 not intended to be as all-encompassing as PaintCare argues. Moreover, the ACA—PaintCare’s
19 alleged creator and sole member—endorsed this narrow exemption. *See* Dkt. No. 51-4 at ECF
20 p.51. In an August 10, 2010 joint memorandum with the California Paint Council (“CPC”) to the
21 Senate Appropriations Committee, the ACA and the CPC stated that “[w]e also appreciate the
22 assistance of the Senate Judiciary Committee in finalizing *a narrow antitrust provision* to enable
23 the paint stewardship organization authorized in the bill to operate effectively.” *Id.* (emphasis
24 added).

25 As such, the Court finds section 48706’s legislative history shows that the Safe Harbor
26 Provision is not intended to protect all actions taken under the Program, but rather only those
27 actions that are specified in the statute.

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No later than seven calendar days before the Case Management Conference, the parties shall file a Joint Case Management Statement containing the information in the Standing Order for All Judges in the Northern District of California, available at: <http://cand.uscourts.gov/mejorders>. The Joint Case Management Statement form may be obtained at: <http://cand.uscourts.gov/civilforms>. If the statement is e-filed, no chambers copy is required.

IT IS SO ORDERED.

Dated: April 11, 2017



MARIA-ELENA JAMES
United States Magistrate Judge