IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHERN CALIFORNIA MINIMALLY INVASIVE CARDIOVASCULAR SURGERY, INC.; RAMZI DEEIK, M.D.,

Plaintiffs,

v.

NORTHBAY HEALTHCARE CORPORATION; NORTHBAY HEALTHCARE GROUP, INC.; NORTHBAY HEALTHCARE MEDICAL GROUP, INC.,

Defendants.
_____/

No. C 15-06283 WHA

**ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS; VACATING MOTION HEARING AND MOVING CASE MANAGEMENT CONFERENCE TO ELEVEN A.M.**

## INTRODUCTION

In this antitrust action, defendants move to dismiss under Rule 12. To the extent stated herein, defendants' motion is **GRANTED IN PART AND DENIED IN PART**. The motion hearing set for April 21 is **VACATED**. The initial case management conference, originally set for April 21 at Eight A.M., is moved to **APRIL 21 AT ELEVEN A.M.**

## STATEMENT

The following well-pled facts are assumed to be true for the purposes of the present motion. Beginning in 2007, plaintiff, Dr. Ramzi Deeik, and alleged conspirator Dr. Robert Klingman (not a party herein), operated a surgery practice called Napa Valley Cardiac & Thoracic Surgery, Inc. (NVCTS), which serviced defendant NorthBay Medical Center's cardiac, thoracic, and vascular surgery programs. NVCTS had a contract with NorthBay to conduct

surgeries on the medical center's monthly call schedule. During this time, Dr. Deeik also had full surgical privileges at two other hospitals, Queen of the Valley Medical Center and Santa Rosa Memorial Hospital (Compl. at ¶¶10, 35, 46).

After developing a successful cardiac surgery program (with NVCTS), NorthBay's next goal was to develop a successful vascular surgery program. To that end, it recruited Dr. Sepehre Naficy, a newly minted vascular surgeon, to help build up this new specialty with Dr. Deeik and Dr. Klingman. Dr. Deeik supervised Dr. Naficy, but began expressing concerns about his problematic vascular surgical outcomes. In response, NorthBay essentially swept Dr. Deeik's concerns about Dr. Naficy under the rug, and ceased its peer review program, allegedly because NorthBay did not want to endanger its new vascular surgery practice, which was still in its infancy. Furthermore, at the time Dr. Deeik expressed his concerns, NorthBay "planned a major bond deal that depended, in part, on the success of the full range of its surgical specialty-related service lines" (Compl. at ¶¶23, 36–40).

At this point, while Dr. Deeik had been questioning NorthBay's vascular surgery program, Dr. Deeik and Dr. Klingman's relationship began to sour. Thus, to eliminate Dr. Deeik, "NorthBay administrators, Dr. Klingman, and Dr. Naficy, and other possible unknown parties (the 'conspirators') commenced a series of clandestine discussions evincing a new relationship to replace NVCTS upon expiration of its contract with NorthBay in 2012" (Compl. at ¶ 41). Specifically, the complaint names the following NorthBay administrators as players in the scheme who conspired with Dr. Klingman: Deborah Sugiyama (President); Kathy Richerson (Chief Nursing Officer); Dr. Mitish Patel (Chief Medical Officer); and Dr. Thomas Erskine (Chief of Medical Staff). According to the complaint, this scheme had many prongs, with the ultimate goal of squeezing Dr. Deeik out of NorthBay while also destroying his reputation at other hospitals to reduce and eventually eliminate him as a competitive threat (Compl. at ¶¶ 22, 53).

*First*, administrators at NorthBay and Dr. Klingman agreed to change several call coverage policies and agreed to selectively enforce them only against Dr. Deeik. Specifically, NorthBay enhanced the requirements regarding backup surgeons, requiring Dr. Deeik to have a

qualified backup surgeon available for all surgeries. Thereafter, Dr. Klingman and Dr. Naficy refused to serve as Dr. Deeik's backup. When Dr. Deeik obtained another area surgeon, Dr. Samer Kanaan, to serve as a backup for him, administrators at NorthBay contacted Dr. Kanaan, pressured and threatened him, disparaged Dr. Deeik, which led Dr. Kanaan to withdraw his agreement to serve as Dr. Deeik's backup.

Before contacting Dr. Kanaan, NorthBay administrators Sugiyama, Richerson, and Dr. Patel sent several emails to each other discussing their plan to keep Dr. Kanaan from serving as Dr. Deeik's backup, with Sugiyama stating "[w]ell must admit I didn't see this one coming! Guess we will have to see what or if [Dr. Klingman] has thoughts about this" and Richerson stating "[p]robably need a conversation with [Dr. Klingman] on Mon and a call to Dr. Kanaan also. I will do that first thing on Mon morning" (Compl. at ¶ 57). After rescinding his agreement to serve as Dr. Deeik's backup, Dr. Kanaan told Dr. Deeik that "he felt beat down, embarrassed, and sorry, but that he could not back up [Dr. Deeik] at NorthBay after all" (Compl. at ¶ 58). Sugiyama later admitted that NorthBay chose only to enforce the backup requirement against Dr. Deeik. A similar pattern occurred when Dr. Deeik found another surgeon to back him up, Dr. Sarah Minasyan (Compl. at ¶ 60).

*Second*, while selectively enforcing new requirements against Dr. Deeik to force him out of NorthBay, the administrators and Dr. Klingman engaged in a smear campaign in order to convince other hospitals in the market to also squeeze Dr. Deeik out. According to the complaint, this smear campaign was necessary to prevent Dr. Deeik from taking his patients away from NorthBay to other competing hospitals. Moreover, it caused competitive harm by eliminating an allegedly superior surgeon from the market who had the ability to conduct minimally invasive surgeries for patients in the area.

Initially, Dr. Klingman falsely told many doctors and staff at other hospitals that Dr. Deeik had embezzled money from their joint venture. As will be discussed further below, Dr. Deeik initiated an arbitration against Dr. Klingman alleging defamation, among other claims, relating to these false allegations. The arbitrator found for Dr. Deeik on the defamation claim, finding that Dr. Klingman had knowingly spread false allegations against Dr. Deeik, and

awarded Dr. Deeik over $600,000 in damages based on harm to his professional reputation (Compl. at ¶ 43).

Moreover, NorthBay administrators, in agreement with Dr. Klingman, also participated in the smear campaign. Several administrators falsely spread word that Dr. Deeik had moved to Santa Rosa and was no longer conducting surgeries in the area, the purpose of which was to dilute future referrals to Dr. Deeik. As an additional aspect of the scheme, NorthBay administrators "instructed the head of NorthBay's hospital security to conduct a clandestine investigation into [Dr. Deeik] for any useful information that could be used against him" (Compl. at ¶ 54). This included contacting law enforcement agencies.

*Third*, NorthBay administrators and Dr. Klingman expanded the conspiracy to include St. Helena Hospital, a local competitor to NorthBay. St. Helena agreed to allow Dr. Gansevoort Dunnington to conduct most of his surgeries at NorthBay, despite the fact that he had been a paid, full-time employee of St. Helena. This allowed Dr. Dunnington to "not only provide backup coverage for Dr. Klingman and Dr. Naficy, he could take [Dr. Deeik's] share of the call schedule so that if and when [Dr. Deeik] overcame Klingman's call-policy obstacles, there would be even fewer opportunities for him at both NorthBay and the Queen" (Compl. at ¶ 62(g)).

*Fourth*, when NVCTS dissolved, due to infighting between Dr. Deeik and Dr. Klingman, NorthBay renewed its contract only with Dr. Klingman's newly formed practice. It excluded Dr. Deeik's new entity called Northern California Minimally Invasive Cardiovascular Surgery (the other plaintiff herein). Once they had effectively squeezed Dr. Deeik out, Dr. Klingman and NorthBay administrators exchanged emails stating the following, showing that they intended to keep Dr. Deeik from practicing at competing hospitals: "Queen will be ending any contracts with [Dr. Deeik] and only using [Dr. Klingman's] group" and "no one at Queen will be sending business to [Dr. Deeik]" (Compl. at ¶ 62(c)).

*Fifth*, NorthBay administrators began tracking referral patterns to determine which cardiologists made the most surgical referrals to Dr. Deeik. Subsequently, three of Dr. Deeik's top referrers were offered new and lucrative positions at NorthBay and the referrals to Dr.

Deeik immediately stopped, achieving the goal of freezing Dr. Deeik's supply of patients (Compl. at ¶ 62(d)).

Essentially, the complaint alleges that Dr. Klingman and administrators at NorthBay engaged in a scheme to force Dr. Deeik out of NorthBay (to keep him from divulging NorthBay's substandard surgical results and ensure bond financing) and then to disparage his reputation to keep other hospitals from doing business with him. Dr. Deeik alleges the result of the scheme is that the area's only minimally invasive and robotic cardiac surgeon (himself) and the area's only minimally invasive and robotic thoracic surgeon (Dr. Kanaan) have been forced out of the market. While Dr. Deeik concedes he continues to maintain an office in Napa, his surgical volume has allegedly been reduced to zero. Dr. Deeik summarizes the competitive harm as follows (Opp. at 7 (citing Compl. at ¶¶ 86–89)):

> The remaining surgeons are lower quality competitors who perform more invasive surgeries. The Queen, the area's only hospital with robotic facilities, has lost more than two thirds of its volume while its hybrid and robotic operating rooms sit empty. Consumers' few remaining choices in the relevant market involve risky, invasive procedures performed by lower quality surgeons; they suffer more complications and lesser outcomes.

In addition to the instant antitrust action, Dr. Deeik has filed two other suits in relation to the conduct discussed above. *First*, as stated, Dr. Deeik initiated an arbitration against Dr. Klingman. The arbitrator found for Dr. Deeik, awarding him over $600,000 in damages for his defamation and intentional infliction of emotional distress claims. *Second*, Dr. Deeik filed a state court action against NorthBay alleging he was wrongfully removed from his posts as director of cardiac surgery (*Deeik v. NorthBay Healthcare Group Inc., et al.*, No. FCS-045917 (Sup. Ct. Solano Cty. 2015)). Defendants' demurrer is currently pending in that case. This order follows full briefing.

## ANALYSIS

### 1. PLAINTIFFS' ANTITRUST CLAIMS.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. A claim is facially plausible when there are sufficient factual allegations to draw a reasonable inference that the

defendant is liable for the conduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). An antitrust plaintiff must allege evidentiary facts that, if true, would "raise a right to relief above the speculative level" and "raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

To state a claim under Section 1 of the Sherman Act, claimants must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove: (1) a contract, combination, or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008).

Here, plaintiffs have alleged facts sufficient to state a plausible claim under Section 1. The complaint has set forth who the main players in the scheme were and how they went about executing it. As detailed above, the complaint discusses the initial conspiracy between Dr. Klingman and several administrators at NorthBay, the different prongs of their scheme, the time line and purpose, several specific policies enacted to force Dr. Deeik out, conversations with competitors, and specific emails from which one could plausibly infer an intent to cease referrals to Dr. Deeik and dampen the market. Furthermore, the complaint has plausibly alleged that the intent of the scheme was to harm competition. The complaint sets forth Dr. Nacify's substandard results, the setbacks the new vascular surgery program faced, and the threat Dr. Deeik posed to this program (and NorthBay's pending bond deal). The complaint sufficiently alleges that the conspirators intended to squeeze out Dr. Deeik, and the superior product he offered (minimally invasive cardiac and vascular surgery), in order to prop up their inferior product. Lastly, the complaint has plausibly alleged that the scheme actually injured competition. The complaint states that the scheme has "resulted in significant anticompetitive harm to the market for cardiovascular and thoracic surgery in Napa and Solano counties in terms of quality of care, the range of services offered, the number of surgeons, and cost" (Compl. at ¶ 86). The complaint further states that the number of cardiac surgeries performed at

Queen (the only hospital in the market capable of conducting minimally invasive cardiac and thoracic surgery) have reduced from over 300 in 2007 to less than 80 in 2015 (Compl. at ¶ 87).

A closely analogous case to ours is *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440 (9th Cir. 1988). There, a nurse anesthetist brought an antitrust action against a hospital and four anesthesiologists alleging that they had forced him out of the market, causing competitive harm. The nurse contended that the hospital and doctors "drafted policies encouraging supervision by anesthesiologists of all anesthesia administered at St. Peter's, removed Mr. Oltz from the anesthesia call schedule, and declin[ed] administrative as opposed to clinical supervision of Mr. Oltz' practice at St. Peter's." *Id*. at 1443. The hospital and doctors also conspired to terminate Oltz' billing contract. After a trial against the hospital (the four doctors settled) the jury found for Oltz, specifically finding that competition among providers of anesthesia services in the Helena area had been harmed.

Our court of appeals affirmed the jury's verdict on liability, rejecting the hospital's argument that the relevant market had been broader than the market for anesthesia services in Helena, and stated that "[d]efining the relevant market is a factual inquiry ordinarily reserved for the jury." *Id*. at 1446. Our court of appeals went on to state that the evidence showed harm to two market segments: "One segment was the market in which anesthesia service providers compete for staff privileges at hospitals; the other was the patient market for anesthesia services" and that "a showing of injury to competition in either market suffices for the rule of reason." *Id*. at 1447. In analyzing the jury's verdict, the decision went on to state:

> [T]he termination of Oltz had actual detrimental effects on competition among anesthesia service providers in that area. The evidence amply supports that finding. Some patients and surgeons who preferred the services of Oltz were hindered from obtaining them. Furthermore, the price of anesthesia services and the incomes of the M.D. anesthesiologists rose dramatically because of the challenged restraint. Given that the ability to raise price and to exclude competition are hallmarks of market power, the finding of actual harm to competition suffices under Sherman Act § 1 even in the absence of extended market analysis.

*Id*. at 1448. Furthermore, in analyzing the intent element, the decision asserted that "[a]mple evidence supports Oltz' claim that the M.D. anesthesiologists and St. Peter's conspired to terminate his billing contract . . . Thus, the jury could justifiably have concluded that the goal

was, at least partially, the elimination of Oltz as a direct competitor of the anesthesiologists. Such a goal would furnish the necessary intent for a Section 1 claim." *Id*. at 1449.

So too here. As in *Oltz*, Dr. Deeik alleges that a doctor and hospital administrators conspired to terminate his contract and squeeze him out NorthBay. Furthermore, Dr. Deeik alleges that the conspirators defamed him, spread false rumors, and tampered with his referrals in an effort to freeze him out of the broader market. At the Rule 12 stage, these allegations are sufficient to withstand defendants' motion to dismiss.

Defendants make several arguments in support of their motion. Primarily, defendants assert that the complaint does not plead sufficient specific facts as required by the Supreme Court's decision in *Twombly* and other recent decisions from our court of appeals, such as: *In re Musical Instruments & Equipment Antitrust Litigation*, 798 F.3d 1186 (9th Cir. 2015); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008); and *Name.Space, Inc. v. Internet Corporation for Assigned Names and Numbers*, 795 F.3d 1124 (9th Cir. 2015). Defendants correctly state that "[i]t is not enough to merely include conclusory allegations that certain actions were the result of a conspiracy; the plaintiff must allege facts that make the conclusion plausible." *Id*. at 1129. Defendants assert that the facts alleged are consistent with reasonable business practices not meant to harm competition.

As stated above, however, the complaint has pled a plausible conspiracy between Dr. Klingman and administrators at NorthBay. Specifically, Dr. Deeik alleges that the conspirators disparaged him to other medical providers, spread word that Dr. Deeik had moved to Santa Rosa, persuaded doctors to decline to serve as Dr. Deeik's backup surgeon, lured doctors who previously referred patients to Dr. Deeik, and arbitrarily enforced surgical requirements only against Dr. Deeik. Furthermore, the complaint describes specific meetings between Dr. Klingman and NorthBay administrators as well as emails plausibly suggesting concerted action.

Defendants also assert that the allegations are not sufficiently specific as to the three NorthBay entities named as defendants herein — NorthBay Healthcare Corporation, NorthBay Healthcare Group, Inc., and NorthBay Medical Group, Inc. The complaint, however, states that NorthBay Healthcare Corporation is the parent entity that owns NorthBay Healthcare Group

(which operates the hospital) and NorthBay Medical Group (which employs the physicians) (Compl. at ¶¶ 12–14, 35, 73). Furthermore, Dr. Deeik alleges that NorthBay administrators presented themselves not as representatives of single entities but of the entire corporate family. More importantly, Dr. Deeik does not allege that separate NorthBay entities conspired with each other. Rather, he alleges NorthBay conspired with Dr. Klingman. While defendants also assert that Dr. Deeik has failed to allege sufficient facts to implicate nonparty St. Helena Hostpital in the conspiracy — the only allegations regarding St. Helena are that it sent Dr. Dunnington to NorthBay to replace Dr. Deeik — the complaint pleads a plausible conspiracy between Dr. Klingman and the named NorthBay administrators. Accordingly, a failure to plead more specifics regarding St. Helena's involvement is not fatal to the antitrust claims.

Next, defendants argue that the complaint has failed to sufficiently allege antitrust injury, that is, a harm to competition. Defendants assert that whatever Dr. Deeik's injuries are, they are not antitrust injuries. Instead, defendants contend, they are merely injuries to Dr. Deeik himself that do not affect competition in the broader market.

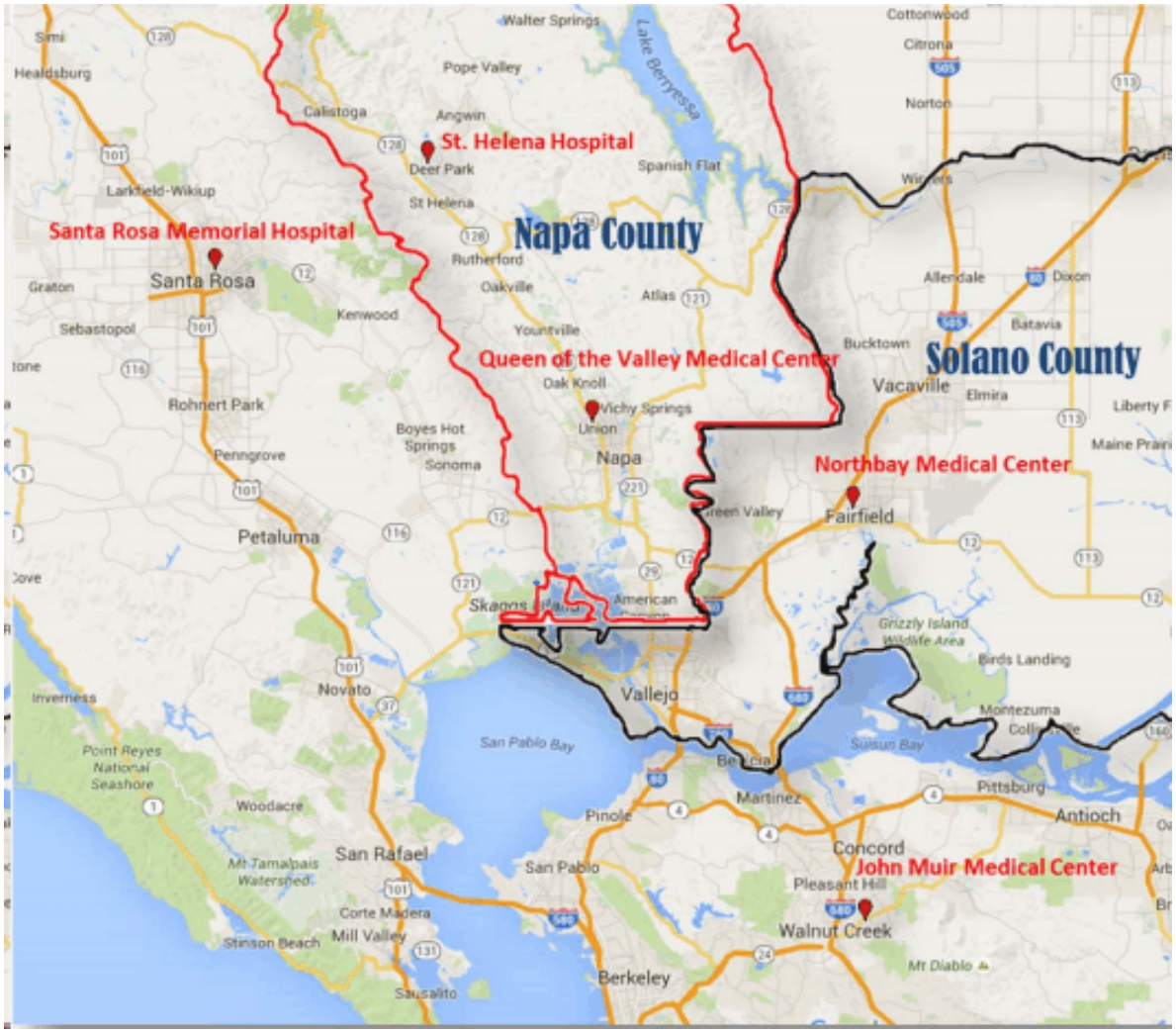
Not so. Dr. Deeik has alleged, as in *Oltz*, that his exclusion from the market (along with Dr. Kanaan's exclusion) has led to "lesser quality services," has "caused consumers to pay supracompetitive prices," and "gave consumers fewer choices" (Compl. at ¶ 103). The complaint also alleges that the conspiracy has "resulted in significant anticompetitive harm to the market for cardiovascular and thoracic surgery in Napa and Solano counties in terms of quality of care, the range of services offered, the number of surgeons, and cost," specifically pointing out that Queen, the only facility capable of performing the full range of minimally invasive cardiac and thoracic surgery, has been crippled (Compl. at ¶¶ 86–87). In a similar factual scenario, in which a physician sued a hospital for revoking his staff privileges, our court of appeals stated as follows regarding alleging antitrust injury:

> Pinhas alleges in his complaint that the conspiracy was intended to boycott his attempts at providing patients with lower prices as a result of his ability to perform operations at a rate quicker than that of his competitors. Assuming Pinhas's allegation that he provides his services at a rate cheaper than that of his competitors to be true, the preclusion of Pinhas from practicing could conceivably injure competition by allowing other similar doctors to charge higher prices for their services. Or Pinhas may show that his preclusion

> otherwise substantially reduced total competition in the market. We therefore conclude that Pinhas has adequately pleaded injury to competition.

*Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1032 (9th Cir. 1989). So too here.

Finally, defendants contend that Dr. Deeik has failed to plead a plausible geographic market. The complaint alleges the relevant geographic market is "Napa and Solano counties in California, which roughly compose the area of effective competition" (Compl. at ¶ 24). Defendants point out that this geographic market definition leaves out two nearby hospitals that a patient could potentially go to. To demonstrate this, defendants included the following map in their motion, showing Santa Rosa Memorial Hospital and John Muir Medical Center as close by, but not included in the complaint's alleged geographic market (Mot. at 16):



In a post *Twombly* decision, reversing the district court's dismissal of an antitrust action based on an implausible geographic market, our court of appeals stated: "An antitrust complaint therefore survives a Rule 12(b)(6) motion unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect. And since the validity of the relevant market is typically a factual element rather than a legal element, alleged markets may survive scrutiny under Rule 12(b)(6) subject to factual testing by summary judgment or trial." *Newcal Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008). Furthermore, subject to Rule 56, "[d]efining the relevant market is a factual inquiry ordinarily reserved for the jury." *Oltz*, 861 F.2d at 1446. Although defendants' argument regarding the geographic market is plausible, it is simply not ripe at the Rule 12 stage, where there is no factual record to stand on. Here, the complaint has alleged that Napa and Solano counties are the relevant market because patients are not willing to travel outside of those counties to obtain the subject cardiac and thoracic surgical services. Accordingly, this order finds that the geographic market has been plausibly defined.

**2. PLAINTIFFS' OTHER CLAIMS.**

In addition to pleading antitrust claims, the complaint asserts an unfair competition claim under Cal. Bus. & Prof. Code Section 17200 as well as a claim for tortious interference with prospective economic advantage. The Section 17200 claim alleging unfair competition is derivative of the antitrust claims. Accordingly, as this order finds plaintiffs have pled plausible antitrust claims, the motion to dismiss the Section 17200 claim is **DENIED**.

Based on the allegations in the complaint, however, the tortious interference claim is time barred. The statute of limitations for claims of tortious interference with prospective economic advantage is two years. Cal. Code Civ. Proc. § 339. Here, the complaint alleges that in "the fall of 2013, [Dr. Deeik] became aware of the coordination and agreements between NorthBay and its coconspirators" (Compl. at ¶ 91). Dr. Deeik filed this lawsuit, however, on December 29, 2015, more than two years later. In his opposition, Dr. Deeik asserts that he had entered into a tolling agreement with defendants on December 12, 2014, which terminated on May 30, 2015, sufficiently tolling the statute of limitations such that the tortious interference claim is timely.

That tolling agreement, however, is nowhere to be found in the complaint. Accordingly, the motion to dismiss the tortious interference claim is **GRANTED**.

## CONCLUSION

For the reasons stated above, defendants' motion to dismiss the antitrust claims and the Section 17200 claim are **DENIED**. To the extent stated herein, defendants' motion to dismiss the tortious interference claim is **GRANTED**. Plaintiffs shall have until **MAY 9, 2016 AT NOON**, to file a motion, noticed on the normal 35-day track, for leave to amend the tortious interference claim. A proposed amended complaint must be appended to this motion. Plaintiffs must plead their best case. The motion should clearly explain how the amended complaint cures the deficiencies identified herein, and should include as an exhibit a redlined or highlighted version identifying all changes.

The motion hearing set for April 21 is **VACATED**. The initial case management conference, originally scheduled for April 21 at Eight A.M., is hereby moved to **APRIL 21 AT ELEVEN A.M.** At the case management conference, the parties should be prepared to discuss whether the instant antitrust litigation should be stayed pending the outcome of Dr. Deeik's state court action (*Deeik v. NorthBay Healthcare Group Inc., et al.*, No. FCS-045917 (Sup. Ct. Solano Cty. 2015)).

**IT IS SO ORDERED.**

Dated: April 19, 2016.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE