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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MSP RECOVERY CLAIMS, SERIES LLC,
Plaintiff,
v.
JAZZ PHARMACEUTICALS, PLC, et al.,
Defendants.

Case No. [5:23-cv-01591-EJD](#)

**ORDER GRANTING MOTIONS TO
DISMISS**

Re: Dkt. Nos. 49, 52

This case arises from Plaintiff’s, MSP Recovery Claims, Series LLC (“MSP”), class action complaint alleging that Defendants Jazz Pharmaceuticals, PLC, Jazz Pharmaceuticals, Inc., and Jazz Pharmaceuticals Ireland, LTD (collectively, “Jazz”); Express Scripts, Inc., Express Scripts Specialty Distribution Services, Inc., Curascript, Inc., and Priority Healthcare Distribution, Inc., (collectively, “Express Scripts”); Caring Voice Coalition (“CVC”); and Adira Foundation (“Adira”) (all collectively, “Defendants”) conspired to raise the price and quantity of two pharmaceutical drugs in violation of 18 U.S.C. § 1962, as well as various states’ consumer protection laws. Class Action Compl. (“Compl.”), ECF No. 1. Before the Court are two motions to dismiss filed by Jazz and Express Scripts. Jazz Mot. to Dismiss (“Jazz MTD”), ECF No. 49; Express Scripts Mot. to Dismiss (“Express Scripts MTD”), ECF No. 52.

Having carefully reviewed the relevant documents, the Court finds this matter suitable for decision without oral argument pursuant to Civil Local Rule 7-1(b). For the reasons stated below, the Court **GRANTS** Defendants’ motions to dismiss.

1 **I. BACKGROUND**

2 **A. Parties**

3 Plaintiff MSP is a Delaware limited liability company with its principal place of business
4 in Coral Gables, Florida. Compl. ¶ 30. MSP holds various claims recovery assignments, whereby
5 MSP maintains the right to sue on behalf of assignors and pursue any and all rights, benefits, and
6 causes of action arising from assignments. *Id.* ¶ 31. MSP brings this action to seek
7 reimbursement for payments made by its assignor, a health care insurance company called
8 SummaCare, Inc., (“SummaCare”), as well as additional unnamed “assignors” who provide health
9 care insurance. *Id.* ¶¶ 33–34. MSP alleges that SummaCare made purchases of the
10 pharmaceutical drugs at issue from at least January 1, 2011, until present. *See id.* ¶ 35.

11 Defendant Jazz Pharmaceutical PLC is an Ireland public limited company with principal
12 executive offices located in Dublin, Ireland. *Id.* ¶ 37. Defendant Jazz Pharmaceuticals Ireland,
13 Ltd., is a corporation organized and existing under the laws of Ireland having a principal place of
14 business in Dublin, Ireland. *Id.* Defendant Jazz Pharmaceuticals, Inc., is a corporation organized
15 and existing under the laws of the State of Delaware having a principal place of business in Palo
16 Alto, California. *Id.*

17 Defendants, Express Scripts Holdings Company, Express Scripts, Inc., and Express Scripts
18 Specialty Distribution Services, Inc., are Delaware corporations with their principal places of
19 business located in St. Louis, Missouri. *Id.* ¶ 39. Defendant Priority Healthcare Distribution, Inc.,
20 d/b/a CuraScript SD, is a wholly owned subsidiary of Express Scripts Holdings Company, Express
21 Scripts, Inc., and Express Scripts Specialty Distribution Services, Inc., with its corporate offices in
22 Memphis, Tennessee. *Id.* ¶ 40. Defendant CuraScript, Inc., d/b/a CuraScript SD, f/k/a CuraScript
23 Pharmacy, Inc., is a wholly owned subsidiary of Express Scripts Holdings Company, Express
24 Scripts, Inc., and Express Scripts Specialty Distribution Services, Inc, with its corporate offices
25 located in Lake Mary, Florida. *Id.* ¶¶ 41–42.

26 Defendant CVC is an Idaho nonprofit corporation with its principal place of business in
27 Richmond, Virginia. *Id.* ¶ 48. Defendant Adira is the successor corporation of CVC. *Id.* ¶ 51.

B. Factual Background

1 This case arises out of Defendants’ alleged conspiratorial kickback scheme to circumvent
2 congressionally mandated co-payments and increase the unit price and quantity of two prescription
3 drugs manufactured by Jazz: Xyrem and Prialt (“Subject Drugs”). Compl. ¶¶ 1, 3–4.

4 MSP alleges the following. The scheme began when Jazz and CVC conspired to create
5 two funds at CVC to help patients pay their co-payments for the Subject Drugs. *Id.* ¶ 4. Jazz was
6 the sole donor to these funds and referred patients to CVC for help paying for the Subject Drugs.
7 *Id.* ¶¶ 4, 201.a., 202.a. CVC almost exclusively used these funds for the Subject Drugs, requiring
8 patients who were seeking other competing drugs to obtain a denial letter from another assistance
9 plan before helping them. *Id.* ¶¶ 4, 239. Essentially, Jazz funneled money through CVC to pay
10 for its drug’s own co-payments in order to increase the number of prescriptions and thereby
11 receive more money from the Medicare program and insurance companies. *See id.* In the course
12 of the scheme, Jazz increased the Subject Drugs’ price by 150%. *Id.* ¶ 239.g. Jazz also paid other
13 pharmacies, including Express Scripts, to refer patients to CVC. *Id.* ¶ 6. Upon receiving co-pay
14 assistance from CVC, these pharmacies would generate and submit claims for payment directly to
15 SummaCare (as well as additional unnamed assignors). *Id.* MSP alleges that SummaCare paid
16 over \$700,000 in beneficiaries’ claims for the Subject Drugs from 2001 through present, which
17 MSP alleges is more money than they would have paid had the price and quantity not been
18 inflated as the result of Defendants’ scheme. *Id.* ¶¶ 28, 68.

19 In April of 2019, Jazz entered into a settlement with the U.S. Department of Justice
20 (“DOJ”) regarding the same general conduct alleged here. *Id.* ¶ 18. Jazz paid the DOJ \$57
21 million to settle claims that Jazz violated the AKS and False Claims Act. *Id.*; *see also* Compl., Ex.
22 1, ECF No. 1-2 (copy of settlement).

23 Jazz and Express Scripts argue in their motions to dismiss that MSP lacks Article III
24 standing, MSP fails to allege a valid assignment contract, the complaint is an impermissibly
25 shotgun pleading, MSP’s claims are time-barred, Express Script is not subject to personal
26 jurisdiction, and MSP fails to plead facts sufficient to state a claim for relief. *See* Jazz MTD;
27

1 Express Scripts MTD.

2 **II. LEGAL STANDARD**

3 **A. Rule 12(b)(1)**

4 A district court must dismiss an action if it lacks jurisdiction over the subject matter of the
5 suit. Fed. Rules Civ. Pro. 12(b)(1). Once a defendant moves to dismiss for lack of subject matter
6 jurisdiction, the plaintiff has the burden of establishing the court’s jurisdiction. *Chandler v. State*
7 *Farm Fut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010).

8 **B. Rule 12(b)(6)**

9 A complaint must contain “a short and plain statement of the claim showing that the
10 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A defendant may move to dismiss a
11 complaint for failing to state a claim upon which relief can be granted under Rule 12(b)(6). When
12 deciding whether to grant a motion to dismiss under Rule 12(b)(6), the court must generally accept
13 as true all “well-pleaded factual allegations.” *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009). While
14 a plaintiff need not offer detailed factual allegations to meet this standard, she is required to offer
15 “sufficient factual matter . . . ‘to state a claim to relief that is plausible on its face.’” *Id.* at 678
16 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court must construe the
17 alleged facts in the light most favorable to the plaintiff. *See Retail Prop. Trust v. United Bd. of*
18 *Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014) (“[The court] must accept as true
19 all factual allegations in the complaint and draw all reasonable inferences in favor of the
20 nonmoving party.”). However, “courts are not bound to accept as true a legal conclusion couched
21 as a factual allegation.” *Iqbal*, 556 U.S. at 678.

22 Claims sounding in fraud must also meet the heightened pleading requirements of Federal
23 Rule of Civil Procedure 9(b). *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102–03 (9th
24 Cir. 2003). Under Rule 9(b), a party “must state with particularity the circumstances constituting
25 fraud.” Fed. R. Civ. P. 9(b). Typically, Rule 9(b) requires the party alleging fraud to plead “the
26 who, what, when, where, and how” of the misconduct. *Vess*, 317 F.3d at 1106 (quoting *Cooper v.*
27 *Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)).

1 If the court concludes that a 12(b)(6) motion should be granted, the “court should grant
2 leave to amend even if no request to amend the pleading was made, unless it determines that the
3 pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d
4 1122, 1127 (9th Cir. 2000) (en banc) (quotation omitted).

5 **III. DISCUSSION**

6 The Court finds that MSP has failed to plead an Article III injury-in-fact,¹ therefore the

7
8 ¹ Notably, this Order follows an extensive line of cases whereby district courts have found
9 standing issues with MSP’s similar pleadings. *See, e.g., MSP Recovery Claims, Series LLC v.*
10 *Actelion Pharms. US, Inc.*, No. 22-CV-07604-JSC, 2023 WL 5725517, at *8 (N.D. Cal. Sept. 5,
11 2023) (collecting cases); *MSP Recovery Claims, Series LLC v. Pfizer, Inc.*, No. 22-CV-01419
12 (DLF), 2023 WL 2770432, at *5 (D.D.C. Apr. 4, 2023) (finding “the Court cannot accept
13 inferences that are unsupported by the facts set out in the complaint”) (cleaned up); *MSP Recovery*
14 *v. Metro. Gen. Ins. Co.*, 2023 WL 168758, *2 (S.D. Fla. Jan. 12, 2023) (Plaintiffs’ “unhelpful[]”
15 claims data tables “fail[ed] to clearly set forth any injuries”); *MSP Recovery Claims, Series LLC v.*
16 *Plant Insulation Co. Asbestos Settlement Tr.*, No. 21-CV-08602-RS, 2022 WL 767276, at *1
17 (N.D. Cal. Mar. 11, 2022) (collecting cases); *MSP Recovery Claims, Series LLC v. Grange Ins.*
18 *Co.*, No. 19-CV-219, 2019 WL 6770729, at *6, *16 (N.D. Ohio Dec. 12, 2019) (finding that
19 Plaintiff must “allege facts demonstrating that the MAOs incurred reimbursable costs and were not
20 reimbursed” and evaluating the validity of the assignments as part of the jurisdictional inquiry)
21 (internal quotation marks omitted); *MSP Recovery Claims, Series LLC v. Progressive Corp.*, No.
22 18-CV-2273, 2019 WL 5448356, at *10–13 (N.D. Ohio Sept. 17, 2019) (same); *MAO-MSO*
23 *Recovery II, LLC v. Gov’t Emps. Ins. Co.*, No. 17-CV-711, 2018 WL 999920, at *6–7 (D. Md.
24 Feb. 21, 2018) (describing the injury-in-fact as incurred costs without reimbursement and
25 recognizing that plaintiffs must also make allegations of proper assignment to support
26 jurisdiction); *MSP Recovery Claims, Series LLC v. New York Cent. Mut. Fire Ins. Co.*, No.
27 619CV00211MADTWD, 2019 WL 4222654, at *1 (N.D.N.Y. Sept. 5, 2019) (“Plaintiffs’ strategy,
28 it appears, is to throw their allegations into as many federal courts as possible and see what sticks.
In each of these cases, Plaintiffs file deficient complaints, relying on courts to point out the
problems, and then repeatedly amend their pleadings A pleading is not meant to be a means
by which a party can discover if they actually have a case.”); *MSP Recovery Claims, Series, LLC*
v. Zurich Am. Ins. Co., No. 18 C 7849, 2019 WL 6893007, at *3 (N.D. Ill. Dec. 18, 2019) (“Nine
attempts to establish standing and plead a cause of action is enough. The Court denies leave to
amend.”); *MSPA Claims I, LLC v. Liberty Mut. Fire Ins. Co.*, 322 F. Supp. 3d 1273, 1275 n.1
(S.D. Fla. 2018) (dismissing the action with prejudice for lack of subject matter jurisdiction after
the plaintiffs “had multiple opportunities to amend their complaint”); *MSP Recovery Claims,*
Series LLC v. Auto-Owners Ins. Co., No. 1:17-CV-23841, 2018 WL 1953861, *6-7 (S.D. Fla. Apr.
25, 2018) (dismissing the case with prejudice where MSP Recovery Claims, Series LLC failed to
allege facts to show standing “[d]espite its fourteenth attempt at pleading its claims [across four
consolidated actions]”); *MSP Recovery Claims, Series LLC v. Tech. Ins. Co., Inc.*, No. 18 CIV.
8036 (AT), 2020 WL 91540, at *4 (S.D.N.Y. Jan. 8, 2020) (“This Court’s decision to dismiss the
complaint for lack of standing is similarly not singular, as it joins a growing contingent of courts
that have dismissed complaints brought by Plaintiffs due to various standing defects.”); *MSP*
Recovery Claims, Series LLC v. Endurance Am. Ins. Co., No. 20-23219-CIV, 2021 WL 706225, at
*3 (S.D. Fla. Feb. 23, 2021) (“As the Plaintiff’s legal conclusions are unsupported by factual
allegations, and the Court cannot determine if [the] claim was actually assigned to the Plaintiff, the
Court must dismiss . . . for lack of standing.”); *MAO-MSO Recovery II, LLC v. USAA Cas. Ins.*

1 Court dismisses solely on this ground and will not address Defendants’ additional arguments at
2 this time.

3 “The plaintiff has the burden of establishing the three elements of Article III standing: (1)
4 he or she has suffered an injury in fact that is concrete and particularized, and actual or imminent;
5 (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be
6 redressed by a favorable court decision.” *Salmon Spawning & Recovery All. v. Gutierrez*, 545
7 F.3d 1220, 1225 (9th Cir. 2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61
8 (1992)). Courts must assume the merits of a plaintiff’s claim when considering Article III
9 standing. *Zeiger v. WellPet LLC*, 304 F. Supp. 3d 837, 843 (N.D. Cal. 2018).

10 Here, MSP failed to plead an injury-in-fact that is concrete, particularized, and fairly
11 traceable to the challenged conduct.

12 As an initial matter, MSP lacks standing to bring claims on behalf of unidentified,
13 unenumerated assignors. As the Ninth Circuit recently reiterated, “[s]tanding is not dispensed in
14 gross; instead, a plaintiff must demonstrate standing for each claim he seeks to press and for each
15 form of relief that is sought.” *MAO-MSO Recovery II, LLC v. Mercury Gen.*, No. 21-56395, 2023
16 WL 1793469, at *2 (9th Cir. Feb. 7, 2023) (internal quotations omitted) (quoting *Davis v. Fed.*
17 *Election Comm’n*, 554 U.S. 724, 734 (2008)). To satisfy Article III, “[a]t a minimum, Plaintiffs
18 must plead some specific facts alleging a specific named assignor assigned its claims to Plaintiffs
19 via a valid assignment agreement.” *MSP Recovery Claims, Series LLC v. Actelion Pharms. US,*
20 *Inc.*, No. 22-CV-07604-JSC, 2023 WL 5725517, at *8 (N.D. Cal. Sept. 5, 2023) (declining to find
21 standing for MSP’s unnamed assignors).

22 As to SummaCare, because MSP is suing on behalf of an assignor, MSP must sufficiently
23 allege that its assignor suffered an assigned injury-in-fact. The basis for SummaCare’s injury is

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25 _____
26 *Co.*, No. 17-21289-CIV, 2018 WL 4956736, at *3 (S.D. Fla. Mar. 29, 2018) (“Absent the
27 conclusory assertions that ‘Plaintiffs have been assigned all legal rights of recovery and
28 reimbursement,’ the Court cannot find any facts regarding the nature of that assignment, and
therefore has no basis for determining that a valid assignment exists.”).

1 \$700,000 in claims paid for the Subject Drugs from approximately January 1, 2011, to present.
2 Compl. ¶ 68. MSP alleges that this amount is more than SummaCare should have paid due to the
3 unlawful inflation and increased sales for the Subject Drugs. *Id.* ¶ 28. To support its allegation
4 that SummaCare paid \$700,000 in claims for the Subject Drugs, MSP attaches as Exhibit 15 a
5 chart with fourteen rows of various unexplained numbers and abbreviations. Compl., Ex. 15, ECF
6 No. 1-16.

7 These allegations do not satisfy Article III standing. First, it is unclear when MSP
8 experienced an alleged injury-in-fact. The period of time that MSP alleges Defendants' engaged
9 in this scheme is unclear. MSP largely references the DOJ's settlement with Jazz, which states
10 that the scheme occurred from 2011 through 2014. *See, e.g.*, Compl. ¶ 18; Compl., Ex. 1, ECF
11 No. 1-2. MSP also alleges in other parts of its complaint that Jazz paid CVC donations in
12 furtherance of the scheme from 2011 until 2016. *See, e.g.*, Compl. ¶ 73. Regardless of when the
13 conduct allegedly ended, MSP bases this lawsuit on \$700,000 of claim payments for the Subject
14 Drugs from 2011 to the present, without identifying the payments made during the relevant period
15 of alleged fraud. It is therefore impossible to know which years SummaCare experienced its
16 alleged injury—as pled, it is possible that SummaCare made claim payments, for example, in 2011
17 and then not again until after the scheme concluded in 2014 or 2016. And further, as alleged in its
18 complaint, Jazz did not even acquire the rights to Prialt until 2012, which necessarily means that
19 MSP could not have paid out claims for Prialt in 2011. *Id.* ¶ 169. Second, MSP does not allege to
20 whom it paid \$700,000. It is unclear from the complaint if MSP paid any of these claims to any of
21 the identified Defendants, and MSP's incomprehensible chart does not lend any assistance. In
22 sum, MSP's complaint fails to provide Defendants with proper notice of the injuries to which it
23 seeks recovery.

24 The Court is not requiring MSP to accomplish the impossible and plead facts solely in
25 Defendants' possession. *Compare, e.g., Corcoran v. CVS Health Corp.*, 169 F. Supp. 3d 970, 986
26 (N.D. Cal. 2016) (recognizing a relaxed pleading standard in fraud cases where missing details are
27 likely in the sole possession of the defendant) (citing *Schreiber Distributing Co. v. Serv-Well*

1 *Furniture Co., Inc.*, 806 F.2d 1393, 1400 (9th Cir. 1986)). The Court is merely requiring that
2 MSP allege facts to show when SummaCare experienced an injury, what injury SummaCare
3 experienced during the relevant period of allegedly unlawful conduct, and to whom SummaCare
4 paid the \$700,000 that serves as the basis of its injury. *See Iqbal*, 556 U.S. at 664; *Twombly*, 550
5 U.S. at 570.

6 **IV. CONCLUSION**

7 For the foregoing reasons, the Court **GRANTS** Defendants’ motions to dismiss with leave
8 to amend. *See Lopez*, 203 F.3d at 1127. Should MSP choose to file an amended complaint, it
9 must do so by January 5, 2024.

10 **IT IS SO ORDERED.**

11 Dated: December 12, 2023



EDWARD J. DAVILA
United States District Judge