SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

UFCW & EMPLOYERS BENEFIT TRUST, *et al.*, Plaintiffs, v. SUTTER HEALTH, ET AL., Defendants.	Case No. CGC-14-538451 Consolidated with Case No. CGC-18-565398 ORDER RE SUTTER'S MOTION FOR SUMMARY ADJUDICATION OF COUNTS I AND III
PEOPLE OF THE STATE OF CALIFORNIA, ex rel. XAVIER BECERRA, Plaintiff, v. SUTTER HEALTH, Defendant.	

INTRODUCTION

Plaintiffs UFCW & Employers Benefit Trust ("UEBT") and the People of the State of California (the "People") filed substantially similar complaints. Through the present motion, Sutter[1] moves for

[1] The parties refer to the moving Defendants as "Sutter Health et al. ('Sutter')." (Notice of Motion, 1; see

summary adjudication of Counts I and III of both complaints. Plaintiffs jointly oppose.

The matter was set for hearing on March 11, 2019. The Court provided the parties with a tentative ruling. Having considered the argument of the parties in addition to the pleadings on file, Sutter's motion is denied.

LEGAL STANDARD

"A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding. The motion may be made at any time after 60 days have elapsed since the general appearance in the action or proceeding of each party against whom the motion is directed or at any earlier time after the general appearance that the court, with or without notice and upon good cause shown, may direct." (Cal. Code of Civ. Proc., § 437c(a)(1).) "A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (*Id.*, § 437c(f)(1).)

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 843.)

"First, and generally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Id.* at 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*) "[A] defendant bears the burden

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also Opposition, 1.)

of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto." (*Ibid.*)

"Second, and generally, the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid.*) "A burden of production entails only the presentation of 'evidence.'" (*Ibid.*)

"Third, and generally, how the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial." (*Id.* at 851.) "Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not-otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact. By contrast, if a defendant moves for summary judgment against such a plaintiff, he must present evidence that would require a reasonable trier of fact not to find any underlying material fact more likely than not-otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Ibid.*)

The pleadings delimit the scope of the issues and frame the outer measure of materiality in a summary judgment proceeding. (*Hutton v. Fidelity Nat'l Title Co.* (2013) 213 Cal.App.4th 486, 493.) The burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability as alleged in the complaint; a moving party need not refute liability on some theoretical possibility not included in the pleadings. (*Ibid.*)

DISCUSSION AND ANALYSIS

I. Count I

Count I is a claim for price tampering in violation of the Cartwright Act. (See UEBT Complaint ¶¶ 138-144; People's Complaint ¶¶ 140-146.) In short, the theory of liability set forth in the complaints is that Sutter's contracts with Network Vendors unlawfully control and tamper with the price terms that

Self-Funded Payors may offer the enrollees of their Health Plans. (UEBT Complaint ¶ 138; People's Complaint ¶ 140.) The purpose of Sutter's contractual restrictions is to eliminate price competition and thereby stabilize and maintain prices for general acute care hospital services and ancillary products at supra-competitive levels in violation of the Cartwright Act. (UEBT Complaint ¶ 138; People's Complaint ¶ 140.) The conduct constitutes either a per se violation of California's antitrust laws or an unreasonable and unlawful restraint of trade. (UEBT Complaint ¶ 142; People's Complaint ¶ 144.)

There are two layers to Sutter's argument. First, Sutter contends that, as a matter of law, the only "price tampering" prohibited by the Cartwright Act is price fixing. (Motion, 11-12.) Second, Sutter argues that, as a matter of fact, Sutter did not fix prices. (*Id.* at 12-14.) Sutter asserts that Plaintiffs' rely on vertical restraints that indirectly resulted in prices. (*Id.* at 14-15.) Sutter argues that this theory is not cognizable. (*Id.* at 14-17.)

Plaintiffs disagree. First, Plaintiffs contend that claims based vertical tampering with price and price structures are cognizable under the Cartwright Act. (Opposition, 8-13.) Plaintiffs assert that they have evidence to support such a theory. (*Id.* at 13-14.) Second, if Sutter's legal position is correct, Plaintiffs argue that Plaintiffs have evidence of vertical price fixing. (*Id.* at 14-16.)

A. The Cartwright Act

Under the Cartwright Act, a "trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: ... (d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State. [¶] (e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any combination of any of the following: ... (2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure. [¶] (3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity. [¶] (4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected." (Cal. Bus. & Prof. Code,

§ 16720(d), (e)(2)-(4).)

The Cartwright Act is this state's principal antitrust law. (*In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 136.) The act's principal goal is the preservation of consumer welfare. (*Ibid.*) "At its heart is a prohibition against agreements that prevent the growth of healthy, competitive markets for goods and services and the establishment of prices through market forces. [Citation.] 'The act 'generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices' [citation], and declares that, with certain exceptions, 'every trust is unlawful, against public policy and void.' [Citations.]" (*Ibid.* [internal citations omitted].)

"Though the Cartwright Act is written in absolute terms, in practice not every agreement within the four corners of its prohibitions has been deemed illegal." (*Ibid.*) Instead, based on common law prohibitions against restraints of trade, the broad prohibitions in the act are subject to an implied exception similar to one that validates reasonable restraints of trade under the federal Sherman Antitrust Act. (*Id.* at 136-37, 146.)

B. Vertical Price Tampering[2]

It is undisputed that the Cartwright Act prohibits both horizontal and vertical price fixing. (See, e.g., Motion, 12.) Where the parties part company is on the question of whether the Cartwright Act imposes liability on agreements that "might in any manner" affect prices. (Compare Motion, 12; Opposition, 9.)

Plaintiffs' argument is rooted in the broad language of the statute. (Opposition, 8-9.) But, as observed above, the statute does not prohibit every agreement that falls within the four corners of its prohibitions. (*In re Cipro*, 61 Cal.4th at 136-37.) Under the common law, reasonable restraints of trade are permitted. (*Ibid.*)

Accordingly, the first question presented here is whether vertical price tampering is, or may be, prohibited by the Cartwright Act. On that question, Plaintiffs direct the court's attention to *Oakland-Alameda County Builders' Exchange v. F.P. Lathrop Construction Co.* (1971) 4 Cal.3d 354 ("*Lathrop*"). (See Opposition, 9-10.) There, the California Supreme Court held that "the rules of the Oakland-

[2] Plaintiffs do not base their claims on any agreement of any kind between Sutter and other hospitals or healthcare providers. (Plaintiffs' Response to Separate Statement ¶ 7.) Accordingly, the court need not discuss horizontal price fixing or horizontal price tampering.

Alameda County Bid Depository impose requirements on participating subcontractors and general contractors which involve illegal price tampering and group boycotts." (*Lathrop*, 4 Cal.3d at 369.) The bid depository rules provided the exclusive process by which general contractors could obtain bids from subcontractors in formulating their bids on prime contracts. (See *id.* at 357.) First, subcontractors submitted their bids to a lockbox by an appointed time. (See *ibid.*) Second, general contractors could use only the bids that had been submitted to the lockbox to formulate their bids for the prime contract, without any opportunity to negotiate lower bids. (See *ibid.*) The process violated the Cartwright Act for two reasons. First, it stifled price competition amongst subcontractors. (*Id.* at 362-64.) Second, it required general contractors to boycott subcontractors who failed to comply with the bid depository rules. (*Id.* at 364-65.)

Sutter argues that *Lathrop* is factually distinguishable because the bid depository rules precluded horizontal price competition – competition between subcontractors. (Motion, 16; Reply, 3.) Further, Sutter argues that cases involving vertical price competition are limited to vertical price fixing – situations in which the supplier fixes the price at which the distributor will sell the product. Among other cases, Sutter highlights *Kunert v. Mission Financial Services Corp.* (2003) 110 Cal.App.4th 242 and *Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672. (See Motion, 13-14; Reply, 4.)

In *Kunert*, the Court of Appeal evaluated whether the Kunerts could amend their complaint to state a claim for vertical price-fixing based on certain proposed allegations. (*Kunert*, 110 Cal.App.4th at 262.) The Court explained that a "vertical price-fixing agreement, commonly known as resale price maintenance, involves the efforts of a supplier to control the distribution of its product or service by retailers or distributors. [Citation.] Such an agreement limits the distributor's freedom to sell the supplier's product at a price independently selected by the distributor [citation]; instead, the supplier establishes the price at which its distributors may sell the supplier's products, resulting in maintenance of the resale price at a single level. The supplier's price restrictions are often enforced through the supplier's refusal to deal with a particular distributor. [Citation.] A vertical price-fixing or resale price maintenance agreement between supplier and distributor 'destroys horizontal competition as effectively as would a horizontal agreement among distributors or retailers' [citation] and is per se unlawful under the Cartwright Act. [Citation.]" (*Id.* at 263 [internal quotations omitted].) The proposed allegations were

insufficient because "[t]he essence of resale price maintenance is the supplier's—in this case, Mission Financial's—control of the resale price of its automobile financing, setting it at the same level for all its dealers and thus restricting competition among the dealers on the financing rate. The Kunerts have not and cannot in good faith assert that Mission Financial set the financing rate dealers must charge their customers, or made any effort whatsoever to restrict the financing rate charged by the dealer." (*Id.* at 263-64.)

In *Exxon*, Exxon franchisee service station dealers alleged that Exxon violated, *inter alia*, the Cartwright Act by requiring them to pay excessive rates for gasoline. (*Exxon*, 51 Cal.App.4th at 1677.) The Court of Appeal analyzed the restraint as a vertical non-price restraint that is tested under the rule of reason such that the plaintiffs were required to prove that the restraint had an anticompetitive effect in the relevant market in order to prevail. (*Id.* at 1680-81.)

Sutter's cases, especially read in conjunction with *Lathrop*,[3] do not establish that "vertical price tampering" is lawful so long as it does not rise to the level of price fixing. Rather, "price tampering," as described in Count I, may be actionable under the Cartwright Act. Sutter concedes that if Sutter is correct that the "price tampering" described in the complaints constitutes only a "non-price vertical restraint," the result is that the restraints are "evaluated just like any other alleged unreasonable restraint of trade" – not that the claim is invalid. (Motion, 23; *Exxon*, 51 Cal.App.4th at 1680-81; *Kunert*, 110 Cal.App.4th at 263-64 [concluding that the Kunerts could not plead vertical price-fixing because they could not allege that Mission Financial set financing rates *or* "made any effort whatsoever to restrict the financing rate charged by the dealer"].)[4]

C. Sutter's Initial Burden

To meet its initial burden, Sutter must meet Plaintiffs' theory of liability as alleged in the complaints. (See *Hutton*, 213 Cal.App.4th at 493.) Sutter has not done so.

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[3] The *Lathrop* court did not focus on any distinction between horizontal and vertical price competition. Instead, it underscored the fact that one of the central purposes of the Cartwright Act is to promote price competition. (*Lathrop*, 4 Cal.3d at 362-63.)

[4] The point Sutter is making here is that Sutter believes that all three theories of liability set forth in Counts I, II, and III should have been included in a single cause of action for unreasonable restraint of trade. (Motion, 23.) However, Sutter does not cite authority to support its implied assertion that the court should remove valid and distinct theories of liability from the case because they could have been alleged as a single cause of action.

To carry its initial burden, Sutter refers to interrogatory responses in an effort to show that Plaintiffs have disclaimed any intent to show horizontal price tampering or vertical price fixing. (See Sutter Separate Statement ¶¶ 1-9.) This is consistent with Sutter's legal argument that "vertical price tampering" is not a cognizable offense, only vertical price fixing. But Sutter concedes that "non-price vertical restraint[s]" are evaluated "like any other alleged restraint of trade." (Motion, 23.) Plaintiffs alleged that what the conduct they alleged constituted "price tampering" constitutes "an unreasonable and unlawful restraint of trade." (UEBT Complaint ¶ 142; People's Complaint ¶ 144.) Accordingly, consistent with Sutter's own argument, demonstrating that Plaintiffs' cannot prove price fixing does not indicate that the conduct they describe as "price tampering" is lawful. Accordingly, Sutter has not carried its initial burden of producing evidence that Plaintiffs will be unable to establish an element of their first cause of action.

II. Count III

Count III is a claim for combination to monopolize in violation of the Cartwright Act. (See UEBT Complaint ¶¶ 156-160; People's Complaint ¶¶ 158-162.) In short, the theory of liability set forth in the complaints is that Sutter compelled Health Plan Vendors to agree to contract terms through which Sutter unlawfully restrains trade with the purpose and effect of obtaining or maintaining monopoly power with the relevant geographic markets, which in turn allows Sutter to demand supra-competitive prices. (UEBT Complaint ¶¶ 156-157; People's Complaint ¶¶ 158-159.)

There are again two layers to Sutter's argument. First, Sutter argues that a "combination to monopolize" claim can only be maintained where the members of the combination shared a specific intent to monopolize the market. (See Motion, 17-20.) Second, Sutter contends that, as a matter of fact, the Health Plan Vendors, or insurers, did not have a specific intent to help Sutter monopolize the market. (*Id.* at 20-23.)

Plaintiffs' disagreement is with the Sutter's first line of argument. Plaintiffs assert that they need not show that all combining parties shared a specific intent to monopolize to support a claim for a combination to monopolize. (See Opposition, 16-19.)

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A. Essential Elements

1. The Cartwright Act

"[T]he Cartwright Act is not derived from the Sherman Act, but rather from the laws of other states, and the Cartwright Act and the Sherman Act differ in wording and scope." (*Asahi Kasei Pharma Corp. v. CoTherix, Inc.* (2012) 204 Cal.App.4th 1, 8 (citation omitted).) "The Cartwright Act bans combinations, but single firm monopolization is not cognizable under the Cartwright Act. [Citations.] To maintain an action for combination in restraint of trade under the Cartwright Act, 'the following elements must be established: (1) the formation and operation of the conspiracy; (2) illegal acts done pursuant thereto; and (3) damage proximately caused by such acts. [Citation.]' [Citation.] " (*Ibid.* [internal citations omitted].)[5]

"[A]greements to establish or maintain a monopoly are restraints of trade made unlawful by the Cartwright Act. [Citations.] Under general antitrust principles, a business may permissibly develop monopoly power, i.e., 'the power to control prices or exclude competition' [citation], through the superiority of its product or business acumen. To acquire or maintain that power through agreement and combination with others, however, is quite a different matter. [Citation.]" (*In re Cipro*, 61 Cal.4th at 148; see also *Lowell v. Mother's Cake & Cookie Co.* (1978) 79 Cal.App.3d 13, 23 ["Though not specifically listed, monopoly is a prohibited restraint of trade. The offense of monopoly involves the willful acquisition of the power to control prices or exclude competition from commerce in a particular geographic are with respect to a specific product"].)

2. *In re Cipro*

The *In re Cipro* Court was presented with a "reverse payment" patent settlement whereby a brand-name drug manufacturer paid a generic in exchange for the generic dropping its patent challenge and consenting to stay out of the market. (*In re Cipro*, 61 Cal.4th at 130.) Summarizing its ruling, the Court stated that parties "illegally restrain trade when they privately agree to substitute consensual monopoly in place of potential competition that would have followed a finding of invalidity or noninfringement." (*Ibid.*) In its analysis, the Court addressed whether reverse payment settlements are subject to a rule of

[5] Count II of the complaints is a separate claim for unreasonable restraint of trade in violation of the Cartwright Act. (See UEBT Complaint ¶¶ 146-154; People's Complaint ¶¶ 148-156.)

reason analysis and, if so, how the analysis should be structured. (*Id.* at 148.) In that context, the Court made the foregoing observation that agreements to establish or maintain a monopoly are unlawful restraints of trade. (*Ibid.*) As an example, the Court noted that a firm may not pay its only potential competitor not to compete in return for a share of the profits that firm can obtain by being a monopolist. (*Ibid.*) In the meat of its analysis, the Court described how the rule of reason analysis applies where a plaintiff challenges a reverse payment patent settlement. (See *id.* at 151-160.) The focus of the analysis is on whether the settlement fund includes a payment made in exchange for a delay in market entry. (See *ibid.*) Specific intent is never discussed.

3. Plaintiffs' Argument

Plaintiffs' argument is straightforward. A "combination to monopolize" is a restraint of trade. (Opposition, 16; *In re Cipro*, 61 Cal.4th at 148 ["agreements to establish or maintain a monopoly are restraints of trade made unlawful by the Cartwright Act"].) The elements of a claim for a combination in restraint of trade do not include a shared specific intent to create a monopoly. (Opposition, 16-17; *Asahi Kasei*, 204 Cal.App.4th at 8; *Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 720 ["the 'conspiracy' or 'combination' necessary to support an antitrust action can be found where a supplier or producer, by coercive conduct, imposes restraints to which distributors involuntary adhere"].) Accordingly, Plaintiffs conclude that they need not show a shared specific intent to create a monopoly.

4. Sutter's Arguments

a. Whether Counts II and III are Duplicative

First, Sutter argues that the court should disregard Plaintiffs' reference to the elements of a combination in restraint of trade because Plaintiffs pled a separate cause of action for "unreasonable restraint of trade." (Reply, 8; see also Motion, 23.) As detailed more fully below, the manner in which Plaintiffs organized their legal theories does not govern the court's determination of the essential elements of the Plaintiffs' legal claims.

Turning to the complaints, Plaintiffs allege that the "combination to monopolize" addressed in Count III violates the Cartwright Act because, at minimum, it constitutes an unreasonable restraint of trade. (UEBT Complaint ¶ 158; People's Complaint ¶ 160.) In Count II, Plaintiffs allege that similar conduct constituted, at minimum, an unreasonable restraint of trade, but do not allege that Sutter had the

specific intent to obtain or maintain monopoly power. (See UEBT Complaint ¶¶ 146, 152, 157; People's Complaint ¶¶ 148, 154, 159.) Accordingly, Plaintiffs alleged that the conduct addressed in Counts II and III is unlawful under the Cartwright Act for the same reason – it constitutes an unreasonable restraint of trade. (UEBT Complaint ¶¶ 152, 158; People's Complaint ¶¶ 154, 160.)

Sutter suggests that if its motion is granted the Count III theory can, in the absence of specific intent to monopolize, be pursued under Count II. (Motion, 23.) But Sutter's motion seeks relief that would remove the Count III theory from the case. Sutter has not cited authority to support the proposition that a distinct theory of liability can be removed from a case on summary adjudication because it was pled as a separate cause of action. Instead, Sutter argues that Count III is invalid because Plaintiffs do not have evidence of a specific intent to monopolize shared by the insurers. The court's present analysis is limited to that challenge.

b. Sherman Act

Second, Sutter contends that the specific intent requirement it would impose is required by analogous cases interpreting the Sherman Act. (See Motion, 18-19.) However, a review of those cases does not lead to the conclusion that Plaintiffs must prove a shared specific intent to monopolize to prevail on Count III.

Under Section 2 of the Sherman Act: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." (15 U.S.C. § 2.)[6]

[6] Under Section 1 of the Sherman Act: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." (15 U.S.C. § 1.) Plaintiffs suggest that the court should analogize their claim to a claim for conspiracy to monopolize under Section 1, which Plaintiffs contend lacks a specific intent requirement. (See Opposition, 19; *City of Vernon v. Southern California Edison Co.* (9th Cir. 1992) 955 F.2d 1361, 1371 [stating in dicta that a Section 1 conspiracy to monopolize may exist even where one of the conspirators participates involuntarily or under coercion].) This line of argument is tangential. Plaintiffs' primary

Section 2 of the Sherman Act applies to both actual monopolies and the preliminary steps that can lead to monopoly, but conduct falling short of a monopoly is not illegal unless it is part of a plan to monopolize or to gain such other control of a market as is equally forbidden. (See *United States v. Aluminum Co. of America* (2d Cir. 1945) 148 F.2d 416, 431-32.) Attempt-to-monopolize and conspiracy to monopolize claims require a specific intent to monopolize any part of the trade or commerce, but conspiracy claims do not require proof that the conspiracy resulted in a dangerous threat of achieving monopoly power. (See, e.g., *Auraria Student Housing at the Regency, LLC v. Campus Village Apartments, LLC* (10th Cir. 2016) 843 F.3d 1225, 1233 [attempt-to-monopolize and conspiracy to monopolize claims require a specific intent to monopolize any part of the trade or commerce, but conspiracy claims do not require proof that the conspiracy resulted in a dangerous threat of achieving monopoly power]; *Rebel Oil Co., Inc. v. Atlantic Richfield Co.* (9th Cir. 1995) 51 F.3d 1421, 1437 n.8.) Sutter explains that specific intent is necessary because "combination or conspiracy to monopolize is an inchoate offense–it prohibits an agreement to monopolize even if monopolization does not in fact occur." (Motion, 19.)

There are two California cases that treat agreements to establish or maintain a monopoly as unlawful restraints of trade under the Cartwright Act. (See *In re Cipro*, 61 Cal.4th at 148; *Lowell*, 79 Cal.App.3d at 23; see also *Dimidowich v. Bell & Howell* (9th Cir. 1986) 803 F.2d 1473, 1478 [citing *Lowell* for the proposition that monopoly is a prohibited restraint of trade under the Cartwright Act and stating, in dicta, that a claim for conspiracy to monopolize between two actors is cognizable under the Cartwright Act].) Sutter notes that the discussions in those cases include citations to cases interpreting Section 2 of the Sherman Act. (Motion, 17-19; *Lowell*, 79 Cal.App.3d at 23 [citing *United States v. Grinnell Corp.* (1966) 384 U.S. 563 and *Aluminum Co.* to support the proposition that the "offense of monopoly involves the willful acquisition of the power to control prices or exclude competition from commerce in a particular geographic area with respect to a specific product]; *In re Cipro*, 61 Cal.4th at 148-49 [citing numerous federal cases in explaining examples of prohibited conduct][7].)

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argument is that federal law is inapposite. (See Opposition, 18.) The reason that Sutter turns to Section 2 of the Sherman Act is because it deals specifically with monopolization. It is the strength of the analogy between Section 2 and California law that determines the weight to be given to Sutter's argument.

[7] *In re Cipro* did not only cite cases decided under Section 2 of the Sherman Act. (See *Palmer v. BRG of Georgia, Inc.* (1990) 498 U.S. 46 [Section 1 case].)

The fact that California cases cited to Section 2 cases in outlining general principles of monopoly law does not, in itself, indicate that the Cartwright Act tracks Section 2 of the Sherman Act. Instead, *In re Cipro* adopts an approach to evaluating the anticompetitive effects of an agreement to establish or maintain a monopoly in the unique reverse patent settlement context by formulating an analysis focusing on whether the settlement eliminates competition beyond the point at which competition would have been expected in the absence of the agreement.[8] (*In re Cipro*, 61 Cal.4th at 151-60.) This is consistent with the language in *In re Cipro*, *Lowell*, and *Dimidowich* that monopoly is one form of prohibited restraint of trade. The upshot is this: an agreement to monopolize is prohibited by the Cartwright Act if it constitutes an unreasonable restraint on trade. This is consistent with the theory pled in the complaints. (UEBT Complaint ¶ 158 [alleging that combination to monopolize constituted an unreasonable restraint of trade]; People's Complaint ¶ 160 [same].)[9] Shared specific intent amongst all co-conspirators is not an essential element of that offense. (*Kolling*, 137 Cal.App.3d at 720.)

B. Sutter's Initial Burden

Because Plaintiffs are not required to prove that the insurers had a specific intent to help Sutter form a monopoly, Sutter has not carried its initial burden. (See Sutter Separate Statement ¶¶ 2, 10-65 [the facts on which the motion is based are intended to show that the insurers with which Sutter

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[8] During oral argument Sutter suggested that *In re Cipro* is limited to reverse patent settlement cases. The court respectfully rejects such a limited interpretation of the opinion.

[9] This conclusion is also consistent with Sutter's position that the claim is nothing more than a further theory that Sutter unreasonably restrained trade. (Motion, 23.) At the same time, it is consistent with Plaintiffs' argument that a "combination to monopolize" is analyzed like any other restraint of trade. (Opposition, 16-17.) To the extent there is nothing more here than a disagreement as to whether the theory should have been pled as part of the second cause of action rather than as the third cause of action, Sutter has not explained why this pleading formality makes a difference.

contracted did not act out of a desire to help Sutter secure a monopoly or to restrain trade]; Motion, 17-23 [argument predicated on the absence of specific intent].)

CONCLUSION AND ORDER

For all these reasons, Sutter's motion is denied.[10]

IT IS SO ORDERED.

Dated: March 14, 2019

Anne-Christine Massullo
Judge of the Superior Court

[10] Plaintiffs submitted objections to evidence in conjunction with their opposition papers and Sutter did the same in conjunction with its reply papers. The motion is denied because Sutter did not meet its initial burden, even if its evidence is considered. Accordingly, the court does not rule on the evidentiary objections. (Cal. Code of Civ. Proc., § 437c(q).)

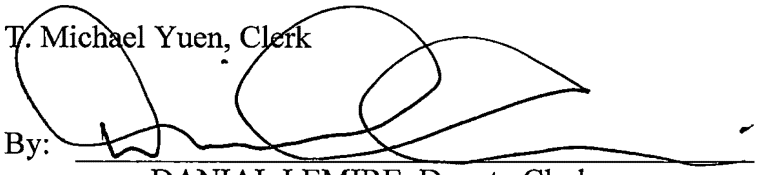
CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On MAR 14 2019 , I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: MAR 14 2019

T. Michael Yuen, Clerk

By: 
DANIAL LEMIRE, Deputy Clerk