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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GOLDENE SOMERVILLE,

Plaintiff,

No. C 08-02443 JSW

v.

STRYKER ORTHOPAEDICS ET AL,

Defendants.

**ORDER GRANTING MOTION TO  
DISMISS WITH LEAVE TO  
AMEND**

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

**BACKGROUND**

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

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

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

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

## 7 ANALYSIS

### 8 A. Legal Standard for Motion to Dismiss.

9 A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the  
 10 pleadings fail to state a claim upon which relief can be granted. The complaint is construed in  
 11 the light most favorable to the non-moving party and all material allegations in the complaint  
 12 are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). The court,  
 13 however, is not required to accept legal conclusions cast in the form of factual allegations, if  
 14 those conclusions cannot reasonably be drawn from the facts alleged. *Clegg v. Cult Awareness*  
 15 *Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) (citing *Papasan v. Allain*, 478 U.S. 265, 286  
 16 (1986)). Conclusory allegations without more are insufficient to defeat a motion to dismiss for  
 17 failure to state a claim upon which relief may be granted. *McGlinchy v. Shell Chemical Co.*,  
 18 845 F.2d 802, 810 (9th Cir. 1988). Even under the liberal pleading standard of Federal Rule of  
 19 Civil Procedure 8(a)(2), a plaintiff must do more than recite the elements of the claim and must  
 20 “provide the grounds of [its] entitlement to relief.” *Bell Atlantic Corporation v. Twombly*, 127  
 21 S. Ct. 1955, 1959 (2007) (citations omitted). In addition, the pleading must not merely allege  
 22 conduct that is conceivable, but it must also be plausible. *Id.* at 1974.

### 23 B. Claim Under the Cartwright Act.

24 In order to set out a claim for violation of the Cartwright Act, California Business and  
 25 Professions Code § 16700, *et seq.*, a plaintiff must allege: (1) the formation and operation of a  
 26 conspiracy; (2) illegal acts done pursuant to the conspiracy; (3) a purpose to restrain trade; and  
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28 <sup>1</sup> Plaintiff Claire C. Haggarty in the related, and practically identically-pled suit, *Haggarty v. Stryker*, C08-160 JSW, underwent hip replacement surgery as well and her case is adjudicated by this Order. To the extent the facts differ, the Court will so note throughout.

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

12 Here, both parties agree that the named defendants, related parties and subsidiaries,  
13 cannot conspire amongst themselves. However, the complaint alleges that the Stryker  
14 defendants conspired with unnamed co-conspirators, surgeons performing orthopedic surgeries,  
15 in order to reap the rewards of the allegedly pervasive kickback scheme. Plaintiff alleges that  
16 the “scheme involves Stryker’s use of phony consulting agreements with orthopedic surgeons to  
17 disguise kickbacks paid to doctors and/or hospitals in return for their use of Stryker products in  
18 patients undergoing hip and/or knee replacement surgery. It was through this scheme that  
19 Stryker was able to reduce competition and artificially inflate the price and cost of it [sic] hip  
20 and knee surgery products. Thus, Stryker not only created an environment where the choice of  
21 medical devices was not drive by safety, effectiveness or the needs of patients, but also one  
22 where patients actually had to pay more for the device than they otherwise should have paid.”  
23 (Complaint at ¶ 1.) The claim under the Cartwright Act alleges that “Stryker and its unnamed  
24 co-conspirators have violated California’s Cartwright Act ..., by forging one or more  
25 combinations to accomplish purposes prohibited by and contrary to the Cartwright Act. They  
26 engaged in one or more agreements, contracts, combinations, trusts, and or [sic] conspiracies to  
27 create and maintain market dominance, resulting in artificially high prices for Stryker hip and  
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1 knee surgery products, including without limitation implant devices and related products, such  
2 as bone cement.” (*Id.* at ¶ 47.)

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

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

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

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

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

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

12 California’s Unfair Competition Law, California Business & Professions Code § 17200  
13 (“17200”), establishes three varieties of unfair competition – acts or practices that are unlawful  
14 or unfair or fraudulent. Because the law is stated in the disjunctive, it contemplates three  
15 distinct categories of unfair competition and a plaintiff must plead the specific rubric under  
16 which the proscribed conduct falls. *Cel-Tech Communications, Inc. v. Los Angeles Cellular  
17 Telephone Co.*, 20 Cal. 4th 163, 180 (Cal. 1999).

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

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

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

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

12 As currently drafted, the complaint does not establish either an antitrust violation or  
13 injury. Accordingly, the Court GRANTS Stryker's motion to dismiss the cause of action for  
14 violation of California's unfair competition law.<sup>4</sup>

15 **D. Class Action Claims.**

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

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26 <sup>3</sup> Plaintiff Haggarty, in the related suit, alleges that she incurred \$3,600 in out-of-  
27 pocket expenses for her surgeries. (Haggarty Complaint at ¶ 30.)

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

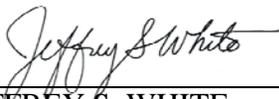
1 amend her complaint, such facts must be alleged in order to qualify as a member of the class she  
2 purports to represent.

3 **CONCLUSION**

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

9 **IT IS SO ORDERED.**

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11 Dated: January 16, 2009

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14 JEFFREY S. WHITE  
15 UNITED STATES DISTRICT JUDGE  
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