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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

INDEPENDENT PHYSICAL THERAPISTS OF CALIFORNIA, on behalf of itself and its members,

Plaintiff,

vs.

MEDRISK, LLC; MEDRISK HOLDCO, LLC; and DOES 1 through 10, inclusive,

Defendants.

Case No. RG19045049

[ASSIGNED FOR ALL PURPOSES TO THE HON. JUDGE BRAD SELIGMAN]

PLAINTIFF'S OPPOSITION TO DEFENDANT'S DEMURRER TO FIRST AMENDED COMPLAINT

Hearing Date: September 29, 2020
Time: 3:00 p.m.
Dept.: 23

Date Action Filed: November 27, 2019
Trial Date: Not yet set

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

I. INTRODUCTION

Contrary to Defendant MedRisk, LLC's ("MedRisk") contention, this case is not about altering thousands of contracts or overhauling Defendant's business model. This case is primarily about a specific illegal practice that this Court can and should enjoin: referring patients to physical therapists who agree to the lowest discounts. This practice violates the California Labor Code and California's Unfair Competition Law and is within this Court's jurisdiction to correct. Plaintiff Independent Physical Therapists of California ("IPTCA") has standing to prosecute this injunctive relief action, and the case is not barred by the doctrine of abstention.

II. MEDRISK'S ILLEGAL CONDUCT

At the heart of this action is MedRisk's systemic practice of illegally referring injured workers to those of its contracted health care professionals who acquiesce to the deepest discounts. As the First Amended Complaint ("FAC") sets forth in detail, MedRisk acts an illegal middleman in the health care industry. FAC, ¶¶ 9, 34.[1] MedRisk contracts with payors of workers' compensation services and then solicits (or extorts) deep discounts of a specified amount from its contracted health care professionals as an inducement to send them more referrals. ¶ 37. MedRisk's payor clients do not directly pay health care professionals' claims. ¶ 39. Rather, MedRisk pays these claims and pockets the difference between what MedRisk is paid by payors and what MedRisk pays these professionals, creating a direct financial incentive to make referrals to the providers who have acquiesced to the deepest discounts. *Id*.

MedRisk is paid by workers' compensation payors, at least in part, based on the number of referrals it makes and the size of the discount it has obtained from the health care providers it has contracted with to provide treatment services to injured workers. ¶ 71. The larger the discount it has negotiated, the larger the amount it retains from the employer or insurer who ultimately pays for the services provided to injured workers, with MedRisk keeping the "spread" between the contracted rates between MedRisk and the payor on the one hand, and MedRisk and the health care professional on the other. *Id*. Because MedRisk is paid more when it refers injured workers to specific contracted network providers based on this spread, the amount it is

[1] Citations to "¶ _" are to the FAC.

paid increases with the size of the discounts it has negotiated. *Id*.

This case relates to physical therapists. Effectively, MedRisk is operating an illegal referral system whereby MedRisk maximizes the compensation it receives from its payor clients by referring injured workers only to its physical therapists who agree to the lowest rates. MedRisk solicits deep discounts of a specified amount from its contracted physical therapists as an inducement for MedRisk to send them more referrals. ¶¶ 2, 37. MedRisk assigns injured workers to the provider of MedRisk's choosing, thus further ensuring it maximizes its revenue by assigning these injured workers to the physical therapists who have acquiesced to the deepest discounts. *Id*.

Plaintiff's FAC is buttressed by actual emails from MedRisk to physical therapists. ¶¶ 52-56. These emails confirm that MedRisk knowingly steers injured workers to physical therapists willing to take the deepest discounts.[2]

MedRisk has gamed the workers' compensation process by systemically offering and providing a preference to those health care professionals who agree to the lowest prices, without regard to their quality of care or other relevant factors, and as a result, retaining greater net compensation from its payor clients. ¶ 33. Physical therapists who acquiesce to the steepest discounts receive the vast majority of referrals from MedRisk. ¶ 45. MedRisk expresses to physical therapists that, the higher the discount they are willing to accept, the greater the number of referrals they will receive, which results in MedRisk referring the business to physical therapists who agree to provide MedRisk with the steepest discounts. *Id*. MedRisk handles the referral and initial scheduling of appointments for the vast majority of these injured workers, and otherwise makes it difficult or impossible for the injured workers, their attorneys, or their primary treating physicians to schedule appointments themselves. *Id*. Thus, MedRisk is benefited by

[2] *See* ¶ 53 ("There is room to negotiate but it potentially would affect your referral volume."); ¶ 54 ("Be mindful that having one of the highest rates in the area can potentially affect referrals since our clients are looking for cost savings."); ¶ 55 ("Honestly, the [requested rate increase] may affect your referral volume. . . Honestly, staying at $70 would be your best option if you are looking for referral volume."); ¶ 56 ("I just got off the phone with [a MedRisk Network Development Specialist] who said that I could get a direct contract but the $85 per visit that I am requesting will automatically mean that I will see fewer referrals!").

steering injured workers who require physical therapy treatment services directly to those providers who capitulate to its demands. *Id.* MedRisk is able to sustain this practice because it controls a significant market share of California's workers' compensation health care services in several workers' compensation service lines, including physical therapy service, by virtue of its contracts with the payors of workers' compensation services. ¶ 44. In many cases, patients have been steered away from their preferred physical therapy providers during a session of care simply because their clinic is not the lowest cost provider that contracts with MedRisk. ¶ 26.

To remedy these violations, Plaintiff seeks an order that Defendant cease from the practice of illegally referring patients to providers based on lower rates and pocketing the difference, which affects the ability of Plaintiff's members to do business, is injurious to the public, and is an illegal and unfair business practice.

In addition to MedRisk's systemic policy of making illegal referrals, the FAC also alleges other systemic malfeasance by MedRisk regarding failure to comply with all legal requirements of electronic billing (including failure to comply with requirements that employers and their agents accept electronic claims and that MedRisk abide by the internal and external billing dispute mechanisms). ¶¶ 98-105. MedRisk further exacerbates its unduly low payment rates by failing to comply with laws and regulations that have been enacted in the last several years requiring that employers and their agents accept electronic claims, acknowledge their receipt electronically upon submission, process and pay those claims expeditiously, provide prompt, clear explanations for any claim contest or denial, and abide by the internal and external billing dispute mechanisms. ¶ 47. As a result, physical therapists continue to deal with all the billing and payment issues that have plagued the workers' compensation system prior to the adoption of these laws, including "lost claims" and payment delays. *Id.* To remedy the billing violations, Plaintiff also seeks an order requiring Defendant to comply with all legal requirements regarding electronic billing.

III. LEGAL STANDARDS ON DEMURRER

For the purpose of determining the sufficiency of a pleading on demurrer, the court must accept as true "all material facts properly pleaded." *Moore v. Conliffe*, 7 Cal. 4th 634, 638

(1994). A demurrer can be used only to challenge defects that appear on the face of a complaint. *Geneva Towers Ltd. Partnership v. City & County of San Francisco*, 29 Cal. 4th 769, 781 (2003). All facts are to be considered in the light most unfavorable to defendants. *Perdue v. Crocker Nat'l. Bank*, 38 Cal. 3d 913, 922 (1985). "Whether the plaintiff will be able to prove the pleaded facts is irrelevant to ruling upon the demurrer." *Stevens v. Superior Court*, 180 Cal. App. 3d 605, 609-610 (1986). The purpose of a complaint is simply to put the defendant on notice as to why it is being sued, not to prove or even establish a prima facie case. *Semole v. Sansoucie*, 28 Cal. App. 3d 714 (1972). If the Court finds the pleading deficient in any manner, Plaintiff respectfully requests leave to amend.

IV. PLAINTIFF HAS STANDING

A. IPTCA

Plaintiff IPTCA is a non-profit membership organization, with approximately 300 physical therapist members located throughout the State of California. ¶ 8. IPTCA's stated mission is to educate practicing physical therapists in order to improve their clinical and business acumen, in addition to providing a body for advocating for the interests of physical therapists in California. *Id.* IPTCA seeks to provide its members with services and programs designed to effectively represent physical therapists before state government, communicate to physical therapists the latest clinical and governmental news affecting their practices and patients, offer products and services through partners and others to positively impact patient treatment, and enhance the public's knowledge of benefits of physical therapy treatment. *Id.* IPTCA also actively engages in media, legislative, political and regulatory processes to carry out its mission. *Id*. Additionally, IPTCA regularly engages with government and private health plans to advocate for the interests of its members and works to represent members in discussions with numerous companies, including MedRisk, with respect to payment practices such as at issue in the FAC. *Id*.

It is well-settled that an organization may allege two types of standing. *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Individual or organizational standing permits a group to allege standing on its own behalf for injuries directly inflicted upon the organization. The second type

of standing, variously termed associational or representative standing, enables an organization to sue as a representative of its members who have been injured.

MedRisk argues that Plaintiff does not have standing to pursue the UCL claim because it lacks both organizational standing and associational standing. Plaintiff anticipated these arguments, and the FAC contains sufficient, detailed allegations (¶¶ 22-31) to establish that Plaintiff has standing under both of these requirements.

B. The FAC Sufficiently Alleges That Plaintiff Has Organizational Standing to Bring This Action in Its Own Capacity

Plaintiff has organizational standing to bring these claims in its own capacity because it has been injured in fact and lost money or property as a result of Defendant's wrongful conduct. ¶ 22. As alleged in the FAC, Plaintiff's resources that could otherwise have been spent on fulfilling the organization's goals were, and are being, diverted to address the systemic practices alleged in the FAC. *Id*.

Specifically, as the FAC alleges in detail, Plaintiff has expended considerable time and out of pocket expenses, as well as both financial and staff resources, prior to initiation of this action and independently of this action, to help Plaintiff's members regarding Defendant's alleged illegal practices, separate and apart from litigating this action. ¶ 25. These efforts include, but are not limited to, incurring costs and expenses relating to retaining legislative analysists to evaluate the practice of illegal referrals based on discounted rates, incurring travel and meeting expenses to meet with legislative officials to discuss the illegal practice, engaging in communications with members, and expending numerous valuable hours of IPTCA's leadership's time, which could have been spent on other projects, in order to manage the complaints received from IPTCA members regarding Defendant's alleged violations of state law, which IPTCA would have otherwise expended in other ways to advance the mission of IPTCA set forth above. *Id*.

Further, as the FAC alleges, IPTCA has, during the last several years and prior to this litigation, been required to devote significant resources of its staff and Board members to assist its members in addressing Defendant's improper practices as alleged in the FAC. ¶ 26. IPTCA

has received and responded to communications from multiple professional physical therapist members who have been pressured to lower prices, been threatened with termination or reductions in referrals, or have actually been terminated or otherwise lost patients and business, all in a manner in contravention with the California laws cited herein. *Id*. In many cases, patients have been steered away from their preferred physical therapy providers who are members of IPTCA during a session of care simply because their clinic is not the lowest cost provider that contracts with MedRisk. *Id*. IPTCA and its leadership has been forced to expend significant time and resources in an attempt to combat and counteract Defendant's practices and has spent significant resources dealing with complaints relating to disputes with MedRisk. ¶ 29. However, IPTCA's concerns were not resolved, necessitating this action. *Id*.

IPTCA has also expended resources in communicating with and educating its members about their rights and obligations with respect to Defendant's illegal activities, as well as communicating concerns regarding Defendant's practices with the Division of Workers' Compensation as the only oversight committee agency in the State of California, the Senate Labor, Public Employment and Retirement Committee, numerous state legislators, and leadership of other healthcare professional associations. ¶ 27.

Thus, Defendant's illegal conduct has impacted Plaintiff's operating budget, causing it actual economic injury, and Plaintiff has expended funds independently of the litigation to investigate and combat Defendant's misconduct. ¶ 29. Defendant's practices have perceptively impaired Plaintiff's ability to service its members and been a drain on the organization's resources, requiring Plaintiff to divert resources to counteract Defendant's illegal practices. Plaintiff undertook the expenditures described herein in response to, and to counteract, the effects of Defendant's alleged misconduct and not in anticipation of litigation. *Id*.

All of the foregoing allegations are more than adequate to establish that Plaintiff has lost money or property as a result of Defendant's unfair business practice. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (finding associational standing where plaintiff alleged that illegal conduct impacted operating budget causing actual economic injury).

The foregoing allegations also are adequate to rebut Defendant's contention that

Plaintiff's "alleged individual injuries collectively amount to little more than activities preparatory to litigation." (Motion at 13). The FAC clearly alleges that Plaintiff's alleged injuries occurred well *prior* to the commencement of the litigation and resulted from expending considerable time and out of pocket expenses, as well as both financial and staff resources, to assist IPTCA's members regarding MedRisk's alleged illegal practices, *separate and apart* from this litigation.

Courts in California have consistently held that the expenditure of resources to investigate a defendant's alleged wrongdoing is different from pre-litigation expenses and establishes economic injury under the UCL because the expenses were incurred prior to and independent of the litigation. *See e.g., Animal Legal Def. Fund v. LT Napa Partners LLC*, 234 Cal. App. 4th 1270, 1280-82 (2015) (funds expended independently of the litigation to investigate or conduct defendant's misconduct establish injury in fact). Further, as the court noted, "that the expenditure of resources in investing defendant's alleged lawbreaking was wholly consistent with plaintiff's mission does not mean that the resources were not in fact diverted from other activities as a result of defendant's conduct." *Id*. at 1283. *Two Jinn, Inc. v. Government Payment Service, Inc.*, 233 Cal. App. 4th 1321 (2015), cited by Medrisk is inapposite, as in that case plaintiff expressly conceded that funds expended were for "pre-litigation activities." Indeed, *Two Jinn, Inc.* supports the general rule that funds expended *independently* of the litigation to investigate or combat the defendant's misconduct can establish an injury in fact.

C. The FAC Sufficiently Alleges That Plaintiff Has Associational Standing to Bring This Action on Behalf of Its Members

In addition to individual or organizational standing, IPTCA also has associational standing to act on behalf of its members. The United States Supreme Court has articulated a three factor test for associational standing:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt. v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). California follows the federal precedent on associational standing. *See Amalgamated Transit Union, Local 1756 AFL-CIO v. Superior Court*, 46 Cal. 4th 993, 1004 (2009).

IPTCA members have been harmed by Defendant's illegal referral scheme. In addition, as the FAC alleges, many IPTCA members are not able to provide care for California's injured workers at all because the only way to access a patient is to contract with Defendant. ¶ 28. Historically, the typical California physical therapy outpatient provider could be expected to have a mix of 20% workers compensation patients as a percentage of their overall practice. *Id*. Defendant's practices have further reduced many IPTCA members' participation to less than 1-3% of their practice. *Id*. Further, IPTCA also has associational standing to act on behalf of its members because the interests IPTCA seeks to protect are highly relevant to the organization's purpose as set forth above, and a strong likelihood exists that IPTCA's members will be harmed in the future. ¶ 23.

Indeed, MedRisk challenges only the third *Hunt* factor, namely, that that the lawsuit requires the individual participation of IPTCA's members. However, the United States Supreme Court has held that the participation of *some* members is not fatal to associational standing, so long as the participation of *each* member is not required. *Warth*, 422 U.S. at 511 (*Hunt's* third prong is satisfied "so long as the nature of the claim and of the relief sought does not make the individual participation of *each injured party indispensable* to proper resolution of the cause") (emphasis added); *see also Int'l Woodworkers of Am. v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1267 (4th Cir. 1981) ("The relevant inquiry . . . is whether the claims asserted or the relief requested requires each member to participate individually in the lawsuit."). *See also Hosp. Council of W. Pa. v. Pittsburgh*, 949 F.2d 83, 89 (3d Cir. 1991) ("an association may assert a claim that requires participation by *some* members"); *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 601-02 (7th Cir. 1993) (*Hunt*'s third prong may be satisfied even when the "litigation would likely require that [individual members] provide discovery and trial testimony").

Here, the FAC clearly alleges and demonstrates that the individual participation of each

member of the Plaintiff association is *not* indispensable to resolution of Plaintiff's claims because Defendant's alleged systemic policy violations make extensive individual participation of Plaintiff's members unnecessary. ¶ 24. The heart of Plaintiff's FAC involves alleged systemic policy violations that make extensive individual participation unnecessary. As Plaintiff has alleged, Plaintiff's claims can be established with evidence from MedRisk and documentation from some members, such as a small, but significant sample of Plaintiff's members. ¶ 51. The FAC specifically identifies confirmatory emails to physical therapists in California from MedRisk representatives that make quite clear that MedRisk knowingly steers injured workers to the health care providers willing to take the deepest discounts. These mails also suggest that the practice is systemic across various providers in MedRisk's system. ¶¶ 52-56. Courts have upheld standing where, as here, an association can prove its case with a sampling of evidence from its members. *See e.g., Pa. Psychiatric Society Green Spring Health Services, Inc.*, 280 F.3d 278 (3d Cir. 2002); *Hosp. Council of W. Pa v. City of Pittsburgh,* 949 F.2d 83 (3d Cir. 1991); *Retired Chicago Police Ass'n, supra,* 7 F.3d at 601. *See also Ass'n of Am. Physicians & Surgs. v. Tex. Med. Bd.*, 627 F.3d 547, 552 (5th Cir. 2010) ("Proof of [defendant's] misdeeds could establish a pattern with evidence from the Board's witnesses and files from a small but significant sample of physicians.").

Moreover, it is well settled that where, as here, an association seeks only equitable and declaratory relief, both the claims and relief do not require participation by individual association members. *See e.g., Ass'n of Am. Physicians & Surgs., supra,* 627 F.3d at 550 (noting that the third *Hunt* prong is prudential, "focuses importantly on matters of administrative convenience and efficiency," and that where an association seeks only equitable and declaratory relief, both the claims and relief do not require participation by individual association members, and support judicially efficient management, if associational standing is granted).[3]

[3] MedRisk's cases are inapplicable because in those cases plaintiffs sought either damages in addition to equitable relief or individualized injunctive relief. *See Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc*., 280 F.3d 278, 284 (3d Cir. 2002) ("because claims for monetary relief usually require individual participation, courts have held [that] associations cannot generally raise these claims on behalf of their members."); *Spindex Physical Therapy USA Inc. v. United Healthcare of Arizona, Inc.* 770 F.3d 1282 (9th Cir. 2014) (plaintiff association

For example, in *Alaska Fish & Wildlife Federation & Outdoor Council, Inc. v. Dunkie,* 829 F.2d 933 (9th Cir. 1987), a conservation organization sought declaratory relief to void agreements between the government and native Alaskans that gave the latter closed-season hunting privileges. *Id*. at 934-35. The Ninth Circuit ruled that the organization had associational standing:

> First, the Conservation Fund's members use the resources in question and have been injured by the decrease in the migratory bird population. Second, preventing the extinction of migratory game birds is germane to the association's purpose of participating in "litigation in courts when necessary to protect the beneficial pursuits of hunting . . . and scientific wildlife management practices." Third, because the [Conservation] Fund seeks declaratory and prospective relief rather than money damages, its members need not participate in the litigation.

Id. at 937-38.

As in *Dunkie*, Plaintiff seeks only *prospective injunctive relief* under the UCL, which is precisely "the type of relief which associational standing was originally recognized." *Retail Indus. Leaders Ass'n. v.Fielder*, 475 F.3d 180, 187 (4th Cir. 2007); *see also Hosp. Council of W. Pa. v. Pittsburgh*, 949 F.2d 83, 89 (3d. Cir. 1991) ("The Supreme Court has repeatedly held that requests by an association for declaratory relief and injunctive relief do not require participation by individual association members.").[4]

V. JUDICIAL ABSTENTION IS INAPPROPRIATE IN THIS CASE

Plaintiff agrees that, as a general matter, a trial court may abstain from adjudicating a suit that seeks equitable remedies if "granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency," and that a court may also abstain when "the lawsuit involves determining complex economic policy, which is best handled by the Legislature or an administrative agency," or where "granting injunctive relief would be unnecessarily burdensome for the trial court to

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sought to recover payments for denied claims); *Association of Christian Sch. Int'l v. Stearns*, 678 F. Supp. 2d 980 (C.D. Cal. 2009) (plaintiff association sought declaratory relief which was improper due to the individualized nature of the as-applied claims).

[4] Almost as an afterthought, the Demurrer also inexplicably argues that "Plaintiff likely does not bring this action as a class action because it cannot do so" in contravention of the decision in *Amalgamated Transit* (Motion at fn. 5, at 11). That contention is disproved by the express class allegations in the FAC. ¶¶ 106-117.

monitor and enforce given the availability of more effective means of redress." *Arce v. Kaiser Foundation Health Plan, Inc.*, 181 Cal. App. 4th 471, 495-496 (2010). The issue is whether these criteria apply in this case. They do not.

Nothing about the adjudication of this issue implicates any of the concerns that would compel judicial abstention. To the contrary, judicial abstention is *inappropriate* where, as here, a court is simply asked to "to perform an ordinary judicial function, namely, to grant relief under the UCL … for business practices that are made unlawful by statute," and the court is "merely being called upon to enforce those statutory prohibitions." *Id*. at 498. The relief sought by Plaintiff, namely an order barring MedRisk's illegal practice, will not be unnecessarily burdensome for this Court to monitor or enforce. Accordingly, Plaintiff's UCL action is appropriate for adjudication by this Court.

As set forth above, Plaintiff seeks injunctive relief primarily to redress an alleged uniform and systemic policy whereby MedRisk, in violation of California law, refers business only to those physical therapists who agree to accept the lowest rates. Plaintiff alleges that MedRisk's conduct violates California Labor Code § 3820 (¶¶ 76-78), which prohibits knowingly soliciting discounts as an inducement for referring patients to obtain workers compensation benefits and knowingly receiving other consideration as compensation for referring patients to obtain medical or medical-legal services, and California Labor Code § 3215, which prohibits offering or accepting any kind of compensation or inducement in exchange for referrals, in both its relationships with its workers' compensation insurers, self-insured employers and third-party administrators and in its relationships with its contracted health care professionals. ¶¶ 74-75. Defendant's conduct also violates Labor Code 139.32 which make it illegal to obtain discounts from health care professionals as an "inducement" or "preference" for referrals. ¶ 73.

Whether or not MedRisk's conduct is illegal is a straightforward legal issue that this Court can and should adjudicate. This issue does not require the Court to revise any contracts or make any determinations regarding individual members but only to evaluate the alleged uniform policy and determine whether MedRisk's practice violates the Labor Code. Plaintiff is asking the Court to perform an ordinary judicial function, namely, to grant relief under the UCL for business

practices that are made unlawful by statute. Similarly, with respect to MedRisk's systemic electronic billing violations, this Court would be interpreting and applying provisions of the Labor Code to determine MedRisk's noncompliance with straightforward billing requirements.

This case will not pull this Court into the thicket of the healthcare financial industry or require the Court to determine complex economic policy. The Legislature, by enacting the Labor Code provisions, already made the policy determinations outlawing MedRisk's practices. By this action, this Court is only being asked to enforce those statutory prohibitions. Any doubt about whether abstention is not warranted weighs in favor of Plaintiff. *See Klein v. Chevron USA, Inc.*, 202 Cal. App.4th 1342, 1369 (2012) (abstention is not warranted where "at the pleading stage in the proceedings, it is not clear that adjudicating plaintiff's claims will require the court to resolve complex policy issues").

Plaintiff's request for injunctive relief also does not require the Court to assume or interfere with the functions of the California Department of Worker's Compensation ("DWC"). In contending that the DWC considered and "declined to adopt Plaintiff's view" with respect to MedRisk's referral policy (Motion at 2), Defendant misstates Plaintiff's allegations. The FAC alleges only that Plaintiff "has also expended resources in communicating with and educating its members about their rights and obligations with respect to Defendant's illegal activities, as well as communicating concerns regarding Defendants' practices with the Division of Workers' Compensation. . ." ¶ 27. Moreover, even if the DWC considered the policy issues raised by the FAC, private individuals are still entitled to bring suit under the UCL to enjoin acts made unlawful under the Labor Code. Further, the DWC's failure to act actually *supports* Plaintiff's suit. Abstention may be appropriate where there is "an alternative means of resolving the issues raised by raised by plaintiff's complaint" (*see e.g., Klein*, *supra*, 202 Cal. App. 4th at 1369), but here the DWC has failed to act. Even if the DWC indicated that it might act in the future (which it has not), "the fact that an administrative agency may, at some future time, adopt new regulations bearing on pending legal issues does not mean that a court should abstain from adjudicating [the] controversy." *Arce, supra,* 181 Cal. App. 4th at 502.

Finally, Plaintiff's request for relief is not unnecessarily burdensome. Unlike instances

where courts have abstained, here the relief Plaintiff seeks will not require continuing Court supervision, monitoring of MedRisk's conduct, or the administration of a network of injunctions across the state. "If the trial court issues an injunction, then defendants will be expected to comply with it, but that does not impose on the court any active role in monitoring compliance." *Arce*, 181 Cal. App. 4th at 499. Here, Plaintiff seeks an order that Defendant cease from the practice of illegally referring patients to providers based on lower rates and pocketing the difference (and, with respect to violation of billing requirements, an order that MedRisk comply with the Labor Code requirements for electronic billing). Moreover, even if the injunction ultimately includes different details, the trial court has "very broad" discretion to formulate an appropriate remedy and "at the pleadings stage, it would be improper [for us] to presume that the only possible means of addressing plaintiffs' claims" is the form of injunction sought by Plaintiff. *Klein*, 202 Cal. App. 4th at 1368, n. 9.

MedRisk relies almost exclusively on *Hambrick v. Healthcare Partners Medical Group, Inc.*, 238 Cal. App. 4th 124 (2015), but the circumstances of the instant case with respect to Defendant's uniform and systemic practices are more analogous to *Arce*, *supra,* and *Blue Cross of California, Inc. v. Superior Court*, 180 Cal. App. 4th 1237 (2009). In *Arce*, the Court of Appeals held that the trial court abused its discretion in abstaining where plaintiff alleged a UCL claim arising out of defendant's uniform denial of behavioral and speech therapy for members with autism. The Court held that the issues presented were "issues of statutory interpretation that are well suited for adjudication by the courts." *Arce*, 181 Cal. App. 4th at 471. The Court concluded that the doctrine of abstention did not preclude the UCL claim because resolution of the claim did not require the trial court to make individualized determinations or determine complex issues of economic policy or require the court to assume or interfere with the functions of an administrative agency. Similarly, in *Blue Cross of California, Inc. v. Superior Court*, 180 Cal. App. 4th 1237 (2009), plaintiff challenged defendant's uniform policy of violating a statutory prohibition regarding post claims underwriting. The trial court declined to abstain from adjudicating the UCL claim, and the Court of Appeals affirmed. The Court held that the suit was simply asking the court to perform an ordinary judicial function, namely, to grant relief under the

UCL for business practices made unlawful by statute and that court was "in the main, merely being called upon to enforce those statutory prohibitions." *Id*. at 632. The Court also noted that an injunction was not unnecessarily burdensome because defendant was expected to comply with it, and the injunction did not impose on the court any active role in monitoring compliance. *Id*.

In sum, none of the factors warrant judicial abstention in this case.

VI. PLAINTIFF'S CLAIM IS A COGNIZABLE USE OF THE UCL

There is little doubt that the UCL provides for this Court to issue injunctive relief to prohibit MedRisk from illegally referring patients to providers based on lower rates and pocketing the difference, and requiring Defendant to comply with all legal requirements regarding electronic billing. The UCL contains exceedingly broad remedial statutory language, which is designed to encourage multiple avenues of enforcement. S*ee Abbott Labs. v. Superior Court*, 24 Cal.App.5th 1, 35 (2018) citing *Kasky v. Nike, Inc*., 27 Cal.4th 939, 949-950 (2002). As with the substantive provisions of the "broad, sweeping language" of the UCL, the remedial provisions have been liberally construed to give courts broad powers to fashion creative awards of injunctive or restitutionary relief. *See Abbott Labs. v. Superior Court*, 9 Cal.5th 642, 652 (2020) ("T]he Legislature … intended by [the UCL's] sweeping language to permit tribunals to enjoin ongoing wrongful business conduct in whatever context such activity might occur.") Moreover, public courts are well equipped to consistently maintain and enforce an injunction, bind non-parties to the injunction, and enable public oversight of the injunction. *Golba v. Citigroup, Inc*., 2012 U.S. Dist. LEXIS 187544, *15 (C.D. Cal. Mar. 30, 2012) citing *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066, 1080 (1999).

As set forth above, Plaintiff's action does not require this Court to "assume regulatory oversight" over MedRisk or "rewrite," cancel or amend any contracts. *Samura v. Kaiser Foundation Health Plan, Inc*., 17 Cal. App. 4th 1284 (1993), the only case Defendant cites in support of its argument that Plaintiff's request for an injunction is inappropriate under the UCL, is inapposite. In *Samura*, the core of plaintiff's lawsuit involved a challenge to a third-party liability provision in individual and group service agreements, which plaintiff attempted to invalidate. The trial court issued an injunction requiring Kaiser to rewrite its service agreements

to clarify its third-party liability terms. The Court of Appeal reversed because the statutes at issue did not define unlawful acts that could be enjoined under the UCL and the statutory provisions at issue related solely to regulatory powers of the DMHC. Here, Plaintiff is not attempting to rewrite any contracts with MedRisk or third parties, and the acts that Plaintiff is seeking to enjoin via the UCL are based on express violations of the Labor Code.[5]

VII. CONCLUSION

Defendant's Demurrer to Plaintiff's FAC should be overruled. As this is the first occasion the Court has had to review Plaintiff's complaint, to the extent the Court identifies any deficiencies in the FAC, Plaintiff respectfully requests leave to amend.

Dated: August 20, 2020

Respectfully submitted,

POMERANTZ LLP
LAW OFFICES OF ZEV B. ZYSMAN, APC

By: _____

Jordan L. Lurie
Ari Y. Basser
Zev B. Zysman
Attorneys for Plaintiff

[5] MedRisk also challenges Plaintiff's alter ego allegations regarding MedRisk Holdco, LLC ("Holdco"). Motion at 14. That argument is moot, as Plaintiff has agreed to dismiss Holdco subject to a tolling agreement. *See* Plaintiff's Response to Holdco's Motion to Quash, filed concurrently herewith.

PROOF OF SERVICE

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1100 Glendon Avenue, 15th Floor, Los Angeles, California 90024.

On **August 20, 2020**, I served the document described as:

PLAINTIFF'S OPPOSITION TO DEFENDANT'S DEMURRER TO FIRST AMENDED COMPLAINT

on the interested parties in this action by sending [ ] the original [or] [✓] a true copy thereof [✓] to interested parties as follows [or] [ ] as stated on the attached service list:

MCDERMOTT WILL & EMERY — Attorneys for Defendant
Jason D. Strabo, State Bar No. 246426
Jstrabo@mwe.com
2049 Century Park East, Suite 3200
Los Angeles, CA 90067
Telephone: (213) 229-9500

[ ] **BY MAIL (ENCLOSED IN A SEALED ENVELOPE):** I deposited the envelope(s) for mailing in the ordinary course of business at Los Angeles, California. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, sealed envelopes are deposited with the U.S. Postal Service that same day in the ordinary course of business with postage thereon fully prepaid at Los Angeles, California.

[✓] **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known e-mail address or e-mail of record in this action.

[ ] **BY FAX:** I hereby certify that this document was served from Los Angeles, California, by facsimile delivery on the parties listed herein at their most recent fax number of record in this action.

[ ] **BY PERSONAL SERVICE:** I delivered the document, enclosed in a sealed envelope, by hand to the counsel for Defendant.

[ ] **BY OVERNIGHT DELIVERY:** I am "readily familiar" with this firm's practice of collection and processing correspondence for overnight delivery. Under that practice, overnight packages are enclosed in a sealed envelope with a packing slip attached thereto fully prepaid. The packages are picked up by the carrier at our offices or delivered by our office to a designated collection site.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **August 20, 2020,** at Los Angeles, California.

Ari Y. Basser
Type/Print Name

Signature