AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

AIDS HEALTHCARE FOUNDATION, A California Non-Profit Public-Benefit Corporation, Claimant v. **PRIME THERAPEUTICS LLC, A Delaware Limited-Liability Company,** Respondent.	**Case No. 01-22-0000-2756** **Arbitrator David R. Cohen** **ORDER GRANTING-IN-PART AND DENYING-IN-PART RESPONDENT PRIME THERAPEUTICS LLC'S MOTION TO DISMISS**

In its Second Restated Arbitration Complaint ("Complaint"), Claimant AIDS Healthcare Foundation ("AHF") alleges Respondent Prime Therapeutics LLC ("Prime") horizontally fixed its reimbursement rates with a competing entity, non-party Express Scripts, Inc. ("ESI"),[1] through a collaboration agreement, thereby violating federal and Minnesota antitrust laws. AHF also alleges Prime violated Minnesota contract and tort laws, a Minnesota Unlawful Clawback Statute, and California unfair competition law ("UCL").[2]

Prime moves to dismiss AHF's Complaint. AHF submitted a Response in opposition and Prime submitted a Reply. Having carefully reviewed the parties' submissions, and for the reasons stated below, Prime's Motion to Dismiss ("Motion") is **GRANTED** with respect to AHF's

[1] "ESI" refers broadly to the family of related Express Scripts entities, including Express Scripts Holding Company, Express Scripts, Inc., and Express Scripts PBM.

[2] AHF alleges seven causes of action: (1) Federal Horizontal Price-Fixing (15 U.S.C. §§ 1, 16, 26); (2) Minnesota Horizontal Price-Fixing (Minn. Stat. §§ 325D.49, 325D.51, 325D.53, 325D.54, 325D.56, 325D.57, 325D.58, 325D.61); (3) Minnesota Unlawful Clawbacks (Minn. Stat. §§ 62W.01, 62W.13); (4) Minnesota Breach of Contract; (5) Minnesota Breach of the Implied Covenant in All Contracts; (6) Minnesota Unjust Enrichment; and (7) California Unfair Competition (Cal. Bus. & Prof. Code §§ 17200, 17203).

California UCL claim and Minnesota Unlawful Clawback claim (Claims 7 and 3), and **DENIED** with respect to all other causes of action.

Background

AHF, a California corporation, operates a chain of 63 pharmacies in California and 13 other States. Prime is a Pharmacy Benefits Manager ("PBM") headquartered in Minnesota. On November 15, 2018, AHF entered into a Pharmacy Participation Agreement ("PPA") with Prime. Complaint at ¶ 7. The PPA states that Prime provides pharmacy benefits services to prescription-drug plans, which in turn provide "health care benefits . . . [including] access to a contracted pharmacy network" for plan members. PPA at 1 (Recitals). The PPA further states that Prime "desires to arrange for the provision of prescription drug services" to those members, and that AHF "is willing to provide Prescription Drug Services" to Prime's clients' members, under the terms of the PPA. *Id.* In other words, AHF's pharmacies become part of a pharmacy network that Prime's clients' members can use to fill their prescriptions, broadening AHF's customer base; and in return, Prime gains access to a broader network of pharmacies to which it can refer its prescription-drug-plan clients' members.[3]

In practice, AHF purchases prescription drugs from a wholesaler (sometimes referred to as a distributor) and provides the drugs to its patients in exchange for a patient's copayment. Pursuant to the PPA, those patients include Prime's clients' members. Prime then "reimburses the pharmacy for the prescription, less the amount of the [member]'s copayment. The prescription-drug plan, in turn, reimburses [Prime]." *Rutledge v. Pharmaceutical Care Mgmt. Ass'n*, 141 S. Ct. 474, 478

[3] "Prime is owned by twelve entities representing nineteen not-for-profit Blue Cross and Blue Shield Plans, subsidiaries or affiliates of those plans (collectively referred to as "Blue Plans") . . . . Prime's clients include Prime's owners, non-owner Blues Plans, as well as other groups such as employers and unions." Motion at 3; Complaint at ¶ 3.

(2020). The reimbursement rates that AHF receives from Prime is the subject of the present dispute.

On or about December 19, 2019, Prime began a collaboration with ESI. AHF alleges that, in April 2020, pursuant to the collaboration agreement, Prime "fixed its [reimbursement rate] prices [for 15 categories of prescription drug services] to Express Scripts' prices." Complaint at ¶ 18. AHF further alleges that, on or about November 13, 2020, Prime further fixed its reimbursement rate prices for an additional 13 categories of prescription drug services to ESI's rates. *Id.* at ¶ 20. Since then, AHF alleges the remuneration it has been receiving pursuant to its contract with Prime has been provided at ESI's lower reimbursement rates rather than what AHF would have received had Prime not fixed its prices to ESI's. *Id.* at ¶ 19, 22. "PBMs normally develop and administer their own unique [reimbursement rate] lists." *Rutledge*, 141 S. Ct. at 478.

On June 18, 2021, AHF filed a complaint in federal court in the Central District of California alleging antitrust and unfair competition claims against Prime. The district court granted a motion by Prime to compel arbitration, which leads to this matter. *See AIDS Healthcare Foundation v. Prime Therapeutics LLC*, Case No. 21-CV-4979, Order Granting Motion to Compel Arbitration, docket no. 35 (C.D. Cal. Nov. 30, 2021). On March 23, 2023, following full briefing, the undersigned resolved a choice-of-law dispute between the parties, ruling that "Minnesota law will apply to AHF's claims in this proceeding." Order on Choice of Law at 6.

Legal Standard

This dispute was referred to arbitration from federal court in the Central District of California. AHF asserts that "the procedural rules of the U.S. District Court, Central District of California, and the U.S. Court of Appeals, Ninth Circuit, should govern the present Motion to

Dismiss." Response at 11.[4] Prime is silent on the application of federal procedural law. Therefore, the undersigned will apply procedural law governing motions to dismiss as would a federal court.

A complaint is required to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). When ruling on a motion to dismiss filed under Fed. R. Civ. P. 12(b)(6), a court "must accept as true all the factual allegations contained in the complaint," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and "should construe the complaint liberally in the light most favorable to the plaintiff," *Eckert v. Titan Tire Corp.*, 514 F. 3d 801, 806 (8th Cir. 2008). However, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (quoting *Bell*, 550 U.S. at 570). The Court is not bound, however, to accept a mere legal conclusion as true. *Id.*

AHF's Antitrust Claims

Prime argues AHF has not and cannot plead an antitrust injury. Motion at 5–6. In support, Prime asserts that: (1) AHF does not allege any unlawful conduct, *id.* at 7, and (2) AHF has not alleged an injury that the antitrust laws were designed to prevent. *Id.* at 8. Case law explains AHF's burden:

> Section 1 of the Sherman Act provides that "[e]very 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." 15 U.S.C. § 1. To establish a claim under § 1 "a plaintiff must demonstrate '(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably

[4] Federal procedural law is considered uniform throughout the country. *See* Fed. R. Civ. P. 1. AHF concedes it "is not presently aware of how any relevant law would be interpreted differently by a court in Los Angeles versus a court in Minnesota." Response at 11 n.7.

> restrained trade under either a *per se* rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce.'"

In re Pork Antitrust Litig., 495 F. Supp. 3d 753, 768 (D. Minn. 2020) (quoting *Insignia Sys., Inc. v. News Am. Mktg. In-Store, Inc.*, 661 F. Supp. 2d 1039, 1062 (D. Minn. 2009)). And "Minnesota antitrust law is generally interpreted consistently with federal antitrust law." *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 626 (Minn. 2007).

A. *Per Se* Analysis

Under *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977), AHF must allege an antitrust injury. In other words, AHF must allege an injury to competition, itself. *See id.* ("antitrust laws . . . were enacted for 'the protection of competition, not competitors'") (quoting *Brown Shoe Co. v. United States*, 370 U. S. 294, 320 (1962)). Alleging only an injury-in-fact that is sufficient for *constitutional* standing is not enough; there must also be antitrust standing. *In re Auto. Parts Antitrust Litig*., 50 F. Supp. 3d 836, 854 (E.D. Mich. 2014) (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 (1983)). The antitrust injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. *Brunswick,* 429 U.S. at 489.

Nonetheless, "certain agreements, such as horizontal price fixing . . . , are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused." *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (citing *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 5 (1958)).[5] "Where a plaintiff proves conduct that falls within a *per se* category, nothing more is needed for liability; the defendants' power, illicit purpose and anticompetitive effect are all said to be irrelevant." *Addamax Corp. v. Open Software*

[5] The same is true under Minnesota law. "[P]rice fixing . . . is a per se violation of the law that strikes at the heart of antitrust law's purpose of protecting competition." *Lorix*, 736 N.W.2d at 632 (Minn. 2007).

Fndn., Inc., 152 F. 3d 48, 51 (1st Cir. 1998) (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)). "The *per se* rule is limited to certain categories of agreements that are so plainly anticompetitive and lacking in redeeming virtue that they are conclusively presumed to be illegal without elaborate inquiry into the precise harm that they have caused or their business justification." *Five Smiths, Inc. v. Nat'l Football League Players Ass'n*, 788 F. Supp. 1042, 1049 (D. Minn. 1992) (citing *Northern Pacific,* 356 U. S. at 5.). Although the categories of anticompetitive behavior that warrant *per se* treatment have been shrinking over time, horizontal price fixing remains one of the paradigmatic examples of a *per se* antitrust violation. *See Addamax*, 152 F. 3d at 51–52 ("*Per se* offenses remain very important—they include horizontal price fixing—but only for conduct that fits squarely within the 'ever narrowing *per se* niche.'") (quoting *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 593 (1st Cir. 1993)).

Prime asserts a litany of reasons why its collaboration with ESI is justified—including, for example, that their agreement "increase[s] economic efficiency" and is "intended to lower costs to patients and within the system." Motion at 11. These allegedly pro-competitive justifications, however, are irrelevant to a properly alleged *per se* violation. A price fixing agreement among horizontally competing businesses is necessarily within the "categor[y] of agreements that are so plainly anticompetitive and lacking in redeeming virtue that they are conclusively presumed to be illegal." *Five Smiths*, 788 F. Supp. at 1049.

Prime also implies that the undersigned may not deploy a *per se* analysis without first having "amassed considerable experience with the type of restraint at issue." Motion at 10 (quoting *NCAA v. Alston*, 141 S. Ct. 2141, 2156 (2021)). This argument, however, defeats the purpose of the *per se* rule. The undersigned accepts as true that the PBM business model is complicated and, in some ways, opaque. Complaint at ¶ 24–25. However, the Supreme Court has made clear that

"[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *State of Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) (quoting *Socony-Vacuum*, 310 U. S. at 222). Put differently, when a *per se* violation of the antitrust laws is proved, an arbitrator (or a federal court) need not be overly concerned with ensuring ***precise*** understanding of the industry involved or the manner in which the competitive injury manifests itself; the agreement is *per se* illegal.

Of course, under the federal plausibility pleading standard, AHF must do more than conclusorily assert a horizontal price fixing agreement to allege a *per se* violation of the Sherman Act. *Twombly*, 550 U.S. 544. In this case, AHF has done so. AHF alleges that Prime, through the collaboration agreement with ESI, fixed its reimbursement prices with a direct horizontal competitor. Complaint at ¶¶ 12–13. AHF also alleges that Prime not only ***agreed*** with ESI to fix prices, but in fact ***did so***, pointing to published price tables and schedules as proof. *Id.* at ¶¶ 18–22. In other words, AHF has plausibly alleged, beyond with simple conclusory language, that Prime adjusted its reimbursement rates not because of competitive forces in a free market, but instead by agreement with a direct market competitor. These allegations are sufficient for AHF's antitrust claims to survive a motion to dismiss.[6]

B. Rule of Reason

Of course, a plausibly alleged *per se* antitrust violation is not a proved violation, and it may certainly occur that, upon careful consideration of the evidence adduced in arbitration, AHF cannot, in fact, show horizontal price fixing. In that case, AHF must prove its alleged antitrust claims, if at all, under the rule of reason.

[6] For the same reasons, AHF has also properly alleged a claim under the equivalent Minnesota antitrust laws.

Prime asserts that, if AHF's allegations fail under a *per se* theory of antitrust liability, then its antitrust claims "must be dismissed since no rule of reason claim [is] being pursued." Motion at 4. To be clear, the rule of reason is not a ***claim***. It is one of two ways to ***analyze*** a federal antitrust claim.[7] As described above, AHF has plausibly alleged a Sherman Act claim, and although AHF has apparently elected to try to prove its claim via a *per se* theory, if the evidence shows that the Prime-ESI collaboration is something other than a price-fixing agreement requiring *per se* treatment, the undersigned may instead evaluate AHF's claim under the rule of reason.[8] *Cf. In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 735 (8th Cir. 2014) (when deciding a summary judgment motion where plaintiff failed to prove a *per se* violation, it was error for the district court to not even consider a rule of reason violation).

[7] *See Five Smiths*, 788 F. Supp. at 1045 ("Two methods of analysis are used to determine whether a particular concerted action violates section 1 [of the Sherman Act]: the per se rule and the rule of reason."); *see also United States v. Brown Univ. in Providence in State of R.I.*, 5 F.3d 658, 668-69 (3rd Cir. 1993) ("Three general standards have emerged for determining whether a business combination unreasonably restrains trade under section one" – "the traditional rule of reason and the *per se* rule, [and] . . . an abbreviated or 'quick look' rule of reason analysis").

Regardless of which type of analysis is used, the ultimate question remains the same: did the defendant reach an agreement that unreasonably restrains trade in a way that affects interstate commerce? *See California Dental Ass'n v. F.T.C.,* 526 U.S. 756, 779–80 (1999) ("The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear. We have recognized, for example, that 'there is often no bright line separating per se from Rule of Reason analysis,' since 'considerable inquiry into market conditions' may be required before the application of any so-called '*per se*' condemnation is justified. '[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition.'") (internal citations omitted).

[8] Prime cites *TMT Mgmt. Grp., LLC v. U.S. Bank Nat'l Ass'n*, 2016 WL 730254 (D. Minn. Jan. 4, 2016), for the proposition that, "[b]ecause AHF has opted to continue to rely on a per se theory only, AHF cannot subsequently rely upon the rule of reason." Motion at 12. That is not what *TMT* held. In *TMT*, the court found that: (1) plaintiff's Sherman Act claim did not survive under the *per se* analysis, because the alleged conduct was not price fixing; (2) the complaint was actually "devoid of ***any*** allegation that [defendant's] conduct restrained trade in a way prohibited by the antitrust laws;" and (3) plaintiff's proposed amended complaint "to allege an antitrust violation under the 'rule of reason'" would be futile, since the conduct plaintiff intended to plead ***still*** [did] not fall within the scope of §1." *Id*. at *27-*29 (emphasis added).

In this case, AHF has plausibly alleged price fixing, and although the Complaint might not support an antitrust claim under a rule of reason analysis, it is possible AHF could properly move to amend its Complaint to add such allegations following discovery. As the *TMT* opinion acknowledges, "courts are hesitant to dismiss antitrust actions before the parties have had an opportunity for discovery, because proof of illegal conduct lies largely in the hands of the alleged antitrust conspirators." *Id.* at *28 (quoting *Double D. Spotting Serv., Inc. v. Supervalu, Inc.*, 136 F.3d 554, 558 (8th Cir.1998)).

California Unfair Competition Law ("UCL")

As previously stated, the undersigned ruled that "Minnesota law will apply to AHF's claims in this proceeding." Order on Choice of Law at 6. In its Complaint, AHF asserts that, "[u]nder Minnesota law, if a corporation is physically located in California and has a contract with another person or entity, and that contract has a Minnesota choice-of-law clause, then that corporation has standing to sue that other person or entity for violating California Business and Professions Code section 17200 *et seq*. in connection with that contractual relationship." Complaint at ¶ 65 (citing *Avrok Labs. LLC v. Robinson*, 2023 WL 2730124 at *1-*4 & n.1 (D. Minn. Jan. 5, 2023)). In its Motion, Prime asserts that AHF's reliance on *Avrok* is misplaced and that, "[i]n fact, Minnesota courts that have considered this issue have repeatedly dismissed claims brought under statutes from other states, after determining Minnesota law applies." Motion at 13. In support, Prime cites *Northwest Airlines v. Astraea Aviation Services, Inc.*, 111 F.3d 1386 (8th Cir. 1997). Examination of the conflicting case law convinces the arbitrator that Prime holds the stronger position.

In *Avrok*, the plaintiff, a Delaware corporation with its principal place of business in California, filed suit in State court in California. The defendants removed the case to federal court under diversity jurisdiction and the parties stipulated removal to the District of Minnesota. *Avrok*, 2023 WL 2730124 at *1. In denying the defendants' motion to dismiss, the *Avrok* court noted "[t]he parties seem to agree that Minnesota law governs here. Both parties cite Minnesota Supreme Court cases in their briefs. The Agreement also includes a governing law clause providing that claims arising out of or based on the Agreement 'shall be governed by the laws of the State of Minnesota.' (Agreement § 11.3.)" *Id.* at *3 n.1. The *Avrok* court then concluded summarily that "Avrok has stated a claim against Defendants under the [California] UCL." *Id.* at *4.

In response, however, Prime cites *Northwest Airlines*, 111 F.3d at 1392 n.4. Prime asserts *Northwest* stands for the proposition that, when a contract contains a Minnesota choice-of-law clause, Minnesota will not recognize a claim resting on an out-of-state statute. Motion at 13–14.

In *Northwest*, the Eighth Circuit affirmed the trial court's dismissal of the defendant's counterclaimed violation of the Texas Deceptive Trade Practices Act ("TDTPA"). The trial court "found the TDTPA claim inapplicable in all respects." *Northwest Airlines v. Astraea Aviation Services, Inc.*, 930 F. Supp. 1317, 1325 (D. Minn. June 18, 1996) *aff'd*, 111 F.3d 1386 (8th Cir. 1997). In affirming the district court's ruling, the Eighth Circuit held: "[t]he district court did not err in applying Minnesota law to dismiss the claim[] for . . . violation of the Texas Deceptive Trade Practices Act. . . . [T]he deceptive trade practices claim rests on a Texas statute not available under Minnesota law." *Northwest*, 111 F.3d at 1392 n.4.

The *Northwest* trial court opinion is clear that the defendant's TDTPA counterclaim was inapplicable under Minnesota law due to the Minnesota choice-of-law provision. *See Northwest*, 930 F. Supp. at 1325 n.7 ("the TDTPA has been found inapplicable in all respects. If this decision is appealed, the Eighth Circuit would only need to decide whether this Court's choice-of-law determination is correct with respect to the TDTPA. If the Eighth Circuit reverses that determination, a subsequent appeal would address the facts underlying the TDTPA claim."). Although the district court did also address the underlying merits of the TDTPA claim, the circuit court affirmed on the trial court's choice-of-law determination, alone.

Both the *Avrok* and *Northwest* opinions appear to be directly on point. Accordingly, notwithstanding the more recent *Avrok* decision, the Eighth Circuit's higher precedent must control.[9] None of AHF's other cases lend *Avrok* any support. *See* Response at 24 (listing cases).

[9] Although the *Avrok* court allowed the UCL claim to survive the motion to dismiss, the lack of any analysis (or even citation) of the *Northwest* decision by the *Avrok* court calls into question that conclusion.

Prime correctly points out that none of these other cases undertake any analysis of a choice-of-law provision, Reply at 8–9; thus, they only stand for the proposition that a Minnesota district court ***can*** adjudicate a claim resting on an out-of-State statute. That is a separate issue. The issue in the present case is whether a Minnesota district court can adjudicate a California UCL claim where there is a contractual choice-of-law provision ***requiring*** the application of Minnesota law. The holding in *Northwest* indicates it cannot. Accordingly, AHF's California UCL claim must be dismissed.

Unlawful Clawback

AHF alleges a claim under Minnesota's anti-clawback statute, Minnesota Statute § 62W *et seq.* Specifically, AHF alleges that "Prime has retroactively adjusted claims for reasons other than the outcome of a pharmacy audit conducted in accordance with Minn. Statute § 62W.09 or technical billing errors." Complaint at ¶ 50. Taken as true, this would be a violation of Minn. Stat. § 62W.13.

Prime moves to dismiss this cause of action, arguing Minn. Stat. § 62W *et seq.* does not create a private right of action; therefore, AHF lacks standing to bring the claim. In response, AHF asserts "a plaintiff with sufficient connections to California may invoke the UCL to enforce Minnesota law, for restitution and an injunction." Response at 25. AHF explains it "has invoked the UCL's 'unlawful' prong to 'borrow' Prime's (brazen) violation of the Minnesota Anti-Clawback Law (which essentially flatly prohibits clawbacks) as the basis for obtaining restitution under the UCL." *Id.* at 24.

AHF misapprehends the interaction between the UCL and other laws. The UCL cannot create a separate private right of action under the laws of another state where one does not exist. Instead, the UCL's "unlawful" prong empowers a plaintiff to properly allege a business practice

was unlawful because it violated another law, even where that other law does not provide a private right of action, itself. *See Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999) ("By proscribing 'any unlawful' business practice, 'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable."). By "independently actionable," the *Cel-Tech* court meant "actionable under the UCL."

In other words, AHF can rely on an alleged violation of the Minnesota Unlawful Clawback Statute as evidence of an unlawful business practice enforceable under the UCL, but AHF cannot allege that Minnesota statutory violation, itself, as a separate cause of action. *See Lopez v. Stages of Beauty, LLC*, 307 F. Supp. 3d 1058, 1067 (S.D. Cal. 2018) ("Plaintiff's argument misses a crucial distinction between the existence of a private right to *enforce* [§ 62W.13] (such as under the UCL, and/or § 17535), and the existence of an independent *cause of action* under [§ 62W.13] itself.") (emphasis in original) (cleaned up).

Prime asserts, and AHF does not refute, that Minn. Stat. § 62W *et seq.* does not provide for a private right of action. The law expressly states that "[t]he commissioner [of commerce] shall enforce this chapter." Minn. Stat. § 62W.03, subd. 6. Accordingly, AHF does not have standing to bring its unlawful clawback claim, and that claim is dismissed.[10]

[10] Notably, this conclusion would hold even if the undersigned had not dismissed the UCL claim—there is simply no independent private right of action available under the Minnesota Unlawful Clawback statute, as opposed to a UCL claim reliant on a violation of that statute.

Unjust Enrichment

Prime also challenges AHF's unjust enrichment claim. Prime asserts: "AHF's unjust enrichment claim must be dismissed due to the existence of a valid agreement which governs the relationship between the parties." Motion at 15.

"Unjust enrichment is an equitable claim that 'arises when a party gains a benefit illegally or unlawfully,' and there is no valid contract completely governing the rights of the parties." *Stein v. O'Brien*, 565 N.W. 2d 472, 474 (Minn. Ct. App. 1997) (quoting *Midwest Sports Marketing, Inc. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254, 268 (Minn. Ct. App. 1996)). "[E]quitable relief cannot be granted where the rights of the parties are governed by a valid contract." *United States Fire Ins. Co. v. Minnesota State Zoological Bd.*, 307 N.W.2d 490, 497 (Minn. 1981) (citing *Cady v. Bush*, 166 N.W.2d 358 (Minn. 1969)).

While Prime states the law correctly, *see id.* at 14 (citing cases), its argument assumes a valid agreement, which has not yet been adjudicated. The undersigned assumed, in order to determine what law would be applicable to AHF's claims, that the PPA was valid, but never reached this conclusion. In its Complaint, with facts taken as true and viewed in a light favorable to Claimant, AHF alleges the PPA "is a form contract prepared by Prime for which Prime expressly claims a 2016 copyright. Prime and AHF did not negotiate the terms or conditions of the Prime-AHF Contract. It was presented to AHF on a take-it-or-leave-it basis, reflecting Prime's bargaining power over AHF." Complaint at ¶ 7. AHF further alleges the PPA contains "an unconscionable and unenforceable provision purporting to limit Prime's liability to AHF." *Id.* at ¶ 9. These allegations are sufficient for AHF to plausibly claim an unenforceable contract of adhesion. Further, AHF maintained this position throughout its briefing on the choice of law issue. *See* AHF

Choice-of-Law Br. at 10 n.1 ("The Prime-AHF Contract's adhesive quality makes it procedurally unconscionable.").

"AHF acknowledges that there may (or may not) come a time in this arbitration when the cause of action for breach of contract is understood to overlap with the cause of action for unjust enrichment, at least to the extent of preventing AHF from obtaining a double recovery." Response at 26. The arbitrator understands this to mean that AHF essentially seeks *legal* damages for breach of contract, ***or*** *equitable* relief in the form of unjust enrichment if there is no contract, ***in the alternative***. For now, at least, AHF's unjust enrichment claim survives dismissal.

Contractual Statute of Limitations

Finally, Prime asserts that, regardless of the rulings above, AHF's claims must all be dismissed because the PPA contains a one-year limitations clause. Motion at 16, Reply at 11-12. Prime argues that, even if AHF has been receiving reimbursements from Prime at ESI's rates since April 2020, AHF untimely filed this action in federal court on June 18, 2021, more than one year after the alleged antitrust violation allegedly arose. *Id.*

In response, AHF interposes three arguments: (1) the contractual limitations period is unreasonable and unenforceable; (2) the limitations period is subject to various equitable tolling doctrines, including the continuing-violations doctrine; and (3) even if the limitations period is enforceable and not equitably tolled, Prime "enacted the horizontal price-fixing scheme in two parts," the second of which began in January 2021, well within the one-year limitations period. Response at 14, 32. Each argument is examined below.

A. Contractual Limitations Period

Under Minnesota law, "parties may limit the time within which an action may be brought to a period less than that fixed by the general statutes of limitation provided the limitation is not unreasonably short. Such provisions, however, are not generally favored and are strictly construed against the party invoking them." *Henning Nelson Const. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W. 2d 645, 650–51 (Minn. 1986) (internal citations omitted) (cleaned up); *see Davies v. Waterstone Cap. Mgmt.*, L.P., 856 N.W. 2d 711, 717 (Minn. Ct. App. 2014) (citing *Peggy Rose Revocable Trust v. Eppich*, 640 N.W. 2d 601, 606-07 (Minn. 2002)). "Whether a contractual limitation is reasonable or not is to be decided on a case-by-case basis, looking at the particular facts of each case." *Henning*, 383 N.W.2d at 651.

The Minnesota Appeals Court's description of the Supreme Court's *Peggy Rose* decision is instructive and so is quoted at length below:

> There is little guidance in the Minnesota caselaw on how to determine whether a contractually shortened limitations period is reasonable. In *Peggy Rose*, the supreme court held unreasonable an 18-month limitations clause in an arbitration agreement. *Id.* at 609. The *Peggy Rose* court found "it useful as a starting point to consider what parameters the legislature has determined to be appropriate." *Id.* at 607. But *Peggy Rose* involved unusual circumstances because the respondent in that case asserted fraud claims, and the supreme court interpreted the limitations provision in the arbitration agreement to not include a discovery provision. *Id.* at 610. Primarily because the 18-month limitations period could expire before a claim even accrued, the supreme court held it unreasonable. The supreme court explained, "Although we maintain that parties may agree to a shorter limitations period than provided by statute, there is a difference between merely shortening the time within which an existing claim may be brought and altering the date on which a cause of action accrues." *Id.* at 608-09. The decision did not address whether an 18-month term would be reasonable if it included a discovery provision.

Davies, 856 N.W. 2d at 717 (quoting *Peggy Rose*, 640 N.W. 2d at 606-10).

Here, as in *Peggy Rose*, the PPA does not contain a discovery provision—in fact, it expressly abrogates the discovery rule. It provides:

> The parties agree that any action, including arbitration, in relation to an alleged breach of this Agreement will be commenced within one (1) year of the date of the breach, ***without regard to the date the breach is discovered***. Any action or arbitration not brought within that one year time period will be barred, without regard to any other limitations period set forth by law or statute.

Motion Exh. 1, § 9.10.3 (emphasis added).

AHF asserts the one-year contractual limitations period in the PPA is unreasonable. A contract that abrogates the discovery rule could plausibly lead to the circumstance described in *Peggy Rose,* where the limitations period might expire before the claim accrued.[11] *See Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 401 U.S. 321, 338 (1971) ("Generally, a[n antitrust] cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business."); *accord Digital Angel Corp. v. Corporativo SCM, S.A. de C.V.*, 2006 WL 1228859 at *4 (D. Minn. 2006) ("Defendant's cause of action could be barred long before Defendant even discovers its existence. . . . [S]uch a result is unreasonable.") (citing *Peggy Rose*, 640 N.W.2d at 609).

As described above, the PBM business model is complicated and opaque. And antitrust claims are often difficult to discover. *See In re Wholesale Grocery Prods.*, 752 F.3d at 735 ("[M]ost would-be monopolists probably can be expected to display a bit more guile, jotting down only a few seemingly common terms while sealing their true anticompetitive agreement with a knowing nod and wink."); *TMT Mgmt.*, 2016 WL 730254, at *2 ("[C]ourts are hesitant to dismiss antitrust actions before the parties have had an opportunity for discovery, because proof of illegal conduct lies largely in the hands of the alleged antitrust conspirators."). The PPA's abrogation of the discovery rule, the holding in *Peggy Rose*, and the shrouded nature of antitrust claims combine against Prime's argument.

[11] A 4-year statute of limitations is the "parameter[] the legislature has determined to be appropriate" for the Sherman Act and Minnesota antitrust laws. *Davies*, 856 N.W. 2d at 717 (quoting *Peggy Rose*, 640 N.W. 2d at 607).

In sum, the undersigned concludes the PPA's one-year limitations period is unreasonable and does not bar AHF's claims.

B. Continuing Violations

Even if, contrary to the conclusion stated above, the PPA's one-year limitations period *is reasonable*, it is nonetheless susceptible to equitable tolling.

Prime asserts "the contractual limitations period agreed upon by the parties supersedes the exceptions AHF attempts to rely upon," citing *FDIC v. Hartford Acc. & Indem. Co.*, 97 F.3d 1148, 1151 (8th Cir. 1996). Reply at 12. Prime's reliance on *Hartford* is misplaced. In *Hartford*, the Eighth Circuit applied South Dakota law to consider an insurance contract that contained a discovery provision. The circuit court held that "the district court erred in applying a tolling theory" to the contractual limitations period, explaining the lower court was wrong to "rewrite the policy's limitations provision" because "its clear and unambiguous terms" provided a "fixed, unqualified limitation." *FDIC v. Hartford*, 97 F.3d at 1151. But the circuit court relied heavily on the fact that the contract was an insurance policy: "[b]ecause South Dakota law already protects an insured who has been mislead [sic] or otherwise induced into missing a filing deadline, we decline to rewrite the policy's limitations provision to read other than its clear and unambiguous terms provide." *Id.*

Rather than stating an unqualified rule of law regarding the application of equitable tolling doctrines to contractual limitations periods, the *Hartford* opinion strongly suggests the result is confined to the facts of that case; or, at least, to insurance contracts governed by South Dakota law. *Hartford* does not fit with the facts of this case.

The undersigned is persuaded that the continuing violations doctrine also applies to AHF's antitrust claims, which are different in nature than an insurance contract claim. *See Zenith Radio*,

401 U.S. at 338 ("In the context of a continuing conspiracy to violate the antitrust laws, . . . this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act."). Therefore, AHF's surviving claims are not barred by the one-year contractual limitations period because that period is subject to equitable tolling, pursuant to the continuing-violations doctrine.

C. Two-Part Scheme

AHF also asserts that, even if the PPA's one-year limitations period is reasonable, and even if the limitations period is not susceptible to equitable tolling, a discrete, stand-alone part of Prime's allegedly illegal activity still fell withing the one-year period. Specifically, AHF alleges Prime "enacted the horizontal price-fixing scheme in two parts": (1) an agreement with ESI in April of 2020 to fix 15 categories of prices, Complaint at ¶ 19; and (2) a second agreement with ESI in November of 2020 to fix another 13 categories of prices, Complaint at ¶ 22. AHF notes the latter action is certainly within the one-year limitations period, which—given that AHF filed its complaint in June of 2021—extends back to June of 2020. In both its Motion and Reply, Prime does not engage with this argument.

In light of the two conclusions reached above regarding the limitations period, the arbitrator finds it unnecessary to address this last argument in detail. It is sufficient to observe that AHF's allegations provide enough traction that the arbitrator must deny Prime's Motion on limitations grounds at least as to part two of the alleged scheme.

Conclusion

Accordingly, for the reasons stated above, Prime's Motion to Dismiss is **GRANTED** as to AHF's California UCL Claim and Minnesota Unlawful Clawback claim (Claims 7 and 3), but **DENIED** with respect to all other causes of action.

The parties shall proceed according to Scheduling Orders No. 2 & 3, and the Arbitrator shall convene a teleconference in the near future to discuss dates for the Evidentiary Hearing.

IT IS SO ORDERED.

/s/ David R. Cohen
David R. Cohen, Esq.
Arbitrator

Dated: June 20, 2023