AMERICAN ARBITRATION ASSOCIATION

AIDS HEALTHCARE FOUNDATION, Claimant, v. PRIME THERAPEUTICS LLC, Respondent.	No. 01-22-0000-2756 Arbitrator: Stuart M. Widman

Ruling On Respondent's Motion For Summary Adjudication

On May 21, 2024, Respondent Prime Therapeutics LLC. ("Prime") submitted its Motion For Summary Adjudication ("Motion") seeking dismissal of Claimant AIDS Healthcare Foundation's ("AHF") Second Restated Complaint (the "SAC") on two grounds: (i) on the antitrust merits, Prime's December 2019 collaboration (the "Collaboration") with Express Scripts, Inc. ("ESI") must be evaluated under the rule of reason, and, applying that standard, the Collaboration does not violate either Section 1 of the Sherman Act or Minnesota's antitrust statute, and (ii) even if there were an antitrust violation, AHF suffered no recoverable antitrust damages.

Prime's Motion was supported by excerpts from numerous depositions taken in the case, excerpts from the report of Prime's damages expert, Robert S. Maness, and other materials and exhibits. On June 10, AHF submitted its Opposition ("Oppos."), which was also supported by transcripts, an expert's report, a declaration, and cases, and on June 17, Prime submitted its Reply.

Having considered the legal and factual arguments of counsel, this Arbitrator: (i) denies the Motion in part, concluding that Prime has not shown as a matter of law that the SAC must be the evaluated under the rule of reason rather than the *per* se standard, and (ii) grants the Motion in part, concluding that AHF's damages must, as a matter of law, be based on the net effect of the Collaboration upon AHF's revenues, although there are material and genuine fact issues of what

damages AHF suffered in gross and net from the alleged statutory violation, and therefore that last aspect of the Motion is also denied. This Ruling does not decide whether the Collaboration fails the rule of reason test (Motion, B), and that is deferred to the Hearing.

Discussion

Prime Has Not Shown That
AHF's Antitrust Claims Should Be
Evaluated Under The Rule Of Reason[1]

The Motion asks this Arbitrator to perform the task that often falls upon court judges: determine whether an antitrust claim under Section 1 of the Sherman Act, 15 U.S.C. Section 1, and under the Minnesota Antitrust Law, Minn. Statute Section 325D.53, is more properly examined under the *per se* or rule of reason standard. *Five Smiths, Inc. v. National Football League Players Ass'n.*, 788 F.Supp. 1042, 1045 (D. Minn. 1992) ("court must scrutinize the alleged activity to determine whether [the *per se* label] is appropriate."). That analysis may be made on a motion to dismiss (See, also *Jain Irrigation, Inc., etal. v. Netafin Irrigation, Inc.*, 386 F.Supp. 3d 1308, 1314 (E.D. Cal. 2019)) but it often occurs on summary judgment, when the record is more robust. *In Re Blue Cross Blue Shield Antitrust Litigation*, 308 F.Supp. 3d 1241 (N.D. Ala. 2018).[2] And sometimes it is not decided until after trial. *NCAA v. Alston et al.*, 141 S.Ct. 2141 (2021); *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

[1] This aspect of the Motion attacks only the First and Second Causes of Action under the SAC. Thus, even were this aspect of the Motion granted, a Hearing would still be necessary to adjudicate liability on the other claims for breach of contract (Fourth Cause of Action), breach of the implied covenant of good faith and fair dealing (Fifth), and unjust enrichment (Sixth). However, as discussed below, the Motion's assertion that AHF suffered no damages apparently covers those other three counts too.

[2] Here, Prime challenged the *per se* standard via both a motion to dismiss and this summary judgment motion. On June 20, 2023, the prior Arbitrator's Order on Prime's Motion To Dismiss determined (pp. 4 - 8) that the First and Second Causes Of Action adequately pleaded facts that supported a *per se* analysis. That prior determination is not law of the case, however, where there now is an expanded evidentiary record upon which Prime can base its new argument. Thus, this Arbitrator must again assess the viability of AHF's *per se* approach.

Prime contends the *per se* approach is improper, and the alleged violation deserves rule of reason treatment, for many reasons: (i) healthcare is a "mind-numbingly complex" industry, where the *per se* rule should only be applied in instances in which courts have historical familiarity; (ii) the Collaboration is not just a horizontal arrangement between competitors, but also has vertical attributes; (iii) the Collaboration has pro-competitive benefits that must be considered; (iv) the Collaboration is "like" a joint purchasing agreement that offers economic efficiencies from integration, all of which Prime contends is supported by case law and the Federal Trade Commission's and Minnesota Attorney's General allowance of the Collaboration without limits.

The alleged antitrust violation had two primary components, which AHF alleges together lowered the reimbursements paid to AHF: (i) fixing reimbursement rates at ESI's lower prices/rates (ie., front-end reductions), and (ii) also subjecting AHF's payments to post-payment clawbacks (i.e., back-end reductions) under ESI's direct and indirect remuneration (DIR) fees, which AHF says Prime also adopted under the Collaboration. These were, per AHF, agreements between two horizontal competitors - both healthcare insurers or plan managers. AHF's alleged damages are the sum of both of those alleged wrongs because, AHF says, they collectively lowered AHF's revenues post-Collaboration compared to its revenues pre-Collaboration.

As noted, the SAC exclusively says (¶¶ 37, 46) that the Collaboration and its resulting impacts are *per se* unreasonable restraints of trade under Sherman Act Section 1 and Minnesota's Section 325D.53. Even after the prior Arbitrator's June 20, 2023 Order (p. 8, fn 8) on Prime's Motion to Dismiss, AHF elected not to amend upon the completion of discovery on April 23, 2024 to add a rule of reason approach to analyzing the Collaboration. Nor does it now ask to amend.[3] Rather, with the Hearing set for late July, 2024, AHF stands on its *per se* test, albeit suggesting

[3] Amendment would be governed by AAA Rule R-6(b), where Arbitrator discretion is tempered by issues of prejudice, among other concerns.

some leeway under the "quick look" aspect of the rule of reason. (Oppos. pp. 10, 11, 13, 24.) Especially in antitrust cases, a claimant is the master of its claims, but it must abide by its election and may not switch theories late in the proceeding. *Jain*, at 1314; *Bay Area Surgical Mgmnt. LLC v. Aetna Life Ins. Co., etal.*, 166 F.Supp. 3d 988, 994 (N.D. Cal. 2015). Therefore, this Arbitrator need only determine whether the claims must be evaluated under the rule of reason or may proceed under the *per se* approach, which is the first point in the Motion. If the *per se* approach is still viable, this Arbitrator need not address Prime's other argument (Motion, B), which presumes application of the rule of reason.

Overarching Antitrust Concepts. Price-fixing agreements between two or more competitors, known as horizontal price-fixing agreements, are arrangements that generally are *per se* unlawful. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). That is because such agreements are deemed to so obviously threaten competition that they can be condemned without a fact-specific assessment of the particular restraint upon the impacted market. *NCAA v. Alston, et al*, 594 U.S. at 81, 90; *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (rejecting *per se* rule in vertical resale price maintenance case).

The *per se* rule applies only to restraints that "would always or almost always" tend to decrease competition, has manifestly anticompetitive effects, and lacks any redeeming virtue. *Leegin*, at 886. Thus, the unreasonableness of the alleged restraint need not be certain; it need only be "predominantly" anticompetitive or "virtually always likely" to restrict competition. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery And Printing Co.*, 472 U.S. 284, 289, 295 (1985) (rejecting *per se* analysis in buyers' refusal to deal case). There is no dispute here that Prime and ESI are competitors in the healthcare industry, and were so at the time they agreed to collaborate. They both offer and help manage healthcare plans that provide plan members with covered

services, including drug reimbursements. Nor is there any question that the Collaboration affected interstate commerce.[4] The central issue now is the certainty (or not) of anticompetitive effects.

Historically, the Sherman Act has mostly targeted sellers of commodities who drive prices up in the market. But horizontal anti-competitive agreements between buyers of products or services, especially those that lower payments to suppliers, are also subject to Sherman Act scrutiny. *U.S. v. Socony-Vacuum Oil Co, Inc, etal*., 60 U.S. 811, 829 - 830 (1940) (buying program that raised prices in order to effect higher retail prices); *Alston*, at 73, 82 (attacking policy of restricting compensation "in its buyer-side labor market"); *Bay Area Surgical*, 166 F. Supp. at 991 - 992 (reducing payments in healthcare industry to ambulatory surgery centers); *Castro, M.D. P.A., etal v. Sanofi Pasteur Inc.,* 2012 WL 12516573, *5 (D.N.J. 2012) (healthcare industry: buyer cartels with objective to force sellers' prices down are illegal *per se*). The analysis and standards for claims under Minnesota's price-fixing statute, Minn. Statutes Section 325D.49 - .61, are generally the same. *Lorix v. Crompton Corp., et al.*, 736 N.W. 2d 619, 626 (2007); *Howard v. Minnesota Timberwolves Basketball Ltd. Pship*, 636 N.W. 2d 551, 557 (Minn. Ct. App. 2001). Here, the SAC complains that the Collaboration lowered prices paid to AHF for drugs and related services, thereby reducing AHF's compensation.[5]

But sometimes even horizontal price-fixing is subject to the rule of reason, not the *per se* standard when, for example, some restraints on competition are essential to the availability of the product, there are offsetting competitive benefits, or the structure of the restraint exempts it. Which standard is appropriate is a legal question, but that is predicated on a fact inquiry into the restraint's

[4] There is no interstate commerce component to Count II under Minnesota antitrust law.

[5] A Sherman Act claim arises when the alleged anti-competitive behavior affects a host of market participants, not just the plaintiff. The SAC alleges, and the Motion does not contest, that the Collaboration affected not just AHF, but also pharmacies nationwide whose patients were members of healthcare plans that used Prime's and ESI's reimbursement rates.

competitive affects). *In re Blue Cross Blue Shield*, 308 F.3d at 1258. The Motion argues that all of those qualifying factors exists here, and therefore the *per se* rule is inapt.

The Collaboration Is Subject To Antitrust Scrutiny. This Arbitrator disagrees with Prime's initial assertion (Motion, pp. 2 - 3) that healthcare in general, and this Collaboration in particular, is too complex and not sufficiently familiar to courts to allow *per se* treatment.[6] That view was pretty much discarded in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 349 (1982), which stated that price-fixing under the Sherman Act is "applicable to all industries alike." Indeed, *Maricopa* was a healthcare industry claim where the Court struck down as *per se* illegal a horizontal agreement among competing physicians to set maximum fees that could be submitted to insurers. Abundant other healthcare industry cases since *Maricopa*, cited throughout, underscore the inclusion of healthcare transactions like this in the Sherman Act crucible. Horizontal price-fixing there has the same familiar attributes as in any other industry. *In Re*: *Blue Cross Blue Shield*, 308 F.Supp. 3d at 1259 (healthcare cases; experience with type of restraint, rather than industry, is focus); *North Jackson Pharmacy v. Caremark RX, Inc.*, 385 F.Supp. 2d 740 (N.D. Ill. 2005) (PBM price fixing conceded as *per se* violations). *North Jackson Pharm. Inc., v. Express Scripts, Inc.,* 345 F. Supp. 2d 1279 (N.D. Ala. 2004) (PBM price fixing stipulated *per se* violation).

Accordingly, this Arbitrator concludes two foundational things on this aspect of the Motion: (i) that the *per se* rule might still be applied because price fixing among PBMs is not so hard to comprehend that the rule of reason must be applied, but also (ii) that more analysis of the anticompetitive and procompetitive effects of the Collaboration should be made before a conclusion is made whether full rule of reason evaluation is mandated.

[6] The Motion (pp. 6 - 7) illservers Prime's point. In barely a page, the Motion succinctly summarizes the essence of the Collaboration, at least as Prime sees it. Coupled with the allegations in the SAC of how the Collaboration works, the Motion shows that the Collaboration is not unduly complex to grasp or analyze under the Sherman Act.

More specifically, as to the issue of which test applies to the SAC, this Arbitrator additionally concludes: (i) as a matter of law, the Collaboration did not include a vertical restraint; (ii) Prime has not shown that the Collaboration is not a price fixing arrangement; (iii) Prime has not shown that the Collaboration was a joint venture or joint purchasing agreement; (iv) Prime has not shown there were actual procompetitive benefits to consumer patients; (v) Prime has not shown that output was reduced; and (vii) the inaction or action of the Federal Trade Commission (FTC) and the Minnesota Attorney General have no impact on this analysis.

Thus, this Arbitrator concludes that two of those arguments fail as a matter of law and that Prime has not sufficiently shown that others support its Motion. Accordingly, at this juncture, Prime has not established even a likelihood that the rule of reason rather than *per se* treatment governs.

These conclusions might warrant an overall holding that the *per se* test applies, as pleaded in the SAC. Indeed, this Arbitrator strongly leans toward that conclusion. However, some of Prime's arguments fail because there are genuine issues of material fact, as Claimant argued. Therefore, this Arbitrator will keep the door open for Prime to present at the Hearing more persuasive evidence on above items (ii) to (v) that supports its contentions, as well as Claimant to rebut. Thus, this aspect of the Motion is denied, albeit without prejudice as to some parts.

This allowed deeper dive into factors that Prime says are compelling may develop a better record for the ultimate decision on which legal analysis best suits this case. This is particularly appropriate because many of Prime's justifications are projections, anticipations, possibilities, and expectations looking at the Collaboration from 2020, when it started. But there now is four years of operational history of the Collaboration, over which the theoretical benefits may have become reality (or not). In other words, with some actual track record, it is no longer best to just

prognosticate whether those particular procompetitive benefits were real. For the Motion and the Hearing, where possible, the better evidence is the actual outcomes - especially of benefits to consumers in the form of lower drug costs.

The foregoing does not mean that all of Prime's procompetitive justifications are invalid. This Arbitrator only concludes that, at this summary judgment stage, the asserted procompetitive features espoused above by Prime have not been shown as a matter of law. Therefore, on the issue of which antitrust standard applies, the Motion cannot be granted.

The Collaboration Is Not A Combined Horizontal And Vertical Arrangement. Prime's recasting of the Collaboration as a "supply agreement" or "subcontractor agreement" that has both horizontal and vertical elements (Motion, pp. 5 - 6) is denied as a matter of law, not left open for further fact review. Whether a restraint is horizonal or vertical "depends on the relationship between the parties to the agreement that imposes the restraint." *United States v. Brewbaker,* 87 F.4th 563, 575 (4th Cir. 2023) (vertical restraint typified by agreement between firms at different levels); *In re Blue Cross Blue Shield,* 308 F. Supp. 3d at 1263 (whether vertical or horizontal driven by central substance of the situation, not its periphery, and by the identity of the conspiring parties); *North Jackson Pharmacy, Inc. v. Express Scripts, Inc.*, 345 F. Supp. 2d at 1294 - 1295 (horizontal because PBMs used to effect price fix).

The Winn-Dixie cooperative that got rule of reason treatment was an agreement among horizontally-situated mushroom farmers as well as vertically-situated mushroom distributors. *Winn-Dixie Stores, Inc. v. Eastern Mushroom Marketing Cooperative, Inc. et al.*, 89 F.4th 430, 435 - 437 (3d Cir. 2023). The scheme involved "myriad organizational structures", varying degrees of vertical integration, and cooperation at multiple levels. 89 F.4th at 440. That is vastly different from the two-party Collaboration here. Indeed, the Motion does not actually offer evidence of

other parties to the Collaboration (horizontal or vertical), instead expanding (and relabeling) the Collaboration beyond its fundamental two-party core to include ancillary impacts. But verticality arises, if at all, from the agreement, not effects. Thus, the Collaboration is purely horizontal, and no rule of reason treatment arises based on verticality.

Prime Has Not Shown That The Collaboration Is Not A Price-Fixing Arrangement. Prime's argument (Motion, pp. 7 - 8; Reply, pp. 3, 10 - 12) that the Collaboration is simply not price fixing is not well-taken because it rests on an analysis that is contrary to antitrust principles. Prime focuses on the micro aspects of the price restraints, arguing that the Collaboration does not set prices for either individual pharmacies or for individual drugs, and that Prime and ESI did not see individual reimbursements. Even if true, price fixing does not just look at that granular level, and Prime has not provided sufficient legal authority to show that it does. Rather, the antitrust laws are concerned with the overall impact of an agreement upon free market forces, including any interference with the usual negotiations of private deals. See cases listed in *California Dental Assoc. v. FTC*, 119 S.Ct. 1604, 1612 – 1613 (1999). Thus, any combination that tampers with price structures - not just particular prices for individual entities - is subject to antitrust scrutiny.

Here, there is little doubt that the Collaboration impacted Prime's pricing of its reimbursements to AHF and the industry. Prime concedes (Motion, p. 8; Reply, pp. 10 - 11) that the Collaboration was designed and implemented to create and set annual and aggregate targets, floors, and guardrails. That macro level of price control is enough to trigger antitrust exposure. Indeed, the Maness Report (pp. 18, 33)[7] mentions that pharmacy/PBM contracts and their attendant price structures usually result from negotiations by those parties. It is the Collaboration's

[7] Notably, Maness does not make the micro/macro distinction that Prime presents in it briefs.

multifaceted interference with that normal negotiating process - e.g., target pricing, adoption of DIR clawbacks, shifting of grievance procedures - that makes it a price-fixing combination.

Prime Has Not Shown That The Collaboration Is A Proper Joint Venture Or Purchasing Agreement. The Collaboration also does not deserve rule of reason treatment because, per the Motion (p. 6), it is "like" a joint purchasing agreement that would not always or almost always restrain competition. Legitimate joint purchasing agreements or joint ventures get rule of reason analysis because they have structural economies and efficiencies that remove them from the naked price-fixing category. Those are not apparent here.

The buyers' refusal to deal in *Northwest Wholesale* deserved rule of reason analysis because the purchasing cooperative (Northwest) did more than merely buy (or in that case refuse to buy) the supplies from Pacific Stationery. The cooperative also provided warehousing facilities for the wholesale supplies, thereby ensuring ready access to stock. Those cost-saving and order-filling guarantees were important economic efficiencies that enabled the cooperative members to compete more effectively. 472 U.S. at 286, 295.

Thus, some type of integration of the competitors, and resultant economies to them, is necessary to move the restraint into rule of reason realm. Such attributes can shift the restraint away from unreasonable - the only type that violates the Sherman Act (*Dagher*, 547 U.S. at 5) - and into a possibly more reasonable framework that escapes *per se* analysis. *In Re Blue Cross Blue Shield*, 308 F.Supp. 3d at 1275 (in legitimate joint ventures, competitors typically pool their capital to exploit larger-scale efficiencies); *Castro v. Sanofi*, *supra.* at *5 (observing that a properly defined joint purchasing arrangement arises "only when there is sufficient efficiency-enhancing integration among competitors to justify the agreement", and holding that the complaint did not allege preset fixed prices); *North Jackson Pharmacy, Inc. v. Caremark RX, Inc.*, 385 F.Supp. 2d

at 747 (healthcare; cooperative purchasing by pharmacy benefits manager analyzed under rule of reason because prices were not preset but rather based on negotiations with providers, and plans integrated certain assets).

The Motion provides little to show that the Collaboration should be treated like a joint purchasing agreement or joint venture. Operational integration with ESI - an important litmus test to qualify as a proper joint venture on purchasing arrangement – is absent. Indeed, Prime concedes (Motion, p. 3) that it still adjudicates all of its pharmacy reimbursement claims, and the overall evidence weighs heavily against Prime on this. (Expert Report of Barak Richman, pp. 10 – 12, 16; Conlin Rough TR., pp. 25, 86, 93; Expert Report of Robert Maness, pp. 20 – 21, 24.)[8]

Prime Has Not Shown There Were Actual Benefits To Consumers. Prime contends (Motion, pp. 2, 5, 10) that one procompetitive gain from the Collaboration is that consumers can pay lower prices for drugs because the cost savings realized by Prime and its owners/plans are passed on via reduced plan premiums and lower drug bills. That defense may not be as influential as Prime suggests. *West Penn Allegheny Health Systems, Inc. v.* UPMC, 627 F.3d 85, 104 – 105 (3d Cir. 2010). Moreover, Prime does not offer any actuals of that theoretical benefit to the ultimate consumer. There is nothing in the Maness Report, which Prime cites as its factual source, that shows material pass throughs. Rather, Maness at most (Report, pp. 17, 21 - 24) discusses the "potential" or "likely" consumer benefits, where Prime's lower costs for drugs "could" be passed on to consumers and "enable" them to pay less; says those benefits "can translate" into enrollee benefits (p. 21); that Prime "is structured to pass on the cost savings" to plan members (p. 22); and offers the FTC's opinion of a "high likelihood of benefiting consumers" in a possibly comparable combination (pp. 23 - 24.) That is all qualitative, not quantitative, commentary. Missing are the

[8] The Parties have apparently stipulated that the group purchasing operation of Ascent Health Services LLC is outside the scope of this matter and not relevant to any disputed claim or defense. (Oppos. p. 22.)

statistics that reveal what actually happened to consumers - whether just AHF's patients or those that Prime covered overall - over the past 4+ years. This factual void is telling, as it hardly eliminates - with concrete evidence, that is - a genuine and material fact question about that asserted procompetitive benefit of the Collaboration.

For sure, Prime touts cost savings to its upstream owners and plans, but that rationale could exonerate every price-fixing arrangement that (for a fix of higher sale prices) generates more revenues for the seller and its shareholders/owners, or (for a fix of lower purchase prices) helps the wrongdoer's bottom line and enables the price-fixer to lower costs. Here, however, it is the alleged impairment of AHF's (and other pharmacies') receipts based on alleged preset prices that is the correct anticompetitive focus. *Socony*, 310 U.S. at 220 – 221 (price fixers' claimed individual competitive gain "no legal justification"). AHF says it would have been paid more under Prime's higher reimbursement rates, but those rates were nullified by Prime's adoption of ESI's rate schedules.

Prime Has Not Shown That Output Was Not Reduced. Also supported by the Maness Report (pp. 17 - 18, 22) and Maness Declaration (p. 5), Prime contends (Motion, pp. 5 - 6) that AHF cannot show that the Collaboration passed a supposed antitrust litmus test of reduced output, and therefore the Collaboration cannot be anticompetitive for that reason too.

The reduced output test in a price fixing case generally looks at the resultant productivity of the collaborating entities. It is a prevalent and important measurement of anticompetitive effect, but is certainly not the only one. *In re Blue Cross Blue Shield*, 308 F.Supp. 3d at 1272. In any event, a price cartel can be unlawful even if there is no effect on output. Also, it is sometimes difficult to measure the actual impact of a restraint on output, whether the ruler looks at units or revenues. That may be particularly true here, where the demand for Prime's services are

predominantly triggered by patients' medical needs and physicians' prescriptions - neither of which may be a function of any price control. In the absence of empirical evidence, the impact on output may sometimes be inferred from the nature of the agreement.

Prime has not provided sufficient factual support for a conclusion that the Collaboration either increased output or at least did not reduce it. Maness only states (Report, p. 18) that AHF's expert Richman provided no empirical analysis to show that output was reduced. But neither did Maness; he also did not specify whether his conclusions were based on units or revenues. On this summary judgment motion, it was Prime's initial burden to offer material (perhaps quantitative) facts, not just theoretical statements, in order to obtain a judgment as a matter of law. However, Prime's and Maness's lean assertions did not do that.

Therefore, here too, Prime has not shown as a matter of law that the Collaboration was not anticompetitive, and therefore that the SAC deserves rule of reason treatment. Rather, as with other aspects discussed above, additional evidence on output could be offered at the Hearing.

In the absence of a convincing showing on these four aspects – actual procompetitive benefits, unchanged output, not a vertical agreement, not a joint venture/joint purchasing deal - this Arbitrator could well declare now that *per se* treatment is appropriate. However, AHF argues (Oppos., p. 12.) there are fact issues precluding a judgment now. Thus, as noted above, the door remains ajar at the Hearing for Prime to present compelling and redemptive evidence that might avoid that holding.[9]

[9] Prime's own benefits of lower costs, even if those were passed through to its owners/plans, are doubtfully enough to meet the necessary threshold of procompetitive benefits. Self gain in the conspirators' chain rarely excuses competitive harm from price fixing. *West Penn*, 627 F.3d at 105.

The FTC's Actions And Inactions Are Not Informative. The Parties offer competing inferences from the distant inaction and more recent action of the FTC with respect to enforcement (or not) of antitrust laws against the Collaboration. They joust whether those reflect on the illegality of the Collaboration, and especially as to which legal test applies here. Thus, Prime talks about (Motion, pp. 6 – 7; Reply, pp. 3 - 4) the FTC's and Minnesota's decisions to not investigate the Collaboration when it began, whereas AHF mentions (Oppos., pp. 22 – 23, 26 - 27) the FTC's newer interest in examining it, illustrated by the FTC's withdrawal of prior no action statements.

Reading such tea leaves is disfavored. This Arbitrator will not be driven by the Parties' respective speculations about what the FTC thinks. Whether the FTC now sees some reason - perhaps troubling actuals over the past four years' operations of the Collaboration - to take a fresh look at it may be interesting, but the case law (Oppos., p. 23) discourages such reliance. For this Motion, therefore, this Arbitrator does not derive any help from the FTC's different postures over time. Just as Prime implies the FTC's inaction supports a rule of reason analysis, AHF implies that the supposed procompetitive aspects of the Collaboration were always illusory, but it just took more time and a better track record to reveal that.

Considering all of Prime's arguments, this Arbitrator concludes that Prime cannot succeed as a matter of law or has not offered enough to show that the Collaboration should be evaluated under the rule of reason rather than the *per se* standard. Therefore, it is not necessary to address Prime's two arguments in part B of the Motion which are premised on the application of the rule of reason. Those latter arguments are deferred, pending the final conclusion on the applicable legal test.

Claimant's Damages Are Its Losses Offset By Benefits, But
Fact Questions Remain On The Gross And Net Amounts

Prime contends (Motion, pp. 11 - 14) that AHF's claim must be denied because AHF overall financially benefited from the Collaboration and thus did not suffer any recoverable damages. This contention has both legal and factual elements, discussed below. In summary, this Arbitrator agrees with Prime that, as a matter of law, net damages are the proper recoverable amount, but this Arbitrator concludes there are material fact issues that preclude entry of judgment on the current record.

On antitrust claims, AHF must prove that the alleged violation caused its damages - i.e., that AHF's alleged injury flowed from a harm to competition as a result of the Collaboration. *Insignia Systems, Inc. v. News America Marketing In-Store, Inc.*, 661 F.Supp. 2d 1039, 1054 - 1055 (D. Minn. 2009). Traditionally, this entails a comparison of revenues received before the Collaboration with revenues received after it. *Insignia*, at 1054 - 1055.

Moreover, to honor the above guideline that only damages actually caused by the antitrust violation are recoverable, AHF's alleged gross injury from the antitrust violation must be reduced by any benefits that it received from the violation - i.e., a reduction of the benefits that AHF would not have obtained if there were no Collaboration. *Los Angeles Memorial Coliseum Commsn. v. National Football League, etal*., 791 F.2d 1356, 1366 - 1367, 1374 (9th Cir. 1986), *cert. den*. 108 S. Ct. 92 (1987); *Minpeco, S.A. v. Conticommodity Services, Inc., etal*, 676 F.Supp. 486, 488 - 490 (S.D.N.Y. 1987). Only the net injury is then subject to trebling under the statute. *L.A. Memorial* at 1374 - 1375.[10]

[10] Authorities cited by the Parties offer disparate views on which side has the burden to prove the offsets. *Minpeco* (at 490) says that burden remains upon the plaintiff as part of its overall burden to prove damages, but *John Morrell & Company v. Local Union 304A Of United Food And Commercial Workers, AFL-CIO, etal.*, 913 F.2d 544, 557 (8th Cir. 1990), says (in a non-antitrust context) that the defendant must prove the amount of the offsets. With the denial of this aspect of the Motion for fact reasons, this Arbitrator need not now decide that burden issue, but urges counsel

AHF did not contest that legal structure for determining its damages. (Oppos., pp. 32 -33.) Accordingly, this Arbitrator preliminarily concludes that, as a matter of law, AHF's recoverable damages are its net injury after offsetting against any proven gross losses any established benefits from the Collaboration.

But there are significant fact issues as to the amounts of both AHF's gross injuries and offsets that precludes this Arbitrator from granting summary judgment to Prime on this issue. Prime contends (Motion, pp. 11, 14; Mannes Report, p. 33, Table 4) that AHF had an "overall windfall" - i.e., an overall net gain - of over $1.7 million from the Collaboration based on AHF's reimbursements for Medicare Part D and related DIR fees. Thus, Prime contends that, considering offsets, AHF had no damages, and therefore no antitrust violation was proven.

AHF's damage analysis presents a very different picture. It argues (Oppos., pp. 32 – 33.) that its damages witness has determined that it suffered $3 million in net damages and that Prime's claimed offset is illusory. Thus, AHF says there was a compensable antitrust violation that is also subject to trebling.

Clearly, this Arbitrator cannot adjudicate that genuinely disputed damage issue via summary judgment. The Hearing is the proper place for the Parties to present their competing experts' opinions and theories, and to challenge the other side's damages approach. Accordingly, Prime's Motion is also denied on this aspect.

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to address that in any pre-Hearing or post-Hearing briefs. It suffices for now that this Arbitrator observes that Prime pleaded setoff in its Twelfth Affirmative Defense.

Conclusion

For the foregoing reasons, the Motion is granted is part and denied in part. It is granted only on the legal determination that Claimant's damages are its net losses (gross losses offset by gains) resulting from the Collaborations. It is denied in all other respects: (i) that Prime has not established as a mater of law that the rule of reason applies, and (ii) on the issue of Claimant's actual net damages. Ruling is deferred on Motion Part B.

Dated: July 10, 2024

/s/ Stuart M. Widman
Stuart M. Widman,