UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

COSTCO WHOLESALE CORPORATION,

Plaintiff,

vs. Case No. 3:15-cv-734-J-20JRK

JOHNSON & JOHNSON VISION CARE, INC.,

Defendant.

ORDER

This antitrust case is before the Court on Defendant Johnson & Johnson Vision Care, Inc.'s ("JJVC") Motion to Dismiss Plaintiff's Complaint (Doc. 59; Motion). Plaintiff, Costco Wholesale Corporation ("Costco") has filed a response in opposition to the Motion. (Doc. 77; Response). With leave of Court, JJVC submitted a reply, (Doc. 80; Reply), and Costco filed a sur-reply. (Doc. 90; Sur-reply). The parties also filed supplemental memoranda. (Docs. 97, 98). The Court heard argument of counsel regarding the Request at a hearing, conducted on September 9, 2015, the record of which is incorporated herein. See (Doc. 91; Clerk's Minutes); (Doc. 92; Transcript).

I. Background

This case is a part of a larger multidistrict litigation captioned In Re: Disposable Contact Lens Antitrust Litigation, 3:15-md-2626-HES-JRK (M.D. Fla.) ("Contact Lens MDL") which was centralized before this Court on June 10, 2015, by order of the United States Judicial Panel on Multidistrict Litigation (MDL Panel"). (Doc. 83; Transfer Order). These antitrust cases arise out of JJVC's pricing policy with regard to its distribution and sale of contact lenses. Costco refers to

the pricing policy as a "Resale Price Maintenance Policy ("RPM"), while JJVC calls it a "Unilateral Price Policy" ("UPP"). For purposes of this discussion, the Court will refer to the policy at issue as JJVC's Price Policy ("Price Policy"). Plaintiff filed a six-count Complaint on March 2, 2015, in the United States District Court for the Northern District of California. (Doc. 1; Complaint). On June 10, 2015, the Court received the Transfer Order, signed by Judge Sarah S. Vance, Chair of the Panel of Multidistrict Litigation, transferring this action and various listed actions to this Court. See Transfer Order. The MDL Panel transferred the instant case to the undersigned as a stand-alone case. The MDL Panel reasoned that the instant action

> shares sufficient questions of fact regarding the imposition of pricing restraints on contact lenses to merit inclusion in this MDL. Coordination of Costco [the instant case] with the other actions may be preferable to consolidation, but [28 U.S.C. § 1407] contemplates transfer for "coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). Accordingly, we leave the question of determining the extent of any coordination or consolidation to the discretion of the transferee judge.

Transfer Order at 2.

In addition to the law as set forth by the United States Supreme Court, the law of this Circuit applies to federal claims and procedural matters. As the Eleventh Circuit has observed, "[s]ince the federal courts are all interpreting the same federal law, uniformity does not require that transferee courts defer to the law of the transferor circuit." Murphy v. F.D.I.C., 208 F.3d 959, 966 (11th Cir. 2000); see also In re Imagitas, Inc., Drivers' Privacy Prot. Act Litig., No. 3:07-md-2-J-32JRK, 2011 WL 6934127, at *2 (M.D. Fla. Dec. 30, 2011) ("[B]ecause federal law is supposed to be unitary, a transferee district court should apply the law of the Supreme Court and its own circuit to issues of federal law." (citing Murphy, 208 F.3d at 965-66); Reynolds v. Gen. Elec. Co., No. 5:09-CV-80025-ER, 2012 WL 2835500, at *1 n.1 (E.D. Pa. Apr. 2, 2012) ("In multidistrict

litigation, 'on matters of procedure, the transferee court must apply federal law as interpreted by the court of the district where the transferee court sits.'" (citation omitted)); In re Toys "R" Us Delaware, Inc.- Fair & Accurate Credit Transactions Act (FACTA) Litig., No. MDL 08-01980 MMM (FMOx), 2010 WL 5071073, at *4 (C.D. Cal. Aug. 17, 2010) ("[C]ircuit and district courts, including the Ninth Circuit, have uniformly applied the law of the transferee circuit in MDL proceedings involving federal law." (citations omitted)).

However, the law of the transferor court must be applied to state law claims. See In Re Conagra Peanut Butter Prods. Liab. Litig., No. 1:07-MD-1845 TWT, 2009 WL 799422, at *1 (N.D. Ga. Mar. 24, 2009) ("In multidistrict litigation, however, the MDL court is a transferee court and, for issues of state law, the transferee court should apply the law of the transferor court."); In re Managed Care Litig., 185 F. Supp. 2d 1310, 1336 (S.D. Fla. 2002) ("Although in multidistrict litigation cases the transferee forum generally controls with respect to choice of law on federal law issues . . . , the state choice of law rules of the transferor forum must be consulted when adjudicating questions of state law." (citations omitted)), amended on other grounds, Nos. MDL 1334, 00-1334MDMORENO, 2002 WL 1359736 (S.D. Fla. Mar. 25, 2002).

II. The Complaint

Plaintiff Costco is a membership-based warehouse club, which purports to offer merchandise for sale to its members at discounted prices in exchange for the members' annual membership fee. Complaint ¶ 13. "One of Costco's core offerings is its Optical department, which buys contact lenses directly from manufacturers and sells them to members at prices that it believes . . . are generally lower than those of other contact lens retailers." Id. ¶ 14. There are four primary contact lens manufacturers in the United States. Id. ¶ 23. Costco purchases a "large volume" of

contact lenses from JJVC, and none from the other three manufacturers. Id. ¶¶ 16, 46-48. Defendant JJVC is the largest manufacturer of contact lenses in the United States, selling at least 43% of all lenses sold in the country. Id. ¶ 15. Contact lens manufacturers, "sell significant volumes of contact lenses to authorized distributors." The Complaint lists six "primary distributors" for JJVC, including ABB Concise. Id. ¶ 24.

Key to Costco's allegations is that by law, contact lenses in the United States are sold only with prescriptions by eye care professionals ("ECPs"). Complaint ¶¶ 2, 3, 26. End users of contact lenses must obtain a prescription from an ECP in order to purchase contact lenses, and the ECP specifies a specific brand of contact lens in the prescription. Inasmuch as the contact lenses are disposable and can only be worn for a limited period of time, end users must repeatedly purchase lenses. Vendors may not substitute a different brand of contact lens for the customer and must sell to the end user the brand specified by the ECP. See id. ¶¶ 2, 3, 26. ECPs may sell the contact lenses they prescribe to their patients, providing for the ECP a source of income in addition to the fees earned for their service examining and diagnosing the patient's eye condition, and determining the appropriate contact lens prescription. Id. ¶¶ 2, 3. Thus ECPs serve as both eye care professionals and retailers.

In 2014, JJVC responded to price policies put in place by other contact lens manufacturers, Complaint ¶¶ 46-48, and to the urging of "some retailers," including ECPs. Complaint ¶¶ 46-49. JJVC "sought 'feedback,'" from retailers, and on June 24, 2014, responded in a letter by acknowledging this coordination and thanking ECPs "for their 'open and candid responses,' which allowed [JJVC] 'to define our strategy and implement the changes and actions you told us were needed.'" Id. ¶ 49. Costco alleges that JJVC "conspired with ECPs in these communications and

meetings to devise and ultimately agree upon a [Price Policy] that [JJVC] introduced in an effort '[t]o further demonstrate [its] commitment to prescribers.'" Id. JJVC announced in June 2014 that it would launch its Price Policy applicable to the 12-pack of ACUVUE Oasys lenses, and that starting in August, 2014, the Price Policy would extend to the majority of JJVC's existing products as well as all future products. Id. ¶ 51. JJVC also discontinued funding for discount coupons and mail-in rebates. Id. Under JJVC's Price Policy, "if a retailer priced any covered product below the minimum price, [JJVC] and its distributors would cease supplying the retailer with all of [JJVC's] covered products, apparently regardless of the retailer's contractual rights." Id. ¶ 51; see also id. ¶ 50. JJVC "'and its authorized distributors will cease to supply UPP products to any reseller who advertises or sells UPP products to patients at a price below the UPP price. . . . .'" Id. (quoting Doc. 1 at 27 (Acuvue Brand Contact Lenses Unilateral Price Policy [Price Policy], effective July 1, 2014)). The purpose of the Price Policy is to give the ECP the "'ability to improve his or her capture rate in the office,'" by taking away the patient's incentive to "'shop around'" for a better price on prescribed contact lenses. Id. ¶ 61.

JJVC subsequently tweaked its Price Policy "[a]fter input from ECPs, . . . to add that a 'bundled offer cannot include "free" products or services.'" Complaint ¶ 52. JJVC negotiated with Costco seeking "to find some 'middle ground' or 'common ground,'" id. ¶¶ 53, 54. JJVC adopted a Third Price Policy on August 7, 2014, creating an "'exception to the combined product discount requirements,'" permitting in-store credits when a customer purchased an annual supply of contact lenses, so long as the price of the ACUVUE product remained equal to or above the Price Policy price. Id. ¶ 54. On that same date, August 7, 2014, JJVC sent to Costco a Fourth Price Policy "making clear that any in-store credit as part of a now permitted combined product discount cannot

be advertised externally," with regard to in-store credits through gift cards. Id. ¶ 56.

Costco alleges that negotiations between Costco and JJVC continued through September, 2014, and that a agreement to additional discounts was memorialized on October 5, 2014 in a Fifth Price Policy. Complaint ¶¶ 58, 59. "This amendment allowed 10% off the RPM pricing at club stores in the form of a gift card to be used on a subsequent purchase that could not include [JJVC] contact lenses and still left almost all of [JJVC's] lenses at higher RPM prices, and Costco was prohibited from advertising that cash cards were available to partially offset the RPM price increases." Id. ¶ 59. Negotiations continued into 2015. Costco alleges that "[t]he continuing threat of termination by [JJVC] compelled Costco to agree to comply with the Fifth [Price Policy] until Costco's rights can be determined in this action." Id. ¶ 60. Costco alleges a series of "anticompetitive effects and injury." Id. ¶¶ 63-72.

JJVC's Fifth Price Policy provides:

> Effective October 2014, [JJVC] is amending the ACUVUE® Brand Contact Lenses Unilateral Pricing Policy (UPP) to permit combined product discounts that include an offer of in-store credit when less than an annual supply is purchased. This exception is limited to club store retailers, which are membership-only warehouse clubs requiring payment of an annual membership fee for the opportunity to purchase a wide selection of optical and non-optical merchandise and prohibiting non-members from shopping at their locations.
>
> An example of this type of offer is: Buy two boxes of ACUVUE® OASYS® Six-month supply pack (12 lenses per box) and get a $10 store gift card. These types of offers are now permitted when the following conditions are met:
>
> a. The value of the in-store credit does not exceed 10% of the amount spent on the contacts.
>
> b. The offer cannot be combined with any other offer.
>
> c. The price of the ACUVUE® product is equal to or above

> its UPP price.
>
> d. The price of the ACUVUE® product is clearly stated in any advertising and on the receipt.
>
> e. The in-store credit can only be advertised through displays and communications occurring within the store and cannot be advertised externally. . . .
>
> f. The credit can only be used for future purchases.
>
> g. The in-store credit cannot be used towards the purchase of contact lenses.
>
> . . .
>
> Under the UPP, [JJVC] and its authorized distributors will cease to supply UPP products to any reseller who advertises or sells UPP products to patients at a price below the UPP price.
>
> The UPP is unilateral and does not represent an agreement between [JJVC] and its authorized distributors or resellers. As such, the UPP is non-negotiable and individual representatives are not authorized to alter, waive, modify or negotiate the UPP. Resellers are free to advertise and sell any UPP product at a price of their own choosing, however, violations will result in loss of product supply.
>
> . . .

(Doc. 1 at 45) (attaching price schedules).

Costco currently purchases contact lenses from JJVC pursuant to a Qualified Retail Account Agreement ("QRAA"), effective January 1, 2015. Complaint ¶ 1; (see also id. ¶ 16 (Costco's business relationship involving the purchase of a "large volume of contact lenses" from JJVC "is presently governed by" the QRAA.) The QRAA requires Costco to comply with JJVC's "pricing policies." It is to be construed under the laws of New York. Id. ¶¶ 16, 74; (see Docs. 59-2 and 68-3; QRAA ¶ 2.16).

Under the QRAA, Costco "agrees to purchase Products from [JJVC] directly pursuant to the terms of this Agreement or from an authorized Distributor in accordance with the terms of this

Agreement." QRAA ¶ 1.1(a). Costco agrees that as a condition of being an authorized account for JJVC, it "will not" sell JJVC contact lenses "in violation of the Company's [JJVC's] Customer Sales Policy (attached as Schedule A)." Id. ¶ 1.1(b). Schedule A provides, in part:

> . . .
>
> Qualified Professionals and Retailers may purchase only from authorized U.S. Distributors or directly from VISTAKON® [JJVC];
>
> . . .
>
> Qualified Professionals and Retailers must comply with all label licenses, use restrictions, and pricing policies on which VISTAKON® may condition the purchase or receipt of any Products.
>
> . . .
>
> VISTAKON® reserves the right to terminate a Qualified Professional or Retail Account [Costco] that violates this Policy, or place the Account on the VISTAKON® "Do Not Sell" list.

QRAA, Schedule A (emphasis added). The QRAA further provides that JJVC "may change list price ('Price') at any time in their sole discretion." QRAA ¶ 1.7. The QRAA is effective as of January 1, 2015, and expires December 31, 2017. However, "[e]ither party may terminate this Agreement at any time by giving 30 days' advance notice to the other party." Id. ¶ 2.1. The QRAA is to be construed under the laws of the State of New York "without giving effect to choice of law principles." Id. ¶ 2.16. Significant here, the QRAA provides:

> In performing their obligations under this Agreement, the Company [JJVC], the Account [Costco], and its Affiliates shall comply with all country, U.S. federal and state laws and regulations, including without limitation the . . . Fairness to Contact Lens Consumers Act (FCLCA).

QRAA ¶ 2.15.

In support of its claims, Costco recounts a contextual history of legal concerns regarding

JJVC's and other contact lens manufacturers' sale and distribution of contact lenses. During the 1990's, the attorney generals from 32 states and a national class of consumers brought actions against te American Optometric Association and the major contact lens manufacturers, including JJVC, alleging that they conspired with retailers to restrain competition. The multidistrict litigation was transferred to this Court. On motion for summary judgment, the Court concluded that there was a genuine issue of fact whether Defendant's alleged activities amounted to an illegal restraint of trade. The parties eventually settled the action. Complaint ¶ 42. See In re Disposable Contact Lens Antitrust Litig., No. MDL1030, 2001 WL 493244, at *12 (M.D. Fla. Feb. 8, 2001). In 2003, Congress passed the Fairness to Contact Lens Consumers Act ("FCLCA"), 15 U.S.C. § 7601 et seq, which prohibits "ECPs from requiring purchase of contacts from themselves or tying the service or service fee to the purchase," and was passed to increase "'consumers' ability to shop round with buying contact lenses.'" Id. ¶¶ 5, 43.

Costco brings the following claims:

Count 1:	Declaratory Judgment as to the Parties' Contract
Count 2:	Restraint of Trade Under Section 1 of the Sherman Act
Count 3:	California Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq.
Count 4:	California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq.
Count 5:	New York General Business Law § 369(A) and Breach of Contract Under New York Law
Count 6:	Maryland Antitrust Act, Md. Code Ann., Com. Law § 11-201 et seq.

III. Standard of Review

When considering a motion to dismiss brought pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure (Rule(s)), the Court must accept all factual allegations in the complaint as true, construing the allegations and drawing all reasonable inferences in the light most favorable to the plaintiff. See, e.g., Davidson v. Capital One Bank (USA), N.A., 797 F.3d 1309, 1312 (11th Cir. 2015); Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291, 1297 (11th Cir. 2015). Rule "8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" Erickson v. Pardus, 551 U.S. 89, 93 (2007). Normally, "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). However, a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Twombly, 550 U.S. at 555 (quotations and internal citations omitted). As a result, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Id. at 570.

Of course, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In considering a motion to dismiss, a court should "1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, 'assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.'" Amer. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1290 (11th Cir. 2010) (quoting Igbal, 556 U.S. at 679)).

IV. Discussion

The Court commences with an examination of Count II of the Complaint, which alleges a restraint of trade in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

A. Count 2: Restraint of Trade Under Section 1 of the Sherman Act

Costco alleges that JJVC "participated in concerted action to restrain trade and competition in the Contact Lens Markets, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1." Complaint ¶ 78. Costco alleges that JJVC "accomplished this conspiracy by colluding and agreeing with ECPs, its distributors, and others to adopt, implement, enforce, and revise" JJVC's Price Policy. Id. "The concerted action has injured Costco, competition, and consumers, including Costco members, through decreased competition, increased prices and administrative costs, and reduced choice, quality, innovation, and output." Id. ¶ 80. Costco seeks preliminary and permanent injunctive relief. Id. ¶ 81. Costco also seeks damages. See id. at 23.

1. Elements

"Section 1 of the Sherman Act makes unlawful '[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.'" Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1333 (11th Cir. 2010) (quoting 15 U.S.C. § 1). Section 1 applies both to agreements between companies that directly compete with one another, called "horizontal" agreements, and to agreements between businesses operating at different levels of the same product's production chain or distribution chain, known as "vertical" agreements. Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065, 1071 (11th Cir.2004). In order to establish a Section 1 violation, the plaintiff must show (1) a contract, combination, or conspiracy among two or more separate entities that (2) unreasonably restrains

trade, (3) affects interstate or foreign commerce, and (4) causes antitrust injury and damages. See Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1455, 1459 (11th Cir.1991). "Section One applies only to agreements between two or more businesses; it does not cover unilateral conduct." Spanish Broad. Sys. of Fla., 376 F.3d at 1071.

2. Antitrust Pleading Standards

In a case brought under § 1 of the Sherman Act, a court must determine "whether the complaint, in asserting a conspiracy or agreement in restraint of trade, contains 'allegations plausibly suggesting (not merely consistent with) [a conspiracy or] agreement,' that is, whether the complaint 'possess[es] enough heft to show that the pleader is entitled to relief.'" Jacobs, 626 F.3d at 1327 (quoting Twombly, 550 U.S. at 557). The court must accept the plaintiff's allegations as true, but may disregard the plaintiff's legal conclusions; "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678.

> In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

Twombly, 550 U.S. at 556. Allegations of parallel conduct coupled with bare assertions of conspiracy will not suffice. See id. Rather, "allegations of parallel conduct . . . must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." Id. at 556–57. The alleged conduct must not be "compatible with, but indeed . . . more likely explained by, lawful, unchoreographed free-market behavior." Iqbal, 556 U.S. at 680; see also Jacobs 626 F.3d at 1342. Additionally, in order to survive a Rule

12(b)(6) motion to dismiss, "antitrust plaintiffs . . . must present enough information in their complaint to plausibly suggest the contours of the relevant geographic and product markets." Jacobs, 626 F.3d at 1336.

3. Vertical Resale Pricing Agreements: Rule of Reason

Costco alleges that JJVC engaged in a "vertical resale price maintenance agreement." See Jacobs, 626 F.3d at 1334. Though historically vertical resale price maintenance agreements had been considered a per se antitrust violation, review has since loosened considerably to permit a rule of reason. See id. at 1335-36 (citing Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 727 (1988) (evaluating a manufacturer's termination of its agreement with an undesired discounting distributor under rule of reason analysis)). The parties agree that the Rule of Reason applies to Costco's Section 1 vertical agreement claim.

In Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007), the Supreme Court examined the pros and cons of vertical price maintenance agreements, and held that "the rule of reason, not a per se rule of unlawfulness, would be the appropriate standard to judge vertical price restraints." 551 U.S. at 899; see also id. at 907 (overruling prior precedent). In Leegin, a manufacturer of leather goods refused to sell to retailers that discounted its goods below the manufacturer's suggested prices. One retailer, to whom the manufacturer stopped selling after the retailer refused to cease discounting below the suggested prices, sued the manufacturer, alleging that it had entered into vertical minimum resale price agreements that were per se illegal. See Jacobs, 626 F.3d at 1335 (citing Leegin, 551 U.S. at 882-84). The Supreme Court remanded the action to the lower courts for proceedings consistent with its newly adopted rule of law. Under the "rule of reason,"

> the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. . . . Appropriate factors to take into account include specific information about the relevant business and the restraint's history, nature, and effect. . . . Whether the businesses involved have market power is a further, significant consideration. . . . In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

Leegin, 551 U.S. at 885 (internal quotation marks and citations omitted).

Applying the rule of reason to vertical price restraints, the Supreme Court observed that vertical price restraints "can have either procompetitive or anticompetitive effects, depending on the circumstances in which they are formed," Leegin, 551 U.S. at 894, and that it is up to the courts to eliminate their anticompetitive uses from the market. Id. at 897. The Court gave examples of both procompetitive, and anticompetitive effects that a vertical price restraint may have. On the positive side, "[m]inimum resale price maintenance can stimulate interbrand competition" among manufacturers selling different brands of the same type of product by "reducing intrabrand competition" among retailers selling the same brand. Id. at 890; see also id. at 891.

Negatively, "[a] single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition." Leegin, 551 U.S. at 890. Additionally, vertical price restraints might be used to organize "cartels" at the retailer level, id. at 893, or may be abused by a powerful manufacturer or retailer. Id.

> A dominant retailer, for example, might request resale price maintenance to forestall innovation in distribution that decreases costs. A manufacturer might consider it has little choice but to accommodate the retailer's demands for vertical price restraints if the manufacturer believes it needs access to the retailer's distribution network. . . . A manufacturer with market power, by comparison, might use resale price maintenance to give retailers an incentive not

> to sell the products of smaller rivals or new entrants.

Id. at 893-94 (citations omitted). "If there is evidence retailers were the impetus for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer." Id. at 897-98. "If, by contrast, a manufacturer adopted the policy independent of retailer pressure, the restraint is less likely to promote anticompetitive conduct." Id. at 898.

"The rule of reason asks whether, in the circumstances of the case, a restrictive practice imposes 'an unreasonable restraint on competition.'" Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1569 (11th Cir. 1991) (quoting Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977)).

> A restraint is unreasonable if it has an adverse impact on competition and cannot be justified as a procompetitive measure. . . . "[T]he rule of reason standard hinges the ultimate legality of a restraint on whether the plaintiff has demonstrated an anticompetitive effect which is not offset by a need to achieve a procompetitive benefit or justification."

Id. (citations omitted). "Under Eleventh Circuit case law, alleged Section One agreements analyzed under the rule of reason require a plaintiff 'to prove (1) the anticompetitive effect of the defendant's conduct on the relevant market [footnote omitted], and (2) that the defendant's conduct has no pro-competitive benefit or justification.'" Spanish Broad. Sys., 376 F.3d at 1071 (citation omitted). "In alleging 'the anticompetitive effect of the defendant's conduct,' an antitrust plaintiff must show harm to competition rather than to competitors. That is, the 'anticompetitive effects' are measured by their impact on the market rather than by their impact on competitors." Id. "In order to prove this anticompetitive effect on the market, the plaintiff 'may either prove that the defendants' behavior had an actual detrimental effect on competition, or that the behavior had the

potential for genuine adverse effects on competition.'" Id. at 1072 (citation omitted).

4. Constitutional Standing - Injury

Standing is a "'threshold jurisdictional question'" that must be addressed and satisfied at each stage of the litigation. See Fla. Family Policy Council v. Freeman, 561 F.3d 1246, 1253 (11th Cir. 2009) (quoting Elend v. Basham, 471 F.3d 1199, 1204 (11th Cir. 2006)). Article III of the United States Constitution permits the court to hear only "Cases" and "Controversies." U.S. Const. art. III, § 2; see Warth v. Seldin, 422 U.S. 490, 498 (1975). The doctrine of standing implicates whether a dispute is a case or controversy that can be "appropriately resolved through the judicial process." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal marks and citation omitted). Article III standing has three elements: (1) injury in fact to "'a legally protected interest'" that is "'(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;'" (2) "'a causal connection between the injury and the conduct complained of'" that is fairly traceable to the defendant's action; and (3) a likelihood that the injury will be redressed by a favorable decision. Fla. Family Policy Council, 561 F.3d at 1253 (quoting Lujan, 504 U.S. at 560-61). See e.g. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000); CAMP Legal Defense Fund, Inc. v. City of Atlanta, 451 F.3d 1257, 1269 (11th Cir. 2006). Standing "'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof,'" that is "'with the manner and degree of evidence required at the successive stages of the litigation.'" CAMP, 451 F.3d at 1269 (quoting Lujan, 504 U.S. at 561). "It is well-settled that an organization has standing when the organization itself suffers injury." Meek v. Martinez, 724 F. Supp. 888, 901 (S.D. Fla. 1987) (citing Warth, 422 U.S. at 511; Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982); Village of Arlington Heights v. Metro.

Hous. Dev. Corp., 429 U.S. 252, 261-62 (1977)). "Injury to an organization's activities or projects confers direct standing." Id.

"'At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice'" to establish standing. Resnick v. AvMed, Inc., 693 F.3d 1317, 1323 (11th Cir. 2012) (quoting Lujan, 504 U.S. at 561); see also Clements v. LSI Title Agency, Inc., 779 F.3d 1269, 1273 (11th Cir. 2015) (same); Bischoff v. Osceola Cty., Fla., 222 F.3d 874, 878 (11th Cir. 2000) ("Therefore, when standing becomes an issue on a motion to dismiss, general factual allegations of injury resulting from the defendant's conduct may be sufficient to show standing.").

JJVC argues that Costco has failed to plead any facts showing that it has suffered injury or will suffer any injury in fact as a result of JJVC's Price Policy. (Doc. 59; Motion at 17). It argues that the allegations reveal that Costco is making more money through the sale of JJVC contact lenses; that its sales are not down; that JJVC's distribution of contact lenses to Costco has not been terminated; and that other retailers are charging higher prices for the lenses than Costco. Transcript at 9, 11, 12; see also Motion at 3, 6, 7, 16-18 (citing Complaint ¶¶ 57, 63, 68). "Costco simply speculates that it may lose sales as a result of the UPP [Price Policy]." Id. at 3; see also id. at 17. Additionally, JJVC contends that Costco's allegations that it has suffered injury to its goodwill, that it has experienced increased administrative costs, and that it will experience reduced sales of contacts and other products is speculative. Motion at 18.

Costco contends that it has sufficiently alleged injury and standing, based upon direct injury, as well as injury to its "members," caused by JJVC's Price Policy. (Doc. 77; Response at 19, 22). "[A]ny short-term gains are overshadowed by harm to Costco['s] . . . business model, which results in its long-term harm." Id. at 19 (citing Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.,

190 F.3d 1051, 1056 (9th Cir. 1999) (holding that injury to plaintiff's ability to provide discounted service to customers constituted an antitrust injury). Costco alleges that JJVC "Costco has suffered injury, including harm to its business model and to its goodwill with its members, and . . . will continue to suffer such harm." Complaint ¶ 12; see also id. ¶¶ 60, 68. Additionally, the higher contact lens profits interferes with its ability to attract new members by offering discounted contact lens products. Complaint ¶ 4.

> Even though Costco's margin on [lenses covered by the Price Policy] has increased, that harms Costco's business model, which is to provide better value to its members for their membership fees.

Id. ¶ 68. The Price Policy will also "result in reduced unit sales of contacts and other products." Id. Costco further alleges that the Price Policy will divert sales of contact lenses to ECPs or other retailers, because it will no longer be able to offer the lenses at discounted prices. Complaint ¶ 63.

At the pleading stage, Costco's general factual allegations of direct injury resulting from JJVC's Price Policy are sufficient to establish its standing. See Resnick, 693 F.3d at 1323. This is not to say that Costco's standing is not subject to future challenge. For instance, "when standing is raised at the summary judgment stage, the plaintiff can no longer rest on 'mere allegations.' . . . Instead, the plaintiff must 'set forth' by affidavit or other evidence 'specific facts.'" Bischoff, 222 F.3d at 878 (citations omitted).

Costco also alleges that it has "standing to protect its members from paying more than they otherwise would for contacts." Complaint ¶ 63; see also Response at 19, 22 (Costco has sufficiently alleged injury and standing, "based not only on the harms it has and will suffer, but also the harm to its members."). Costco acknowledges that its associational standing position is a "fallback argument." Transcript at 54.

An organizational plaintiff has standing to enforce the rights of its members "'when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" Arcia v. Fla. Sec'y of State, 772 F.3d 1335, 1342 (11th Cir. 2014) (quoting Friends of the Earth, Inc., 528 U.S. at 181). "[O]rganizational plaintiffs need only establish that 'at least one member faces a realistic danger' of suffering an injury." Id. (quoting Fla. State Conference of N.A.A.C.P. v. Browning, 522 F.3d 1153, 1163 (11th Cir. 2008)); see also e.g., Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist., 647 F.3d 1296, 1302 n.4 (11th Cir. 2011). The Eleventh Circuit recognizes that the "indicia of membership" in an association sufficient to confer associational standing includes the ability to influence priorities and activities of organization, and the means by which they could express their collective views. Doe v. Stincer, 175 F.3d 879, 886 (11th Cir. 1999). See generally Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 344-45 (U.S. 1977) (The Commission's status as a state agency, rather than a traditional voluntary membership organization, did not preclude it from asserting, in a representational capacity, claims of Washington apple growers and dealers who formed its constituency, notwithstanding that "membership" was "compelled" in the form of mandatory assessments; "[W]hile the apple growers and dealers are not 'members' of the Commission in the traditional trade association sense, they possess all of the indicia of membership in an organization. They alone elect the members of the Commission; they alone may serve on the Commission; they alone finance its activities, including the costs of this lawsuit, through assessments levied upon them. In a very real sense, therefore, the Commission represents the State's growers and dealers and provides the means by which they express their collective views and protect their collective

interests.").

A association may have standing to pursue antitrust claims brought pursuant to the Sherman Antitrust Act. See Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566, 1571-72 (11th Cir. 1991) (holding that real estate broker's association had direct standing to bring antitrust claim alleging loss of membership, and also on behalf of members against a multi-list real estate listing service); see also Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1103, n.6 (9th Cir. 1999) (holding that Plaintiff referral associations that allege a loss of membership due to the RA's policies may establish antitrust standing in their own right, and otherwise may be able to establish standing to sue on behalf of their members).

JJVC argues that Costco is not a candidate for associational standing based on its customers' standing; "Costco cannot gain standing by invoking its members" as a for-profit retailer. (Doc. 80; Response at 2); see also id. at 17. It cites the decision in Grp. Health Plan, Inc. v. Philip Morris, Inc., 86 F. Supp. 2d 912, 918 (D. Minn. 2000), in which the court denied associational standing to health maintenance organizations ("HMOs") because its injuries were contingent upon HMO members' injuries, and the members of the HMOs did not have indicia of membership sufficient to confer associational standing on HMOs. The court found that "the relationship between Plaintiffs and their 'members' is most aptly described as a that of a business-consumer relationship, which is readily distinguishable from the traditional association-member relationship necessary to support an assertion of associational standing." Grp. Health Plan, Inc., 86 F. Supp. 2d at 918. See also Allstate Ins. Co. v. City of Chicago, No. 02 C 5456, 2003 WL 1877670, at *4-5 (N.D. Ill. Apr. 14, 2003) (Plaintiff insurance companies lack associational standing to assert Clean Water Act claims on behalf of their insureds; "The relationship between

the insureds and the plaintiffs is a business-consumer relationship.").

Because the Court has found that Costco has sufficiently alleged direct standing on its own behalf, the Court does not resolve at this time whether Costco can assert associational standing on behalf of its members, in this commercial context.

5. **Antitrust Standing - Antitrust Injury**

Antitrust standing "involves more than the 'case or controversy' requirement that drives constitutional standing." Todorov, 921 F.2d at 1448. It requires "an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws. . . . Antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the antitrust laws." Id. (citations omitted); see also Omni Healthcare, Inc. v. Health First, Inc., No. 6:13-cv-1509-Orl-37DAB, 2015 WL 275806, at *7 (M.D. Fla. Jan. 22, 2015).

The Eleventh Circuit employs a two-pronged test to determine whether a plaintiff has antitrust standing. See Palmyra Park Hosp. Inc. v. Phoebe Putney Mem'l Hosp., 604 F.3d 1291, 1299 (11th Cir.2010). "[F]irst, the plaintiff must have alleged an antitrust injury." Id. An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). Second, "the plaintiff must be an efficient enforcer of the antitrust laws." Palmyra, 604 F.3d at 1299. The "efficient enforcer" requirement ensures that a "particular plaintiff will efficiently vindicate the goals of the antitrust laws." Todorov, 921 F.2d at 1452 (emphasis added); see also Omni Healthcare, Inc. 2015 WL 275806, at *7.

JJVC argues that Costco is "not an appropriate plaintiff to sue on behalf of its consumers," Transcript at 13. However, this argument was not developed in JJVC's papers. Factors considered

in determining whether a plaintiff is an "efficient enforcer" of antitrust injury include: "the directness or indirectness of the injury, the remoteness of the injury, whether other potential plaintiffs were better suited to vindicate the harm, whether the damages were highly speculative, the extent to which the apportionment of damages was highly complex and would risk duplicative recoveries, and whether the plaintiff would be able to efficiently and effectively enforce the judgment." Palmyra Park Hosp. Inc., 604 F.3d at 1299. As set forth above, Costco has sufficiently alleged a direct injury, and while potential damages at this juncture are not determined, the allegations in the Complaint are sufficient to establish that damages are not speculative. JJVC has not identified a better plaintiff to vindicate the alleged harms caused by the Price Policy. Moreover, the Complaint sufficiently alleges facts that establish that Costco, a nationwide retailer, see Complaint ¶ 13, would be able efficiently and effectively enforce any judgment that may be entered against JJVC. Costco satisfies the "efficient enforcer" prong of the antitrust standing inquiry.

The parties focus their arguments upon whether Costco has sufficiently alleged an antitrust injury to the relevant market. An antitrust injury must "result from interference with the freedom to compete," Johnson v. Univ. Health Servs., Inc., 161 F.3d 1334, 1338 (11th Cir.1998), and its remedy must further the public "goal of increased competition." Todorov, 921 F.2d at 1450. "The antitrust injury requirement ensures that the plaintiff, although motivated by private interests, is seeking to vindicate the type of injury to the public that the antitrust laws were designed to prevent." Palmyra, 604 F.3d at 1299 (emphasis added). See generally Spanish Broad. Sys., 376 F.3d at 1069 ("'[T]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not

against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. '" (citation omitted)); Seagood Trading Corp., 924 F.2d at 1573 ("It is only when the market is being distorted by anticompetitive conduct that the antitrust laws should be invoked.").

"Under rule of reason analysis, a plaintiff may show either actual or potential harm to competition." Jacobs, 626 F.3d at 1336 (citing Levine v. Cent. Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1551 (11th Cir.1996)).

> Actual harm is indicated by a factual connection between the alleged harmful conduct and its impact on competition in the market, Spanish Broad. Sys., 376 F.3d at 1072, and the plaintiff claiming it should point "to the specific damage done to consumers" in the market, id. (citing Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745, 753-54 (10th Cir.1999)). The plaintiff has the burden of demonstrating damage to competition with "specific factual allegations." Id. at 1073. Actual anticompetitive effects include, but are not limited to, reduction of output, increase in price, or deterioration in quality. United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir.1993). Higher prices alone are not the "epitome" of anticompetitive harm .... Rather, consumer welfare, understood in the sense of allocative efficiency, is the animating concern of the Sherman Act.

Id. at 1339 (additional citations omitted). To establish potential harm, a plaintiff must "define the relevant market and establish that the defendants possessed power in that market," Levine, 72 F.3d at 1551, and then, make "specific allegations linking market power to harm to competition in that market." Spanish Broad. Sys., 376 F.3d at 1073; see also Jacobs, 626 F.3d at 1339.

Thus, to state a claim under Section 1 of the Sherman Act, a claimant must allege a relevant geographic market and product market in which harm to competition is occurring or will occur. See Jacobs, 626 F.3d at 1336 ("Section One plaintiffs must define both (1) a geographic market and (2) a product market."). Thus, "[r]egardless of whether the plaintiff alleges actual or potential harm to

competition, . . . he must identify the relevant market in which the harm occurs." Id.

> Although the "parameters of a given market are questions of fact," [citation omitted], antitrust plaintiffs still must present enough information in their complaint to plausibly suggest the contours of the relevant geographic and product markets. Since both the geographic and product market allegations are necessary for a plaintiff suing under § 1 of the Sherman Act to succeed, a court, in assessing the sufficiency of the complaint, may begin by analyzing either one.

Id.

Costco alleges in the Complaint that the minimum retail prices set by the Price Policy "are unreasonably anticompetitive," in a number of ways. These include increased prices to consumers; prescription decisions by ECPS being influenced by profit considerations; facilitation of collusion to increase prices; increased market power of a less efficient group of retailers; restraint on intrabrand competition by retailers; absence of interbrand competition; control over consumer choice and demand by ECPs through the prescription process; and anticompetitive motivations regarding prices by retailers. Complaint ¶ 11. Costco alleges that "[t]he anticompetitive concerted action has harmed consumers, including Costco members, most directly by increasing prices they pay for contact lenses" by as much as 25-30%. Id. ¶ 63. "For example, for the ACUVUE Oasys contact lens, the top-selling contact lens brand in the world, the prices required by the [Price Policy] average at least 20% above what many retailers had effectively been charging. The [Price Policy] required one internet seller to increase its price on one brand and type by over 100%." Id. ¶ 31. Costco further alleges that the Price Policy "seeks to all but eliminate intrabrand competition," through which Costco and other retailers could provide lower prices. Id. ¶ 65. "In addition to increased prices, consumers also face reduced choice," reducing the number of prescriptions for products not covered by the Price Policy. Id. ¶ 66. At the wholesale level, the Price Policy creates

a "disincentive to innovate or provide enhanced services," because JJVC "is maintaining or even increasing market share based on increased margins and sales it can facilitate for ECPs . . . creating a disincentive for ECPs to purchase from new or smaller rivals." Id. ¶ 67. Additionally, the Price Policy "creates an incentive for dual-positioned ECPs to prescribe lenses for financial reasons." Id. ¶ 72. Costco also alleges that it has incurred injury to its own business model, harm to goodwill, and administrative costs. Complaint ¶ 68.

a. Relevant Product Market

JJVC argues that Costco "lacks antitrust standing because it has failed to plead facts sufficient to show that this injury flows directly from harm to competition in a specific product market." (Doc. 59; Motion at 18). "Costco's general and conclusory allegations regarding harm to competition in an unspecified contact lens market fall woefully short of establishing a tangible injury of the type the antitrust laws were intended to prevent." Id. at 19.

The relevant product market involves identifying "producers that provide customers of a defendant firm (or firms) with alternative sources for the defendant's product or services. " Levine, 72 F.3d at 1552 (citation omitted). "The 'market is composed of products that have reasonable interchangeability.' " Id. (quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956)). The inquiry also involves review of "the uses to which the product is put by consumers in general." Jacobs, 626 F.3d at 1337. "A relevant product market can exist as a distinct subset of a larger product market." Id. (citing U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 995 (11th Cir.1993)). As to the contours of a submarket, "[a] court should pay particular attention to evidence of the cross-elasticity of demand [footnote omitted] and reasonable substitutability of the products, because "'[i]f consumers view the products as substitutes, the

products are part of the same market.'" Id. at 1337-38 (quoting Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1435 (9th Cir.1995)).

JJVC argues that Costco has failed to identify "which product market it actually contends suffered harm to competition as a result of the UPP [Price Policy]." Motion at 3. Specifically, JJVC argues that the Complaint fails to allege how the JJVC Price Policy restrains competition in the Wholesale Market, which is made up of Costco and others that purchase lenses from JJVC. Transcript at 14. As to the downstream Retail Market, JJVC argues that Costco has failed to plead that the Price Policy is harming competition throughout the market for disposable contact lenses and that Costco erroneously attempts to restrict the relevant downstream market to JJVC lenses. JJVC contends that Costco's Complaint is not clear in defining what the relevant market is. Motion at 19-20; Reply at 3-4 (arguing that single brand downstream markets are "extremely rare").

Costco responds that it has "sufficiently alleged the Wholesale and Retail Contact Lens Markets." Response at 21 (citing Complaint ¶¶ 33-41). Specifically, Costco alleges that the Wholesale Contact Lens Market is highly concentrated in four manufacturers, with high barriers to entry. Complaint ¶¶ 35, 36. Costco argues that its has sufficiently alleged that the Wholesale Market is injured because the four contact lens manufacturers "are now focused on pleasing ECPs by facilitating high minimum retail prices and margins rather that lowering wholesale prices," and that "[a]bsent collusion, [JJVC] and other manufacturers would compete in part through increased use of more efficient retailers." Complaint ¶ 64; see Transcript at 51. Costco alleges that the Retail Contact Lens Market is comprised of sellers that "are limited to each brand and type of contact lens that can be prescribed," and that "[t]here is no cross-elasticity of demand between

contact lenses once they are prescribed." Id. ¶ 37. Costco contends that the inability to substitute contact lense brands "creates distinct submarkets for each type and brand of contact lens." Response at 2 (citing Complaint ¶¶ 33, 36-37). "Because a retailer cannot substitute for the prescribed brand and type of contact lens, the retail markets are limited to each brand and type of contact lens that can be prescribed." Complaint ¶ 37. Alternatively, Costco contends that it can premise its antitrust claim on the entire contact lens market, taking into account the intra-brand power of ECPs. enabled by JJVC Price Policy.

The Complaint alleges that JJVC controls 43% of the market. While it is true that courts repeatedly have rejected markets that are defined by a company's trademark, excluding interchangeable substitutes, and ignoring the "'cross elasticity of demand' for products that a serve a similar purpose," Am. Needle, Inc. v. New Orleans La. Saints, 385 F. Supp. 2d 687, 693 (N.D. Ill. 2005), "[a] single branded product may, in rare cases, constitute its own relevant market." U.S. Anchor Mfg., Inc., 7 F.3d at 998 (citing Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1393 (9th Cir. 1984)). Given the market power of JJVC's product, and the unique posture of its availability to consumers via prescriptions written by ECPs, Costco has sufficiently alleged facts to suggest the contours of the relevant product market, both as the entire contact lens market, and as a sub-market consisting of contact lenses manufactured by JJVC. See Jacobs, 626 F.3d at 1337; see also U.S. Anchor Mfg., 7 F.3d at 998. The allegations set forth above, addressing not only higher prices for JJVC contact lenses, but the resultant motivations for prescribing a certain product, and effect on both the interbrand and intrabrand market and competition, are sufficient to allege a plausible claim of actual and potential harm to competition and to consumers and in the market, of the type that the antitrust laws were designed to prevent.

b. Relevant Geographic Market

Costco alleges that the Relevant Geographic Market for the Wholesale Contact Lens Market is the United States. Complaint ¶ 39. The Geographic Market for the Retail Contact Lens Market, although theoretically nationwide, is effectively limited by the Price Policy which reduces the possibility of discount prices, to the local level. Id. ¶¶ 40, 41. JJVC does not take issue with this allegation, and the Court determines that Costco has satisfied the antitrust injury standard at the pleading stage.

6. Conspiracy, Agreement, Concerted Action

To prove that an agreement in restraint of trade exists, a plaintiff must "demonstrate a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 569 (11th Cir.1998) (citation omitted).

> [A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality . . . .
>
> . . . A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory.

Twombly, 550 U.S. at 556-57. As noted by the Supreme Court,

> [T]here is the basic distinction between concerted and independent action - a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a "contract, combination . . . or conspiracy" between the manufacturer and other distributors in order to establish a violation. 15 U.S.C. § 1. Independent action is not proscribed. A manufacturer of course

> generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. United States v. Colgate & Co., 250 U.S. 300, 307 (1919); cf. United States v. Parke, Davis & Co., 362 U.S. 29 (1960). Under Colgate, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.

Monsanto Co. v. Spray Rite Serv. Corp., 465 U.S. 752, 761 (1984). Indeed,

> the fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions. A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market.

Id. at 762. However, the Court must look beyond a defendant's bald denial of concerted action and analyze the substance of the allegations to determine if an agreement or concerted action is sufficiently pleaded. See DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1515 (11th Cir. 1989). "Conspiracies are rarely evidenced by explicit agreements, and must almost always be proven by inferences that may be fairly drawn from the behavior of the alleged conspirators." Id.

At this stage of the proceedings, plaintiffs will often be unable to prove the existence of an express agreement, and thus may rely on inferences from the alleged conspirators' conduct. Cf. Seagood Trading Corp., 924 F.2d at 1573. At the motion to dismiss stage, "[p]laintiffs need not allege the existence of collusive communications in 'smoke filled rooms,'" . . . in order to state a § 1 Sherman Act claim. See In re Delta/AirTran Baggage Fee Antitrust Litig., 733 F. Supp. 2d 1348, 1360 (N.D. Ga. 2010). However, an antitrust plaintiff must plead enough facts to state a claim for relief that is plausible on the face of the complaint. See Twombly, 550 U.S. at 556, 570; see generally Monsanto, 465 U.S. at 764 ("[T]he antitrust plaintiff should present direct or

circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" (citation omitted).). "'Circumstances must reveal "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" Monsanto, 464 U.S. at 764. This involves "more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." Id. at 764 & n. 9.

JJVC argues that its Price Policy is unilateral, and that unilateral conduct by a single entity is not unlawful under the Sherman Act. (Doc. 59; Motion at 7-8 (citing Colgate, 250 U.S. at 305-07; Monsanto, 465 U.S. at 761; The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1152 (9th Cir. 1988))). It argues that the Complaint is deficient because it does not allege specific facts regarding any alleged conspiracy or agreement, inasmuch as "Costco fails to identify a single retailer or ECP whose consent JJVC sought and needed as a condition to announcing the UPP [Price Policy]." Motion at 2, see also id. at 5. Similarly, JJJVC argues that the Complaint fails to adequately allege that facts that tend to establish that JJVC conspired with distributors. Id.; see also id. at 4 (referring to the "alleged conspiracy, initiated by unnamed ECPs and distributors"). "Costco does not plead . . . the 'who, what, where, and when' of an alleged conspiracy - to show that the UPP [Price Policy] is anything other than a unilateral policy by JJVC." Id. at 9.

Costco responds that it has alleged "what" (the Price Policy), "who" (ECPs, Distributors and JJVC), where (nationwide), and when (the summer of 2014). (Doc. 77; Response at 17). Costco asserts that the Court may consider "context" in determining whether the Complaint sets forth sufficient allegations of an agreement, citing to the legal history, and arguing that the contact

lens industry is unusually susceptible to anti-competitive behavior and effects. Response at 2-4. In this regard, it makes the following allegations. See Response at 2. Four contact lens manufacturers control the contact lens market in the United States and JJVC is the largest, with a 43% market share. Complaint ¶¶ 15, 23. The manufacturers, including JJVC, sell significant volumes of contact lenses to authorized distributors. Id. ¶ 24. JJVC has considerable market power "given such factors as the high barriers to entry and high concentration in the Wholesale Market," and the "low cross-elasticity of demand between contact lenses and potential substitutes," Id. ¶¶ 34, 35, 36. "ECPs are the only contact retailers that can legally prescribe contacts for consumers, and once they do so, neither the consumer nor a competing contact retailer can substitute even an equivalent product except in unusual circumstances." Id. ¶¶ 3, 26. Many ECPs fill the prescriptions they write, and "make additional profit on sales of contact lenses." Id. ¶ 2. In this construct, "neither the consumer nor the retailer has the power to substitute an alternative or cheaper option to the prescribed brand, such as generic equivalents, severely restricting interbrand competition at the retail level." Id. ¶ 26. Because interbrand competition is so severely limited by the consumer's inability to substitute contact lenses in the Retail Contact Lens Market, based upon the legally required prescription by an ECP, id. ¶ 37, the only remaining area of viable competition in the Retail Contact Lens Market is intrabrand competition by retailers selling the same brand of contact lenses. Id. ¶¶ 4, 28. According to Costco, "[i]ntrabrand competition as to price is vital and provides significant savings and choices to consumers." Id. ¶ 28. Costco alleges:

> Because interbrand competition to fill a prescription is so restricted, practices such as retail price maintenance that reduce intrabrand competition increase incentives for retailers that both prescribe and fill prescriptions [ECPs] to prescribe the brand and type that provides the greatest profit, whether as margin on the immediate purchase or through increased repeat business.

Complaint ¶ 8. The Price Policy creates "financial incentives" favoring "retailers that both write and fill prescriptions." Id. ¶ 32.

a. Conspiracy or Agreement Between JJVC and ECPs

JJVC contends that Costco's allegations regarding an alleged conspiracy between JJVC and ECPs are "vague and speculative." Doc. 59; Motion at 10); (Doc. 80; Reply at 9). It argues that regular discussions about process and the exchange of price information between a supplier and a distributor are legitimate and do not amount to concerted price fixing. Id. (citing Monsanto, 465 U.S. at 762). JJVC argues that the June 24, 2014 letter to ECPs reflecting that JJVC asked for ECP feedback, followed by unilaterally implementing the Price Policy, does not constitute an agreement,. See Reply at 9. "Manufacturers have the right to solicit feedback." Id. JJVC contends that Costco has failed to allege facts that exclude JJVC and ECPs were acting independently. Motion at 10-11 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986)). JJVC contends that there is no dominant retailer who can request a retail price or enter into an agreement with JJVC, as there are "thousands" of ECPs." Reply at 10. Moreover, JJVC cites to the statement in the Price Policy that the Policy is unilateral, and that it is not an agreement with any retailer. Motion at 11. Finally, JJVC contends that Costco's allegations of conspiracy between JJVC and ECPs fail because the Complaint "is utterly devoid of any facts identifying which ECPs participated . . . ." Id.

Costco alleges that "[r]ecognizing greater margins and increased sales from [minimum retail Price Policies], some retailers urged" JJVC to institute such a Price Policy. Complaint ¶ 49. It alleges that the ECPs complained about the price competition by discounters: "Many retailers are openly unhappy with price competition on lenses from other retailers and historically have asked

manufacturers to agree to restrain this competition." Complaint ¶ 29; see also id. ¶ 42 ("Some ECPs have historically sought to leverage their control over prescriptions to extract from manufacturers in the Wholesale Contact Lens Market concerted actions to prevent or limit the effects of price discounting and other competition in the Retail Contact Lens Markets . . . ."). See Response at 4, 15. At the same time, contact lens manufacturers, including JJVC, "are strongly motivated to agree to the anti-discounting requests of retailers who write contact lens prescriptions [ECPs] even if doing so would not be in the manufacturers' independent interest in a competitive market." Id. ¶ 27. In this context,

> [JJVC] President of the Americas sought "feedback on what we are doing well and areas where we could improve." In a letter dated June 24, 2014, [JJVC] acknowledged this coordination and thanked ECPs for their "open and candid responses," which allowed [JJVC] "to define our strategy and implement the changes and actions you told us were needed."

Complaint ¶ 49. The Price Policy was announced that same month, and commenced in July, 2014. Id. ¶ 51; see also id. ¶ 8 ("Recently, . . . [JJVC] responded again to the requests of ECPs to limit competition by 'discounters.' [JJVC] agreed with ECPs, among others, to require certain minimum retail prices . . . ."). The Price Policy was further amended to limit bundling and advertisement of in-store credits through gift cards, "[a]fter input from ECPs." Id. ¶¶ 52, 55, 56. Costco alleges that JJVC "identified the purpose of the [Price Policy] requirement as giving 'the optometrist the ability to improve his or her capture rate in the office . . . . Now the patient has no incentive to shop around.'" Id. ¶ 61. In this vein, Costco alleges:

> The [Price Policy] prices create financial incentives to favor RPM [Price Policy] lenses for retailers that both write and fill prescriptions [ECPs]. [Distributor] ABB Concise reported that nearly three quarters of retailers it surveyed were more inclined to prescribe RPM [Price Policy] products than non-RPM products. The [Price Police]

> increases their "capture" rate (the percentage of prescription customers that also purchase lenses from them) and profit margins, and restricts retail intrabrand competition.

Complaint ¶ 32.

Accepting the factual allegations in the Complaint as true, and construing the Complaint in the light most favorable to Costco, the allegations set forth above state a plausible claim that JJVC entered into an unlawful agreement with ECPs to restrain trade. Costco has alleged sufficient facts "to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Twombly, 550 U.S. at 556. A Rule 12(b)(6) motion to dismiss for failure to state a claim "merely tests the sufficiency of the complaint; it does not decide the merits of the case." Zlotnick v. Premier Sales Grp., Inc., 431 F. Supp. 2d 1290, 1293 (S.D. Fla. 2006), aff'd, 480 F.3d 1281 (11th Cir. 2007).

b. Conspiracy or Agreement Between JJVC and Distributors

JJVC argues that Costco's allegations regarding any alleged vertical conspiracy between JJVC and distributors are conclusory and "lack sufficient factual matter to state a conspiracy claim that is plausible it its face." Doc. 59; Motion at 12, 13). Again, JJVC asserts that the Price Policy contains an express statement that the Policy is unilateral, and is not a result of any agreement between JJVC and authorized distributors, or conditioned upon distributors' consent. Id. at 12, 13; Reply at 10. JJVC contends that Costco's allegation regarding distributor ABB are not probative of a conspiracy or relevant. Motion at 12. JJVC contends that it and the authorized distributors carry on a "normal business relationship," and that the distributors are "entitled to follow JJVC's policy and directions to discontinue supplying retailers that do not comply with its unilateral pricing policy." Id. at 14. Additionally, it argues that the Complaint does not sufficiently allege a

"unity of purpose" between JJVC and the distributors. Reply at 11-12.

Costco alleges in the Complaint that JJVC "needed the agreement of its distributors . . . to help enforce the [Price Policy] and avoid the Policy's being undercut by interbrand competition at the wholesale level." Complaint ¶ 50. The face of the Price Policy made clear that "[JJVC] and its distributors agreed to concerted action to implement and enforce the [Price Policy] against any retailer that violated the policy." Id. Costco identifies by name seven distributors, id. ¶ 24, and alleges that one of them, ABB Concise, actively promotes the Price Policy with ECPs, alleging:

> ABB Concise, for example, advertises itself to ECPs as being "dedicated to help you build profits," providing "Quarterly Profit Advisor, Retail Price Monitor, [and] personalized business review." ABB Concise actively promotes the implementation of [the Price Policy] and even higher prices and describes to ECPs how to use minimum pricing to increase revenue.

Complaint ¶ 25; see also id. ¶¶ 50, 61 ("ABB Concise's 'Profit Advisor' publication confirmed the basis for the [Price Policy], focusing not on improving client services or education but on eliminating price competition."). Costco's Complaint sufficiently alleges the plausible existence of an agreement or conspiracy between JJVC and the distributors. See Complaint ¶¶ 6, 10, 17, 24, 25, 50, 51, 61. Indeed, the agreement of the distributors to enforce the Price Policy is alleged to be essential to the Policy's successful implementation.

c. Conspiracy or Agreement Between JJVC and "Other Retailers"

JJVC argues that, to the extent that the Complaint appears to allege that JJVC entered into a price conspiracy with other retailers, the Complaint fails to state a claim because "there are no factual allegations to suggest that [JJVC] conditioned the introduction of the UPP [Price Policy] on Costco or any other retailer committing to abide by its terms." (Doc. 59; Motion at 14-15). JJVC reiterates that the Price Policy does not represent an agreement between Costco and JJVC. Id. at

15; (see also Doc. 80; Reply at 6 (the existence of a contract between parties does not, without more, give rise to an inference of concerted action under Section 1)). JJVC maintains that Costco cannot "salvage its claim by asserting that it was coerced by [JJVC] into adhering to the UPP [Price Policy]," because Costco has failed to allege facts that JJVC's conduct rose to such as level as to deprive Costco of its free choice; pricing suggestions, persuasion, conversations, and pressure are not sufficient to establish coercion sufficient to support a Section 1 antitrust claim. Motion at 15-16; Reply at 7-8 (pricing suggestions and "legitimate pressure" is not coercion). JJVC contends that Costco's acquiescence to the Price Policy does not rise to the level of an "agreement" under Section 1.

Costco responds that the QRAA on its face incorporates the Price Policy, and that JJVC "has entered into an agreement with Costco . . . requiring Costco . . . to comply with its [Price Policy]." (Doc. 77; Response at 12). This, according to Costco, establishes "concerted activity" between JJVC and retailer Costco. Id. Costco argues that the allegations regarding the negotiations between Costco and JJVC and statements made including coercive threats of product suspension, constitute evidence of the agreement. Id. at 13-15 (citing Complaint ¶¶ 9, 53-60).

Costco alleges in the Complaint that through the QRAA, JJVC dictates Costco's retail prices for JJVC's contact lenses upon threat of termination or constraint of Costco's ability to purchase JJVC's contact lens products. Complaint ¶ 12. Costco asserts "[t]he continuing threat of termination by [JJVC] compelled Costco to agree to comply with the Fifth [Price Policy]." Id. ¶ 60. The Complaint includes factual allegations supporting the coerciveness of the agreement, alleging that JJVC contact lense products "constitute more than 50% of contact lens sales at Costco, and that it concluded that it was in the "best interests of its members" to enter into the

QRAA agreement and continue selling JJVC contact lenses. Id.

Monsanto advises that an "agreement" for purposes of Section 1 "must reveal a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." Monsanto, 465 U.S. at 764 (internal quotation marks and citation omitted). "[T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." Id. (internal quotation marks and citation omitted). On the other hand, a manufacturer's independent act to set minimum resale prices, without seeking agreement from its retailers, does not amount to a contract. See id. at 761. At the pleading stage, the allegations of the Complaint plausibly suggest a conspiracy or agreement between JJVC and other retailers such as Costco, to a common scheme designed to achieve an unlawful objective, inconsistent with the purpose of the Sherman Act. Here, Costco has pleaded that there were negotiations between JJVC and Costco, and that they entered into a coerced agreement which included the Price Policy.

To be sure, it is unusual in this posture, for Plaintiff Costco to include itself in this alleged unlawful scheme. But such a posture does not defeat Costco's antitrust claim at the motion to dismiss stage. For example, in the per se unlawful product "tying" context,

> [A] contract between a buyer and seller satisfies the concerted action element of section 1 of the Sherman Act where the seller coerces a buyer's acquiescence in a tying arrangement imposed by the seller. [Footnote omitted.]. The essence of section 1's contract, combination, or conspiracy requirement in the tying context is the *agreement,* however reluctant, of a buyer to purchase from a seller a tied product or service along with a tying product or service. To hold otherwise would be to read the words "contract" and "combination" out of section 1.

> A § 1 agreement may be found when the conspirators had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful agreement. . . . Although a buyer is unlikely to desire a provision restricting its ability to purchase a product from other suppliers, a buyer might agree to such a term where the other provisions of the contract serve the buyer's interests. Even though a seller and a buyer may not share the same motive for entering into the anticompetitive agreement, the concerted action requirement is satisfied when their minds meet in an unlawful tying agreement. . . . To say that the buyer, having agreed to the contract, did not agree to an express term because the buyer would have preferred a contract without the term makes little sense. . . . [A] plaintiff can clearly charge a combination between the defendant and himself, as of the day he unwillingly complied with the restrictive agreement.

Systemcare, Inc. v. Wang Labs. Corp., 117 F.3d 1137, 1142-43 (10th Cir. 1997) (internal quotations and citations omitted); see also Spectators' Commc'n Network Inc. v. Colonial Country Club, 253 F.3d 215, 220 (5th Cir. 2001) ("Antitrust law has never required identical motives among conspirators, and even reluctant participants have been held liable for conspiracy."); Isaksen v. Vermont Castings, Inc., 825 F.2d 1158, 1164 (7th Cir. 1987) ("[T]he motives for the dealer's adhering to a suggested list price are irrelevant. If (but only if) he *agrees* to adhere (having been asked to), there is an agreement, no matter how unwilling he is."); Toscano v. PGA Tour, Inc., 70 F. Supp. 2d 1109, 1115 n.6 (E.D. Cal. 1999) ("[A] contract may satisfy the concerted action requirement even if one of the parties was coerced into the agreement."), aff'd sub nom., Toscano v. Prof'l Golfers Ass'n, 258 F.3d 978 (9th Cir. 2001).

While the allegations of the Complaint are to be analyzed under the Rule of Reason, Costco has alleged sufficient facts to make plausible a Section 1 claim excluding the possibility of independent action and suggesting that the JJVC and Costco "'had a conscious commitment to a common scheme designed to achieve an unlawful objective,'" Toscano, 70 F. Supp.2d at 1115

(quoting Monsanto, 465 U.S. at 764). The Complaint alleges that JJVC and Costco had a "unity of purpose" to enter into the QRAA and the Price Policy, even if the agreement was allegedly coerced, and the parties entering into the agreement had different motives for doing so. The Court finds that Complaint alleges a plausible claim that the agreement between JJVC and retailer Costco satisfies the concerted action requirement of Section One of the Sherman Act.

For all of the foregoing reasons, reasons, JJVC's Motion to Dismiss Count 2 of the Complaint is due to be denied.

B. Count 3: California Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq. Count 6: Maryland Antitrust Act, Md. Code Ann., Com. Law § 11-201 et seq.

The parties treat Count 3: California Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq., and Count 6: Maryland Antitrust Act, Md. Code Ann., Com. Law § 11-201 et seq. as being subject to the same standards as Costco's Count 2 antitrust claim based upon Section 1 of the Sherman Act. See Motion at 12, 16, 18; Response at 11; Transcript at 30, 72. See generally Cty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir.2001) ("The analysis under California's antitrust law mirrors the analysis under federal law because the Cartwright Act . . . was modeled after the Sherman Act."); In re Cipro Cases I & II, 348 P.3d 845, 858 (Cal. 2015) ("Interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century." (citations omitted)); Krause Marine Towing Corp. v. Ass'n of Md. Pilots, 44 A.3d 1043, 1053 (Md. Ct. Spec. App. 2012) (observing that Maryland's Antitrust Act "is essentially the same as § 1 of the Sherman Antitrust Act," and that "[d]ecisions of federal courts interpreting the Sherman Antitrust Act" guide the analysis of a claim brought pursuant to the Maryland Antitrust Act. (citations

omitted)).

For the reasons set forth above, Costco's alleges a plausible claim under both of these state provisions.

C. Count 4: The California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq.

In Count 4, Costco alleges that JJVC has violated California's Unfair Competition Law, California Business and Professional Code, § 17200 et seq. ("UCL") because its acts and practices, including the Price Policy, "were carried out in violation of the Federal Trade Commission Act ["FTC Act"], Sherman Act, and Cartwright Act, and are therefore unlawful." Complaint ¶ 89. Costco further alleges that JJVC violates the UCL because it has "engaged in unfair competition," adopting policies that "effectively restrict retail price discounting in light of the ban on substitution and the central role ECPs play in dictating contact lens prescriptions and retail sales." Id. ¶ 90. Costco seeks preliminary and permanent injunctive relief. Id. ¶ 92.[1]

JJVC contends that Costco's UCL claim fails because Costco's antitrust claim fails. (Doc. 59; Motion at 23); (Doc. 80; Reply at 14). It also argues that Costco has failed to sufficiently allege either "unlawful, unfair, or fraudulent business act[s]" on the part of JJVC. JJVC adds that Costco may not include the FTC Act as a predicate for a UCL claim because the FTC Act does not provide for a private right of action. Motion at 23. "Plaintiff may not use a state law cause of action to evade this restriction." Id. at 23-24 (citing O'Donnell v. Bank of Am., Nat'l Ass'n, 504 F. App'x 566, 568 (9th Cir. 2013) ("The district court rightly dismissed the unfair competition claim premised on Bank of America's alleged violation of the Federal Trade Commission Act. The

[1] Damages are not available under the UCL. Munguia v. Wells Fargo Bank N.A., No. 2:15-cv-00582-CAS(JCx), 2015 WL 1475996, at *8 (C.D. Cal. Mar. 30, 2015).

federal statute doesn't create a private right of action, . . . and plaintiffs can't use California law to engineer one." (citation omitted)); Aleem v. Bank Of Am., No. EDCV 09-01812 VAP (RZx), 2010 WL 532330, at *3 (C.D. Cal. Feb. 9, 2010) ("The UCL cannot create a private right of action where none exists under the federal statute.")); see also Reply at 14. As to the "unfair" prong of the UCL, JJVC argues that Price Policy "cannot be considered unfair if it is simultaneously condoned by antitrust laws." Motion at 24 (citing inter alia City of San Jose v. Office of the Comm'r of Baseball, 776 F.3d 686, 692 (9th Cir. 2015); Chavez v. Whirlpool Corp., 113 Cal. Rptr. 2d 175 (Cal. Ct. App. 2001)). Finally, JJVC argues that Costco's claims under the UCL must fail because the conduct complained of was not alleged to have taken place in California, as required by the statute. Reply at 15.

Costco responds that it has successfully pleaded an antitrust violation, and that it may also rely upon an alleged violation of the FTC Act because "'a private right of action under the predicate statute is not necessary in order to state a UCL violation based on that statute.'" (Doc. 77; Response at 24 (quoting Blakemore v. Superior Court, 27 Cal. Rptr. 3d 877, 890 n.17 (Cal. Ct. App. 2005) ("[A] private right of action under the predicate statute is not necessary in order to state a UCL violation based on that statute."), and citing Torres v. JC Penney Corp., No. 12-cv-01105-JST, 2013 WL 1915681, at *7 (N.D. Cal. May 8, 2013) ("[C]ourts in this circuit routinely allow UCL claims predicated on FTCA violations to proceed as long as the plaintiff pleads sufficient facts to raise the reasonable inference that the defendant engaged in unfair practices that caused the plaintiff substantial injury.")). As to "unfair" conduct, Costco argues that this case is distinguishable from the Chavez case relied upon by JJVC because the Price Policy here "is not unilateral and thus does not fall under the protection of the Colgate doctrine." Response at 25.

Additionally, as to JJVC's argument that the claim fails because the Complaint failed to allege that the underlying conduct took place in California, Costco responds that a UCL claim is not dependent upon where the agreements were made. Rather, "[t]he UCL . . . prohibits unfair or unlawful conduct that occurs in or causes harm within California." (Doc. 90; Sur-Reply at 1, 4 (arguing that Costco has been harmed in California)). Nevertheless, Costco contends that it specifically pleaded unlawful and unfair conduct occurs in California, because the Price Policy results in contact lenses being sold to consumers in California at artificially high prices. Sur-Reply at 3-4 (citing Complaint ¶¶ 15, 21, 39, 39-62). Costco also contends that the Court should not consider JJVC's "new" argument, raised for the first time in JJVC's Reply. Sur-Reply at 2.

Starting with the reach of the UCL, JJVC challenges whether Costco, a "Washington corporation with its headquarters in Washington," can sue JJVC, a "Florida corporation with its headquarters in Florida," for a violation of the UCL. JJVC Reply at 15 (citing Complaint ¶¶ 13, 15). "With respect to California's consumer protection laws, such as the UCL . . . , non-California residents are foreclosed from bringing such claims 'where none of the alleged misconduct or injuries occurred in California.'" Collazo v. Wen by Chaz Dean, Inc., 2:15-CV-01974-ODW-AGR, 2015 WL 4398559, at *3 (C.D. Cal. July 17, 2015) (citation omitted); see also Gershman v. Bayer HealthCare LLC, No. 14-cv-05332-HSG, 2015 WL 2170214, at *6 (N.D. Cal. May 8, 2015) ("Where none of the alleged misconduct or injuries occurred in California, the UCL has no application." (quotation marks and citation omitted)). On the other hand, "California statutory remedies may be invoked by out-of-state parties when they are harmed by wrongful conduct occurring in California." In re Clorox Consumer Litig., 894 F. Supp. 2d 1224, 1237 (N.D. Cal. 2012) (quotation marks and citation omitted); see also Gustafson v. BAC Home Loans Servicing,

LP, No. SACV 11-915-JST (ANx), 2012 WL 4761733, at *5 (C.D. Cal., Apr. 12, 2012) ("[W]hile the UCL reaches claims made by out-of state residents harmed by unlawful conduct occurring inside California, it does not apply to wrongful conduct occurring outside of California."); Sullivan v. Oracle Corp., 254 P.3d 237, 248 (Cal. 2011) ("Certainly the UCL reaches any unlawful business act or practice committed in California."); Norwest Mortg., Inc. v. Superior Court, 85 Cal. Rptr. 2d 18, 25 (Cal. Ct. App. 1999) ("[S]tate statutory remedies may be invoked by out-of-state parties when they are harmed by wrongful conduct occurring in California.").

Here, Costco alleges that JJVC conducted itself in California, and that Costco suffered injury in California. See Complaint ¶ 13 ("the largest number of [Costco's] members and locations in any state are in California."); ¶ 21 ("the actions of [JJVC] challenged in this action have affected and continue to affect the sale of contact lenses occurring in San Francisco, California, and these actions have harmed and continue to harm Costco, competition, and consumers, including Costco's members, in San Francisco, California."); see generally id. ¶¶ 15, 39-41 (alleging JJVC's conduct extends nationwide). These alleged California connections are sufficient at the pleading stage to state a claim by a non-California plaintiff for alleged conduct and injury which occurred within California.

Turning to the substantive issue raised, the UCL provides that

> any person or entity that has engaged, is engaging or threatens to engage "in unfair competition may be enjoined in any court of competent jurisdiction." Cal. Bus. & Prof. Code §§ 17201, 17203. "Unfair competition" includes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. The California Supreme Court has held that the UCL's "coverage is sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law." Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527 (Cal. 1999) (internal

> quotations and citation omitted). The UCL "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." Id. (internal quotations and citation omitted). Further, the UCL creates "three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent." Id.

Wilson v. Hewlett Packard Co., 668 F.3d 1136, 1140 (9th Cir. 2012). "The broad scope of the statute encompasses both anticompetitive business practices and practices injurious to consumers." Chavez, 113 Cal. Rptr. 2d at 183.

Costco's UCL claim is derivative of its Section 1 Sherman Antitrust Act and Cartwright Act claims. Thus, Count 4 of the Complaint alleges a plausible claim of violation of he California UCL for the same reasons Counts 2 and 3 allege plausible claims, as set forth above. E.g. Retrophin, Inc. v. Questcor Pharms., Inc., 41 F. Supp. 3d 906, 918 (C.D. Cal. 2014). Additionally, because 'practices which are "unlawful, or unfair, or fraudulent," are prohibited by the UCL, the Court, at this juncture, need not determine whether the alleged conduct by JJVC was "unfair" or "fraudulent," or the legal question whether Costco can and does allege a violation of the FTC Act as a predicate "unlawful" act.

D. Count 5: New York General Business Law § 369(A) and Breach of Contract Under New York Law

In Count 5, Costco alleges that the New York General Business Law § 369-a ("Section 369-a") "prohibits the enforcement of agreements to fix minimum resale prices." Complaint ¶ 94. It alleges that it is entitled to injunctive relief because JJVC's "threats and demands are efforts to insert such minimum resale prices into the [QRAA], or to enforce them if the [QRAA] is construed to include them, and are invalid." Id. ¶ 94. Costco seeks declaratory and injunctive relief. Id. ¶ 96.

JJVC argues that Count 5 fails as a matter of law because there is no private right of action

under Section 369-a, which is exclusively enforced by the New York Attorney General. (Doc. 59; Motion at 22). "Even if a private right of action under the statute did exist, the statute merely provides that a contractual provision setting minimum resale prices may not be enforced in New York State Court." Id. Costco responds that:

> [JJVC] pretends to misunderstand Costco Wholesale's first and fifth causes of action. Costco Wholesale is not asserting "private rights of action" under either the FTC Act or New York General Business Law section 369(a). . . . Rather, Costco Wholesale is asking the Court to declare that [JJVC] breached its contract with Costco Wholesale for failing to comply with "all laws," including the FTC Act, the FCLCA, and New York law.

(Doc. 77; Response at 22). In other words, Costco contends that it's Count I breach of contract claim is based, in part, upon JJVC's alleged violation of New York Law Section 269-a. Id. at 23 (citing Carl Wagner & Sons v. Appendagez, Inc., 485 F. Supp. 762, 772 (S.D.N.Y.1980) (finding that retailer was entitled to recover contractual damages from a manufacturer when the manufacturer failed to fill and ship orders to retailers who declined to enforce the manufacturer's minimum pricing policy; Manufacturer "could not legally implement that policy, in view of the New York fair trade law, found in the General Business Law, § 369-a.")). Costco asserts that "[t]he fact that a law does not create a private right of action does not bar parties from agreeing to abide by such laws." Id. Notably, Costco did not bring a stand-alone claim seeking declaratory or injunctive relief for violation of the FTC Act or the FCLCA.

Section 369-a provides:

> Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law.

N.Y. Gen. Bus. Law § 369-a (McKinney). The statute does not provide for a private right of

action. See WorldHomeCenter.com, Inc. v. PLC Lighting, Inc., 851 F. Supp. 2d 494, 503 (S.D.N.Y. 2011). Moreover, the "statutory language makes clear that an action may not be maintained in a court of law to enforce such a provision. However, there is nothing in the text to declare those contract provisions [Resale Price Maintenance Agreements] to be illegal or unlawful; rather the statute provides that such provisions are simply unenforceable in the courts of this state." People v. Tempur-Pedic Int'l, Inc., 944 N.Y.S.2d 518, 519 (N.Y. App. Div. 2012).

Because Section 369-a does not provide a private right of action, as conceded by Costco, Count 5 of the Complaint is due to be dismissed. While Count 5 cannot survive as a stand-alone claim, the legal issues raised by Count 5 are duplicative of and subsumed by the issues raised by Count 1 of the Complaint. However, as set forth below, the Court is not required to reach the question at this juncture of whether an alleged violation of Section 369-a can provide a basis for a breach of contract claim under New York law premised on a contractual requirement to abide by all laws.

E. Count 1: Declaratory Judgment as to the Parties' Contract

In Count I of the Complaint, Costco alleges:

> 74. The [QRAA] incorporates the [Price Policy] generally but more specifically requires that [JJVC] comply with all laws. Requiring minimum resale pricing in these circumstances does not comply with federal and state antitrust and consumer protection laws or with the intent of the FCLCA.

Complaint ¶ 74. Costco alleges that, in addition to the alleged statutory violations set forth in Counts 2-6 of the Complaint, the JJVC"s "minimum resale price requirement violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 ["FTC Act"]." Id. ¶ 75. Costco requests that the Court "declare that the contractual relationship between [JJVC] and Costco shall continue so

that Costco may sell [JJVC] contact lenses at competitive prices and regardless of Costco's decisions as to the prices at which it sells [JJVC] contacts . . . ." Id. ¶ 76.

JJVC first asserts that Count I should be dismissed for failure to state a claim, because there is no agreement between Costco and JJVC regarding the JJVC's Price Policy, as underscored by the fact that Costco continues to object to the Policy. (Doc. 59; Motion at 3). JJVC argues that the Price Policy states on its face that it is "'unilateral and does not represent an agreement between [JJVC] and its authorized distributors or resellers.'" Id. at 4 (quoting First Price Policy.). JJVC argues that the QRAA "governs the wholesale price at which Costco can purchase contact lenses from [JJVC]," and "does not contain any terms dictating the retail price at which Costco sells contact lenses to its members and does not reference the UPP [Price Policy] even by incorporation." Motion at 6; see also id. at 20-21; (Doc. 80; Reply at 6, 12 ("JJVCI agrees that the UPP [Price Policy] is not part of the QRAA (or any other agreement with Costco) and cannot be enforced as a breach of contract. . . .")). Additionally, JJVC asserts that the Complaint contains no allegation that JJVC ever used the QRAA to enforce the Price Policy. Reply at 12. JJVC maintains that Costco's compliance with the JJVC Price Policy does not constitute an "agreement." Reply at 7. JJVC also argues that Count I fails because there is no private right of action under the FTC Act or the new York General Business law § 369-a, Motion at 20-22, and that the FTC Act and the FCLCA do not apply to a manufacturer's setting a minimum resale price for the sale of its contact lens. Reply at 13. Thus, any alleged violation of these laws cannot be bootstrapped into a breach of contract claim. Id. JJVC states that the QRAA became effective in January 2015, but is "terminable at will," Reply at 13, and that JJVC "has never argued - nor will it - that Costco is in breach of the QRAA if it declines to comply with [JJVC's] unilateral [Price Policy.]" (Doc. 97;

JJVC Supplemental Memo at 1-2).

Costco characterizes Count 1 as seeking a declaration that JJVC "breached its contract with Costco Wholesale for failing to comply with 'all laws.'" (Doc. 77; Response at 22). It states that "[t]he remedy is to declare the price-setting provisions of the contract unenforceable." Id. at 23. Costco argues that the QRAA between Costco and JJVC incorporates the Price Policy by "expressly" requiring Costco to "'comply with all . . . pricing policies on which [JJVC] may condition the purchase or receipt of any Products,'" (Doc. 98; Costco's Supplemental Memo at 1 (quoting the QRAA)), and that Count I alleges that the Price Policy violates the provision of the QRAA that requires both JJVC and Costco to "comply with all country, U.S. federal and state laws and regulations, including without limitation the . . . Fairness to Contact Lens Consumers Act (FCLCA)," as alleged in the Complaint. Id.; see QRAA ¶ 2.15.

> The issue is whether [JJVC] can legally terminate Costco Wholesale despite, not through, the QRAA. The compliance-with-laws provision . . . is violated by [JJVC's] threat to terminate Costco Wholesale outside of the QRAA. . . . The declaration that Costco Wholesale seeks in this regard is not that the [Price Policy] is not part of the QRAA, but that the QRAA prohibits [JJVC] from having and enforcing such a policy, unilateral or not, in circumstances as anticompetitive as those here.

Costco Supplemental Memo at 2. At oral argument, counsel for Costco stated that Count I does not seek to exclude the Price Policy from the QRAA, but rather seeks a declaration that if JJVC terminates Costco under the Price Policy, that termination is a breach of the QRAA. (Doc. 92; Transcript at 27). Noting that the QRAA is governed by New York law, Costco argues that New York law allows for a "breach of contract claim based on incorporated laws even where relevant law did not provide for [a] private right of action." Response at 22-23 (citing Komanoff v. Mabon, Nugent & Co., 884 F. Supp. 848, 860 (S.D.N.Y. 1995) (declining to dismiss plaintiff's breach of

contract claim alleging defendants breach the contract by failing to abide by specified bylaws, rules and regulations, as distinct from asserting a private right of action under those provisions; "plaintiffs have a breach of contract claim entirely independent from any possible claim existing under [the cited provisions].")).

JJVC's challenge to Count I is pursuant to Rule 12(b)(6) (though JJVC did raise a "case or controversy" question at oral argument). (See Doc. 92; Transcript at 22, 23). However, the Court is obligated to sua sponte ensure that it has subject matter jurisdiction to entertain Costco's request for declaratory relief. The Declaratory Judgment Act provides, in relevant part:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201(a). "To establish a case or controversy sufficient to invoke a court's jurisdiction under the Declaratory Judgment Act, a party must, '[a]t an irreducible minimum,' show: '(1) that they personally have suffered some actual or threatened injury as a result of the alleged conduct of the defendant; (2) that the injury fairly can be traced to the challenged action; and (3) that it is likely to be redressed by a favorable decision.'" Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel or Vessels, 512 F. App'x 890, 895 (11th Cir. 2013) (emphasis added) (quoting U.S. Fire Ins. Co. v. Caulkins Indiantown Citrus Co., 931 F.2d 744, 747 (11th Cir. 1991)).

Costco has sufficiently alleged that its relationship with JJVC is governed by the QRAA, that the Price Policy is incorporated into the QRAA, and that the signees of the QRAA are required to comply with all laws. While Count I of the Complaint is not the model of clarity, the Court construes it as requesting that the Court declare that the QRAA, which governs the relationship

between Costco and JJVC, prohibits the enforcement of the Price Policy because the Policy is contrary to law, and that the QRAA cannot be terminated for violation of the Price Policy. Count I seeks a declaration regarding an "actual controversy" between the parties, alleging that JJVC has threaten that it will refuse to sell contact lenses to Costco for re-sale if Costco does not abide by JJVC's Price Policy. See Complaint ¶¶ 9, 12, 51, 60 (alleging that the "continuing threat of termination by [JJVC] compelled Costco to agree to comply with the Fifth [Price Policy]"), which Costco alleges is contrary to law and thus invalid under the terms of the QRAA.

As set forth above, the Court has determined that Costco has sufficiently alleged a violation of Section 1 of the Sherman Act to withstand a Rule 12(b)(6) motion to dismiss, as well as the UCL, the California Cartwright Act, and the Maryland Antitrust Act . The Court need not resolve at this juncture whether the allegations of the Complaint state a violation of the FTC Act, the UPCFA, or any other state statute, and whether a lack of private action under any of the specified statutes nullifies a breach of contract claim premised upon alleged violation of the statute. JJVC argues that the QRAA is terminable at will on 30 days' notice (see Doc. 92; Transcript at 22-23), and thus JJVC could conceivably terminate its agreement with Costco for any reason or for no reason at all. That may or may not be. But the circumstances surrounding any future termination of the QRAA, and whether any such termination would moot the declaratory relief sought by Count I, are not before the Court today. Count I, as pleaded, seeks a declaration that JJVC and Costco's relationship, as embodied by the QRAA, cannot include JJVC's Price Policy, which JJVC has threatened to enforce, because it is contrary to law. Count I sufficiently states a claim for declaratory relief.

Accordingly, it is hereby

ORDERED:

1. Defendant Johnson & Johnson Vision Care, Inc.'s Motion to Dismiss Plaintiff's Complaint (Doc. 59) is **GRANTED IN PART AND DENIED IN PART**, as follows:

A. The Motion is **granted** as it pertains to the Fifth Cause of Action alleging a violation of the New York General Business Law § 369(A) and Breach of Contract Under New York Law, set forth in the Complaint (Doc. 1).

B. The Motion is **denied** as it pertains to the First, Second, Third, Fourth, and Sixth Causes of Action set forth in the Complaint (Doc. 1).

2. The Fifth Cause of Action alleging a violation of the New York General Business Law § 369(A) and Breach of Contract Under New York Law, set forth in the Complaint (Doc. 1). is **DISMISSED**. Because the New York General Business Law § 369(A) does not provide for a private right of action, and a breach of contract claim based upon an alleged violation of New York General Business Law § 369(A) is subsumed by the First Cause of Action, amendment of the Complaint as to the Fifth Cause of Action is futile, and the Court need not provide time for amendment.

3. Defendant Johnson & Johnson Vision Care, Inc. shall file an answer to the Complaint (Doc. 1), within twenty (20) days of the date of entry of this Order.

DONE AND ORDERED in Jacksonville, Florida, this 4th day of November, 2015.

HARVEY E. SCHLESINGER
United States District Judge

jl

Copies furnished to:

Counsel of Record