UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE CALIFORNIA BAIL BOND ANTITRUST LITIGATION

This Document Relates To:

ALL ACTIONS

Case No. 19-cv-00717-JST

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS AND DENYING MOTION FOR SANCTIONS

Re: ECF Nos. 112, 113

Before the Court are Defendants' joint motion to dismiss the second consolidated amended class action complaint ("SCAC"), ECF No. 112, and Defendant All-Pro Bail Bonds, Inc.'s ("All-Pro") motion for sanctions, ECF No. 113. The Court will grant in part and deny in part the motion to dismiss and will deny the motion for sanctions.

I. BACKGROUND

A. Factual Background

The factual background to this putative class action is summarized in more detail in the Court's April 13, 2020 order granting in part and denying in part Defendants' motions to dismiss the first consolidated class action complaint ("CAC"). *See* ECF No. 91 at 1-4. In short, Plaintiffs Shonetta Crain and Kira Monterrey[1] allege that Defendants, various members of the California bail bonds industry, have conspired to artificially inflate the price of bail bonds in California. *See id.* at 1-2; SCAC, ECF No. 94 ¶ 1. Plaintiffs allege that this conspiracy had two components: (1) fixing bail bond premium rates at 10 percent of the cost of bail, and (2) preventing rebating. ECF No. 91 at 3; SCAC ¶ 6.

[1] Kira Monterrey's last name was Serna when this action was first initiated. SCAC, ECF No. 94 at 1 n.1

For the purposes of the instant motion to dismiss, the Court takes the following allegations as true. The conspiracy arose in 2004, after a California Superior Court decision ("*Pacific Bonding Corp.*") made clear that California bail agents were legally permitted to offer rebates on the standard premium rates approved by the California Department of Insurance ("CDI"). SCAC ¶ 5. While this decision should have led to increased price competition in the California bail bond market, Defendants viewed it as "an existential threat to the bail industry's profits" and colluded to prevent competition on the basis of price. *Id.* ¶¶ 123-25.

Defendant American Surety Company ("ASC") and Defendant William Carmichael, ASC's president, CEO, and co-owner, acted as "ringleaders" of the conspiracy. *Id.* ¶¶ 156, 358. In 2004, soon after *Pacific Bonding Corp.* made clear that rebating was permitted, "ASC communicated to its surety rivals that ASC would not seek to lower its default premium rate below 10%, and that ASC would discourage its agents from rebating or advertising rebates. ASC also exhorted its rivals to follow." *Id.* ¶ 157. In March 2005, Carmichael allegedly stated in an article:

> 2005 will not be a year when we, as an industry, can sit passively by while competitive forces continue to encroach upon our markets . . . . Advocates argue that the market dictates that they charge and collect less than the filed rate. . . . [But] I can safely predict that if left unchecked, rampant premium discounting will result in the end of the bail bond business as we know it, to be replaced by a new model that properly reflects the proper balance of risk and reward. Simple economics dictates it. . . . I urge all of us to recognize the serious nature of the threats to our industry and work collectively to repel them. Leaving profit on the table, in the form of discounts or uncollected accounts receivable, is a fool's game.

Id. ¶ 361 (emphasis omitted). Later that year, Carmichael stated in another article posted on ASC's website that "[w]e recognize the important role a surety must play in protecting our markets. If only every competitor we have would do the same." *Id.* ¶ 363.

Defendants enforced the conspiracy through trade associations, including Defendants American Bail Coalition, Inc. ("ABC"), California Bail Agents Association ("CBAA"), and Golden State Bail Agents Association ("GSBAA"), as well as non-Defendant Surety and Fidelity Association of America ("SFAA"). *Id.* ¶¶ 126-55. The "SFAA devised and promulgated the

'standard rate' of 10%, on which the Surety Defendants relied to fix premiums. The Surety Defendants expressly referred to their 10% fixed premiums as 'Surety Association of America (SAA) pricing.'" *Id.* ¶ 153. The SFAA also collects "detailed data concerning all premiums charged and all losses incurred" by the surety Defendants, imposing fines on those who fail to timely submit their data or submit incorrect data. *Id.* ¶ 154. The SFAA uses this data to "create[] and disseminate[] reports to the Surety Defendants that describe the prices charged by their potential rivals. The Surety Defendants use these reports to determine whether, and to what extent, their potential rivals are deviating from the Conspiracy." *Id.* The CBAA also "maintains information regarding premiums charged that Defendants and their agents can use to detect and prevent premium discounting." *Id.* ¶ 139; *see also id.* (quoting a CDI filing by a surety Defendant stating that it was "basing its rates for bail bonds on rate data obtained from the California Bail Agents Association"). The trade associations also host meetings and conferences "that provide opportunities for sureties and bail agents to collude," *id.* ¶ 128, as well as "bail agent training courses where industry participants train other participants in implementing the Conspiracy," *id.* ¶ 150.

Defendants fall into four categories: (1) 20 surety companies, who underwrite bail bonds sold by bail agents, and one umbrella surety organization; (2) two bail agencies, whose agents sell bail bonds to customers; (3) three trade associations; and (4) two individuals who have served as executives for various Defendant organizations. ECF No. 91 at 2; SCAC ¶¶ 15-45. Plaintiffs' SCAC, like their CAC, brings claims for violations of (1) Section 1 of the Sherman Act, 15 U.S.C. § 1; (2) the Cartwright Act, Cal. Bus. & Prof. Code § 16720; and (3) California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.* SCAC ¶¶ 390-416.

B. The Court's April 13, 2020 Order

In its order on Defendants' motions to dismiss the CAC, the Court held that Plaintiffs' Sherman Act claim was barred by the McCarran-Ferguson Act insofar as it related to the alleged fixing of maximum premium rates. ECF No. 91 at 12. It rejected Defendants' other immunity defenses, however, holding that Plaintiffs' Sherman Act claim was not barred as to the rebating allegations and that their Cartwright Act and UCL claims were not barred as to either the

premium-fixing or rebating allegations. *Id.* at 12-18.

The Court additionally held that Plaintiffs had plausibly pleaded the existence of an antitrust conspiracy for the purposes of their Sherman and Cartwright Act claims. *See id.* at 23. It based this holding on Plaintiffs' allegations of (1) parallel conduct in the form of "filing [with CDI] for uniform premium rates," "refrain[ing] from offering competitive rebates," and "misrepresentation regarding Defendants' ability to offer rebates"; and (2) various "plus factors," including trade association meetings that offered "opportunities to exchange information or make agreements," "public statements by defendants that could be construed as 'invitations to agree,'" and "market factors that suggest the presence of price fixing, such as an unusually low loss ratio, and competition on factors other than price, such as marketing and credit terms." *Id.* at 19-23 (citations omitted).

However, the Court held that Plaintiffs had failed to allege sufficient facts as to how all of the surety and bail agency Defendants and two of the industry association Defendants had "joined or participated" in the alleged conspiracy. *Id.* at 23-27. Accordingly, it dismissed Plaintiffs' claims against these Defendants, with leave to amend. *Id.* The Court denied Defendants' motion to dismiss the claims against the individual Defendants and the CBAA, finding that the CAC alleged sufficient facts regarding each of these Defendants' participation in the alleged conspiracy. *Id.* at 27-28.

Lastly, the Court denied Defendants' motion to dismiss Plaintiffs' pre-2015 claims on statute-of-limitations grounds, holding that Plaintiffs had plausibly alleged that the statutes should be tolled under the fraudulent concealment and continuing violation doctrines. *Id.* at 31, 33.

C. Procedural Background

Plaintiffs filed the SCAC on May 13, 2020, along with a motion to lift the stay of discovery that the Court had imposed pending resolution of the last set of motions to dismiss. SCAC; ECF No. 95. The Court granted Plaintiffs' motion to lift the stay of discovery on August 11, 2020. ECF No. 126. *See also* ECF No. 151 (denying Defendants' request to partially stay discovery). On June 12, 2020, Defendants filed a joint motion to dismiss the SCAC, ECF No. 112, and on July 7, 2020, All-Pro filed a motion for sanctions, ECF No. 113. Plaintiffs filed

oppositions to both motions, ECF Nos. 117, 119, and Defendants filed replies, ECF Nos. 121, 123. The Court took the sanctions motion under submission without a hearing, ECF No. 118, and held a hearing on the joint motion to dismiss on August 26, 2020, ECF No. 132.

II. JURISDICTION

This Court has subject-matter jurisdiction pursuant to 15 U.S.C. §§ 15 and 26 and 28 U.S.C. §§ 1337 and 1367.

III. MOTION TO DISMISS

A. Requests for Judicial Notice

Before turning to the merits, the Court addresses the parties' requests for judicial notice. ECF Nos. 111, 115. "Generally, district courts may not consider material outside the pleadings when assessing the sufficiency of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018). Judicial notice provides an exception to this rule. *Id.*

Pursuant to Federal Rule of Evidence 201(b), "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." If a fact is not subject to reasonable dispute, the court "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c)(2). The Ninth Circuit has cautioned, however, that courts must be wary that the "use of extrinsic documents to resolve competing theories against the complaint risks premature dismissals of plausible claims that may turn out to be valid after discovery." *Khoja*, 899 F.3d at 998. Accordingly, "a court cannot take judicial notice of disputed facts contained in . . . public records," when, for instance, "there is a reasonable dispute as to what the [record] establishes." *Id.* at 999, 1001.

1. Defendants' Requests

Defendants seek judicial notice for 51 excerpts of documents related to surety Defendants' bail bond premium rate applications with CDI as well as a financial disclosure filed with CDI by surety Defendant Continental Heritage Insurance Company. ECF No. 111. Plaintiffs do not

oppose this request, provided that the Court takes notice only of the fact that specific rates were filed with, and approved or denied by, CDI, as well as the fact that Defendants or CDI made particular representations or statements in the filing documents. ECF No. 114 at 2. The Court thus grants judicial notice of the documents, which are public records, though not for the truth or accuracy of the statements therein. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001); *Troy Grp., Inc. v. Tilson*, 364 F. Supp. 2d 1149, 1152 (C.D. Cal. 2005) ("[W]hen resolving disputes, courts may not take judicial notice of court documents provided for the truth of the facts asserted therein when such documents contain facts essential to support a contention in a cause then before it.") (quotation marks and citation omitted).

In their reply brief, Defendants also seek judicial notice of various websites that they claim "demonstrate that even a cursory search yields examples of advertisements that Plaintiffs claim do not exist in the marketplace." ECF No. 123 at 21 n.9. Plaintiffs object to the submission of this evidence on reply. ECF No. 124. Because the Court does not rely on the new evidence in its resolution of the motion to dismiss, it need not resolve this dispute.

2. Plaintiffs' Requests

Plaintiffs seek judicial notice of nine different documents in support of their opposition to Defendants' motion to dismiss. ECF No. 115. Four of these documents are CDI filings submitted by surety Defendants. *See id.*, Exs. 5-8. Defendants do not object to Plaintiffs' request as it relates to these documents, presuming they are judicially noticed "for the limited purpose of establishing that these excerpted documents were filed with the CDI." ECF No. 123-1 at 4. For the reasons discussed above, the Court grants judicial notice of these documents, though not for the truth or accuracy of the statements therein. It likewise grants judicial notice of Exhibit 3, surety Defendant ABC's 2005 Form 990 filed with the Internal Revenue Service, and Exhibit 9, a report on surety Defendant Allegheny Casualty Company by the New Jersey Department of Banking and Insurance, for the same limited purpose.

This leaves Exhibits 1, 2, and 4, which are all web pages. *See* ECF No. 115 at 3-5. Defendants do not object to the Court's taking judicial notice of the existence of these web pages, though they do not concede the truth of the statements therein. ECF No. 123-1 at 2-3. Because

Exhibit 4 is referenced in the SCAC, the Court grants judicial notice based on the incorporation by reference doctrine. *See* ECF No. 91 at 6. As for Exhibits 1 and 2 – a "video appearing on Padilla Bail Bond's 'How Bail Works' website" and a "printout of [Defendant AIA's] web page entitled 'About AIA,'" ECF No. 115 at 3-4 – this Court has held that a document is not "judicially noticeable simply because it appears on a publicly available website, regardless of who maintains the website or the purpose of the document." *Rollins v. Dignity Health*, 338 F. Supp. 3d 1025, 1032-33 (N.D. Cal. 2018). As the parties do not dispute that the Court may take notice of the *existence* of both web pages, however, the Court grants the request for that limited purpose.

B. Legal Standard

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Dismissal under Federal Rule of Civil Procedure 12(b)(6) "is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). A complaint need not contain detailed factual allegations, but facts pleaded by a plaintiff must be "enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* While this standard is not a probability requirement, "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quotation marks and citation omitted). In determining whether a plaintiff has met this plausibility standard, a court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable" to the plaintiff. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

C. Discussion

Plaintiffs' SCAC is nearly triple the length of their CAC, adding significant new

allegations regarding the overall alleged conspiracy and the Defendants' participation in it. *See* SCAC. Defendants argue, however, that the SCAC continues to lack the specificity required to support the claims against the Defendants the Court identified in its prior order. *See* ECF No. 112 at 10-11. Moreover, they argue that the new allegations "undercut the plausibility of the alleged conspiracy," requiring the Court to revisit its prior holdings on this front and "dismiss with prejudice the SCAC in its entirety." *Id.* Since the latter argument would be dispositive, the Court addresses it first.

1. Plausibility of Alleged Conspiracy

Section 1 of the Sherman Act prohibits any contract, combination, or conspiracy constituting an "unreasonable restraint" of trade.[2] *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). The "crucial question" for a Section 1 claim is "whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express.'" *Twombly*, 550 U.S. at 553 (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954)).

In order to state a Section 1 claim, however, antitrust plaintiffs must claim more than parallel conduct and a conclusory allegation of agreement. "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." *Id.* at 556-57. Allegations of parallel conduct must thus "be placed in a context that raises a suggestion of a preceding agreement." *Id.* at 557.

The Ninth Circuit "has distinguished permissible parallel conduct from impermissible conspiracy by looking for certain 'plus factors.'" *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194 (9th Cir. 2015). "Whereas parallel conduct is as consistent with independent action as with conspiracy, plus factors are economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action." *Id.* (citing *Twombly,* 550 U.S. at 557 n.4). "If pleaded, they can place parallel conduct 'in

[2] Because the Cartwright Act was modeled after the Sherman Act, the Court's analysis addresses both statutes together pursuant to federal antitrust law. *See, e.g., County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001).

a context that raises a suggestion of [a] preceding agreement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

When the Court evaluates whether a plaintiff has plausibly alleged an antitrust conspiracy, "[a] co-conspirator need not know of the existence or identity of the other members of the conspiracy or the full extent of the conspiracy." *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1118 (N.D. Cal. 2012) (citing *Beltz Travel Serv., Inc. v. Int'l Air Transp. Ass'n*, 620 F.2d 1360, 1366-67 (9th Cir. 1980)); *see also Beltz*, 620 F.2d at 1367 ("Participation by each conspirator in every detail in the execution of the conspiracy is unnecessary to establish liability, for each conspirator may be performing different tasks to bring about the desired result."). Nor should courts indulge antitrust defendants who move to dismiss by "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole . . . ." *High-Tech Emp.*, 856 F. Supp. 2d at 1118 (quoting *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)).

Defendants argue that the SCAC "undercut[s] the plausibility of the alleged conspiracy" by undermining Plaintiffs' allegations of both parallel conduct and plus factors. ECF No. 112 at 10. To better frame its plausibility analysis, the Court will first distinguish the SCAC's allegations regarding the surety Defendants from those regarding the bail agency and trade association Defendants.

a. Structure of Alleged Conspiracy

"In analyzing the reasonableness of an agreement under § 1, the Supreme Court has distinguished between agreements made up and down a supply chain, such as between a manufacturer and a retailer ('vertical agreements'), and agreements made among competitors ('horizontal agreements')." *Musical Instruments*, 798 F.3d at 1191. Price-fixing is a "[c]lassic example[]" of a horizontal agreement. *Id.* Some antitrust conspiracies, however, "involve both direct competitors and actors up and down the supply chain, and hence consist of both horizontal and vertical agreements." *Id.* at 1192. The Ninth Circuit refers to these types of conspiracies as "hub-and-spoke" conspiracies, even where the wheel metaphor is not entirely apt. *Id.* ("A hub-

and-spoke conspiracy is simply a collection of vertical and horizontal agreements.").

In this case, Plaintiffs allege a horizontal agreement among the surety Defendants to seek approval for a uniform standard premium rate of 10 percent and to discourage the bail agents they work with from offering rebates. *See, e.g.*, SCAC ¶ 157 (alleging that ASC "communicated to its surety rivals that ASC would not seek to lower its default premium rate below 10%" and "would discourage its agents from rebating or advertising rebates" and "exhorted its rivals to follow"); *id.* ¶ 174 ("Once rebating was permitted under California law, [the surety Defendants] agreed to abide by the understanding between and amongst other bail bond sureties to prevent [their] bail agents from advertising rebates to consumers."). The Court will address the plausibility of this alleged agreement below.

By naming two bail agencies as defendants, however, Plaintiffs appear also to be alleging a vertical agreement between the agencies and the sureties, and potentially a horizontal agreement among the agencies. Likewise for the trade associations, whom Plaintiffs allege helped enforce the conspiracy. But the SCAC contains no allegations of an actual agreement, explicit or implicit, between the agencies and the sureties; among the agencies themselves; among the trade associations; or between the trade associations and any of the other Defendants. The only agreement described in the SCAC is that among the sureties.

The SCAC alleges various statements by Two Jinn, Inc. and All-Pro, the bail agency Defendants, that it claims misled consumers as to the agencies' ability to offer rebates and thus "further[ed] the Conspiracy." *See, e.g.*, *id.* ¶ 380. But nowhere does the SCAC allege that Two Jinn or All-Pro actually *agreed* to the conspiracy in the first place.[3] Plaintiffs allege that the surety Defendants "discouraged [their] agents from rebating, and instructed them to report any rebating observed by [the sureties'] agents or agents of rival sureties directly to" the sureties or the trade

[3] Plaintiffs argue that "[t]he law does not require . . . the word 'agreement' to find liability" and that "a knowing wink can mean more than words." ECF No. 117 at 67 (citing *Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965)). That may be so, but Plaintiffs must still allege a "wink" or its equivalent, *see Esco Corp.*, 340 F.2d at 1007, which they do not do for the bail agency Defendants. Moreover, it is not clear how the bail agencies could have participated in an agreement to submit uniform premium rates to CDI given that, as the SCAC acknowledges, sureties – not bail agencies – are responsible for submitting proposed rates. *See* SCAC ¶ 60; Cal. Ins. Code § 1861.05.

association Defendants. *See, e.g.*, *id.* ¶ 162. They allege that the bail agency Defendants made various misleading statements about their ability to offer rebates and did not offer rebates to either Plaintiff, meaning that "the Conspiracy worked exactly as intended." *Id.* ¶¶ 371-82. But in the absence of an alleged agreement, competitors' "decisions to heed similar demands made by a common, important customer do not suggest conspiracy or collusion." *Musical Instruments*, 798 F.3d at 1195. Rather, "[t]hey support a different conclusion: self-interested independent parallel conduct in an interdependent market." *Id.*

Because the SCAC does not allege that the bail agency Defendants agreed to any arrangement, it has not alleged the foundational element of a Section 1 claim: an agreement. *See Twombly*, 550 U.S. at 553. Accordingly, the SCAC has not plausibly pleaded a conspiracy among bail agencies or between bail agencies and sureties. The Court thus grants the motion to dismiss the claims against Two Jinn and All-Pro, with leave to amend.[4]

Similarly, the SCAC does not allege that the three trade association Defendants ever agreed to join the conspiracy. Plaintiffs allege that Defendants CBAA, ABC, and GSBAA "played critical roles in creating and maintaining the Conspiracy," but all of the allegations go to maintenance – that the trade association Defendants "host[] meetings that provide opportunities for sureties and bail agents to collude," *id.* ¶ 128, make statements "calculated to mislead consumers into believing that discounts or rebates are unavailable," *id.* ¶ 146, and "maintain[] information regarding premiums charged that Defendants and their agents can use to detect and prevent premium discounting," *id.* ¶ 139. The SCAC does not allege that the trade associations entered into an agreement in the first place, nor is it clear who that agreement would have been with – each other, the sureties, or the bail agencies. Accordingly, the SCAC also fails to state an antitrust or UCL claim against the trade association Defendants, and the motion to dismiss is

[4] Because Plaintiffs concede that their UCL claim "is predicated on Defendants' Sherman Act and Cartwright Act violations," ECF No. 117 at 67, the Court addresses all three claims together.

granted as to these Defendants, with leave to amend.[5]

Because the SCAC does allege an agreement among the surety Defendants, the Court now turns to the plausibility of that allegation.

b. Parallel Conduct

The Court held that the CAC alleged three forms of parallel conduct: (1) "filing [with CDI] for uniform premium rates"; (2) "refrain[ing] from offering competitive rebates"; and (3) "misrepresentation regarding Defendants' ability to offer rebates." ECF No. 91 at 20. Defendants take issue with each of these categories.

i. Filing for Uniform Premium Rates

Plaintiffs' CAC alleged that the surety Defendants "have nearly uniformly filed for a default premium rate of 10 percent of the posted bond, with an 8 percent maximum for consumers who meet enumerated and nearly identical criteria . . . ." CAC ¶ 61; *see also id.* ¶ 74 (alleging that Aladdin, one of the agency Defendants, "uses the SAA as a justification for setting its standard rate, and has said in its CDI filings that '[t]he standard rate is based on Surety Association of America (SAA) pricing'"); *id.* ¶ 115 ("Despite the emergence of market pressures and sureties' knowledge of their ability to rebate, the sureties have largely stayed the course with their rates. With limited exceptions, the default rate for sureties in California remains 10%."); *id.* ¶ 120 ("sureties in California have filed for the same Maximum Rate, offered under nearly identical conditions (including the standard Fully Earned Term)"); *id.* ¶ 140(b). The Court held that "[t]hese facts, taken together, sufficiently allege that Defendants engaged in parallel conduct by filing for uniform premium rates." ECF No. 91 at 19-20.

The SCAC makes very similar allegations, just in more detail. Plaintiffs allege that, from 2004 until 2018, every surety Defendant offered "standard" premium rates of 10 percent. SCAC

[5] The Court acknowledges that the present order conflicts in some respects with its prior order granting in part and denying in part Defendants' first motion to dismiss. *See, e.g.*, ECF No. 91 at 26-27 (holding that the CAC sufficiently alleged "CBAA's participation in the asserted conspiracy."). To that extent, the Court has reconsidered its prior ruling in light of the absence of allegations regarding CBAA's participation in any agreement.

¶¶ 7, 158, 169, 181, 192, 204, 215, 226, 236, 246-247, 259, 267-269, 279, 290, 300, 309, 317, 327, 337, 348. In 2018, they allege, two surety defendants began offering a 9 percent standard rate. *Id.* ¶ 169. Plaintiffs further allege various statements by surety Defendants suggesting that the rates they sought approval for were based on what other sureties were charging. *See, e.g., id.* ¶ 246 (alleging that in its rate application with CDI, Seaview Insurance Company "described its proposal as 'an adoption of current bail bond rates approved for use by Danielson National Insurance Company,'" stated that "its pricing scheme was expressly 'based on Surety Association of America (SAA) pricing,'" and "explained that '[t]he Danielson National Insurance Company adopts the standard 10% of liability rate,' and that '[w]e adopt the Danielson National Insurance Company standard rate'"); *id.* ¶ 257 (alleging that in its first rate application with CDI, Danielson National Insurance Company "stat[ed] that its proposed rates 'are an adoption of current bail bond rates approved for use by Lincoln General Insurance Company'"); *id.* ¶ 268 (alleging that in its 2004 rate application with CDI, Financial Casualty & Surety, Inc. "admitted that 'none of the above filed rates are actuarially justified,' observed that they 'have been in use for many years,' and that '[n]ew insurance company rate filings for bail bond surety . . . are essentially "ME TO[O]" filings'" (emphasis omitted)).

In their motion to dismiss the SCAC, Defendants argue that "the CDI rate filings Plaintiffs rely on and incorporate by reference show that the Surety Defendants sought approval for a wide variety of different rates, and actively cut their premium rates over the relevant time period." ECF No. 112 at 21. Most of Defendants' argument, however, is focused on the "preferred" or "qualified" rates that many sureties offer to customers who meet certain criteria – for example, military service, government employment, union membership, or retention of private counsel. *See* ECF No. 112 at 23. While the majority of these preferred rates are set at 8 percent, Defendants point to eight different sureties they claim have offered multiple tiers of preferred rates, including 6 and 7 percent, *id.* at 24-25, and argue that all of the sureties compete with each other based on *eligibility* for the preferred rates, *id.* at 23. Defendants also point to three surety Defendants who offer 15 percent "high risk" rates. *Id.* at 24.

Defendants do not dispute, however, that – save for the two sureties who began offering a

9 percent standard premium rate in 2018 – the *standard* rate for all of these sureties, for which they applied for and received approval from CDI, was 10 percent. *See* ECF No. 111-1 at 11-281. Variation in "preferred" or "high risk" rates, *see* ECF No. 112 at 24, does not undermine the parallel nature of the standard rates because Plaintiffs have plausibly alleged that the standard rate acts as a sort of "artificially inflated base price from which negotiations for discounts began," *In re. Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 383 (S.D.N.Y. 1996). *See In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 352-53 (N.D. Cal. 2005) (certifying class of purchasers, some of whom paid list price and some of whom received discounts, because "high list prices prove[] the fact of impact, even if the degree of impact differ[s] between products and purchasers") (quoting *In re Citric Acid Antitrust Litig.*, No. 95-1092, C-95-2963 FMS, 1996 WL 655791, at *7 (N.D. Cal. Oct. 2, 1996) (alteration omitted)). Accordingly, the Court finds that the SCAC, like the CAC, has plausibly alleged parallel conduct in the form of nearly uniform filing for standard premium rates.

ii. Rebating Practices

The CAC alleged "very little in terms of actual rebating practices" – just that "Defendants 'generally . . . refrain from offering competitive rebates.'" ECF No. 91 at 20 (quoting CAC ¶ 68). The Court held that, on its own, this allegation would likely not be enough to allege parallel conduct, but took it into consideration alongside Plaintiffs' allegations of uniform premium rate filing and misrepresentation regarding Defendants' ability to offer rebates. *Id.*

Rather than add allegations regarding Defendants' actual rebating practices, the SCAC focuses instead on their alleged agreement "to discourage and suppress rebating, including suppressing the advertisement of rebates." SCAC ¶ 6. Plaintiffs allege that the surety Defendants made "nearly uniform misrepresentations and omissions that misle[d] consumers into believing that rebates [we]re unavailable." *Id.* ¶ 8. In its prior order, the Court held that the CAC's inclusion of "multiple examples of such misrepresentations, including two statements made by Defendants," three statements by "bail agencies who contract with Defendant sureties," and various statements "by members of the bail industry who are not named as Defendants," were sufficient to "to show parallel conduct in the form of similarly allegedly misleading statements

about Defendants' ability to offer rebates." ECF No. 91 at 20-21.

The SCAC makes all of these allegations, plus new ones regarding notices that the surety Defendants "require their agents to post in their retail offices," *see* SCAC ¶ 8 (listing 13 different notices stating, in effect, that listed rates "must be charged by all agents" of the surety), as well as discouraging and reporting of rebating by particular surety Defendant, *see, e.g.*, *id.* ¶¶ 162, 174-176. Defendants argue that the notices were "required to be filed with the CDI" and make "true statement[s] of California's law regarding which premium rates may be charged." ECF No. 112 at 17. Whether a statement is misleading, however, is a question of fact that should not be resolved on a motion to dismiss. *See Friedman v. AARP, Inc.*, 855 F.3d 1047, 1055 (9th Cir. 2017) (likelihood of deception is a "question[] of fact that [is] appropriate for resolution on a motion to dismiss only in 'rare situation[s]'") (third alteration in original) (quoting *Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015)); *Saeger v. Pac. Life Ins. Co.*, 94 F. App'x 544, 546 (9th Cir. 2004) (vacating and remanding order dismissing securities fraud complaint because "the district court should not have made the factual determination that the alleged misrepresentations are neither misrepresentations nor material on a 12(b)(6) motion to dismiss"). The Court thus holds that, like the CAC, the SCAC has alleged parallel conduct "in the form of similarly allegedly misleading statements about Defendants' ability to offer rebates." ECF No. 91 at 21.

c. Plus Factors

The Court held that the CAC "raise[d] a suggestion of a preceding agreement," *see Twombly*, 550 U.S. at 557, based on three plus factors: (1) participation in trade associations that provide "opportunities to exchange information or make agreements," *see In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008); (2) public statements by Defendants that could be construed as "invitations to agree," *see In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1116 (N.D. Cal. 2008) ("*TFT-LCD I*"); and (3) factors suggesting a "market susceptible to conspiratorial price-fixing," such as high barriers to entry, waning demand, and saturation, *see In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp. 2d 538, 576 (M.D. Pa. 2009). ECF No. 91 at 22.

The SCAC alleges all of these plus factors, adding particular detail to the market factors.

See SCAC ¶¶ 67-100. In addition to high barriers to entry, increasing supply and waning demand, unusually low loss ratios, and competition on factors other than price, which Plaintiffs alleged in the CAC, *see* ECF No. 91 at 22-23, the SCAC alleges that "the California bail bonds market is ideally suited to price-fixing" because: (1) "bail bonds are homogenous commodities"; (2) "the rate of relevant technological change is nearly zero"; (3) "demand for bail bonds is highly inelastic"; (4) "bail bonds sales are small, frequent, and regular"; (5) "bail bonds have essentially identical production costs"; (6) "the sureties are highly concentrated and act as cartel ringleader"; and (7) "defections from [the] cartel are easily detectable." ECF No. 94 at 15-28, SCAC ¶¶ 67-100. Courts have recognized that many of these factors can make a market conducive to price-fixing. *See, e.g.*, *In re Titanium Dioxide Antitrust Litig.*, 959 F. Supp. 2d 799, 826-27 (D. Md. 2013) (listing high concentration, "standardized, commodity-like" products, high barriers to entry, excess capacity, and waning demand as factors that may make a market conducive to oligopolistic price fixing); *see also In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 361 (3d Cir. 2004); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656-57 (7th Cir. 2002).

Defendants urge a contrary conclusion, arguing that these new allegations undercut the plausibility of the alleged conspiracy by providing "an alternative plausible explanation because concentrated markets for homogenous price inelastic goods generally see low levels of price competition absent any collusive conduct."[6] ECF No. 112 at 31-32 (emphasis omitted). Defendants are correct that parallel pricing, especially in an oligopolistic market,[7] may have a non-collusive explanation. *See Flat Glass*, 385 F.3d at 359-60 (discussing non-collusive "theory of interdependence" or "conscious parallelism," in which "firms in a concentrated market may maintain their prices at supracompetitive levels, or even raise them to those levels, without

[6] Defendants also argue that Plaintiffs "conflate[] profits with loss ratios," exhibiting "fundamental misapprehensions regarding how surety bonds work." ECF No. 112 at 28-29. Since the SCAC alleges multiple market factors in addition to loss ratios (as well as the other plus factors discussed above), the Court defers an evaluation of the proper means of assessing profit margins in California's bail bond surety market until a later stage of the proceedings.

[7] For the purposes of this motion to dismiss, the Court takes as true Plaintiffs' allegation that the California bail bonds market, which includes at least 20 different sureties, is "highly concentrated." *See* SCAC ¶ 85; *Knievel*, 393 F.3d at 1072.

engaging in any overt concerted action"). However, another explanation for the parallel pricing, in the context of the alleged market factors as well as the other plus factors discussed above, is collusion.

Defendants cite *Kleen Products LLC v. International Paper*, 276 F. Supp. 3d 811, 824 (N.D. Ill. 2017), which noted that many of the market factors plaintiffs relied on as plus factors "also provide Defendants with a ready-made defense that they did not break the law." ECF No. 112 at 36. But this statement was made on summary judgment. By contrast, a different court ruling on a motion to dismiss allegations of the same conspiracy noted that while the defendants' "contentions may be plausible," they did "not negate the plausibility of Plaintiffs' competing version." *Kleen Prods., LLC v. Packaging Corp. of Am.*, 775 F. Supp. 2d 1071, 1079 (N.D. Ill. 2011). Defendants protest that the plaintiffs in that case "had not alleged that the products were price inelastic or fungible," ECF No. 123 at 31-32, but in fact the plaintiffs had alleged a set of market factors including "the consolidated nature of the industry, inability of one firm to control the market, barriers to entry, cost structures, *inelasticity of demand* and commodity-like products" – nearly all of which Plaintiffs have alleged here, *Kleen Prods.*, 775 F. Supp. 2d at 1081 (emphasis added). *Kleen Products v. Packaging Corp.* found that these factors provided "additional contextual support for the plausibility of a conspiracy." *Id.* At the motion to dismiss phase, when the Court is obligated to "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable" to Plaintiffs, *see Knievel*, 393 F.3d at 1072, the same is true here. *See also In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 627 (7th Cir. 2010) (holding that complaint plausibly alleged price-fixing conspiracy where it alleged "a mixture of parallel behaviors, details of industry structure, and industry practices, that facilitate collusion").

The Court thus holds that the SCAC plausibly alleges an antitrust conspiracy among the surety Defendants.

2. Sufficiency of Allegations by Defendant

To survive a motion to dismiss, a complaint alleging an antitrust conspiracy "must allege that each individual defendant joined the conspiracy and played some role in it because, at the heart of an antitrust conspiracy is an agreement and a conscious decision by each defendant to join

it." *TFT-LCD I*, 586 F. Supp. 2d at 1117 (citation omitted). The complaint "need not plead each defendant's involvement in the alleged conspiracy in elaborate detail, but must simply include allegations specific to each defendant alleging that defendant's role in the alleged conspiracy." *Id.*

The *TFT-LCD* court held that this standard was satisfied where the plaintiffs alleged details of "numerous illicit conspiratorial communications between and among defendants"; "facts of the guilty pleas entered by four defendants for fixing prices of TFT-LCD"; "specific information about the group and bilateral meetings by which the alleged price-fixing conspiracy was effectuated," including "the structure and content of these meetings, as well as the types of employees who attended the meetings"; details of "bilateral discussions between various defendants . . . [that] took the form of in-person meetings, telephone calls, e-mails and instant messages"; and information about "which types of meetings the defendants and co-conspirators participated in," including in some instances "more detail such as the year of a meeting and other meeting participants." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179, 1184 (N.D. Cal. 2009) ("*TFT-LCD II*"). In *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 738 F. Supp. 2d 1011, 1019-22 (N.D. Cal. 2010), this standard was satisfied where the plaintiffs had made sufficiently specific allegations "concerning specific [d]efendants' participation in the alleged unlawful meetings and agreements," including the estimated number of meetings each defendant participated in, what sorts of agreements were reached, and in some cases what types of employees had represented defendants at the meetings.

Because the Court has already dismissed claims against the bail agency and trade association Defendants, *see supra*, at III.C.1.a, it will now assess the sufficiency of the claims against the surety and individual Defendants.

a. Surety Defendants

The Court previously found that, while the CAC made "many allegations about the surety Defendants as a group," it failed to "sufficiently allege each surety Defendant's 'role in the alleged conspiracy.'" ECF No. 91 at 24-25 (quoting *TFT-LCD I*, 586 F. Supp. 2d at 1117). The SCAC adds significant detail for each surety Defendant, including allegations on their backgrounds and entries into the California bail bonds market; standard premium rates; loss ratios; participation in

trade associations, where relevant, including monetary contributions in some cases; and statements by many surety Defendants that Plaintiffs claim are relevant to the alleged conspiracy. *See* SCAC ¶¶ 156-357.

The SCAC also alleges the role the sureties played in the conspiracy: seeking CDI approval almost exclusively for standard premium rates of 10 percent, and "work[ing] with rival sureties and bail agents to create an industry culture and practice of monitoring rebating practices of rivals and, if any rebating occurred, to report that practice to [the sureties] and other sureties through trade associations." *See, e.g., id.* ¶¶ 169, 174. The SCAC further alleges that "[e]ach and every economic plus factor" discussed above "applies to the bail bond business" of each individual surety in California, and that each surety refrained from "cheat[ing] on the terms of the Conspiracy" by seeking approval for lower standard premium rates or encouraging its agents to offer rebates because it knew that "rival sureties would soon discover" any such cheating. *See, e.g., id.* ¶¶ 163-65.

Missing from the SCAC, however, are allegations as to how most surety Defendants joined the conspiracy. The SCAC alleges that each surety Defendant joined in 2004, when the conspiracy arose, or, if the surety was not backing bail bonds in California at that point, then whenever the surety entered the market. *See id.* ¶¶ 156-57 (ASC); 166-68, 174 (Allegheny Casualty Company, International Fidelity Insurance Company, and AIA); 180 (American Contractors Indemnity Insurance Company); 191 (Bankers Insurance Company); 202 (Accredited Surety and Casualty Company, Inc.); 213 (Lexington National Insurance Corporation); 225 (Seneca Insurance Company); 235 (Continental Heritage Insurance Company); 245-46 (Seaview Insurance Company); 257 (Danielson National Insurance Company); 267 (Financial Casualty & Surety, Inc.); 278 (Indiana Lumbermens Mutual Insurance Company); 289 (Lexon Insurance Company); 299 (North River Insurance Company); 308 (Philadelphia Reinsurance Corporation); 316 (Sun Surety Insurance Company); 326 (United States Fire Insurance Company); 336 (Universal Fire & Casualty Insurance Company); 347 (Williamsburg National Insurance Company). The SCAC includes the same generic language regarding each surety Defendant's agreement not to rebate: "Once rebating was permitted under California law, [the surety

Defendant] agreed to abide by the understanding between and amongst other bail bond sureties to prevent its bail agents from advertising rebates to consumers." *See, e.g.*, *id.* ¶ 174. The SCAC does not include any allegations as to how or when the surety Defendants agreed to seek approval for a uniform premium rate, presuming this was an agreement separate from the agreement not to rebate.

With the exception of ASC, these allegations are insufficient to demonstrate each surety Defendant's "role in the alleged conspiracy." *See TFT-LCD I*, 586 F. Supp. 2d at 1117. Unlike the plaintiffs in *TFT-LCD* and *CRT*, Plaintiffs here provide no allegations of "communications between and among defendants" or "specific information about the group and bilateral meetings by which the alleged price-fixing conspiracy was effectuated." *See TFT-LCD II*, 599 F. Supp. 2d at 1184. The SCAC alleges that the trade association Defendants "host[] meetings that provide opportunities for sureties and bail agents to collude," SCAC ¶ 128, and identifies the dates of a few conferences, *see id.* ¶¶ 129, 132, 137. But the SCAC does not allege that any surety Defendant learned of or agreed to join the conspiracy at any of these meetings, or any details of who attended them or what was discussed.

Plaintiffs acknowledge that the SCAC lacks this crucial information, but argue that the *TFT-LCD* and *CRT* plaintiffs obtained these details through "discovery or government investigations," which Plaintiffs do not have access to here, and that these cases "do not purport to set a floor for what must be alleged to meet the *Twombly* standard." ECF No. 117 at 55. That may be true, but Plaintiffs cite no alternative authority upholding antitrust conspiracy allegations against defendants whose participation was not described in terms of communications and/or meetings with other defendants, and the Court has located no such case. *See In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1209-11 (N.D. Cal. 2015) (denying motion to dismiss brought by individual studios where complaint alleged specific conversations and meetings between studio executives); *In re Transpac. Passenger Air Transp. Antitrust Litig.*, No. C 07-05634 CRB, 2011 WL 1753738, at *15 (N.D. Cal. May 9, 2011) (denying motion to dismiss brought by individual airlines where complaint alleged that each airline had "participated in a July 2003 meeting in Geneva at which they indicated their support in principle of a collective fuel

surcharge" and described "specific, suspicious emails involving [the airlines]," including some emails that explicitly agreed to the alleged conspiracy); *SRAM*, 580 F. Supp. 2d at 901-04 (denying motion to dismiss individual manufacturer defendants where complaints quoted emails between manufacturers exchanging information about revenue, prices, and product roadmaps). For this reason, the Court concludes that the SCAC does not sufficiently allege most of the surety Defendants' "role[s] in the alleged conspiracy." *TFT-LCD I*, 586 F. Supp. 2d at 1117.

The one exception is ASC, the alleged "ringleader" of the conspiracy. *See* SCAC ¶ 156. The SCAC alleges that ASC "sprung [sic] into action" after *Pacific Bonding Corp.* and "communicated to its surety rivals that ASC would not seek to lower its default premium rate below 10%, and that ASC would discourage its agents from rebating or advertising rebates . . . [and] exhorted its rivals to follow." *Id.* ¶ 157; *see also, e.g.*, *id.* ¶ 174 (alleging that surety Defendants "agreed to abide by the understanding between and amongst other bail bond sureties to prevent [their] bail agents from advertising rebates to consumers"). The SCAC further alleges that "ASC described price competition as akin to 'stripping the wood off the walls for a fire to stay warm'" and "told other sureties that price competition 'works briefly, but eventually you have no fire and no building.'" *Id.* ¶ 157. While the SCAC does not provide the details of these statements, it does allege that ASC "communicated to its surety rivals" its own pricing intent and "exhorted" them "to follow" – i.e., that it proposed the alleged conspiracy to rival sureties. *Id.*

The SCAC also includes a statement from Carmichael, posted on ASC's website the year after *Pacific Bonding Corp.*, in which he decries "rampant premium discounting [that] will result in the end of the bail bond business as we know it, to be replaced by a new model that properly reflects the proper balance of risk and reward," and states, "I *urge all of us* to recognize the serious nature of the threats to our industry and work collectively to repel them. Leaving profit on the table, in the form of discounts or uncollected accounts receivable, is a fool's game." *Id.* ¶ 361 (emphasis added). This statement – posted on a forum accessible to other members of the bail bond industry – is an explicit invitation not to rebate, i.e., to participate in the alleged conspiracy. The same is true of ASC's alleged statement that "rival bail agents are 'our industry's eyes, ears and mouths in recognizing and alerting all to the impending attack [on the industry]. When you

[agents] become aware of a situation, please contact us so that we may assess the depth of the threat and work alongside of you to craft an appropriate response.'" *Id.* ¶¶ 90, 165 (emphasis omitted).

Plaintiffs do not provide specific emails or insight into closed-door meetings, but this is not necessary to survive a motion to dismiss. *See In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007) ("This is not to say that to survive a motion to dismiss, plaintiffs must plead specific back-room meetings between specific actors at which specific decisions were made."). "*Twombly* [does not] require[] elaborate fact pleading. Further, the Supreme Court has recognized that 'in complex antitrust litigation,' 'motive and intent play leading roles,' and 'the proof is largely in the hands of the alleged conspirators.'" *TFT-LCD II*, 599 F. Supp. 2d at 1184 (quoting *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962)). Looking at the alleged conspiracy "as a whole," *see High-Tech Emp.*, 856 F. Supp. 2d at 1118 (citation omitted), the Court finds that the SCAC sufficiently alleges ASC's role in spearheading the conspiracy.

It thus denies the motion to dismiss as to ASC and grants it as to the other surety Defendants, with leave to amend.

b. Individual Defendants

The SCAC alleges that individual Defendants William Carmichael and Jerry Watson "directly participated in the conspiracy" and are also liable for "approv[ing] and ratif[ying] the conduct of" various surety and trade association Defendants. *See* SCAC ¶¶ 358, 364; *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., Ltd.*, 467 F. Supp. 841, 853 (N.D. Cal. 1979), *aff'd sub nom. Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981) (individuals may be liable for the antitrust violations of their employers if they have directly participated in or knowingly approved or ratified "inherently wrongful conduct").

The SCAC alleges that Carmichael held leadership roles within surety Defendant ASC and trade association Defendant ABC. SCAC ¶ 358. The Court has already held that the SCAC states a conspiracy claim against ASC. *See supra*, at III.C.2.a. Several of the statements that the Court relied on in reaching this conclusion were allegedly made by Carmichael. *See* SCAC ¶ 361 ("I

can safely predict that if left unchecked, rampant premium discounting will result in the end of the bail bond business as we know it, to be replaced by a new model that properly reflects the proper balance of risk and reward. Simple economics dictates it. . . . I urge all of us to recognize the serious nature of the threats to our industry and work collectively to repel them. Leaving profit on the table, in the form of discounts or uncollected accounts receivable, is a fool's game."); *id.* ¶ 362 (describing bail agents as "our industry's eyes, ears and mouths in recognizing and alerting all to the impending attack [on the industry]. When you [agents] become aware of a situation, please contact us so that we may assess the depth of the threat and work alongside of you to craft an appropriate response"). The SCAC thus alleges Carmichael's "knowing approval or ratification of [ASC's] unlawful acts." *See Murphy Tugboat*, 467 F. Supp. at 852. For this reason, the motion to dismiss claims against Carmichael is denied.

As for Watson, the SCAC alleges that he worked for surety organization Defendant AIA, which includes member sureties Allegheny Casualty Company and International Fidelity Insurance Company, as well as trade association Defendant ABC. SCAC ¶ 364-65. Because the Court has already dismissed claims against these Defendants, *see supra*, at III.C.2.a., the SCAC has not alleged liability based on Watson's approval or ratification of their conduct. The SCAC alleges that Watson "directly participates in the conspiracy by publishing articles warning against the dangers of newcomers to the bail market, and publicly derid[ing] 'price-cutting' as a 'cancer' and a 'sickness' that was infecting the bail industry." SCAC ¶ 368. But the SCAC does not allege when or how Watson joined the conspiracy, and unlike Carmichael's statements, which can be construed as invitations to conspire, Watson's alleged statements are much more open-ended. *See id.* ¶ 366 ("You know how many checks [AIA has] written to pay a bail loss? Not a single one." (emphasis omitted)); *id.* ¶ 367 (stating that "an increasing number of bail agents want a piece of a shrinking bail bond pie"); *id.* ¶ 368 (describing price-cutting as "a form of cancer in the bail industry" and stating that it "has reached epidemic proportions in the bail profession"); *id.* ¶ 369 (encouraging agents to "offer 'exceptional service'" in the fact of "cost-cutting competitors"). These statements are insufficient to allege that he agreed to the conspiracy. *See TFT-LCD II*, 599 F. Supp. 2d at 1184. Accordingly, the motion to dismiss claims against Watson is granted, with

leave to amend.[8]

D. Conclusion

To summarize, the Court concludes that the SCAC plausibly alleges an antitrust conspiracy among the surety Defendants, but that it alleges sufficiently specific claims only against surety Defendant ASC and individual Defendant Carmichael. The Court thus grants the motion to dismiss the claims against all surety Defendants except ASC; grants the motion to dismiss the claims against the bail agency Defendants; grants the motion to dismiss the claims against the trade association Defendants; grants the motion to dismiss the claims against individual Defendant Watson; and denies the motion to dismiss the claims against surety Defendant ASC and individual Defendant Carmichael. All dismissals are with leave to amend.

IV. MOTION FOR SANCTIONS

Defendant All-Pro moves for sanctions, arguing that "Plaintiffs' counsel have violated Rule 11 by filing a complaint against All-Pro that is objectively baseless, even though they were in possession of information (or refused to consider information) proving as much." ECF No. 113 at 11.

A. Legal Standard

Federal Rule of Civil Procedure 11(b) provides that "[b]y presenting to the court a pleading, written motion, or other paper . . . an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; [and] (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." "If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may

[8] *See* note 4, *supra*.

impose an appropriate sanction on any . . . party that violated the rule . . . ."[9] Fed. R. Civ. P. 11(c)(1). "When Rule 11 sanctions are party-initiated, the burden is on the moving party to demonstrate why sanctions are justified." *Benedict v. Hewlett-Packard Co.*, No. 13-CV-00119-LHK, 2014 WL 234207, at *5 (N.D. Cal. Jan. 21, 2014).

Under Rule 11, "[f]rivolous filings are 'those that are both baseless and made without a reasonable and competent inquiry.'" *Estate of Blue v. County of Los Angeles*, 120 F.3d 982, 985 (9th Cir. 1997) (quoting *Buster v. Greisen*, 104 F.3d 1186, 1190 (9th Cir. 1997)). Where "the complaint is the primary focus of Rule 11 proceedings, a district court must conduct a two-prong inquiry to determine (1) whether the complaint is legally or factually 'baseless' from an objective perspective, and (2) if the attorney has conducted 'a reasonable and competent inquiry' before signing and filing it." *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002) (quoting *Buster*, 104 F.3d at 1190). Rule 11 sanctions may be appropriate not just where a party affirmatively misleads the Court, but where she "omit[s] critical information." *Hall v. Hamilton Fam. Ctr.*, No. 13-cv-03646-WHO, 2014 WL 1410555, at *10 (N.D. Cal. Apr. 11, 2014).

B. Discussion

All-Pro argues that the evidence it provided to Plaintiffs demonstrates that Plaintiffs' claim that All-Pro has participated in the anti-rebating conspiracy is "objectively baseless," and that by refusing to consider this information, Plaintiffs failed to conduct the reasonable inquiry required by Rule 11. ECF No. 113 at 11, 13.

All-Pro's counsel has submitted a declaration authenticating the various communications relevant to this motion. ECF No. 113-1. Plaintiffs do not object to the Court's consideration of this evidence, which underlies All-Pro's allegations regarding the SCAC. On April 30, 2020, after the Court ruled on Defendants' previous motions to dismiss but before Plaintiffs filed the SCAC, All-Pro's counsel emailed Plaintiffs' counsel to "explain why Plaintiffs cannot include All-Pro as

[9] Rule 11 has a safe harbor provision requiring a party seeking sanctions to serve a copy of the motion on the non-moving party at least 21 days before filing the motion, so that "the challenged paper, claim, defense, contention, or denial [may be] withdrawn or appropriately corrected . . . ." Fed. R. Civ. P. 11(c)(2). All-Pro complied with this provision by serving Plaintiffs a copy of the instant motion on June 8, 2020, *see* ECF No. 113 at 10-11, and Plaintiffs do not object to the motion on this ground.

a defendant in any amended complaint consistent with Federal Rule of Civil Procedure 11(b)(3)." *Id.* at 5. The email went on to state that "All-Pro has consistently rebated in order to compete with other agents in the bail bond market" and that "out of the forty-five individuals who obtained bonds from All-Pro on the same date Plaintiff Crain did – December 25, 2016 – the majority (24 out of 45) paid a premium of less than 10% after discounts and commission rebates, with some paying as little as 5% or 6%." *Id.* at 5-6. The email attached supporting documentation for this claim. *Id.* at 6-18. The email also claimed that "over the course of the past four years, the average annual bail bond premium charged by All-Pro, after discounts and rebates, has ranged from 5.3% to 6.7%" and that "in many, if not most, cases, bonds are individually negotiated." *Id.* at 6.

On May 5, 2020, Plaintiffs' counsel responded to the email, noting that, "[e]ven assuming [All-Pro's claims were] true, this information does not disprove your clients' role in a conspiracy to suppress rebating." *Id.* at 20. Plaintiffs' counsel stated that the email had "provided us with nothing regarding the vast majority of the alleged class period," which begins in 2004, and that "[w]ith respect to All-Pro's alleged rebating since 2017, evidence of competition is no defense to participation in a price-fixing conspiracy." *Id.* Plaintiffs' counsel cited the American Bar Association's Model Jury Instructions in Civil Antitrust Cases, which provide that "it is no defense that defendants actually competed in some respects with each other or failed to eliminate all competition between them." Am. Bar Ass'n, Model Jury Instructions in Civil Antitrust Cases (2016 ed.) at 31. To further evaluate All-Pro's claims, Plaintiffs' counsel requested transactional data, marketing materials, internal documents, and communications between All-Pro and "any rival, surety, or trade association, regarding premiums or rebates, from 2004 to the present." ECF No. 113-1 at 21.

All-Pro's counsel responded on May 11, 2020, explaining that it was not claiming that All-Pro "competed merely 'in some respects'" but that it "competed by providing rebates, the very thing that Plaintiffs are claiming All-Pro was conspiring to prevent." *Id.* at 24. All-Pro's counsel refused to provide "the wide-ranging discovery" Plaintiffs' counsel requested but did offer to provide transaction details for five dates of Plaintiffs' choosing from 2014 to the present. *Id.* Plaintiffs declined this offer, responding on May 12, 2020 that "it is black letter antitrust law that

not only is evidence of price competition not a complete defense, evidence of price competition is irrelevant for purposes of determining liability." *Id.* at 27 (emphasis omitted) (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-221 (1940)).

Because the evidence that All-Pro provided to Plaintiffs does not demonstrate that the SCAC's claims against All-Pro are "legally or factually 'baseless' from an objective perspective," *see Christian*, 286 F.3d at 1127, the Court will deny All-Pro's request for sanctions. A claim is legally or factually baseless when, for example, it "is barred by res judicata or collateral estoppel," *see Estate of Blue*, 120 F.3d at 985, or when the allegedly infringing work was created six years before the allegedly infringed work, *see Christian*, 286 F.3d at 1128. Where there is "*some* plausible basis, [even] quite a weak one," a claim is not baseless. *United Nat'l Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1117 (9th Cir. 2001). "'[C]ircumstantial evidence, and the reasonable inferences drawn from that evidence, are treated as evidentiary support' for purposes of Rule 11." *Benedict*, 2014 WL 234207, at *5 (quoting *MetLife Bank, N.A. v. Badostain*, 10-CV-118-CWD, 2010 WL 5559693, at *6 (D. Idaho 2010)).

In *Frost v. LG Electronics, Inc.*, No. 16-cv-05206-BLF, 2017 WL 2775041 (N.D. Cal. June 27, 2017), the court considered a similar request to the one at issue here. There, the plaintiffs had alleged an antitrust conspiracy between LG and Samsung to fix and suppress employee compensation. *Id.* at *1. A month after the complaint was filed, LG's counsel provided plaintiffs' counsel "with evidence allegedly showing that LG does not have the policy or prohibitions against hiring Samsung employees." *Id.* When the plaintiffs "refused to withdraw or correct the complaint as requested by LG," LG moved for sanctions under Rule 11. *Id.* The court denied the motion, noting that the plaintiffs had "recounted certain statements by a recruiter and a Samsung manager that provide some basis for their claims." *Id.* at *3. Even assuming the truth of the evidence LG had provided the plaintiffs – i.e., that LG did hire some Samsung employees – the court held that it did not undermine the plaintiffs' antitrust claims because "[f]urther analysis would be necessary to negate the possibility that exceptions or cheatings might have occurred in the presence of an alleged agreement between LG and Samsung." *Id.*

All-Pro attempts to distinguish *Frost* by arguing that Plaintiffs here "have identified no

evidentiary support for their allegations about All-Pro's rebating." ECF No. 121 at 11. But the SCAC in fact quotes multiple allegedly misleading statements by All-Pro about its ability to rebate. *See* SCAC ¶¶ 197; 380-81. Like the "anecdotal evidence" in *Frost*, these statements provide "some factual support" for Plaintiffs' allegation that All-Pro participated in a conspiracy to "discourage and suppress rebating, including suppressing the advertisement of rebates." *See* 2017 WL 2775041, at *3; SCAC ¶ 6. Even assuming that the evidence All-Pro provided and offered to provide constitutes a comprehensive and reliable assessment of its rebating policies, the evidence would not necessarily undermine Plaintiffs' claims against the bail agency. *See United States v. Beaver*, 515 F.3d 730, 739 (7th Cir. 2008) ("It is not uncommon for members of a price-fixing conspiracy to cheat on one another occasionally, and evidence of cheating certainly does not, by itself, prevent the government from proving a conspiracy."). The Court also notes that All-Pro did not offer any evidence as to its representations or advertising regarding the availability of rebates, which is a key part of Plaintiffs' theory. As in *Frost*, then, "[f]urther analysis would be necessary," 2017 WL 2775041, at *3, to evaluate Plaintiffs' conspiracy claims "as a whole," *High-Tech Emp.*, 856 F. Supp. 2d at 1118 (citation omitted).

The Court has dismissed the SCAC's claims against All-Pro with leave to amend. But the *Twombly* plausibility standard is not identical to the Rule 11 standard for a baseless claim. *See Frost*, 2017 WL 2775041, at *3 ("Even assuming that the factual basis is weak and might fail to withstand a motion to dismiss, the first prong of the Rule 11 analysis is not met as long as the complaint is supported by some factual basis from an objective perspective."). If it were, every Rule 12(b)(6) motion would be accompanied by a motion for sanctions. Because All-Pro has not met its burden to show that the SCAC's claims against it are legally or factually baseless, the Court denies its motion for sanctions.

CONCLUSION

For the foregoing reasons, the Court grants the joint motion to dismiss in part and denies it in part and denies the motion for sanctions. Plaintiffs may file an amended complaint within 30

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days of this order that addresses the deficiencies identified herein.

IT IS SO ORDERED.

Dated: January 5, 2021

JON S. TIGAR
United States District Judge