

United States District Court
Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMERICAN ACADEMY OF
EMERGENCY MEDICINE
PHYSICIAN GROUP, INC.,

Plaintiff,

v.

ENVISION HEALTHCARE
CORPORATION, et al.,

Defendants.

Case No. [22-cv-00421-CRB](#)

**ORDER DENYING MOTION TO
DISMISS**

Plaintiff American Academy of Emergency Medicine Physician Group (AAEMPG) is a corporation that provides business and administrative services to physician groups. FAC (dkt. 18-1) ¶¶ 1, 21. Having lost out on business to Defendant Envision Healthcare Corp./Envision Physician Services LLC¹ (collectively, Envision), *id.* ¶ 69, AAEMPG now brings suit against Envision, *id.* ¶ 27. AAEMPG alleges that Envision’s business model—chiefly its relationship with the professional medical groups with which it works—violates California’s ban on the corporate practice of medicine (CPOM).² *Id.* ¶¶ 75–89. AAEMPG seeks declaratory and injunctive relief. *Id.* ¶¶ 90–108. Envision moves to dismiss the complaint. *See* Mot. (dkt. 23). The Court heard argument on this matter on Friday, May 20, 2022, *see* Motion Hearing (dkt. 43), and now denies the motion.

¹ AAEMPG alleges that Envision HealthCare Cop. and Envision Physician Services LLC are alter-egos of each other. FAC ¶ 3.

² AAEMPG has not brought suit against the professional medical groups themselves.

1 **I. BACKGROUND**

2 **A. California’s Prohibition on the Corporate Practice of Medicine**

3 This case implicates California’s prohibition on CPOM. “The primary objective of
4 the [ban] is to prevent the intrusion of commercial influence on the practice of medicine.”
5 FAC ¶ 13. The doctrine of CPOM “protect[s] physician autonomy. . . . This is especially
6 important when the fiduciary obligation of a corporation to its shareholders does not align
7 with the physician’s obligation to patients.” Amicus Br. by American College of
8 Emergency Physicians in Support of Plaintiff (dkt. 33-1) (hereinafter ACEP Amicus) at 3
9 (quoting Jordan M. Warchol, Corporate Practice of [Emergency] Medicine, in Emergency
10 Medicine Advocacy Handbook (5th ed. 2019)). The CPOM doctrine is based on a number
11 of policy concerns, including that: (1) allowing corporations to practice medicine will
12 commercialize the practice of medicine, (2) a corporation’s obligation to its shareholders
13 may not be the same as a physician’s obligation to his or her patients, and (3) a corporation
14 employing a physician may interfere with the physician’s independent medical judgment.
15 Id. at 3–4 (quoting Issue Brief: Corporate Practice of Medicine, Advoc. Res. Ctr., Am.
16 Med. Ass’n (2015), available at <https://www.ama-assn.org/media/7661/download>).

17 California has banned CPOM since the 1920s. ACEP Amicus at 5. “[T]o
18 determine whether a particular business arrangement violates [CPOM], courts must rely on
19 a complex blend of statutes, regulations, and interpretations, as well as other forms of
20 public policy pronouncements.” Id. at 4 (citing Ari J. Markenson et al., The Corporate
21 Practice of Medicine and Fee-Splitting Prohibitions, 33 Health Law 10 (Feb. 2021)). As a
22 starting point, California Business and Professions Code § 2400 prohibits corporations, lay
23 entities, or any non-licensed persons or entities from practicing medicine. See Cal. Bus. &
24 Prof. C. § 2400 (West 2022) (“corporations and other artificial legal entities shall have no
25 professional rights, privileges, or powers.”). The Medical Board of California (MBC) has
26 explained that “This section of the law is intended to prevent unlicensed persons from
27 interfering with, or influencing, the physician’s professional judgment.” ACEP Amicus at
28 5–6 (quoting Physicians and Surgeons: Information Pertaining to the Practice of Medicine,

1 Med. Bd. Cal., <https://www.mbc.ca.gov/Licensing/Physicians-and-Surgeons/Practice->
 2 [Information/](https://www.mbc.ca.gov/Licensing/Physicians-and-Surgeons/Practice-) (hereinafter “Physicians and Surgeons”). California law further states that
 3 “Any person³ who practices or attempts to practice, or who holds himself or herself out as
 4 practicing . . . [medicine] without having at the time of doing so a valid, unrevoked, or
 5 unsuspended certificate . . . is guilty of a public offense.” Cal. Bus. & Prof. C. § 2052.
 6 And it prohibits persons from conspiring with or aiding and abetting another in the
 7 unlicensed practice of medicine. Cal. Bus. & Prof. C. § 2052(b). “These statutes form the
 8 foundation of CPOM, which broadly prohibits corporations and other lay entities from
 9 directly or indirectly practicing or controlling the practice of medicine, whether through
 10 influence, control, or direct intervention.” Amicus Br. by California Medical Association
 11 (dkt. 36-3) (hereinafter CMA Amicus) at 3.

12 A variety of other state statutes implicate CPOM. Business and Professions Code §
 13 650 prohibits the offer, delivery, receipt, or acceptance of consideration to induce the
 14 referral of patients. Welfare & Institutions Code § 14107.2 similarly prohibits
 15 remuneration for referrals of patients from a physician that treats Medi-Cal beneficiaries.
 16 Business and Professions Code § 16600 bars agreements that restrain persons from
 17 engaging in their lawful profession. Corporations Code § 13408.5 prohibits the formation
 18 of a professional corporation in order “to cause any violation of law, or any applicable
 19 rules and regulations, relating to fee splitting, kickbacks, or other similar practices by
 20 physicians and surgeons or psychologists.” Cal. Corp. C. § 13408.5. California law also
 21 prohibits the transfer of stock ownership in professional corporations to unlicensed persons
 22 or entities. Cal. Corp. C. § 13407. Business and Professions Code § 17200—the UCL—
 23 prohibits the use of unfair, unlawful, and/or fraudulent business acts or practices. Business
 24 and Professions Code § 17500 prohibits the making of untrue or misleading statements
 25 concerning professional services.

26
 27 _____
 28 ³ The statute defines “person” as “any individual, partnership, corporation, limited liability
 company, or other organization, or any combination thereof, except that only natural
 persons shall be licensed under this chapter.” Cal. Bus. & Prof. C. § 2032.

1 In addition to these statutes, MBC issued guidance as to what constitutes CPOM. It
 2 explained that “the following health care decisions should be made by a physician licensed
 3 in the State of California and would constitute the unlicensed practice of medicine if
 4 performed by an unlicensed person:”

- 5 • Determining what diagnostic tests are appropriate for a particular condition;
- 6 • Determining the need for referrals to, or consultation with, another physician/specialist;
- 7 • Responsibility for the ultimate care of the patient, including treatment options available to the patient; and
- 8 • Determining how many patients a physician must see in a given period of time or how many hours a physician must work.

10 Physicians and Surgeons. While MBC recognized that “a physician may consult with
 11 unlicensed persons in making ‘business’ or ‘management’ decisions,” “the following
 12 ‘business’ or ‘management’ decisions and activities, resulting in control over the
 13 physician’s practice or medicine, should be made by a licensed California physician and
 14 not by an unlicensed person or entity:”

- 15 • Ownership is an indicator of control of a patient’s medical records, including determining the contents thereof, and should be retained by a California-licensed physician;
- 16 • Selection, hiring/firing (as it relates to clinical competency or proficiency) of physicians, allied health staff and medical assistants;
- 17 • Setting the parameters under which the physician will enter into contractual relationships with third-party payers;
- 18 • Decisions regarding coding and billing procedures for patient care services; and
- 19 • Approving of the selection of medical equipment and medical supplies for the medical practice.

20 Id. MBC also identified the following types of businesses as prohibited:

- 21 • Non-physicians owning or operating a business that offers patient evaluation, diagnosis, care and/or treatment;
- 22 • Physician(s) operating a medical practice as a limited liability company, a limited liability partnership, or a general corporation;
- 23 • Management service organizations arranging for, advertising, or providing medical services rather than only providing administrative staff and services for a

- 1 physician's medical practice, even where physicians
own and operate the business); and
- 2 • A physician acting as 'medical director' when the
physician does not own the practice. . . .

3 Id.

4 In addition to this guidance from MBC, decisions by the California Attorney
5 General and state court decisions further define the boundaries of CPOM. See, e.g., 83
6 Ops. Cal. Atty. Gen. 170 (2000) ("The selection of a radiology site with appropriate
7 equipment and operational personnel best suited for the performance of a diagnostic
8 radiology study of a patient's particular physical disorder, as well as the selection of a
9 qualified radiologist to view and interpret the films, would involve the exercise of
10 professional judgment and evaluation as part of the practice of medicine."); California
11 Physicians' Serv. v. Aoki Diabetes Research Inst., 163 Cal. App. 4th 1506, 1516 (2008)
12 ("While the principal evils of the corporate practice of medicine may arise from the stress
13 the profit motive places on physicians, the courts have also noted the danger of lay
14 control—a danger that attends all types of corporations.").

15 **B. The Parties' Relationship**

16 The parties are competitors; both provide services to professional medical groups.
17 Until August 2021, AAEMPG provided such services to an emergency medicine
18 physicians group called Placentia Linda Emergency Physicians, Inc. (PLEP), which held
19 the exclusive contract to provide emergency physician coverage at the Placentia Linda
20 Hospital. FAC ¶ 1. AAEMPG's contract with PLEP was for the period of November 1,
21 2018 through November 1, 2021. Id. ¶ 21. The practice management services that
22 AAEMPG provided to PLEP "specifically exclude all activities described in the definitions
23 of the practice of medicine as outlined in the [M]edical [P]ractice [A]ct where Client's
24 Hospital(s) are housed." Id. AAEMPG "lost its contract with PLEP . . . when the Hospital
25 awarded it (and Anesthesiology coverage contracts) to Envision's affiliate medical group
26 Premier (and EM-I)." Id. ¶ 69.

27 **C. Envision's Business**

28 The FAC alleges the following about Envision's business.

1. Structure

1 Envision Physician Services was formed in 2017; its sole member is Envision
2 Healthcare Corp. and it is owned and controlled by Envision Healthcare Corp. Id. ¶ 24. In
3 2018, Envision Healthcare Corp. was purchased for \$9.9 billion; it is no longer publicly
4 traded. Id. ¶ 25.

5 “Envision’s business model is to circumvent the ban [on CPOM] by purchasing,
6 controlling, or creating a separate subsidiary licensed Professional Medical Corporations.”
7 Id. ¶ 27. Those professional medical corporations are “controlled entirely by Envision”
8 and “exist only on paper to undertake functions the law permits only physicians to
9 undertake, such as employing physicians or providing medical coverage for hospitals.” Id.
10 Envision’s predecessor companies “designed these Professional Medical Corporations to
11 evade [CPOM] and anti-kickback rules,” and they exist in all of the states where Envision
12 operates that have CPOM prohibitions. Id. ¶ 28.

13 Envision chooses and appoints the medical directors of the physician entities, id. ¶
14 29, including at Premier Emergency Physicians of California Medical Group, id. ¶ 30.
15 Premier’s CEO, CFO, and Director is Mark Jeffrey Slepín—a Senior Vice President of
16 Envision Physicians’ Services at its corporate headquarters in Florida. Id. ¶ 30. Slepín is
17 an officer “for over a hundred Envision affiliates.” Id. Moreover, Elene Moore, Envision
18 Physicians’ Services’ General Counsel, is Premier’s Secretary. Id. Premier’s mailing
19 address and executive offices are located at Envision Physicians’ Services corporate
20 headquarters in Plantation, Florida. Id.⁴ Premier’s corporate officers are not physicians
21 licensed to practice medicine in California. Id. ¶ 33.

22 Envision has “formed hundreds of controlled affiliate practices nationwide,”
23 including others in California. Id. ¶ 35. Envision either forms the medical groups or
24 “installs Envision executives or officers in pre-existing” medical groups, installs straw-
25

26
27 ⁴ The FAC also lists two additional medical corporations that are controlled by Envision:
28 California EM-I Medical Services and Glass Beach Medical Services. See id. ¶¶ 31, 32.
The corporate officers of California EM-I and Glass Beach are not physicians licensed to
practice medicine in California. Id. ¶ 33

1 man owners or its executives as owners and officers, and binds the owners to numerous
 2 restrictions. Id. ¶ 36. The owners must sell to Envision if requested and may not remove
 3 Envision officers. Id. Envision also requires physician members to limit their authority—
 4 restricting their ability to issue dividends, create additional stock, sell the medical group, or
 5 transfer their shares. Id.

6 Envision insists on bylaws that “limit the rights of the shareholders in favor of
 7 Envision or its appointed Directors.” Id. ¶ 28. The professional medical group’s members
 8 “must execute Agreements that include restrictions on their ability to issue dividends,
 9 create additional stock, or sell the Medical Group without permission from Envision.” Id.
 10 The professional medical groups “are a mere front through which Envision carries out its
 11 business and have no separate identity from Envision, except form.” Id.

12 2. Control

13 Envision requires the professional medical groups to enter into a Management
 14 Services Agreement, giving Envision “profound and pervasive direct and indirect control
 15 and/or influence over the medical practice, making decisions which bear directly and
 16 indirectly on the practice of medicine, by rendering physicians as mere employees, and
 17 diminishing physician independence and freedom from commercial interests.” Id. ¶ 38.

18 Specifically, Envision:

19 decides how many and which physicians to hire, their
 20 compensation, and their work schedule. Envision controls and
 21 influences advertising for physician’s vacancies, vetting
 22 physicians, establishing the terms of employment, the
 23 physician’s rate of pay, scheduling the hours physicians will
 24 work, its staffing levels, the number of patient encounters, and
 25 working conditions. Envision decides when to terminate
 26 physicians and denies them rights to appeal via traditional
 27 medical staffing mechanisms. Envision negotiates the Groups’
 28 contracts with third-party payors and health insurers and then
 decides whether the group will agree to the terms. . . .
 Physicians are not made aware of the terms of their contracts
 with third-party payors.

26 Id. ¶ 39. Envision also “establishes and promulgates physician ‘best practices,’ ‘red rules,’
 27 and ‘evidence-based pathways’ protocols,” creating the standards for patient care and
 28 comparing physician performance “to Envision-created or endorsed standards, a form of

1 clinical oversight.” Id. ¶ 45 (emphasis added). Envision tracks and creates
 2 “benchmarking” reports of physician performance, providing feedback to educate their
 3 physicians. Id. (emphasis added). AAEMPG asserts that “these performance standards
 4 have medical implications and violate the corporate practice doctrine.” Id.

5 **3. Billing**

6 In addition, Envision “requires physicians to assign their rights to the proceeds of
 7 their medical billings to Envision who then determines what is charged to patients and
 8 insurers.” Id. ¶ 40. Envision makes the coding decisions and bills patients for services;
 9 physicians “do not see what is billed and remitted in their names.” Id. Envision also
 10 collects the physicians’ fees, but the physicians “are not allowed to know what is billed in
 11 their name or the Groups’ name.” Id. ¶ 41. Envision retains amounts from the doctors’
 12 billing that exceed the reasonable value of the billing and of the administrative services
 13 Envisions provides, which AAEMPG alleges is “illegal fee-sharing with a lay entity.” Id.
 14 ¶ 43. AAEMPG further alleges that because Envision “makes all hiring and firing
 15 decisions, controls the financial aspects of the group, sets salaries, controls contracting,
 16 and retains all profit,” “it is the functional owner of the completely controlled affiliate
 17 groups irrespective of its use of the corporate form.” Id. ¶ 45. Envision also “profit[s] by
 18 reducing physician compensation, increasing the number of patients that physicians see per
 19 hour, and increasing the utilization of physician assistants.” Id. ¶ 47.

20 **4. Restrictive Covenants**

21 Envision insists that physicians “execute restrictive covenants that the physician
 22 may not attempt to assist or cause any other emergency medical practice to replace
 23 Envision.” Id. ¶ 48. Contracts between Envision’s controlled medical groups and the
 24 hospitals contain illegal restrictive covenants. Id. ¶ 50. AAEMPG argues that these
 25 restrictions “restrict a physician’s ability to practice their profession.” Id. ¶ 52. This is
 26 particularly so because many of the regions where Envision holds emergency department
 27 contracts have few emergency departments. Id.

28 AAEMPG asserts that Envision must know that it restrains competition because it

1 “requires physicians to sign a false disclaimer in their agreements that they can ‘earn a
2 reasonable living in the area in which they reside.’” Id. ¶ 54. Envision previously
3 acknowledged that its non-compete agreements might someday be successfully challenged.
4 Id. ¶ 55. AAEMPG argues that the non-compete provisions also substantially lessen
5 competition for emergency services. Id. ¶ 58. AAEMPG further alleges that Envision
6 conceals these unlawful practices by requiring all physicians to sign nondisclosure
7 agreements concerning their employment agreements. Id. ¶ 62.

8 **5. Kickbacks**

9 Hospitals typically grant physician groups exclusive contracts to ensure continuous
10 physician coverage of their emergency departments. Id. ¶ 63. Because such contracts
11 guarantee a continuous flow of patients, awarding such contracts constitutes the referral of
12 patients under California law; hospitals cannot offer consideration for the granting or
13 renewal of such contracts. Id. ¶ 65. Anesthesia coverage does not provide the same level
14 of patient flow, and so it is “nearly universal” for hospitals to provide anesthesia groups “a
15 significant cash subsidy” for treating patients. Id. ¶ 66.

16 In connection to the above, Envision provided kickbacks to acquire emergency
17 medicine exclusive contracts. Id. ¶ 63.⁵ “Envision pays consideration in exchange for
18 exclusive emergency room staffing contracts by paying hospitals in reduced subsidies to its
19 anesthesia groups.” Id. ¶ 68. AAEMPG refers to this arrangement as a “kickback
20 scheme.” Id. ¶ 71. Envision also offers remuneration to physicians who control physician
21 groups to contract with Envision [to] induce transfer of Emergency Department contracts
22 to its completely controlled affiliate groups.” Id. ¶ 73.

23 **D. Procedural History**

24 AAEMPG first brought suit against Envision in state court, see Notice of Removal
25 Ex. C (dkt. 1-1), but Envision removed the case to this Court based on diversity
26 jurisdiction, see Notice of Removal (dkt. 1) at 4. Envision then moved to dismiss, see First
27

28 ⁵ See also id. ¶¶ 67, 70 (under seal).

1 MTD (dkt. 11), and AAEMPG filed an amended complaint, see FAC. The amended
 2 complaint brings a cause of action under the UCL, alleging unlawful, unfair, and
 3 fraudulent business practices (seeking injunctive relief), FAC ¶¶ 75–89, and a cause of
 4 action for Declaratory and Injunctive Relief, citing Business & Professions Code § 16750,
 5 id. ¶¶ 90–108. AAEMPG asks (1) that Envision be enjoined from engaging in CPOM, (2)
 6 that Envision be enjoined from offering or providing remuneration or anything of value to
 7 hospitals in exchange for patient referrals, (3) for a declaration that causing professional
 8 medical associations to enter into the kinds of covenants alleged violates Cal. Bus. & Prof.
 9 Code § 16600, (4) for a declaration that the practice of agreeing to provide hospitals with
 10 personnel without a subsidy in exchange for Emergency Department contracts violates Cal.
 11 Bus. & Prof. Code § 650 and Welfare & Inst. Code § 14107.02, (5) for a declaration that
 12 the control over medical professional associations by law entities is CPOM in violation of
 13 Cal. Bus. & Prof. Code §§ 2400 and 2502, and (6) for attorneys’ fees. Id. at 29–30.
 14 Envision again moves to dismiss. See Mot.; see also Opp’n (dkt. 28-2); Reply (dkt. 30).

15 II. LEGAL STANDARD

16 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court may dismiss
 17 a complaint for failure to state a claim upon which relief may be granted. Dismissal may
 18 be based on either “the lack of a cognizable legal theory or the absence of sufficient facts
 19 alleged under a cognizable legal theory.” Godecke v. Kinetic Concepts, Inc., 937 F.3d
 20 1201, 1208 (9th Cir. 2019) (cleaned up). A complaint must plead “sufficient factual
 21 matter, accepted as true, to state a claim to relief that is plausible on its face.” Ashcroft v.
 22 Iqbal, 556 U.S. 662, 678 (200) (cleaned up). A claim is plausible “when the plaintiff
 23 pleads factual content that allows the court to draw the reasonable inference that the
 24 defendant is liable for the misconduct alleged.” Id. When evaluating a motion to dismiss,
 25 the Court “must presume all factual allegations of the complaint to be true and draw all
 26 reasonable inferences in favor of the nonmoving party.” Usher v. City of L.A., 828 F.2d
 27 556, 561 (9th Cir. 1987). “Courts must consider the complaint in its entirety, as well as
 28 other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss,

1 in particular, documents incorporated into the complaint by reference, and matters of
 2 which a court may take judicial notice.” Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551
 3 U.S. 308, 322 (2007).

4 **III. DISCUSSION**

5 Envision moves to dismiss the FAC on two separate grounds: (A) the abstention or
 6 primary jurisdiction doctrines, and (B) failure to state a claim.

7 **A. Abstention/Primary Jurisdiction**

8 Envision argues that this Court should apply either the abstention or primary
 9 jurisdiction doctrines, because MBC and not the Court should decide the issues in this
 10 case. See Mot. at 6. The Court disagrees.

11 **1. Abstention**

12 **a. When Appropriate**

13 Under the abstention doctrine, a court “may abstain when the lawsuit involves
 14 determining complex economic policy, which is best handled by the legislature or an
 15 administrative agency.” Alvarado v. Selma Convalescent Hosp., 153 Cal. App. 4th 1292,
 16 1298 (2007). Abstention is also appropriate “where granting injunctive relief would be
 17 unnecessarily burdensome for the trial court to monitor and enforce given the availability
 18 of more effective means of redress.” Id. And it is appropriate “when granting the
 19 requested relief would require a trial court to assume the functions of an administrative
 20 agency, or to interfere with the functions of an administrative agency.” Id.; see also Klein
 21 v. Chevron U.S.A., Inc., 202 Cal. App. 4th 1342, 1366 (2012) (courts apply abstention
 22 doctrine where “plaintiffs had asserted claims that would necessarily require the trial court
 23 to resolve complex policy issues,” and there is “an alternative mechanism for resolving the
 24 issues the plaintiffs had raised in their complaints.”).

25 Alvarado is an example of a case in which the court applied the abstention doctrine.
 26 At issue was whether certain skilled nursing and care facilities complied with statutory
 27 nursing hour requirements. Alvarado, 153 Cal. App. 4th at 1295. The California Court of
 28 Appeal determined that adjudicating the case “would require the trial court to assume

1 general regulatory powers over the health care industry through the guise of enforcing the
2 UCL, a task for which courts are not well-equipped.” *Id.* at 1303–04. The agency was
3 better suited to determine whether a particular facility was governed by one statute or
4 another, to calculate the nursing hours for each facility in the case, to classify employees
5 into different categories, to calculate their hours worked, etc. *Id.* at 1305–06. The agency
6 was also better able “to provide an alternative and more effective remedy.” *Id.* at 1306.

7 In *Shuts v. Covenant Holdco LLC*, 208 Cal. App. 4th 609 (2012), the California
8 Court of Appeal revisited the abstention doctrine in the context of skilled nursing facilities.
9 The court distinguished *Alvarado* and declined to abstain, holding that “at least at this very
10 early stage of the proceedings where the critical issues are largely undefined, ‘[a] judicial
11 determination as to whether [a skilled nursing facility] satisfies its obligations under [the
12 statute]’s staffing requirement does not appear to implicate technical or policy
13 determinations usually reserved to an administrative agency.” *Shuts*, 208 Cal. App. 4th at
14 621 (quoting *Wehlage v. EmpRes Healthcare, Inc.*, 791 F. Supp. 2d 774, 787 (N.D. Cal.
15 2011)). The court stated that “a court should not abstain from deciding a case when the
16 Legislature ‘already has made the relevant policy determinations.’” *Id.* (quoting *Arce v.*
17 *Kaiser Found. Health Plan, Inc.*, 181 Cal. App. 4th 471, 501 (2010)). It concluded that the
18 statute was “sufficiently specific for a court to competently determine whether such
19 statutory guidance is being followed,” adding that “since *Alvarado* was decided in 2007,
20 the [agency] has made significant progress in providing administrative guidance on the . . .
21 standard, and how it should be calculated.” *Id.* at 621–22. It further noted that “this will
22 not be the first time courts have been called upon to adjudicate whether skilled nursing
23 facilities have violated applicable staffing standards.” *Id.* at 623.

24 **b. Application Here**

25 Here, MBC has “responsibility for . . . enforcement of the disciplinary and criminal
26 provisions of the Medical Practice Act.” Cal. Bus. & Prof. Code § 2004. But that does not
27 mean that it must adjudicate this case, or even that it can.

28 As an initial matter, AAEMPG argues that MBC does not even have jurisdiction

1 over Envision, as it only has jurisdiction over licensed (or unlicensed) physicians. Opp’n
2 at 4–5.⁶ This is not exactly right. The statute defines “person” as including a “corporation,
3 limited liability company, or other organization.” See Cal. Bus. & Prof. C. § 2032. So the
4 language in the statute prohibiting “Any person who practices or attempts to practice, or
5 who holds himself or herself out as practicing . . . [medicine] without having at the time of
6 doing so a valid, unrevoked, or unsuspended certificate,” Cal. Bus. & Prof. C. § 2052,
7 could apply to a corporation that practiced medicine. As could the prohibition on any
8 person “conspiring with or aiding and abetting another in the unlicensed practice of
9 medicine.” See Cal. Bus. & Prof. C. § 2052(b).

10 But it is not clear that MBC has experience investigating and pursuing a case like
11 this. At the motion hearing, the parties were at something of a loss when imagining what
12 such an inquiry would look like, and even how it would be initiated. MBC’s role is
13 typically to “investigate, . . . commence disciplinary actions, and . . . take disciplinary
14 action against a physician’s license based on unprofessional conduct as defined in the
15 Medical Practice Act.” See Griffiths v. Superior Court, 96 Cal. App. 4th 757, 768–69
16 (2002). There is no indication that MBC would be able to get its arms around the FAC’s
17 detailed allegations about a multi-billion dollar corporation’s business structure, contracts,
18 and practices. As AAEMPG states, the “systemic and pervasive violation of the law” that
19 it alleges in the FAC “will not be remedied by disciplining . . . individual physicians.”
20 Opp’n at 7.

21 A further impediment to applying the abstention doctrine is that although the case is
22 broadly about the corporate practice of medicine, it also involves a number of additional
23 issues. See, e.g., FAC ¶ 79 (alleging that Envision violates the “unlawful” prong of the
24 UCL based on the CPOM ban and specifically Cal. Business & Professions Code §§ 650,
25

26 ⁶ It also argues that Business and Professions Code § 650, which it alleges that Envision
27 violated, is not part of the Medical Practice Act. Id. at 5. Section 652 confers enforcement
28 jurisdiction over violations of § 650 to “the board by whom he or she is licensed,” and
AAEMP’s point is that Envision has no medical license. Id. at 5–6. It is not clear whether
MBC would really not address Envision’s alleged violation of section 650.

1 2400, 2052, 16600, and Cal. Corporations Code. §§ 13407 and 13408.5), ¶ 81 (alleging
 2 that Envision violates the “unfair” prong of the UCL because Envision’s conduct caused
 3 AAEMPG to lose its contract with PLEP, Envision threatens an incipient violation of
 4 antitrust law, Envision increases medical costs to patients because of billing practices and
 5 thwarting competitors, Envision’s false advertising is unlawful under 15 U.S.C. § 52(a),
 6 Envision violates the Cartwright Act, Envision substantially lessens competition with
 7 lawful medical groups, Envision reduces the market for lawful operating management
 8 services organizations, Envision significantly threatens and harms competition, Envision
 9 harms public policy), ¶ 82 (alleging that Envision violates the “fraudulent” prong of the
 10 UCL because it represents that Envision Physician Services is a physician group lawfully
 11 structured and able to provide medical services in violation of Business and Professions
 12 Code § 17500, because it calls itself a “physician-led medical group,” and “one of the
 13 nation’s largest medical groups,” and “the nation’s largest emergency medical group.”).
 14 There is no reason to believe that MBC is equipped to address those issues. And so it is
 15 not clear that there is “an alternative mechanism for resolving the issues the plaintiffs . . .
 16 raised in their complaints.” See Klein, 202 Cal. App. 4th at 1366.

17 The issue raised in the complaint that MBC indisputably does have expertise in is
 18 the unauthorized practice of medicine. But as to that issue, there is a fair amount of
 19 guidance available to the Court. See Shuts, 208 Cal. App. 4th at 621–22 (statute was
 20 “sufficiently specific for a court to competently determine whether such statutory guidance
 21 is being followed”; agency had “made significant progress in providing administrative
 22 guidance on the . . . standard, and how it should be calculated.”). For example, MBC has
 23 listed “health care decisions [that] should be made by a physician licensed in the State of
 24 California and would constitute the unlicensed practice of medicine if performed by an
 25 unlicensed person,” as well as “‘business’ or ‘management’ decisions and activities,
 26 resulting in control over the physician’s practice or medicine, [that] should be made by a
 27 licensed California physician and not by an unlicensed person or entity.” Physicians and
 28 Surgeons. The list of prohibited decisions and activities includes the hiring and firing of

1 physicians, and the making of decisions about billing procedures, both of which the FAC
2 alleges that Envision does on behalf of its professional corporations. *Id.*; FAC ¶¶ 39, 40.

3 At this stage, the Court does not need MBC in order to determine that AAEMPG
4 has adequately alleged CPOM. *Cf. Cost Mgmt. Servs., Inc. v. Washington Natural Gas*
5 *Co.*, 99 F.3d 937, 949 (9th Cir. 1996) (“Because this case arises in the context of a motion
6 to dismiss under Rule 12(b)(6), we must accept as true CMS’s allegation that WNG
7 violated Tariff 87. For that reason, the ‘threshold decision’ which WNG would have us
8 refer to the [agency] must necessarily be resolved in favor of CMS.”). And there is no
9 reason now to believe that MBC would be better positioned than this Court to assess some
10 of the more complex allegations that bear on CPOM, such as whether Envision’s contracts
11 include restrictive covenants, and whether its corporate structure gives rise to alter ego
12 liability. *See, e.g., Brovont v. KS-1 Med. Servs., P.A.*, 622 S.W.3d 671, 678 (2020) (case
13 addressing the legal ramifications of Envision company with similar business model).
14 “[T]his [would] not be the first time courts have been called upon to adjudicate whether”
15 an entity was engaged in the unauthorized practice of medicine. *See Shuts*, 208 Cal. App.
16 4th at 623; *see, e.g., Conrad v. Medical Bd. of California*, 48 Cal. App. 4th 1038, 1042–43
17 (1996) (discussing case law on CPOM, and its exceptions).

18 The Court therefore does not apply the abstention doctrine.

19 2. Primary Jurisdiction

20 Primary jurisdiction “is a prudential doctrine under which courts may, under
21 appropriate circumstances, determine that the initial decision-making responsibility should
22 be performed by the relevant agency rather than the courts.” *Syntek Semiconductor Co. v.*
23 *Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002). The primary jurisdiction doctrine
24 “permits judicial deference to administrative expertise.” *Bradley v. CVS Pharmacy, Inc.*,
25 64 Cal. App. 5th 902, 912 (2021). However, the doctrine does not “require[] that all
26 claims within an agency’s purview . . . be decided by the agency,” and is not “intended to
27 ‘secure expert advice’ for the courts from regulatory agencies every time a court is
28 presented with an issue conceivably within the agency’s ambit.” *Syntek*, 307 F.3d at 780

1 (quoting Brown v. MCI WorldCom Network Servs., Inc., 277 F.3d 1166, 1172 (9th Cir.
 2 2002)). Instead, it is a “doctrines used by the courts to allocate initial decisionmaking
 3 responsibility between agencies and courts where such [jurisdictional] overlaps and
 4 potential for conflicts exist.” Id. (quoting Richard J. Pierce, Jr., Administrative Law
 5 Treatise § 14.1, p. 917 (4th ed. 2002)). “Unless an agency is empowered to decide all the
 6 issues in a pending lawsuit, the appropriate procedure for a court that applies the primary
 7 jurisdiction doctrine is to stay the lawsuit pending a decision by the administrative
 8 agency.” Bradley, 64 Cal. App. 5th at 913; but see Syntek, 307 F.3d at 782 n.3 (court can
 9 stay case or dismiss without prejudice).

10 Courts traditionally consider four factors in weighing whether to apply the primary
 11 jurisdiction doctrine: “[a] the need to resolve an issue that [b] has been placed by Congress
 12 within the jurisdiction of an administrative body having regulatory authority [c] pursuant
 13 to a statute that subjects an industry or activity to a comprehensive regulatory authority
 14 that [d] requires expertise or uniformity in administration.” Syntek, 307 F.3d at 781 (citing
 15 U. S. v. General Dynamics, 828 F.2d 1356, 1362 (9th Cir. 1987)).

16 **a. Issue**

17 As to the first prong, AAEMPG notes that while primary jurisdiction is about initial
 18 decision-making, Envision never actually identifies “what initial decision the Board should
 19 be asked to make”—i.e., which issues the Court would refer. Opp’n at 4. One issue might
 20 be whether Envision’s exercise of “profound and pervasive direct and indirect control
 21 and/or influence over the medical practice, making decisions which bear directly and
 22 indirectly on the practice of medicine, by rendering physicians as mere employees, and
 23 diminishing physician independence and freedom from commercial interests,” FAC ¶ 38,
 24 constitutes the unauthorized practice of medicine. In other words, the parties could ask
 25 MBC: “do these various practices constitute CPOM?”

26 But as discussed above, MBC has (and other sources have) already provided some
 27 helpful guidance on that question. See Physicians and Surgeons. This case is therefore
 28 distinguishable from Hood v. Wholesoy & Co, Modesto Wholesoy Co. LLC, No. 12-cv-

1 5550-YGR, 2013 WL 3553979, at *5–6 (N.D. Cal. July 12, 2013), which involved the
2 propriety of listing “organic evaporated cane juice” instead of sugar, and labeling soy
3 yogurt “yogurt,” but in which the court noted that “the FDA’s position is not settled.” In
4 Hood, it made sense to refer the case to the FDA because “should the Court go forward
5 with consideration of the Complaint, it would find itself in a position of either having no
6 set standard to apply, or announcing a standard and thereby overstepping its proper role.”
7 Id. at *6. The same absence of guidance is absent here.

8 **b. Agency Jurisdiction**

9 As to the second prong, while both parties agree that MBC has oversight over the
10 unauthorized practice of medicine, AAEMPG asserts that California’s legislature never
11 gave MBC exclusive jurisdiction over that subject. Opp’n at 3. Envision concedes this
12 point. See Reply at 5. This it must do because, as mentioned above, plenty of courts have
13 adjudicated cases involving the unauthorized practice of medicine, including specifically
14 CPOM. See, e.g., People v. Cole, 38 Cal. 4th 964, 970–71 (2006) (“The ban on the
15 corporate practice of medicine generally precludes for-profit corporations—other than
16 licensed medical corporations—from providing medical care through either salaried
17 employees or independent contractors.”) (citing Conrad v. Medical Bd. of California, 48
18 Cal. App. 4th 1038, 1047–48 (1996)); SteinSmith v. Medical Bd., 85 Cal. App. 4th 458,
19 463 (2000) (licensed physician who worked at clinic owned by two unlicensed individuals
20 was properly fined); People ex rel. State Bd. of Medical Examiners v. Pacific Health
21 Corp., 12 Cal. 2d 156 (1938) (“The issue presented herein is not new, and has been
22 considered in this state by recent cases which are controlling. It is an established doctrine
23 that a corporation may not engage in the practice of such professions as law, medicine or
24 dentistry.”); see also Blue Cross of Cal., Inc. v. Superior Court, 180 Cal. App. 4th 1237
25 (2009) (in case where city attorney sued to enforce California health care plans, city was
26 “not asking the court to assume or interfere with the functions of an administrative agency”
27 but “asking the court to perform an ordinary judicial function, namely, to grant relief under
28 the UCL and the FAL for business practices that are made unlawful by statute.”).

1 Envision’s response to AAEMPG’s cited authority is to dismiss it as just a “handful
2 of cases” largely relating to “limited issues relating to individual doctors.” Reply at 6.
3 While that is true of the Steinsmith case, it is not true of Cole or People ex rel. State Board
4 of Medical Examiners. Moreover, the complexity of this case is not a point in Envision’s
5 favor. This case is complicated because Envision’s reach is extensive. See Reply at 6
6 (“None of the cases involved, as here, a complaint purporting to challenge practices
7 allegedly extending throughout the State of California, involving multiple facilities,
8 multiple contracts, and multiple entities, as this case on its face does.”). But this case is
9 also complicated because of the numerous issues the FAC raises, not all of which involve
10 CPOM. See FAC ¶¶ 79–82. Only CPOM was “placed . . . within the jurisdiction of an
11 administrative body having regulatory authority,” see Syntek, 307 F.3d at 781, and that
12 jurisdiction has been shared with the courts.

13 Moreover, there is a real question as to what MBC has the authority to do even as to
14 CPOM as presented in this case. “The [MBC] is the only licensing board that is authorized
15 to investigate or commence disciplinary actions relating to physicians and surgeons who
16 have been issued [a license].” Cal. Bus. & Prof. Code § 2220.5. But that is not this case.
17 In Arnett v. Dal Cielo, 14 Cal. 4th 4, 7–8 (1996), the Supreme Court of California
18 discussed MBC’s investigative powers, which include the ability to petition for injunctive
19 relief against licensees found guilty of unprofessional conduct. That is a bit closer to what
20 this case entails. Still, if MBC concluded that Envision, a corporation and therefore non-
21 license-holder, was violating CPOM, it is not clear that MBC could deliver the kind of
22 relief that AAEMPG seeks here. See FAC at 29 (Prayer for Relief).

23 c. Pursuant to Statute

24 As to the third prong, there is no question that the California legislature entrusted
25 MBC with “responsibility for . . . enforcement of the disciplinary and criminal provisions
26 of the Medical Practice Act.” Cal. Bus. & Prof. Code § 2004. California Business and
27 Professions Code § 2400 prohibits corporations from practicing medicine. See Cal. Bus. &
28 Prof. C. § 2400. It further states that “Any person who practices . . . [medicine] without

1 having [a license] . . . is guilty of a public offense.” Cal. Bus. & Prof. C. § 2052.

2 **d. Requiring Expertise/Uniformity**

3 As to the fourth prong, while MBC has expertise in the unauthorized practice of
4 medicine, these facts differ from cases where the Court would have to go out on a limb to
5 define whether soy yogurt is yogurt, see Hood, 2013 WL 3553979, at *6, or, where a
6 physician was accused of overprescribing, whether a pharmacy was obligated to continue
7 to fill his prescriptions, see Bradley, 64 Cal. App. 5th at 917 (“Board has a unique ability
8 to evaluate whether a decision not to fill prescriptions was justified by a pharmaceutical
9 licensee’s ‘professional training and judgment.’”); see also Davel Commc’ns, Inc. v.
10 Qwest, 460 F.3d 1075, 1088 (9th Cir. 2006) (applying primary jurisdiction so FCC could
11 interpret its own ambiguous order). Here, given the guidance available to the Court
12 already, and the previous case law on the unauthorized practice of medicine, MBC’s
13 expertise may be unnecessary.

14 Because this case does not implicate an issue that the California legislature has
15 placed within the jurisdiction of an agency that requires agency expertise, the Court does
16 not apply the doctrine of primary jurisdiction.

17 **B. Failure to State a Claim**

18 As an alternative basis for dismissal, Envision argues that the FAC fails to state a
19 claim. The Court again disagrees.

20 **1. UCL**

21 Whatever the evidence ultimately shows, the FAC alleges a wide variety of ways in
22 which Envision violates the UCL. See FAC ¶¶ 75–89. For example, the FAC alleges that
23 Envision violates the UCL by unlawfully engaging in, and aiding and abetting, the CPOM
24 in violation of Business & Professions Code §§ 2400, 2502, unlawfully forming
25 professional corporations to violate laws on fee splitting, kickbacks and other practices,
26 including Business & Professions Code § 650 and California Corporations Code §
27 13408.5, unlawfully paying consideration for the retention of emergency department
28 contracts, in violation of Penal Code § 650 and Welfare & Institutions Code § 14107.2,

1 and unlawfully restraining the practice of medicine by requiring doctors to enter into
2 restrictive covenants that restrict their employment. Id. ¶ 79.

3 The FAC includes numerous allegations that support the theory that Envision
4 violates the CPOM. See, e.g., ¶¶ 38–45 (detailing ways in which Envision exercises
5 control over professional medical groups). Amicus California Medical Association asserts
6 that “[a] significant portion of the allegations in this action fall within CPOM’s
7 proscription against activities and practices affecting a physician’s professional judgment.
8 Indeed, there are allegations in the [FAC] that, if proven, demonstrate classic CPOM
9 violations.” CMA Amicus at 6 (emphasis added). The Court agrees. Envision’s response
10 to this point is that the FAC cannot support its claim based on CPOM laws throughout the
11 United States because “much of the United States has no such ban.” Mot. at 9. But the
12 cause of action is based on California law, which does ban CPOM. See FAC ¶ 79(a); see
13 also Opp’n at 16 (“Plaintiff does not premise its UCL claim on the violation of other
14 states’ laws, nor does it seek that the Court award remedies to address Defendants’
15 violations of other states’ laws. . . .”). Envision also argues that AAEMPG has failed to
16 state a claim for CPOM because “it fails to allege that the medical corporation is not
17 owned by a licensed physician.” Mot. at 3. That argument misconstrues AAEMPG’s
18 theory of the case. AAEMPG’s theory is that, notwithstanding the makeup of those
19 professional medical groups, they are really controlled by Envision. See, e.g., FAC ¶ 38;
20 see also Opp’n at 12 (referring to “captive medical groups”). Those allegations are
21 sufficient to state a claim under the UCL. See People v. Superior Court (Cardillo), 218
22 Cal. App. 4th 492, 498 (2013) (error to dismiss “practicing medicine without a license
23 count” against non-physician owners of marijuana dispensaries/clinics who employed
24 physicians, setting their hours, soliciting and scheduling patients, collecting fees from
25 patients, and paying physicians a percentage of those fees).

26 The Court therefore denies the motion to dismiss the UCL claim.

27 2. Declaratory Relief

28 Envision argues in a single paragraph that the Court should decline to exercise

1 jurisdiction over the declaratory relief claim because it duplicates the UCL cause of action.
 2 Mot. at 15. AAEMPG does not address the issue of whether its declaratory relief claim is
 3 duplicative. Instead, it cites to authority holding that “[d]eclaratory relief is appropriate
 4 ‘(1) when the judgment will serve a useful purpose in clarifying and settling the legal
 5 relations in issue, and (2) when it will terminate and afford relief from the uncertainty,
 6 insecurity, and controversy giving rise to the proceeding.’” Opp’n at 24–25 (quoting
 7 Guerra v. Sutton, 783 F.2d 1371, 1376 (9th Cir. 1986)). And it asserts that a declaration is
 8 necessary because “Envision’s systemic CPOM is highly repeatable” as Envision can
 9 repeat these same violations by creating new professional medical groups. Id. at 25.

10 Envision’s alleged business model is certainly capable of repetition—according to
 11 the FAC, there are already “hundreds if not thousands of medical groups controlled by
 12 Envision Physician Services.” FAC ¶ 32; see also id. ¶ 35 (“hundreds”). And while
 13 Envision is correct that the declaratory judgment claim appears duplicative of the UCL
 14 claim, see id. ¶¶ 92–100 (allegations supporting declaratory relief involve CPOM,
 15 kickbacks, restrictive covenants, unlawful agreements, etc.), the Court need not dismiss it
 16 at this time. In Brady v. Conseco, Inc., No. 08-5746 SI, 2009 WL 2356201, at *7 (N.D.
 17 Cal. 2009), Judge Illston explained that the defendants “have filed pleadings vigorously
 18 contesting plaintiffs’ ability to demonstrate one or another of the essential elements of
 19 some of their claims,” and that if the plaintiffs prevailed, “then declaratory relief might be
 20 plaintiffs’ primary, or only, remedy.” Judge Illston concluded that while she had
 21 discretion to dismiss a duplicative claim for declaratory relief, “[u]nder all of the
 22 circumstances. . . it would be premature to exercise such discretion at this early stage.” Id.
 23 Similarly, there is no urgency here to dismiss the declaratory relief claim so early in the
 24 litigation. See also Digby Adler Grp., LLC v. Mercedes-Benz U.S.A., LLC, No. 14-cv-
 25 2349-THE, 2015 WL 1548872, at *9 (April 7, 2015) (“Defendant has not shown that any
 26 prejudice would result from allowing this claim to proceed. Accordingly, at this early
 27 stage, the Court finds that it is premature to foreclose the possibility of declaratory
 28 relief.”). The Court therefore denies the motion to dismiss the declaratory relief claim at

United States District Court
Northern District of California

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this time.⁷

IV. CONCLUSION

For the foregoing reasons, the Court DENIES the motion to dismiss on both grounds.

IT IS SO ORDERED.

Dated: May 27, 2022



CHARLES R. BREYER
United States District Judge

⁷ Envision also argues that the FAC fails as to Envision Healthcare Corporation because it alleges no facts as to that entity other than “the mere fact of ownership.” *Id.* But the FAC alleges that Envision Healthcare Corp. is the alter ego of Envision Physician Services LLC, having common ownership and no separate corporate identities. *See* FAC ¶¶ 3, 23–26. The allegations against Envision Physician Services also apply to Envision Healthcare Corp.