Ginger Pigott (SBN CA 162908)
Jordan D. Grotzinger (SBN CA 190166)
Emerson B. Luke (SBN CA 307963)
GREENBERG TRAURIG, LLP
1840 Century Park East, Suite 1900
Los Angeles, California 90067-2121
Telephone: 310.586.7700
Facsimile: 310.586.7800
Ginger.Pigott@gtlaw.com
grotzingerj@gtlaw.com
lukee@gtlaw.com

Attorneys for APEXUS, LLC

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

AIDS HEALTHCARE FOUNDATION, a California non-profit public benefit corporation,

Plaintiff,

v.

APEXUS, LLC, a Delaware limited-liability company,

Defendant.

CASE NO. 2:22-CV-08450 PA-E

DEFENDANT APEXUS, LLC'S NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[*Declaration of Jordan Grotzinger, Request for Judicial Notice and [Proposed] Order filed concurrently herewith*]

DATE: April 10, 2023
TIME: 1:30 p.m.
DEPT: 9A
JUDGE: Honorable Percy Anderson

TO THE COURT, PLAINTIFF, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on April 10, 2023, at 1:30 p.m., in Courtroom 9A of the above-captioned Court, located at the United States Courthouse, 350 West 1st Street, Los Angeles, California 90012, Defendant Apexus, LLC ("Apexus") will and hereby does move under Fed. R. Civ. P., Rule 12(b)(6), to dismiss the First Amended Complaint ("FAC") of Plaintiff AIDS Healthcare Foundation ("AHF") for failure to state a claim on which relief can be granted. The grounds of the motion are:

- The United States Supreme Court has held that entities like AHF have no private right of action under section 340B of the Public Health Service Act, 42 U.S.C. § 256b, as amended ("340B"), nor are they third-party beneficiaries of contractual obligations derived from 340B, like Defendant Apexus's agreement with the Health Resources and Services Administration here (the "PVP Agreement").
- AHF's own contract with Apexus, governing AHF's ability to purchase drugs under 340B, expressly bars liability to AHF under the PVP Agreement.
- AHF has not satisfied its pleading obligations under *Twombly* and *Iqbal* to support its assertion that Apexus failed to provide negotiating services under the PVP Agreement, but has instead asserted mere conclusions that are not supported by any alleged facts.
- Even if AHF had a right of action, the Court could not grant relief based on Apexus's alleged failure to negotiate more effectively. Rather, it could only issue an improper advisory opinion and speculate as to alleged harm.

This Motion is based on this Notice, the Memorandum of Points and Authorities attached hereto, and the concurrently filed Declaration of Jordan Grotzinger and Request for Judicial Notice.

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This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on March 3, 2023.

Respectfully submitted,

DATED: March 10, 2023 GREENBERG TRAURIG, LLP

By */s/Jordan D. Grotzinger*
Ginger Pigott
Jordan D. Grotzinger
Emerson B. Luke
Attorneys for APEXUS, LLC

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should dismiss Defendant AIDS Healthcare Foundation's ("AHF") First Amended Complaint ("FAC") for any one of four independent reasons.

First, AHF cannot enforce pharmaceutical drug pricing obligations under section 340B of the Public Health Service Act ("340B") because, as the United States Supreme Court has held, "covered entities have no right of action under [340B] itself", nor are they third-party beneficiaries of contractual obligations derived from 340B, like Defendant Apexus, LLC's ("Apexus") agreement with the Health Resources and Services Administration ("HRSA") here (the "PVP Agreement"). *Astra USA, Inc. v. Santa Clara County*, 563 U.S. 110, 117, 120 (2011). Instead, Congress vested the Department of Health and Human Services ("HHS") with the authority to oversee compliance of 340B through an alternative dispute resolution process ("ADR") under the Administrative Procedure Act ("APA"). *See id*. at 111. Therefore, even if AHF could state a claim (it cannot), its recourse would be through the ADR process, not this Court.

Second, the contract between AHF and Apexus (the "Participation Agreement"), under which the parties agreed that Apexus would "act as [AHF]'s purchasing agent for purposes of the [340B] Program[,]" expressly bars liability under the PVP Agreement. Specifically, the Participation Agreement provides that Apexus "shall not be liable to [AHF] for any act, or failure to act, in connection with the [PVP Agreement] . . . ." (*See* Declaration of Jordan Grotzinger ("Grotzinger Decl.") at ¶ 3, Ex. A [Participation Agreement] at 4 [Section F].) The Court may consider this document on a motion to dismiss because it was deliberately omitted from the pleadings yet central to AHF's claim, and its authenticity is not in dispute.[1]

Third, AHF has not satisfied its obligations under *Twombly* and *Iqbal*, pleading only conclusions without factual support. AHF alleges that Apexus failed to adequately negotiate

[1] *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998).

prices for AIDS/HIV drugs, but nothing in the PVP Agreement obligates Apexus to negotiate prices for those drugs or any particular drug. Therefore, this theory states no claim. Moreover, AHF's other allegations lack any factual support. For example, AHF claims that "Apexus has failed to directly provide price negotiating services in accordance with standard business practices when it comes to HIV/AIDS drugs." (FAC, ¶ 28.) But AHF doesn't allege a single fact that might support its conclusion that Apexus failed to negotiate under the PVP Agreement, much less that it failed to do so in accordance with certain unspecified business practices. (*Id*.) AHF's purported dissatisfaction with Apexus's negotiating services is not actionable—Apexus is not a guarantor of prices, nor could AHF so allege, and AHF pleads nothing to support its conclusion that Apexus failed to negotiate adequately. Similarly, AHF concludes that Apexus "discriminates" against HIV/AIDS healthcare providers, based on an assumption that Apexus "has an interest in favoring . . . hospital clients in negotiating sub-ceiling 340B pricing on the drugs most used by those clients, rather than the HIV/AIDS drugs." (*Id*., ¶ 37.) That assumption also has no factual support. In sum, AHF does not plead sufficient facts to render its speculative claims plausible.

Fourth, because Apexus's contractual obligation at issue is only to "provide price negotiating services", it is not possible for the Court to grant relief because it would have to speculate as to how Apexus might negotiate more effectively and guess a more favorable outcome to those negotiations. (*Id*., ¶ 28.) Thus, AHF effectively asks for a vague advisory opinion that Apexus should "do better." That is not allowed. *See St. Pierre v. United States*, 319 U.S. 41, 42 (1943) ("A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it."). Nor could the Court ever award speculative damages under this theory. Moreover, because Apexus's obligation is *to negotiate* and AHF merely alleges dissatisfaction with Apexus's negotiation, this pleading defect cannot be cured.

The motion should be granted without leave to amend.

II. STATEMENT OF FACTS

A. The 340B Program

Section 340B of the Public Health Service Act, 42 U.S.C. § 256b ("340B"), established the 340B Program, which requires pharmaceutical manufacturers to provide a statutorily defined discount on outpatient drugs to qualified entities (the "Ceiling Price").[2] HRSA, an agency of HHS, is responsible for administering the 340B Program. *See* 85 Fed. Reg. 80, 632 (Jan. 13, 2021). In this capacity, HRSA has the authority to enter into pharmaceutical pricing agreements ("PPAs") between participating drug manufacturers and HHS. (*Id.*) In addition, HRSA is charged with the establishment of the prime vendor program ("PVP") "under which covered entities may enter into contracts with prime vendors for the distribution of covered outpatient drugs." 42 U.S.C. § 256b(a)(8).

B. Apexus's Prime Vendor Agreement with HRSA

Apexus has served as HRSA's prime vendor since 1999. (FAC, ¶ 11.) HRSA entered into its current Prime Vendor Program contract—the PVP Agreement—with Apexus in 2019, for a term of five years. (*Id.*, ¶ 12.)

The source of Apexus's obligations under the PVP Agreement is the 340B statutory scheme. The PVP Agreement recites that "HRSA wishes to implement the 340B Prime Vendor Program via this Agreement". (*See* Grotzinger Decl., ¶ 4, Ex. B [PVP Agreement] at 7.)[3] The PVP Agreement also states that "HRSA is responsible for the establishment of a prime vendor program as mandated by Section 340B(a)(8) … under which the prime vendor

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[2] *See County of Santa Clara v. Astra United States, Inc.*, 428 F. Supp. 2d 1029, 1031 (N.D. Cal. 2006).

[3] Although AHF did not attach the 2019 PVP Agreement to the FAC, the Court should consider it under the incorporation by reference doctrine because "(1) the [FAC] refers to the document; (2) the document is central to the [AHF]'s claim; and (3) no party questions the authenticity of the document." *United States ex rel. Lee v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011) (citing *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006)); *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). Apexus's arguments apply equally to the 2014 PVP Agreement attached to the FAC as Exhibit 1 and the 2019 PVP Agreement.

… will develop, maintain, and coordinate a program capable of distribution facilitation and other activities in support of the 340B Program". (*Id*.) The agreement then states that Apexus "will perform the 340B Prime Vendor Program services … in exchange for being designated by HRSA as the 340B Prime Vendor", and the "Prime Vendor shall provide the following services:", including price negotiating services "with the purpose of providing all member entities the most advantageous pricing on outpatient covered drugs that may not exceed the 340B ceiling price." (*Id*. at 7 [Section 1], 8 [Section 1.2].)

C. The Participation Agreement

In September 2006, the parties executed the Participation Agreement under which AHF could purchase drugs under the PVP.[4] (*See* Grotzinger Decl., ¶ 3, Ex. A [Participation Agreement] at 3-6.) The Participation Agreement expressly provides that:

> ***[Apexus], its directors, officers, agents and employees shall not be liable to [AHF] for any act, or failure to act, in connection with the [PVP Agreement]***, including but not limited to, any failure of a Vendor to furnish the drugs that it has agreed to furnish under [the PVP Agreement]. Without limiting the generality of the foregoing, [Apexus] hereby disclaims and excludes any express or implied representation or warranty regarding any drugs or other items or services purchased under the [the PVP Agreement].

(*Id*. at 4 [Section F] (emphasis added).)

Notwithstanding this unambiguous bar of liability to AHF for Apexus's performance under the PVP Agreement, AHF seeks to impose that liability here, alleging that Apexus breached its obligation to provide price negotiating services. (FAC, ¶ 17.) AHF alleges claims for: (1) breach of the PVP Agreement; (2) breach of the implied covenant of good faith and fair dealing therein; (3) violation of California's Unfair Competition Law

[4] AHF did not have to sign up with Apexus in order to obtain 340B pricing, but it could participate to receive the other services under the PVP, including the potential for sub-ceiling pricing. (*See* Grotzinger Decl., ¶ 4, Ex. B [PVP Agreement] at 1.) There was no charge to AHF to participate. (*Id*. at Section 1.3 (member entities are not charged a fee).)

("UCL"); and (4) declaratory relief. (*See* FAC, ¶¶ 23, 27, 24-29, 30-34, 45-38, and 39-31.). Each of these claims fails.

III. LEGAL STANDARD

A complaint should be dismissed under Rule 12(b)(6) unless it "contain[s] 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 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must plead facts showing that its "right to relief [rises] above the speculative level." *Twombly*, 550 U.S. at 555. A plaintiff must show "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. Although the Court must accept material factual allegations as true, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice[,]" and pleadings that are "no more than conclusions, are not entitled to the assumption of truth." *Id*. at 678-79 (citing *Twombly*, 550 U.S. at 555).

IV. ARGUMENT

A. AHF Cannot Assert a Claim Under the PVP Agreement Because it Has No Private Right of Action Under 340B.

The Supreme Court has held that "covered entities"—like AHF—"have no right of action under § 340B itself." *Astra*, 563 U.S. at 117; *see also AHA v. HHS*, No. 4:20-cv-08806-YGR, 2021 WL 616323, *5 (N.D. Cal. Feb. 17, 2021) ("plaintiffs here seek precisely that which *Astra* forbids: the *private* enforcement of 340B program requirements" (emphasis in original)); *Warner v. Wells Fargo Bank, N.A.*, No. SACV 11–00480 DOC (PLAx), *3 (C.D. Cal. Jun. 21, 2021) (citing *Astra* and explaining that, "[i]n passing [340B], Congress provided no private right of action to enforce its provisions"). Instead, "Congress vested authority to oversee compliance with the 340B Program in HHS and assigned no auxiliary enforcement role to covered entities." *Id*. Notwithstanding its recognition "that 'HRSA lack[ed] the oversight mechanisms and authority to ensure that [covered] entities pay at or below the . . . [C]eiling [P]rice[,]'" the Supreme Court noted that "Congress did

not respond to reports of inadequate HRSA enforcement by inviting 340B entities to launch lawsuits in district courts across the country." *Id*. at 121. The Court further explained that, to address any inadequacy in HRSA's enforcement mechanisms, "Congress directed HRSA to create a formal dispute resolution procedure, institute refund and civil penalty systems, and perform audits of manufacturers." *Id*. Thus, instead of recognizing a private right of action:

> Congress … opted to strengthen and formalize HRSA's enforcement authority, to make the new adjudicative framework the proper remedy for covered entities complaining of "overcharges and other violations of the discounted pricing requirements," *id*., at 823, 42 U.S.C. § 256b(d)(1)(A), and to render the agency's resolution of covered entities' complaints binding, subject to judicial review under the APA, *id*., at 827, 42 U.S.C.A. § 256b(d)(3)(C).

Id. at 121-22.

In upholding the bar on any private right of action under 340B, the Court rejected the plaintiff's theory that it was an "intended beneficiary" of the drug manufacturer's PPAs with HHS: "We hold that suits by 340B entities to enforce ceiling-price contracts running between drug manufacturers and the Secretary of HHS are incompatible with the statutory regime." *Id*. at 113. The Supreme Court explained that, since the "PPAs simply incorporate statutory obligations and record the manufacturers' agreement to abide by them[,]" the lawsuit "is in essence a suit to enforce the statute itself." *Id*. at 118. The Court reasoned that the "statute prohibits HHS from disclosing pricing information [and][i]f Congress meant to leave open the prospect of third-party beneficiary suits by 340B entities, it likely would not have barred the potential suitors from obtaining the very information necessary to determine whether their asserted rights have been violated." *Id*. at 121. In addition, the Court noted: "[r]ecognizing the [plaintiff]'s right to proceed in court could spawn a multitude of

dispersed and uncoordinated lawsuits by 340B entities and [w]ith HHS unable to hold the control rein, the risk of conflicting adjudications would be substantial." *Id*. at 120.[5]

Here, like in *Astra*, "340B is the source of the contractual term allegedly breached." *Id*. at 119. In this case, the contractual term allegedly breached is the obligation to provide price negotiating services. (FAC, ¶ 17.) But that obligation is derived from 340B. The PVP Agreement provides in relevant part:

- "HRSA wishes to implement the 340B Prime Vendor Program via this Agreement" (Grotzinger Decl., ¶ 4, Ex. B [PVP Agreement] at 7.);
- "HRSA is responsible for the establishment of a prime vendor program as mandated by Section 340B(a)(8) … under which the prime vendor … will develop, maintain, and coordinate a program capable of distribution facilitation and other activities ***in support of the 340B Program***" (*Id*., (emphasis added).);
- Apexus "***will perform the 340B Prime Vendor Program services*** … in exchange for being designated by HRSA as the 340B Prime Vendor", and the "Prime Vendor shall provide the following services:" (*Id*., at 7 [Section 1] (emphasis added).)
- ***Those services include price negotiating services*** "with the purpose of providing all member entities the most advantageous pricing on outpatient covered drugs that may not exceed the 340B ceiling price." (*Id*. at 8, [Section 1.2] (emphasis added).).

By the PVP Agreement's terms, Apexus's obligation to "develop, maintain, and coordinate a program capable of distribution facilitation and other activities in support of the 340B Program" includes the price negotiating services over which AHF sues. Thus,

[5] In fact, AHF has previously acknowledged the controlling nature of *Astra* as applied to virtually identical claims. *See AIDS Healthcare Foundation v. Tibotec Therapeutics*, Case No. CV 10-09848 GW (FMOx), Doc. 9, *Stipulation to Stay Action Pending Supreme Court Decision in Astra USA, Inc. v. County of Santa Clara* at p. 1:14-25, attached to Request for Judicial Notice as Exhibit 1 at pp. 3-8. AHF had sued a drug manufacturer directly for alleged overcharging for drugs under a third-party beneficiary theory for breach of the manufacturer's PPA with HHS. The present case is just another attempt to end-run the prohibition on private rights of action.

340B is the source of Apexus's negotiation obligation, and there is no private right of action to enforce it. 563 U.S. at 117.

Post-*Astra* decisions confirm that the test for whether a contract simply incorporates statutory obligations for which there is no private right of action is not rigid or formalistic. Rather, if, as here, the substance of the claim derives from the statute, it is barred. *See In re Proceeding in Which Pa. Seeks to Compel the Defender Ass'n of Phila. to Produce Testimony*, No. 13–cv–1871, 2013 WL 4193960, *15 (E.D. Pa. Aug. 15, 2013) ("*Astra* rejects a formalistic approach to determining whether a proceeding falls under the private right of action doctrine; instead, it instructs courts to look to the substance of the cause of action at issue.") (citing *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 615-16 (2012)); *see also Warner*, No. SACV 11–00480 DOC (PLAx), 2011 WL 2470923, at *3 (explaining that, where the agreement of which a plaintiff claims to be an intended beneficiary "serve[s] as the mechanism by which pharmaceutical companies opt-in to [340B]'s statutory scheme, a third-party private action would amount to direct enforcement of [340B].").

Accordingly, in the absence of a final decision resulting from AHF's participation in ADR—of which there is no such allegation—this Court lacks jurisdiction to consider AHF's claims. *See Mamigonian v. Biggs*, 710 F.3d 936, 941 (9th Cir. 2013) (explaining that "district courts are empowered to review agency action by the [APA]," so "for a court to hear a case like this pursuant to the APA, there must be 'final agency action for which there is no other adequate remedy in a court.'" (quoting 5 U.S.C. § 704)); *see also* 2021 WL 616323, *6 ("The judiciary has a prescribed role in this process, but its role comes only after the parties have participated in this ADR process. This Court will not otherwise short-circuit the foundational regime that Congress has enacted in the 340B Program.").

Finally, AHF's claims would not have been actionable even if they were asserted—as they should have been—through the ADR process. Notably, AHF stops short of alleging that it has been *overcharged* for these drugs (i.e., charged more than the Ceiling Price). In

other words, AHF merely complains that the prices "are still too high for us." But that violates no law.[6]

B. AHF's Participation Agreement With Apexus Expressly Bars Liability To AHF Under The PVP Agreement.

Not only has Congress chosen not to provide for a private right of action under 340B, AHF's own contract with Apexus under the PVP—i.e., the Participation Agreement—expressly bars liability to AHF, irrespective of the forum, in connection with Apexus's performance of the PVP Agreement. Specifically, the Participation Agreement provides that:

> ***[Apexus], its directors, officers, agents and employees shall not be liable to [AHF] for any act, or failure to act, in connection with the [PVP Agreement]***, including but not limited to, any failure of a Vendor to furnish the drugs that it has agreed to furnish under [the PVP Agreement]. Without limiting the generality of the foregoing, [Apexus] hereby disclaims and excludes any express or implied representation or warranty regarding any drugs or other items or services purchased under the [the PVP Agreement].

(Grotzinger Decl., ¶ 3, Ex. A [Participation Agreement] at 4 [Section F] (emphasis added).) AHF's decision not to incorporate the Participation Agreement into its FAC—whether by

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[6] AHF's real dispute seems to be with drug manufacturers, not Apexus. But that does not provide a basis to sue Apexus. AHF alleges that "Gilead Sciences, Inc.'s recent price moves" on HIV/AIDS medications "like Descovy and Truvada are sending big shockwaves through the safety-net provider community." (FAC, ¶ 18.) AHF can't sue manufacturers under *Astra*. 563 U.S. at 113 ("We hold that suits by 340B entities to enforce ceiling-price contracts running between drug manufacturers and the Secretary of HHS are incompatible with the statutory regime."). Nor can AHF target another defendant just because AHF is unhappy with a manufacturer's pricing. *AHA*, 2021 WL 616323, *5 (dismissing APA action against HHS and the Secretary of HHS based on a manufacturer's pricing and holding "this action is nothing more than an indirect action against the drug manufacturers themselves. Indeed, plaintiffs' claims and the remedy sought are entirely premised on the enforcement of the 340B Program requirements against the various allegedly non-complying drug companies. In other words, plaintiffs here seek precisely that which *Astra* forbids: the *private* enforcement of 340B program requirements.") (emphasis added).

attachment or by reference—cannot save it from dismissal. Where a reference to a key document has been deliberately omitted from a complaint, assuming there is no dispute as to its authenticity, that document can nonetheless be attached to a 12(b)(6) motion and considered by the Court. *See Parrino*, 146 F.3d at 706 (explaining that there is an exception to the incorporation by reference doctrine where a plaintiff "deliberately omit[s] references to documents upon which their claims are based"); *see also Global Network Communications, Inc. v. City of New York*, 458 F.3d 150, 157 (2nd Cir. 2006) ("The exception thus prevents plaintiffs from generating complaints invulnerable to Rule 12(b)(6) simply by clever drafting.").

Parrino involved claims relating to a "cost containment" program for healthcare services provided under an ERISA group plan through the plaintiff's employer that was administered by the defendant. The plaintiff, despite making reference to the "group plan", did not attach or reference the "FHP Group Application Plan" that governed the terms of coverage. But the defendant addressed this document in its motion to dismiss, which was granted, and the plaintiff appealed the grant of that motion partly on the basis that the court should not have considered the extrinsic evidence. The Court of Appeals held that it could consider the extrinsic document, reasoning:

> In this case, Parrino's complaint and First Amended Complaint both make reference to the FHP "group plan" and its "cost containment program." ***Because Parrino's claims rest on his membership in FHP's plan and on the terms of the plan, documents governing plan membership, coverage, and administration are essential to his complaint***. The FHP Group Application Plan includes key terms regarding the plan covering Parrino, and its authenticity was not disputed by the parties. Accordingly, it was proper for the district court to consider that document in ruling on the defendants' motions to dismiss.

146 F.3d at 706. (emphasis added).

Here, AHF's claims necessarily are based on the Participation Agreement because the PVP Agreement over which AHF sues specifically contemplates the Participation Agreement (*See* Grotzinger Decl., ¶ 4, Ex. B [PVP Agreement] at 9 [Section 1.4].) The Participation Agreement is the only basis by which AHF can claim the opportunity to access the PVP, and it governs the parties' relationship, including expressly barring Apexus's liability under the PVP Agreement. A provision in a contract that expressly precludes liability is dispositive in the context of a motion to dismiss. *See Diep v. Apple, Inc.*, No. 21-cv-10063-PJH, 2022 WL 4021776, *8 (N.D. Cal. Sep. 2, 2022) (dismissing the first amended complaint "with prejudice", explaining that "plaintiffs' claims must be dismissed because of the applicability of the [contract's] limitation of liability for third-party apps."). Thus, the FAC should be dismissed for this additional reason.

C. AHF Has Failed to State Any Claim Because Each of Its Causes of Action Alleges Merely Threadbare Recitals of the Elements, Supported Only by Conclusions.

Each of AHF's causes of action fails to state a claim for the independent reason that they are supported only by conclusions, which are "not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 678-79 (citing *Twombly*, 550 U.S. at 555.).

1. AHF's First and Second Causes of Action for Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing Fail Because AHF has Not Alleged Any Facts Supporting its Assertion that Apexus Failed to Negotiate Under the PVP Agreement.

The basis of AHF's contract claims—its first and second causes of action for breach of contract and of the implied covenant of good faith and fair dealing, respectively—is an alleged failure by Apexus to perform its negotiating services under the PVP Agreement. Specifically, AHF claims that Apexus breached the PVP Agreement, and the implied covenant of good faith and fair dealing therein, by "fail[ing] to directly provide price negotiating services in accordance with standard business practices when it comes to HIV/AIDS drugs." (FAC, ¶¶ 28, 32.) Additionally, AHF alleges that "Apexus has demonstrated it lacks the capacity and/or the desire to conduct timely and successful price

negotiations for manufacturers of HIV/AIDS drugs, and has demonstrated little effort to formulate a good faith plan to competently negotiate sub-ceiling pricing on HIV/AIDS drugs for covered member entities." (*Id.*) AHF has not alleged a single fact to support these conclusions.

First, AHF's claim that Apexus failed to "provide price negotiating services in accordance with standard business practices when it comes to HIV/AIDS drugs" does not state a breach of any contractual obligation. (FAC, ¶¶ 28, 32.) Nothing in the PVP Agreement obligates Apexus to negotiate for pricing on every possible drug, or any particular drug, or to negotiate in the exact way a participant desires. (Grotzinger Decl., ¶ 4, Ex. B [PVP Agreement] at 8 [Section 1.2].) Accordingly, AHF's allegation that Apexus failed to negotiate regarding "HIV/AIDS drugs" does not state any breach of contract.

Second, instead of alleging *how* Apexus purportedly breached its obligations—e.g., what it did (or did not do) that amounted to a failure to negotiate—AHF asserts that it "knows better pricing is possible," based on an allegation that other HIV/AIDS organizations "successfully negotiated significant discounts on [HIV/AIDS] drug pricing . . . and "the United States Department of Veteran Affairs has negotiated even better pricing." (*Id.*, ¶ 20.) These allegations, however, have nothing to do with whether *Apexus* performed its negotiation services under the PVP Agreement (it did). AHF does not claim that, as a result of Apexus's negotiations, it paid prices above the Ceiling Price. Low drug prices paid by other organizations have no bearing on Apexus's performance under the PVP Agreement. Alleging that Apexus "can do better," as AHF essentially does, is not sufficient to satisfy the pleading standards set forth in *Twombly* and *Iqbal*. AHF Has Not Alleged a Single Factual Allegation to Support its Third Cause of Action for Violation of the UCL Based on Alleged Favoritism in Negotiating Non-HIV/AIDS Drugs.

The basis of AHF's third cause of action for violation of the UCL is that, "[u]pon information and belief, [Apexus] has an *interest* in favoring its Section 340B eligible hospital clients in negotiating sub-ceiling 340B pricing on the drugs most used by those clients, rather than HIV/AIDS drugs." (*Id.*, ¶ 22 (emphasis added).) Based on this

unsupported assertion, AHF claims that Apexus has engaged in the "discriminatory administration of its contract . . . ," which, AHF alleges, "constitute[s] unlawful, unfair and/or deceptive business practices . . . ." (*Id*.) Translation: Apexus has discriminatorily provided negotiating services because, *for some unspecified reason*, AHF believes that Apexus has an *interest* in doing so. Glaringly absent, however, is any factual allegation to support the assertion that Apexus has some incentive to discriminate against HIV/AIDS healthcare providers, much less that it acted on it or how it did so.

Moreover, AHF's deficient third-party beneficiary breach of contract theory fails to state a claim under the UCL, which cannot be premised on a simple breach of contract. Under California law, a breach of contract "may not be a predicate for a UCL action as a matter of law." *Puentes v. Wells Fargo Home Mortgage, Inc.*, 160 Cal. App. 4th 638, 645 (2008) (ruling that the court "need not resolve . . . whether there was a breach of contract" and affirming summary judgment on UCL claim); *Dillon v. NBCUniversal Media LLC*, No. CV 12-09728, 2013 WL 3581938, at *8 (C.D. Cal. Jun. 18, 2013) ("an alleged breach of contract, in and of itself, cannot be the basis for a UCL claim"); *Boland, Inc. v. Rolf C. Hagen (USA) Corp.*, 685 F. Supp. 2d 1094 1110 (E.D. Cal. 2010) ("A breach of contract . . . is not itself an unlawful act for purpose of the UCL."). The reason for this is straightforward: "[w]ere a court to rule that a simple breach of contract could form the basis for a [UCL] claim, then virtually every contract action could be converted into a business tort." *Unique Functional Prods. v. JCA Corp.*, No. 9-cv-265, 2012 WL 367245, at *5 (S.D. Cal. Feb. 3, 2012). But a UCL claim "is not an all-purpose substitute for a tort or contract action." *Korea Supply Co. v. Lockheed Martin Inc.*, 29 Cal. 4th 1134, 1150 (2003).

Here, the thrust of AHF's entire action—including its UCL claim—is that Apexus allegedly breached its obligation to perform negotiating services under the PVP Agreement. AHF's own allegations expressly say so, claiming (falsely) that it needs an injunction "to prevent Apexus from committing unlawful, unfair, or fraudulent business practices in the performance of its contractual duty to attempt to negotiate . . . ." (FAC, ¶ 38.) AHF's third cause of action for violation of the UCL fails to state a claim.

2. AHF's Fourth Cause of Action Fails to State a Claim Because Declaratory Relief is Not An Independent Cause of Action.

"Declaratory relief is not an independent cause of action, but is instead a form of equitable relief." *Duarte v. Quality Loan Serv. Corp.*, No. 2:17–cv–08014–ODW–PLA, 2018 WL 2121800 *14 (C.D. Cal. May 8, 2018) (citing *Kimball v. Flagstar Bank F.S.B.*, 881 F. Supp. 2d 1209, 1219 (S.D. Cal. 2012)). This means that "[e]quitable remedies are dependent upon a substantive basis for liability and have no separate viability if the underlying claims fail." *Id.* (quoting *Chan v. Chancelor*, No. 09cv1839 AJB (CAB), 2011 WL 5914263, at *6 (C.D. Cal. Nov. 28, 2011)); *see also Kimball*, 881 F. Supp. 2d at 1220 (dismissing a claim for declaratory relief when all other causes of action failed to state a claim). Here, because AHF's first three causes of action fail to state a claim for the reasons set forth above, its Fourth Cause of Action for Declaratory Relief likewise must fail.

D. Relief for The First Amended Complaint as Framed is Impossible.

AHF's complaint boils down to: "Apexus should have negotiated more effectively." The Court cannot grant relief for this claim. The most the Court could do is issue an advisory opinion and speculate as to damages. Both are improper.

"A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *St. Pierre*, 319 U.S. at 42; *see also Coalition for a Healthy Cal. v. FCC*, 87 F.3d 383, 384 (9th Cir. 1996) ("We dismiss the Coalition's petition because it does not arise from a cognizable dispute and thus seeks relief that we are not empowered to render: an advisory opinion."). As applied, "[r]egardless of whether the relief sought is monetary, injunctive or declaratory, in order for a case to be more than a request for an advisory opinion, there must be an actual dispute between adverse litigants and a substantial likelihood that a favorable federal court decision will have some effect." *Westlands v. NRDC*, 276 F. Supp. 2d 1046, 1050 (E.D. Cal. 2003) (dismissing because the "case concern[ed] a hypothetical, rather than an 'actual,' legal dispute") (citing *Calderon v. Ashmus*, 523 U.S. 740 (1998); and *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995).).

Here, AHF's theory of the case is that Apexus failed to *negotiate a result that never happened*. There is no way the Court could measure relief. Rather, the Court would have to speculate about how much more effectively Apexus could have negotiated, and then speculate about what AHF might have achieved had Apexus so negotiated. Those are impossible tasks and implicate, if anything, the bars on advisory opinions and speculative damages. *See Julian Petroleum Corp. v. Courtney Petroleum Co.*, 22 F.2d 360, 362 (9th Cir. 1927) ("uncertain, and speculative damages are not recoverable"); *see also Valenzuela v. City of Anaheim*, 29 F.4th 1093, 1104 (9th Cir. 2022) (noting the "universally accepted rule which proscribes uncertain or speculative damages.").

AHF's prayers for equitable relief fail for the same reasons. The Court can't enjoin Apexus from negotiating "insufficiently," nor can it measure restitution. And, to the extent damages were recoverable (and they are not), equitable relief is not available because AHF would have an adequate remedy at law. "It is a basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law." *Mort v. United States*, 86 F.3d 890, 892 (9th Cir. 1996) (quotations omitted); *Prudential Home Mortg. Co. v. Superior Court*, 66 Cal. App. 4th 1236, 1250 (1998), *as modified on denial of reh'g* (Oct. 29, 1998) (holding equitable relief under the UCL was unavailable when an adequate legal remedy was available); *see also Duttweiler v. Triumph Mortorcycles (Am.) Ltd.*, No. 14–cv–04809–HSG, 2015 WL 4941780, at *8 (N.D. Cal. Aug. 19, 2015) (explaining that "UCL and FAL provide for only equitable relief.").

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V. CONCLUSION

AHF has no right of action. The relief it seeks is immeasurable and the FAC incurable. The case should be dismissed with prejudice.

Respectfully submitted,

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GREENBERG TRAURIG, LLP

By */s/Jordan D. Grotzinger*
Ginger Pigott
Jordan D. Grotzinger
Emerson B. Luke
Attorneys for APEXUS, LLC