UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SAINT FRANCIS HOSPITAL AND MEDICAL CENTER, INC., Plaintiff, v. HARTFORD HEALTHCARE CORPORATION, HARTFORD HOSPITAL, HARTFORD HEALTHCARE MEDICAL GROUP, INC., and INTEGRATED CARE PARTNERS, LLC, Defendants.	No. 3:22-cv-00050-AVC APRIL 15, 2022

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF
DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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Hartford HealthCare's Motion to Dismiss revealed the innate deficiencies of Plaintiff's Amended Complaint: Plaintiff complained of harm *from* competition rather than harm *to* competition, did not plead that Hartford HealthCare's employment and recruitment of physicians was anticompetitive, fell far short of the standard for pleading a relevant antitrust market, and otherwise failed to allege facts sufficient to state a plausible antitrust claim.[1] Unable to rebut these points, Plaintiff instead asks the Court in its Opposition Brief, Dkt. No. 73 ("Opp."), to disregard the relevant legal standards based on erroneous and trivial distinctions. But Plaintiff's attempt to spin its vague and conclusory allegations into a viable antitrust claim is futile.

ARGUMENT

I. Plaintiff Lacks Antitrust Standing, Including Because Its Alleged Injury Arises from *Increased* Competition for Physician Services.

Plaintiff lacks antitrust standing because its claims do not arise from a cognizable reduction in competition under the antitrust laws. *See* Br. at 12-19. Courts require more than a theoretical antitrust law violation or injury in fact for a plaintiff to demonstrate antitrust injury; a plaintiff can only assert antitrust claims from losses caused by a defendant's alleged conduct where "the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990) ("*ARCO*") (emphasis in original). Plaintiff argues that Hartford HealthCare's alleged recruitment of physicians reduced competition through (i) "horizontal" anticompetitive effects from increased concentration in physician services markets and (ii) "vertical" anticompetitive effects from the affiliation of Hartford HealthCare's hospital business with additional physicians. Opp. at 10-11. But neither alleged effect supports an antitrust injury here. *See Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 122 (2d Cir. 2007)

[1] All party names and defined terms have the same meanings as used in Defendants' Memorandum of Law In Support of Motion to Dismiss Plaintiff's Amended Complaint, Dkt. No. 43 ("Opening Brief" or "Br.").

("We can ascertain antitrust injury only by identifying the anticipated anticompetitive effect of the specific practice at issue and comparing it to the actual injury the plaintiff alleges.").

First, Plaintiff does not plausibly allege antitrust injury from horizontal effects. When Plaintiff loses business or "market share" to Hartford HealthCare because a physician chooses to practice there instead of St. Francis, that loss does not arise from the effects of reduced horizontal competition. *See, e.g.*, Opp. at 14, 16-17. Plaintiff alleges that the anticompetitive effects of a horizontal combination of competitors are *increased prices* for physician services for insurers and patients, *see id.* at 16, but Plaintiff's claimed damages do not arise from such alleged effects, *see Port Dock*, 507 F.3d at 122 (holding plaintiff lacked antitrust injury because it was not injured by an increase in prices from horizontal merger effects). Indeed, competitors typically lack standing in these circumstances because they ordinarily *benefit* from higher prices. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 583 (1986).[2]

Second, Plaintiff does not plausibly allege that it was injured by an anticompetitive aspect of the *vertical* combination of Hartford HealthCare's hospital business with physicians formerly practicing at St. Francis or another institution. Plaintiff contends that it was injured because Hartford HealthCare's recruitment efforts "deprived Saint Francis of 95% of the patients of those physicians who had previously practiced at Saint Francis" and "imposed significant costs on Saint Francis," such as increased recruiting costs. *See* Opp. at 14; ¶ 91. But those injuries do not derive from any supposed competition-reducing effects of the combination of Hartford HealthCare's hospital business with new physicians. Rather, Plaintiff's alleged injuries arise from the

[2] While Plaintiff cites *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102 (2d Cir. 1989), to suggest that a competitor may establish antitrust injury based on the market share of merging firms, *see* Opp. at 16 n.1, the Supreme Court later rejected that proposition in *ARCO*, holding antitrust injury must be demonstrated independently from a violation. *See* 495 U.S. at 344. Following *ARCO*, this Court recognized that competitors cannot rely on a "*prima facie* showing of monopoly power and presumption of illegality" to establish antitrust injury. *Remington Prods., Inc. v. N.A. Philips, Corp.*, 755 F. Supp. 52, 57-58 (D. Conn. 1991).

consequences of *the competitive process itself* when physicians select employment at Hartford HealthCare instead of St. Francis. Those alleged injuries have no relation to the identity or size of the party that acquired Plaintiff's lost physicians—Plaintiff would suffer the same result regardless of where those physicians chose to practice. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977); *Port Dock*, 507 F.3d at 123. Losing physicians to a competitor allegedly willing to pay higher wages[3] is not harm from lost competition—it is instead a hallmark of "vigorous competition." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986); *see Arnett Physician Grp., P.C. v. Greater LaFayette Health Servs., Inc.*, 382 F. Supp. 2d 1092, 1096 (N.D. Ind. 2005) (dismissing complaint for lack of antitrust injury from recruitment of doctors).

Plaintiff's efforts to distinguish *Brunswick* and *SCPH* are superficial at best and only reinforce why this case should be dismissed. Plaintiff claims that the "critical" distinction is that *Brunswick* and *SCPH* involved only a single acquisition, while Plaintiff here complains of a series of acquisitions. *See* Opp. at 17, 22-23. That purported distinction is incorrect. In *Brunswick*, the defendant acquired 222 bowling centers over seven years, including a number of centers in the plaintiffs' markets, with this series of acquisitions making defendant "by far the largest operator of bowling centers, with over five times as many centers as the next largest competitor." 429 U.S. at 480. Similarly, the plaintiffs in *SCPH Legacy Corp. v. Palmetto Health* "repeatedly allege[d]" that the "acquisition of the Moore Clinic, *along with other orthopedic providers*, increased [defendant's] market share for orthopedic services." 2017 WL 1437329, at *4 (D.S.C. Feb. 24,

[3] Plaintiff's Opposition adds nothing to the Amended Complaint's conclusory suggestion that Hartford HealthCare sometimes offered physicians compensation above "what Saint Francis *felt* that it could lawfully provide." ¶ 69 (emphasis added). That allegation lacks any factual support, and the Court should "giv[e] no effect to legal conclusions couched as factual allegations." *Port Dock*, 507 F.3d at 121. And even if Plaintiff had alleged sufficient facts to credit this claim, it could amount at most to a claim of a violation of some other law, and not injury from a reduction in competition.

2017) (emphasis added).[4]

Plaintiff's other purported distinction is no more persuasive. It argues that, unlike in *Brunswick* and *SCHP*, Hartford HealthCare's alleged "size" impacted its ability to acquire physicians, *see* Opp. at 17, 22, such that "no other hospital in the market was in a position to make the series of acquisitions engaged in by HHC," *id.* at 20. But in *Brunswick*, the Supreme Court expressly rejected the defendant's size as a basis for antitrust injury—despite the lower court finding, as Plaintiff argues here, that the defendant's size enabled it to make the challenged acquisitions, and that no one else would have done so—because "Respondents would have suffered the identical 'loss' but no compensable injury had the acquired centers instead . . . been purchased by 'shallow pocket' parents." 429 U.S. at 481-83, 487. As in *Brunswick*, Plaintiff's claimed injury—lost profits it allegedly suffers when physicians accept employment elsewhere—"bears no relationship to the size of either [Hartford HealthCare] or its competitors." *Id.* at 487.

Relying on *Brunswick*, *SCPH* followed the same logic, finding the plaintiff's inability to compete did not amount to antitrust injury simply because the defendant was a large hospital and attractive to the acquired physicians. 2017 WL 1437329, at *4. On the contrary, the plaintiff there "would have suffered the same injury regardless of who acquired" the physicians in question. *Id.* Under the controlling precedent of *Brunswick* and its progeny, to have antitrust standing, it is not enough for Plaintiff to claim it lost physicians because those physicians were attracted to Hartford HealthCare; rather, Plaintiff must plead facts suggesting that its injuries arose from an anticompetitive exercise of market power. *See id.*; *Port Dock*, 507 F.3d at 123 (plaintiff lacked antitrust standing where its "particular injury was not caused by an exercise of the defendant's

[4] And, in *SCPH*, the Moore Clinic acquisition alone involved 330 individuals, including numerous physicians, far more than the number of individuals Plaintiff alleges Hartford HealthCare recruited here. *Id.* at *1.

newly acquired power to raise prices").[5] But Plaintiff has pled nothing to distinguish its alleged injury from that of any hospital losing physicians to a more attractive competitor, and thus fails to link its claimed injury to an anticompetitive exercise of market power by Hartford HealthCare.[6]

Finally, Plaintiff incorrectly asserts that Hartford HealthCare challenges only Plaintiff's tiered network claim under the "efficient enforcer" test, *see* Opp. at 23, but the Opening Brief explains why Plaintiff is not an efficient enforcer of the antitrust laws as to the entirety of its claims, *see* Br. at 18-19. More fundamentally, Plaintiff's lack of antitrust standing under the Supreme Court's multi-factor test is the same as the lack of standing that proved fatal to the plaintiff in *SCPH*. There, as here, the court also found that there were more direct alleged victims of defendants' anticompetitive conduct—those who paid allegedly higher prices—which "cut[] against a finding that [plaintiff] has anti-trust standing." *SCPH*, 2017 WL 1437329, at *5.

II. Plaintiff Does Not—and Cannot—Allege a Viable Antitrust Claim Based on Hartford HealthCare's Recruitment and Employment of Physicians.

Plaintiff argues that a firm's acquisitions of physician practices can theoretically constitute an antitrust violation, *see* Opp. at 26-27,[7] but does not address the pleading deficiency raised in

[5] Plaintiff's reliance on *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354, 1357 (6th Cir. 1985), is misplaced as that case predates the Supreme Court's clarification in *Cargill* that a plaintiff cannot establish antitrust standing merely by alleging "an impairment of plaintiff's ability to compete" because a challenged acquisition results in "a concentration of economic power." 479 U.S. at 114.

[6] Plaintiff's conclusory allegations of "intimidation" by Hartford HealthCare are also insufficient. *See* Br. at 15-16. Plaintiff never pleads which, when, or how many physicians allegedly switched systems out of supposed "intimidation" nor any resulting competitive effects. *See Int'l Norcent Tech. v. Koninklijke Philips Elecs. N.V.*, 2007 WL 4976364, at *10-11 (C.D. Cal. 2007) (dismissing claim where defendant "allege[d] the threat in a conclusory, non-specific manner"). More fundamentally, Plaintiff cannot state a claim based on Hartford HealthCare's alleged statements that it would recruit physicians to "compete specifically" against certain physicians. ¶ 62; *see Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 273 (7th Cir. 1981) ("A statement of intent to compete, even if perceived as a threat, is not unlawful.") (alteration omitted). Moreover, any physician recruited by Hartford HealthCare can still be recruited back to St. Francis under Connecticut law limiting physician non-compete clauses. *See* Conn. Gen. Stat. § 20-14p.

[7] Plaintiff cites *In the Matter of Renown Health, A Corp*., 2012 WL 6188550 (MSNET Dec. 4, 2012), as an example of the FTC challenging a physician acquisition. *See* Opp. at 27. But that matter involved an

Hartford HealthCare's Opening Brief: Plaintiff has not plausibly alleged that the hiring and recruitment of physicians here caused an anticompetitive effect or injury distinct from the physicians simply accepting employment at Hartford HealthCare (or elsewhere). Accordingly, because "[h]iring talent cannot generally be held exclusionary [*i.e.*, anticompetitive] even if it does weaken actual or potential rivals and strengthen a monopolist," Plaintiff fails to allege injury due to anticompetitive conduct from Hartford HealthCare's acquisition of physician practices. 4 Phillip Areeda & Herbert Hovencamp, Antitrust Law § 702b (2021); *see Int'l Dist. Ctrs., Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 795 n.6 (2d Cir. 1987) ("[O]ne firm's hiring of its competitor's employees does not present a compelling case for antitrust intervention.").

Plaintiff nonetheless argues that Hartford HealthCare's employment of physicians was anticompetitive because "HHC did not just hire physicians, but also acquired their practices and patients," including by sometimes "acquir[ing] the physician's facilities and equipment." Opp. at 25. But Plaintiff's theory of harm is not based on the transfer of assets, such as equipment, to Hartford HealthCare, but rather a theory that a physician's move to Hartford HealthCare alters the physician's future hospital admissions and referral practices—which is linked to the decision to accept employment at an integrated healthcare system. *See* Opp. at 29. And Plaintiff makes no allegation, nor can it, that patients are contractually obligated to follow physicians, or that patients follow physicians for any reason related to Hartford HealthCare's acquisition of a practice (as opposed to preference for the individual physician).

Moreover, there is no legal support for Plaintiff's suggestion that this Court should treat the hiring or recruitment of physicians differently from other kinds of professional employees

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acquisition that allegedly imposed non-compete restrictions on the acquired physicians, thereby preventing other healthcare providers from competing to recruit those physicians in the future—which was remedied by barring enforcement of those non-competes. *See* 2012 WL 6188550 at *10-12. Plaintiff does not allege injury from non-compete restrictions here, nor can it. *See* Conn. Gen. Stat. § 20-14p.

under the antitrust laws because physicians "affect decisions as to where patients are hospitalized." Opp. at 28. Indeed, courts have not hesitated to dismiss cases involving physicians or hired professionals bringing their preexisting patient or customer relationships. *See Total Renal Care, Inc. v. W. Nephrology & Metabolic Bone Disease, P.C.*, 2009 WL 2596493, at *12-13 (D. Colo. Aug. 21, 2009) (dismissing antitrust claims alleging unlawful employment of doctors); *Bio-Medical Apps. Mgmt. Co. v. Dallas Nephrology Assoc.*, 1995 WL 215302, at *6 (E.D. Tex. Feb. 6, 1995) (hiring not anticompetitive despite plaintiff's argument that "patients become attached to the [hired] employees" who provide healthcare treatments); *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car. Inc.*, 735 F.2d 884, 894 (5th Cir. 1984) (employee "specifically induced to draw away [plaintiff's] customers"). Plaintiff's claims here are no less about a competitor "hiring talent" than in any of the above cases.

Plaintiff's theory of harm is squarely at odds with public policy favoring free competition for labor, which antitrust law recognizes as paramount. Indeed, by Plaintiff's logic, a physician could never switch to employment at a large healthcare system without provoking antitrust liability. Such a rule would severely injure the "freedom of [physicians] to reap the full benefits of their abilities by discouraging them from moving to the employer offering the highest compensation" or the best employment conditions. *Int'l Dist. Ctrs.*, 812 F.2d at 795 n.6; *see also BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr.*, 176 F. Supp. 3d 606, 621 (W.D. La. 2016).[8]

Plaintiff also fails to plead the one exception to the rule that hiring employees is not

[8] *BRFHH Shreveport* supports dismissal of Plaintiff's antitrust claims to the extent they involve a physician's mere change in employers. Plaintiff argues that *BRFHH Shreveport* allowed some claims challenging the acquisition of entire physician groups to proceed, *see* Opp. at 29, but, here, most of Plaintiff's claims challenge the employment decisions with respect to individual physicians, *see* ¶ 54. For the vast majority of those physicians, Plaintiff fails to allege any facts regarding additional assets acquired by Hartford HealthCare in connection with their employment and, for all, it fails to allege how the acquisition of any such assets had any competitive effect distinct from the change of the employment relationship. *See* Br. at 21-22.

anticompetitive, as it does not plausibly allege that Hartford HealthCare hired *any* physicians (let alone *all*) for the sole purpose of "harm[ing] the competition without helping" its business. *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1258 (9th Cir. 1990); *see* Br. at 22-23. Plaintiff's claim that Hartford HealthCare allegedly acquired some physician practices solely to deny them to Plaintiff, *see* Opp. at 29, is not only conclusory but falls far short of the "clear nonuse in fact" standard, *Universal Analytics*, 914 F.2d at 1258—especially given Plaintiff's other allegations that directly belie any claim of nonuse, *see* Br. at 23.

III. Plaintiff's Market Definition Fails Because It Does Not Sufficiently Plead that Patients Covered by Government Programs Are Inadequate Substitutes.

Plaintiff misapplies the case law requiring private antitrust plaintiffs claiming foreclosure to allege a relevant market based on the sales opportunities available to the allegedly excluded competitor. *See, e.g.*, *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 594 (8th Cir. 2009). The proper question in such cases is not whether *patients* view commercial insurance as interchangeable with government programs, but "whether there are alternative patients available to the" allegedly excluded plaintiff. *See id.* at 597. The "more recent" cases Plaintiff erroneously cites to support its market definition, *see* Opp. at 30-31, are inapposite because they were not brought by an allegedly excluded competitor claiming foreclosure. *See* Br. at 30 n.23. Courts addressing private actions by allegedly excluded competitors apply *Little Rock Cardiology*'s logic and reject artificially limited market definitions that fail to include all of the reasonably substitutable sales opportunities available to that competitor.[9]

Here, the Amended Complaint lacks sufficient allegations that patients covered by

[9] *See, e.g.*, *Shire US v. Allergan, Inc.*, 375 F. Supp. 3d 538 (D.N.J. 2019); *Marion Health Care LLC v. S. Ill. Healthcare*, 2013 WL 4510168 (S.D. Ill. Aug. 26, 2013); *Colonial Med. Grp., Inc. v. Catholic Healthcare W.*, 2010 WL 2108123, at *2-4 (N.D. Cal. May 25, 2010); *Stewart v. Gogo, Inc.*, 2013 WL 1501484, at *4 (N.D. Cal. 2013).

Medicare and Medicaid are not, from Plaintiff's perspective, reasonable substitutes for commercially insured plaintiffs, *see* Br. at 28-29, and Plaintiff does not plausibly allege "special circumstances" exist that would warrant the exclusion of such government-insured patients from the market, *see Shire*, 375 F. Supp. 3d at 551. Though Plaintiff argues that "Medicare and Medicaid cases produce little, if any margin over cost," Opp. at 31-32, that falls far short of an allegation that St. Francis's "long-term viability is jeopardized" by being "shut out of a particular sub-market," *Shire*, 375 F. Supp. 3d at 551. A nonprofit can stay in business even with "little" margin—indeed, St. Francis has the highest operating margin of any hospital in Connecticut.[10]

IV. Plaintiff's Other Conclusory Allegations Are Inadequate Under *Twombly*.

Plaintiff fails to justify its reliance on bare legal conclusions, rather than well-pled factual allegations, to assert its claims regarding tiered networks and exclusive dealing. *See* Br. at 32-37. Plaintiff's vague allegation that Hartford HealthCare's contracts with some insurers place unspecified "limits" on tiered networks, s*ee id.* at 32-34, falls fatally short of its obligation to allege facts—not conclusions—plausibly suggesting that it was Hartford HealthCare's resistance, not independent action by insurers, that purportedly caused those insurers to not offer tiered networks in Connecticut. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564-69 (2007).

Moreover, contrary to Plaintiff's unsupported suggestion that "vertical refusals" to deal with customers are actionable, *see* Opp. at 36, the antitrust laws do not compel firms to do business with customers that they deem contrary to their "apparent legitimate business" interests, *see Port Dock*, 507 F.3d at 125-26. Regardless, the alleged refusal to deal here is horizontal in nature

[10] *See* CONN. OFFICE OF HEALTH STRATEGY, ANNUAL REPORT ON THE FINANCIAL STATUS OF CONNECTICUT'S SHORT TERM ACUTE CARE HOSPITALS FOR FISCAL YEAR 2020 at 77-79, 83 (Dec. 2021), https://portal.ct.gov/-/media/OHS/HSP/FSReport_2020.pdf. This public report summarizes St. Francis's mandatory financial filings under Connecticut law, *see id.* at 3, and is therefore judicially noticeable, *see Citadel Equity Fund Ltd. v. Aquila, Inc.*, 168 F. App'x 474, 476 (2d Cir. 2006).

because Plaintiff claims harm from Hartford HealthCare's alleged decision not to support Plaintiff by participating in a tiered network that offers Hartford HealthCare's services alongside St. Francis's, which Plaintiff claims would benefit it. *See* ¶¶ 47, 109. Plaintiff cannot circumvent *Trinko* by recasting its refusal to deal allegation as coming from an insurer rather than from itself.

Similarly, Plaintiff fails to allege sufficient facts to support its claim regarding exclusive dealing for the Mako robot. *See* Br. at 34-37. "Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers ***are frozen out of a market*** by the exclusive deal." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J. concurring) (emphasis added). Plaintiff has failed to allege this indispensable element. It nowhere alleges that the Mako robot was critical to its ability to compete in any relevant market, much less that it was frozen out of such unpled market, because of its alleged inability to purchase one of the available methods of orthopedic surgery. *See* Br. at 35-36. Contrary to being "frozen out" of any relevant market, Plaintiff raves about the longstanding success of its orthopedic surgery practice, alleging that it has maintained the "highest rated orthopedic surgery practice in Hartford County." ¶ 69. And, in any event, Plaintiff does not dispute its failure to allege that it attempted to purchase a Mako robot but was unable to do so, and Plaintiff's argument that "HHC demanded exclusivity because of its market power," Opp. at 39, is devoid of facts suggesting that Hartford HealthCare had market power when the exclusive relationship began in 2012, *see* Br. at 36-37.

V. Plaintiff's State Law Claims Should Be Dismissed.

Plaintiff's claims under the Connecticut Antitrust Act and CUTPA must be dismissed alongside its federal antitrust claims, and Plaintiff's conclusory allegations of "intimidation," *see supra* note 6, cannot sustain a claim for tortious interference, *see* Br. at 37-39.

CONCLUSION

The Amended Complaint fails to state a claim and should be dismissed in its entirety.

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