**UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF WISCONSIN**

TEAM SCHIERL COMPANIES and HEARTLAND FARMS, INC., on behalf of themselves and all others similarly situated,

*Plaintiffs,*

v.

ASPIRUS, INC., and ASPIRUS NETWORK, INC.,

*Defendants.*

Civil No. 3:22-cv-00580-jdp

Hon. James D. Peterson, U.S.D.J.

Hon. Stephen L. Crocker, U.S.M.J.

**PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITIES**

Team Schierl Companies and Heartland Farms, Inc. ("Plaintiffs") submit as supplemental authority two recent opinions in hospital antitrust cases: (1) *Davis v. HCA Healthcare Inc.*, 21 CVS 3276 (N.C. Super. Apr. 27, 2023) ("*Davis* Op."), attached as Exhibit 1; and (2) *Uriel Pharmacy Health & Welfare Plan v. Advocate Aurora Health, Inc.,* 22-C-0610, ECF No. 31 (E.D. Wis. Apr. 28, 2023) ("*Aurora* Op."), attached as Exhibit 2. These opinions are relevant to Plaintiffs' claims and arguments made in the motion to dismiss briefing.

Plaintiffs allege that Defendants have engaged in a course of anticompetitive conduct—including the imposition of "all-or-nothing" contractual tying (among other conduct)—that was intended to, and did, harm competition in health care markets in North-Central Wisconsin, in violation of Sections 1 and 2 of the Sherman Act. *See, e.g.*, ECF 1 ¶¶ 70–73, 81–84, 89–91; ECF 34 at 3–6.

In *Davis*, the court held that conduct similar to that alleged here states a claim under North Carolina monopolization law, which is analogous to (and in some cases relies on) case law under Section 2 of the Sherman Act. *Davis* Op. at 14–18. Indeed, there was an earlier September 2022 *Davis* Opinion finding the same alleged conduct states a claim for illegal restraint of trade under North Carolina law, which is analogous to Section 1 of the Sherman Act. *See Davis* Op. at 2. That September 2022 *Davis* Opinion was cited extensively in the motion to dismiss briefing in this case. ECF 34 at 7, 16, 19. Despite Defendants' assertion that the September 2022 opinion does not support Plaintiffs' "novel theory," ECF 36 at 16, its upholding of an illegal restraint of trade claim was based in part on the pleading of "all-or-nothing" requirements. *See, e.g.,* ECF 34 at 7, 16, 19.

Likewise, in *Aurora*, the plaintiffs alleged that the defendant hospital system engaged in similar anticompetitive conduct—including the imposition of "all or nothing" contractual tying—that impaired competition for health care services and allowed the defendants to charge supracompetitive prices for those services. *Aurora* Op. at 2-3; *cf.* ECF 1 ¶¶ 69–73, 81–84, 89–91. The *Aurora* court found that such allegations state a claim for relief under Sections 1 and 2 of the Sherman Act. *Aurora* Op. at 4–10.

The *Davis* and *Aurora* Opinions directly relate to arguments made in the motion to dismiss briefing regarding whether such contractual provisions could state a claim for relief under Sections 1 and 2 of the Sherman Act. *See, e.g.,* ECF 34 at 5–7, 16, 19; ECF 36 at 16, 17 n. 11; *cf. Davis* Op. at 14–18; *Aurora* Op. at 2–3, 4–10.

Dated: May 4, 2023

Respectfully submitted,

*/s/ Timothy W. Burns*

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STATE OF NORTH CAROLINA
BUNCOMBE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 3276

WILLIAM ALAN DAVIS; LORRAINE NASH, as Administrator of the Estate of RICHARD NASH; JONATHAN POWELL; FAITH C. COOK, Psy.D.; and KATHERINE BUTTON, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

v.

HCA HEALTHCARE, INC.; HCA MANAGEMENT SERVICES, LP; HCA, INC.; MH MASTER HOLDINGS, LLLP; MH HOSPITAL MANAGER, LLC; MH MISSION HOSPITAL, LLLP; ANC HEALTHCARE, INC. F/K/A MISSION HEALTH SYSTEM, INC.; and MISSION HOSPITAL, INC.,

Defendants.

**ORDER AND OPINION ON DEFENDANTS' MOTION TO DISMISS FIRST AMENDED CLASS ACTION COMPLAINT**

**THIS MATTER** comes before the Court on Defendants' Motion to Dismiss First Amended Class Action Complaint ("Motion to Dismiss" or "Motion," ECF No. 64).

**THE COURT**, having considered the Motion, the briefs of the parties, the relevant pleadings, and the arguments of counsel, **CONCLUDES**, for the reasons set forth below, that the Motion should be **GRANTED**, in part, and **DENIED**, in part.

*Wallace and Graham, P.A., by Mona Lisa Wallace, John Hughes, and Olivia B. Smith, and Fairmark Partners LLP, by Jamie Crooks and Rucha A. Desai, for Plaintiffs William Alan Davis, Lorraine Nash, as Administrator of the Estate of Richard Nash, Jonathan Powell, Faith C. Cook, Psy.D., and Katherine Button, on their own behalf and on behalf of all others similarly situated.*

*Roberts & Stevens, P.A., by Phillip T. Jackson, John Noor, and David Hawisher, and Simpson Thacher & Bartlett LLP, by Sara Razi, Abram Ellis, Laurel E. Fresquez, and John A. Robinson, for Defendants HCA Healthcare, Inc., HCA Management Services, LP, HCA, Inc., MH Master Holdings, LLLP, MH Hospital Manager, LLC, and MH Mission Hospital, LLLP.*

*Bradley Arant Boult Cummings LLP, by Dana C. Lumsden, Anna-Bryce Hobson, and Hanna E. Eickmeier, and Faegre Drinker Biddle & Reath LLP, by Kenneth M. Vorrasi, Jonathan H. Todt, Alison M. Agnew, and Paul H. Saint-Antoine, for Defendants ANC Healthcare, Inc. f/k/a Mission Health System Inc. and Mission Hospital, Inc.*

Davis, Judge.

## INTRODUCTION

1. In this antitrust action involving the market for healthcare services, Plaintiffs' initial Complaint alleged that Defendants possessed a monopoly with regard to the provision of inpatient medical services in certain counties within western North Carolina through its flagship hospital—Mission Hospital-Asheville. Plaintiffs further asserted that by virtue of their negotiating power to insist upon the inclusion of certain anticompetitive contractual restraints in their contracts with commercial health insurers, Defendants were able to extend their monopoly to other markets within western North Carolina in violation of applicable antitrust law. In its 19 September 2022 Order and Opinion ("September 19 Opinion," ECF No. 55) on Defendants' motion to dismiss Plaintiffs' original Complaint, the Court dismissed without prejudice Plaintiffs' monopoly claims but ruled that Plaintiffs had stated a valid claim for relief on their accompanying claim for restraint of trade.

2. Following the Court's ruling, Plaintiffs filed a First Amended Complaint containing additional allegations in an attempt to remedy the defects identified by

the Court with regard to their monopoly claims as originally pled. Defendants have now filed a new motion to dismiss in which they contend that Plaintiffs' amended monopoly claims are still subject to dismissal as a matter of law. Therefore, the issue presently before the Court is whether Plaintiffs' new allegations are sufficient to state valid claims for relief on a monopolization theory.

**FACTUAL AND PROCEDURAL BACKGROUND**

3. The Court does not make findings of fact on a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and instead recites those facts contained in the complaint (and in documents attached to, referred to, or incorporated by reference in the complaint) that are relevant to the Court's determination of the motion. *See, e.g., Concrete Serv. Corp. v. Inv'rs Grp., Inc.*, 79 N.C. App. 678, 681 (1986); *Window World of Baton Rouge, LLC v. Window World, Inc.*, 2017 NCBC LEXIS 60, at *11 (N.C. Super. Ct. July 12, 2017).

4. A complete summary of the factual history of this case is unnecessary, as this Court has previously provided a detailed factual background in its September 19 Opinion, and the factual underpinnings of this case have not changed. Instead, the Court has set out below a brief overview of the most pertinent factual allegations.

5. Plaintiffs in this case are citizens of western North Carolina who claim they have been forced to pay higher premiums for their health insurance due to Defendants' alleged anticompetitive acts. (First Am. Class Action Compl. ["Am. Compl."], ECF No. 61, ¶¶ 15–20.)

6. Defendants HCA Healthcare, Inc.; HCA Management Services, LP; HCA, Inc.; MH Master Holdings, LLLP; MH Hospital Manager, LLC; and MH Mission Hospital, LLLP (collectively, the "HCA Defendants" or "HCA") operate as a for-profit hospital chain. (Am. Compl. ¶¶ 21–41.) HCA currently operates a hospital system in the Asheville area and surrounding western North Carolina region (the "Mission Health System" or the "System"). (Am. Compl. ¶¶ 21–41.)

7. HCA purchased the Mission Health System from Defendants ANC Healthcare, Inc. f/k/a Mission Health System, Inc. and Mission Hospital, Inc. (the "ANC Defendants") following the execution of an Asset Purchase Agreement on 30 August 2018. (Am. Compl. ¶¶ 48, 86.)[1]

8. Prior to HCA's purchase of the Mission Health System, the ANC Defendants operated the System with the benefit of a Certificate of Public Advantage ("COPA") law that provided Mission's hospitals legislative protection from antitrust scrutiny in exchange for their agreement to be subject to certain types of governmental oversight. (Am. Compl. ¶ 59.) Plaintiffs allege that the ANC Defendants abused the protection afforded by the COPA by acquiring and eliminating healthcare practice groups in the area, pressuring smaller hospitals to become part of the System, and buying up other hospitals—resulting in huge growth for the Mission Health System. (Am. Compl. ¶¶ 70–75.) After several subsequent amendments to the COPA law, the ANC Defendants successfully lobbied for the law's ultimate repeal, which formally terminated state oversight of the Mission Health

[1] For ease of reading, throughout this Opinion all of the entities Plaintiffs have sued in this action are often referred to collectively as "Defendants."

System. (Am. Compl. ¶ 59–81.) At the time of the COPA's repeal, Mission had a 93% market share for inpatient general acute care in Buncombe and Madison Counties, where Defendants served patients through Mission Hospital-Asheville. (Am. Compl. ¶¶ 69–71.) Thus, Plaintiffs allege that the COPA law enabled Defendants to obtain a monopoly with regard to inpatient healthcare services in Buncombe and Madison Counties. Plaintiffs contend in this lawsuit that Defendants have misused this monopoly power in violation of applicable law.

9. In the Amended Complaint, Plaintiffs allege that Defendants used their market power to coerce commercial health insurers to include provisions in their health insurance contracts favorable to Defendants. Plaintiffs contend that Defendants then used these contractual restraints to extend their monopoly power to additional healthcare markets in western North Carolina as well as to maintain their monopoly regarding inpatient services in Buncombe and Madison Counties.

10. Plaintiffs first allege that Defendants engaged in an unlawful "tying scheme." Plaintiffs assert that Defendants exploited the fact that no insurance plan in western North Carolina would be viable if Mission Hospital-Asheville was not included in-network. Defendants did so, Plaintiffs contend, by forcing insurers to also include in-network *other* less desirable Mission Health System facilities along with Mission Hospital-Asheville—regardless of whether the insurer actually wanted to include those other facilities in-network. (Am. Compl. ¶¶ 222–25.) Plaintiffs allege that Defendants used this tying scheme to gain monopoly-level power in the markets for outpatient services in the Asheville region (which is comprised of Buncombe and

Madison Counties), as well as in the markets for both inpatient services and outpatient services in the "Outlying Regions," which consist of Macon, McDowell, Mitchell, Transylvania, and Yancey Counties. (Am. Compl. ¶¶ 130, 222–44.)

11. Second, Plaintiffs assert that Defendants have insisted on "anti-steering" language in their contracts with health insurers as a result of which insurers were contractually barred from steering patients away from Defendants' facilities and toward competitor facilities offering lower prices and/or higher quality of care. Plaintiffs similarly contend that these contractual provisions also contained "anti-tiering" language, which prevented insurers from creating cost-saving "tiers" in their health insurance plans. (Am. Compl. ¶¶ 245–53.) Finally, Plaintiffs allege that Defendants insisted on other contractual provisions such as "gag clauses" that prevented insurers from revealing the terms of their contracts with Defendants, thereby inhibiting competition. (Am. Compl. ¶ 254–57.)

12. Plaintiffs argue that as a result of these contractual restraints, residents of western North Carolina pay significantly more for health insurance than residents in other parts of the State. (Am. Compl. ¶¶ 258–64.)

13. Plaintiffs initiated this lawsuit on 10 August 2021 by filing a Complaint in Buncombe County Superior Court containing claims under North Carolina law based on theories of monopoly acquisition, monopoly maintenance, monopoly leveraging, attempted monopolization, and restraint of trade. (ECF No. 3.)

14. Defendants moved to dismiss Plaintiffs' original Complaint on 13 October 2021. (ECF No. 27.) In its September 19 Opinion, the Court granted, in part,

and denied, in part, Defendants' Motion to Dismiss. (September 19 Opinion, ECF No. 55, at pp. 42–43.) Specifically, as noted above, the Court concluded that Plaintiffs had alleged a valid restraint of trade claim but dismissed Plaintiffs' claims for monopolization and attempted monopolization.[2] (September 19 Opinion, at pp. 42–43.)

15. On 31 October 2022, Plaintiffs filed their Amended Complaint in which they reasserted all of the claims contained in their original Complaint except for the monopolization claim under the North Carolina Constitution. (Am. Compl ¶¶ 323–63.) As in the original Complaint, all claims asserted in the Amended Complaint are based exclusively upon North Carolina law, and the markets defined to support their monopoly-based claims are the same as in the original Complaint: (1) the market for inpatient services in the Asheville Region; (2) the market for outpatient services in the Asheville Region; (3) the market for inpatient services in the Outlying Regions; and (4) the market for outpatient services in the Outlying Regions. (Am. Compl. ¶¶ 114–35.)

16. On 5 December 2022, Defendants filed the present Motion to Dismiss. (ECF No. 64.) In the Motion, Defendants seek dismissal of all of the monopolization and attempted monopolization claims contained in the Amended Complaint. (ECF No. 64.)

[2] The Court dismissed all of the monopolization and attempted monopolization claims without prejudice except for a claim under the North Carolina Constitution, which Plaintiffs conceded was not viable. (September 19 Opinion, at pp. 42–43.)

17. This matter came before the Court for a hearing on 27 March 2023. The Motion is now ripe for decision.

**LEGAL STANDARD**

18. "It is well-established that dismissal pursuant to Rule 12(b)(6) is proper when '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' " *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166 (2002)). The Court may also "reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint." *Laster v. Francis*, 199 N.C. App. 572, 577 (2009) (cleaned up).

19. This Court has previously noted that

> "[t]he general standard for civil pleadings in North Carolina is notice pleading." *Murdock v. Chatham Cty.*, 198 N.C. App. 309, 316, 679 S.E.2d 850, 855 (2009) (citing N.C. Gen. Stat. § 1A-1, Rule 8(a)(1)). "Under this 'notice pleading' standard, 'a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought.' " *Tillery Envtl. LLC v. A&D Holdings, Inc.*, No. 17 CVS 6525, 2018 NCBC LEXIS 13, at *78 (N.C. Super. Ct. Feb. 9, 2018) (quoting *Wake Cty. v. Hotels.com, L.P.*, 235 N.C. App. 633, 646, 762 S.E.2d 477, 486 (2014)).
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> However, even if a pleading provides proper notice of "the nature and basis" of a claim sufficient to formulate an answer, the Court must still, under a Rule 12(b)(6) motion, "address the legal sufficiency" of each pleaded claim. *Kingsdown, Inc. v. Hinshaw*, No. 14 CVS 1701, 2015 NCBC LEXIS 30, at *14, *15 (N.C. Super. Ct. Mar. 25, 2015). A pleading that satisfies Rule 8's notice requirement may still be subject to Rule 12(b)(6) dismissal. *Id.* at *13–45 (holding that a counterclaim-plaintiff's

> claims did not violate Rule 8 and then dismissing with prejudice many of those claims under Rule 12(b)(6)).

*Sykes v. Health Network Sols., Inc.*, 2018 NCBC LEXIS 29, at **9–10 (N.C. Super Ct. April 5, 2018).

20. In evaluating the validity of antitrust claims asserted under North Carolina law at the pleadings stage, this Court has stated the following:

> The Motion [to Dismiss] must be decided as a matter of state law; however, it is proper for the Court to consult federal case law. *See Rose v. Vulcan Materials Co.*, 282 N.C. 643, 656-57, 194 S.E.2d 521, 530-31 (1973) (consulting federal decisions to inform the court's restraint-of-trade analysis). The Court is fully cognizant that the Motion [to Dismiss] must be resolved under North Carolina's lenient Rule 12(b)(6) standard rather than the more exacting federal plausibility standard that governs the federal antitrust precedents that the parties cite in their briefs.

*Sitelink Software, LLC v. Red Nova Labs, Inc.*, 2016 NCBC LEXIS 45, at **17 (N.C. Super Ct. June 14, 2016); *see also Dicesare v. Charlotte-Mecklenburg Hosp. Auth.*, 376 N.C. 63, 70 (2020) (applying North Carolina's Rule 12 standard in reviewing antitrust claims brought under North Carolina law).

21. "Dismissal of an antitrust claim 'at the pre-discovery, pleading stage [is] . . . generally limited to certain types of glaring deficiencies.' " *Se. Anesthesiology Consultants, PLLC v. Rose*, 2019 NCBC LEXIS 63, at *25 (N.C. Super. Ct. Oct. 10, 2019) (quoting *Dicesare v. Charlotte-Mecklenburg Hosp. Auth.*, 2017 NCBC LEXIS 33, at *46 (N.C. Super Ct. April 11, 2017)). Nevertheless, "even North Carolina's lenient pleading standard does not allow for an antitrust claim to continue when there are insufficient or conclusory allegations of market power." *Id.* (citing *Sitelink*, 2016 NCBC LEXIS 45, at *29–30).

## ANALYSIS

22. Defendants contend that dismissal of each of the monopolization and attempted monopolization claims contained in the Amended Complaint is appropriate because none of the various theories relied upon by Plaintiffs are adequately supported by their allegations.

23. Our General Statutes provide that

> [i]t is unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of trade or commerce in the State of North Carolina.

N.C.G.S. § 75-2.1 (2021).

24. As an initial matter, the Court notes that Plaintiffs were originally advancing a claim that Defendants had *acquired* their alleged monopoly on inpatient services in the Asheville Region unlawfully. In its September 19 Opinion, the Court dismissed Plaintiffs' monopoly acquisition claim without prejudice. In their brief in opposition to Defendants' present Motion, Plaintiffs acknowledged that they have abandoned this theory. Accordingly, the monopoly acquisition claim is **DISMISSED** with prejudice.

25. Although each of Plaintiffs' remaining monopolization theories are distinct, they all require the following elements: "(1) the possession of monopoly power in the relevant market and (2) willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *See Sykes v. Health Network Sols., Inc.*, 2017 NCBC LEXIS 73, at *60 (N.C. Super. Ct. Aug. 18, 2017) (cleaned up).

26. Our Supreme Court has articulated the following principles regarding monopolies under North Carolina law:

> A monopoly results from ownership or control of so large a portion of the market for a certain commodity that competition is stifled, freedom of commerce is restricted, and control of prices ensues. It denotes an organization or entity so magnified that it suppresses competition and acquires a dominance in the market. The result is public harm through the control of prices of a given commodity. *State v. Atlantic Ice & Coal Co.*, 210 N.C. 742, 747-48, 188 S.E. 412, 415 (1936) . . . .
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> The distinctive characteristics of a monopoly are, then, (1) control of so large a portion of the market of a certain commodity that (2) competition is stifled, (3) freedom of commerce is restricted and (4) the monopolist controls prices . . . .
>
> . . .
>
> In order to monopolize, one must control a consumer's access to new goods by being the only reasonably available source of those goods. A consumer must be without reasonable recourse to elude the monopolizer's reach. Logically, then, the market encompasses geographically at least all areas within reasonable proximity of potential customers.
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> . . .
>
> More than a mere adverse effect on competition must arise before a restraint of trade becomes monopolistic.

*American Motors Sales Corp. v. Peters*, 311 N.C. 311, 315–17 (1984).

27. This Court has previously discussed how to properly assess monopoly power for purposes of Chapter 75.

> "Monopoly power is the power to control prices or exclude competition. A defendant possesses monopoly power in the relevant market if it is truly predominant in the market." *Kolon Indus. Inc. v. E.I. Dupont de Nemours & Co.*, 748 F.3d 160, 173-74 (4th Cir. 2014) (citations omitted) (internal quotation marks omitted). In determining whether monopoly power exists, courts look at defendant's market share, the durability of defendant's market power, and whether there are significant barriers to

> entry. *Id.* at 174; *Bepco, Inc.*, 106 F. Supp. 2d at 830. Market share, while highly relevant to monopoly power, is not conclusive. *Kolon Indus. Inc.*, 748 F.3d at 174 ("[T]here is no fixed percentage market share that conclusively resolves whether monopoly power exists . . . ."); *Broadway Delivery Corp. v. United Parcel Serv.*, Inc., 651 F.2d 122, 128 (2d Cir. 1981) ("The trend of guidance from the Supreme Court and the practice of most courts endeavoring to follow that guidance has been to give only weight and not conclusiveness to market share evidence."); *see also Sitelink Software, LLC*, 2016 NCBC LEXIS 45, at *29-31 (stating that courts often apply certain presumptions for measuring market power, but a determination of market power turns on a fact-specific inquiry and an antitrust plaintiff must "demonstrate some minimal set of well-grounded factual allegations to support an assertion of market power").

*Dicesare*, 2017 NCBC LEXIS 33, at *54–55.

28. Plaintiffs' monopolization claims here are best framed as claims for monopoly maintenance and monopoly leveraging and can be summarized as follows: First, Plaintiffs argue that Defendants have used anticompetitive means (namely, the above-described contractual restraints) to *maintain* the monopoly they possess on inpatient services in the Asheville Region. Second, they contend that Defendants have used these same anticompetitive acts to *leverage* their existing monopoly regarding inpatient services in the Asheville Region into new monopolies for outpatient services in the Asheville Region as well as for both inpatient and outpatient services in the Outlying Regions.

29. Our Supreme Court has not yet had occasion to fully address claims for monopoly maintenance or monopoly leveraging. Therefore, as noted above, although Plaintiffs' claims are based solely on North Carolina law, it is appropriate for this Court to consider relevant case law from other jurisdictions for guidance. *See Sitelink,* 2016 NCBC LEXIS 45, at **17.

30. The Court will address each of Plaintiffs' theories in turn.

**A. Monopoly Maintenance**

31. A monopoly maintenance claim "has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful . . . maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *New York v. Facebook, Inc.*, 549 F. Supp. 3d. 6, 23–24 (D.D.C. 2021) (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 50 (D.C. Cir. 2001)).

32. In support of this claim, Plaintiffs assert that even assuming Defendants obtained their monopoly over the inpatient services market in the Asheville Region lawfully (largely, due to the COPA), they have unlawfully used the above-described contractual restraints to maintain that monopoly. (Am. Compl. ¶ 169.)

33. The Court previously dismissed Plaintiffs' monopoly maintenance claim based on its conclusion that "all, or virtually all, of Plaintiffs' allegations concerning the contractual restrictions utilized by Defendants relate to markets *other than* the Asheville Region Inpatient Services market." (September 19 Opinion ¶ 80.) In other words, the Court determined that Plaintiffs' allegations in the original Complaint focused solely on Defendants' attempt to *leverage* their existing Asheville-based monopoly for inpatient services into other markets as opposed to any attempt to *preserve* that existing monopoly.

34. The Amended Complaint attempts to bolster Plaintiffs' monopoly maintenance theory by adding new allegations directly relating to this claim. In particular, Plaintiffs assert that a specific purpose of the anticompetitive contractual provisions—primarily, the anti-steering provision—that Defendants have coerced commercial health insurers into including has been to maintain Defendants' monopoly in the Asheville Region Inpatient Services Market. Plaintiffs allege that absent these anti-steering provisions, the insurers would be able to steer patients within the service area of Mission Hospital-Asheville to nearby competitor hospitals such as AdventHealth Hendersonville and Pardee UNC Healthcare, who could offer higher quality care at a lower cost. (*See, e,g.*, Am. Compl. ¶¶ 169–72.)

35. Despite Defendants' arguments to the contrary, the Court is satisfied that these new allegations in the Amended Complaint are sufficient to state a valid claim for monopolization on a theory of monopoly maintenance. Simply put, Plaintiffs have now alleged that one purpose of the same contractual restraints that the Court has already held to be potentially anticompetitive was to enable Defendants to maintain their current monopoly as to the Asheville Region Inpatient Services Market. As with all of Plaintiffs' claims in this action that the Court is allowing to go forward, it remains to be seen whether Plaintiffs will be able to move past the summary judgment stage on this claim (much less ultimately prevail at trial). But based on the Court's application of North Carolina's standard for evaluating claims at the Rule 12 stage, the Court concludes that the Amended Complaint adequately pleads a monopoly maintenance claim under North Carolina law.

36. Therefore, the Court **DENIES** Defendants' Motion to Dismiss Plaintiffs' monopoly maintenance claim.

**B. Monopoly Leveraging**

37. Plaintiffs also attempt to reassert their monopoly claims based on a theory of monopoly leveraging.

38. "A monopoly leveraging claim is a . . . monopolization claim or attempted monopolization claim involving conduct in more than one market. To succeed, a plaintiff must demonstrate 'that a party has a monopoly in one area, uses unlawful acts to leverage that monopoly into another area, and achieves or is likely to achieve that second monopoly.' " *Simon & Simon, PC v. Align Tech., Inc., No. 19-506 (LPS)*, 2020 U.S. Dist. LEXIS 72499, at *23 (D. Del. Apr. 24, 2020) (quoting *IQVIA Inc. v. Veeva Systems, Inc.*, 2018 U.S. Dist. LEXIS 171456, at *4 (D.N.J. Oct. 3, 2018)).

39. Thus, a plaintiff asserting a claim under this theory must allege either that the defendant actually possesses monopoly power in the secondary market or that the monopolist has a "dangerous probability of success" of monopolization of the secondary market. *Unigestion Holding, S.A. v. UPM Tech., Inc.,* 305 F. Supp. 3d. 1134, 1150 (D. Ore. 2018) (quoting *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 415 n.4 (2004)).

40. Here, Plaintiffs allege that Defendants have used their preexisting monopoly in the Asheville Region Inpatient Services Market to acquire additional monopolies in the Asheville Region Outpatient Services Market and the Outlying

Regions Inpatient and Outpatient Services Markets. In its September 19 Opinion, the Court dismissed Plaintiffs' monopoly leveraging claims as pled in their original Complaint because Plaintiffs had failed to adequately allege monopoly power in these additional regions—either through allegations based on market share data or through allegations of their ability to control prices.

41. Although Defendants do not challenge the validity of Plaintiffs' allegations that Defendants possess existing monopoly power in the primary market—that is, the Asheville Region Inpatient Services Market—Defendants argue that the new allegations in the Amended Complaint do not cure the pleading deficiencies previously identified by the Court on Plaintiffs' monopoly leveraging claims. The Court must therefore analyze the adequacy of these new allegations as to each of the relevant markets with regard to Plaintiffs' monopoly leveraging theory.

**i. Outlying Regions Inpatient Services Market**

42. As noted above, the Outlying Regions Inpatient Services Market consists of inpatient healthcare services offered to patients in Macon, McDowell, Mitchell, Transylvania, and Yancey Counties. In its September 19 Opinion, the Court ruled that Plaintiffs' allegations as to Defendants' market share for inpatient services in these regions were impermissibly based on Medicare data, which the Court concluded was legally insufficient given that this lawsuit concerns the private insurance market rather than the sale of services to government payors. (September 19 Opinion ¶¶ 87–92.)

43. Plaintiffs' Amended Complaint has cured this deficiency by listing Defendants' "total inpatient market share—including all commercial discharges—as calculated by four different sources of data[.]" (Am. Comp. ¶ 178.) For each of the counties that make up the Outlying Regions, Plaintiffs allege that Defendants possess a market share well in excess of 70%. *See Se. Anesthesiology*, 2019 NCBC LEXIS 63, at *33 ("Generally, seventy percent (70%) to seventy-five percent (75%) market share is necessary to sustain a monopolization claim[.]") (citations omitted).

44. Moreover, Plaintiffs have alleged that Defendants were able to obtain monopolies in these counties by "requir[ing commercial health] insurers to include all of their hospitals in-network through their all-or-nothing contracting" and that Defendants "prevented insurers from steering patients to competitors in the Outlying Regions through the use of anti-steering provisions." (Am. Compl. ¶ 177.) The Amended Complaint further asserts that "[a]bsent these restraints, Defendants would not have monopolized these markets." (Am. Compl. ¶ 177.)

45. Defendants do not seriously challenge Plaintiffs' new market share allegations for inpatient services in the Outlying Regions. Instead, they contend, the Amended Complaint concedes that these high market shares are attributable not to monopolistic conduct on Defendants' part, but rather to the fact that these counties are rural in nature such that Defendants' facilities are in some places "the only viable option within driving distance." (Mem. of Law in Support of Mot. to Dismiss First Am. Class Action Compl. ["Defs.' Brief in Support], ECF No. 65, p. 23.)

46. It is true that the Amended Complaint alludes to this phenomenon. (*See* Am. Compl. ¶ 180.) Nevertheless, a contextual reading of the allegations as a whole in the light most favorable to Plaintiffs reveals that a sufficient causal nexus has been alleged between Defendants' anticompetitive acts and their ability to leverage their existing Asheville-based monopoly for inpatient services into a new monopoly for inpatient services in the Outlying Regions. As a result, while Defendants will no doubt renew this argument at the summary judgment stage (at which time the Court will have the benefit of a fully developed factual record), the Court declines to accept the argument as a basis to dismiss this claim at the present time.

47. Accordingly, because Plaintiffs have properly alleged a monopoly leveraging claim as to the Outlying Regions Inpatient Services Market under North Carolina law, the Court **DENIES** Defendants' Motion to Dismiss as to this claim.

**ii. Outpatient Services Markets in Asheville Region and Outlying Regions**

48. The Court reaches a different result, however, with regard to Plaintiffs' monopoly leveraging claims based on outpatient services—both in the Asheville Region and in the Outlying Regions.

49. In its September 19 Opinion, the Court dismissed Plaintiffs' monopoly leveraging claims regarding outpatient services in all regions for two reasons. First, Plaintiffs did not make any allegations in the original Complaint as to Defendants' market share in any relevant region regarding the provision of such services. Second, the allegations Plaintiffs made as to Defendants' ability to control prices for such outpatient services were too conclusory. (September 19 Opinion ¶¶ 92, 94.)

50. In their Amended Complaint, Plaintiffs have once again failed to allege any market share held by Defendants in any of the regions at issue regarding the provision of outpatient services. Instead, Plaintiffs' new allegations primarily allege that Defendants have obtained monopoly power over outpatient services in these regions through their "control" over various medical practices, facilities, and equipment in these areas. The Court agrees with Defendants that these allegations are simply not enough to state a valid claim for monopolization of these markets as to outpatient services *as a whole*.

51. Plaintiffs correctly contend that monopoly power may be properly alleged through facts that show an antitrust defendant has the ability to control prices or exclude competition in the relevant antitrust market—meaning that allegations of a defendant's market share are not necessarily required. *See*, *e.g.*, *Tops Mkt., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97–98 (2nd Cir. 1998) ("[Monopoly power] may be proven directly by evidence of the control of prices or the exclusion of competition, *or* it may be inferred from one firm's large percentage share of the relevant market.") (emphasis added). The Court observes, however, that neither the parties' briefs nor the Court's own research has disclosed any case in which our Supreme Court has allowed a monopolization claim to survive the pleadings stage where the complaint lacked *any* allegations regarding the defendant's market share in the relevant antitrust market.

52. That is not to say that such a scenario could never occur. The Court finds our Supreme Court's decision in *Dicesare* to be instructive. In that case, the

plaintiffs alleged that the defendant hospital authority had an approximate market share in the relevant market of 50%. The Supreme Court stated that it was "skeptical of monopoly claims that, like plaintiffs[']], assert that a monopoly exists when an entity, like the Hospital Authority, has a market share of fifty percent or less." *Dicesare*, 376 N.C. at 98. The Supreme Court held that, as a result, the "monopolization claim cannot survive unless the other allegations in the . . . complaint show that the Hospital Authority has the ability to control prices in the Charlotte market in spite of the fact that it only has a fifty percent market share." *Id*. Based on its analysis of the complaint in that case, the Supreme Court concluded that it was "unable to agree with the trial court's determination that plaintiffs adequately pleaded that the Hospital Authority controlled 'so large a portion of the market' that it not only stifled competition and restricted freedom of commerce, but also controlled prices." *Id*. at 97.

53. In the new allegations in their Amended Complaint, Plaintiffs largely assert that Defendants control certain types of physician practices and facilities in both Asheville and the Outlying Regions and that Defendants' facilities offer highly sought equipment and medical devices that Defendants' competitors lack.

54. However, Plaintiffs' allegations as to both the Asheville Region and the Outlying Regions fail to sufficiently allege in a non-conclusory fashion that Defendants control prices in the relevant product market, which Plaintiffs have defined to include *all* outpatient services in both their original Complaint and their Amended Complaint. As Defendants note in their briefs, physician services and

outpatient services constitute "different antitrust product markets . . . . Plaintiffs have not alleged that Defendants monopolized or attempted to monopolize any markets for physician services." (Defs.' Brief in Support p. 18.) Nor do Plaintiffs attempt to differentiate between the inpatient services and the outpatient services provided by the physician groups that are the subject of their allegations. Moreover, assertions as to Defendants' mere ownership of certain types of medical equipment or devices at their facilities is likewise insufficient to allege monopoly power.

55. Finally, Plaintiffs' arguments regarding Defendants' alleged ability to control prices for outpatient services essentially rehash contentions that the Court previously rejected in its September 19 Opinion. For all of these reasons, the Court concludes, as in *Dicesare*, that these claims fail as a matter of law. *See Dicesare*, 376 N.C. at 97.

56. Accordingly, the Court **GRANTS** Defendants' Motion to Dismiss as to Plaintiffs' monopoly leveraging claims based on outpatient services in the Asheville Region and in the Outlying Regions, and those claims are **DISMISSED** with prejudice.

**C. Attempted Monopolization**

57. Finally, Plaintiffs contend that their attempted monopolization claims pass muster based on the new allegations in their Amended Complaint. The Court concludes that these claims should be **GRANTED**, in part, and **DENIED**, in part, as set out below.

58. "To demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Doctors Making Housecalls-Internal Med., P.A. v. Onsite Care, PLLC*, 2019 NCBC LEXIS 6, at *13 (N.C. Super. Ct. Jan. 16, 2019) (cleaned up). This Court has stated that "[g]enerally . . . thirty percent (30%) to fifty (50%) [market share] is presumed necessary to sustain a claim for attempted monopolization." *Se Anesthesiology*, 2019 NCBC LEXIS 63, at *32 (citations omitted).

59. Plaintiffs have asserted attempted monopolization claims as to the Outlying Regions Inpatient Services Market, the Outlying Regions Outpatient Services Market, and the Asheville Region Outpatient Services Market.

60. With regard to Plaintiffs' attempted monopolization claim for the Outlying Regions Inpatient Services Market, the Court concludes that Defendants' Motion to Dismiss should be **DENIED** for the same reasons that the Court has denied the actual monopolization claim for that market. *See Kolon,* 637 F.3d at 453 ("Given that we held above that [plaintiff] adequately pled actual monopolization, we can reach no conclusion other than that [plaintiff] adequately pled a dangerous probability of success as to [defendant's] attempted monopolization.").

61. However, as to the outpatient services markets in the Asheville Region and in the Outlying Regions, the same deficiencies underlying the monopolization claims for those markets subject their attempted monopolization claims to dismissal. For the reasons set out above, just as Plaintiffs have not adequately alleged that

Defendants possess monopoly power in those markets, they have likewise failed to sufficiently allege that there is a dangerous probability of Defendants actually achieving monopoly power.

62. The Court therefore **GRANTS** Defendants' Motion to Dismiss Plaintiffs' attempted monopolization claims as to the Asheville Region Outpatient Services Market and the Outlying Regions Outpatient Services Market, and these claims are **DISMISSED** with prejudice.

## CONCLUSION

**THEREFORE, IT IS ORDERED** that Defendants' Motion to Dismiss is **GRANTED**, in part, and **DENIED**, in part, as follows:

1. Defendants' Motion to Dismiss Plaintiffs' monopoly acquisition claim is **GRANTED**, and that claim is **DISMISSED** with prejudice.
2. Defendants' Motion to Dismiss Plaintiffs' monopoly maintenance claim is **DENIED**.
3. Defendants' Motion to Dismiss Plaintiffs' monopoly leveraging claim as to the Outlying Regions Inpatient Services Market is **DENIED**.
4. Defendants' Motion to Dismiss Plaintiffs' monopoly leveraging claim as to the Asheville Region Outpatient Services Market and the Outlying Regions Outpatient Services Market is **GRANTED**, and those claims are **DISMISSED** with prejudice.
5. Defendants' Motion to Dismiss Plaintiffs' attempted monopolization claim as to the Outlying Regions Inpatient Services Market is **DENIED**.

6. Defendants' Motion to Dismiss Plaintiffs' attempted monopolization claims as to the Asheville Region Outpatient Services Market and as to the Outlying Regions Outpatient Services Market is **GRANTED**, and those claims are **DISMISSED** with prejudice.

**SO ORDERED**, this the 27th day of April, 2023.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge for
Complex Business Cases

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF WISCONSIN**

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**URIEL PHARMACY HEALTH AND WELFARE PLAN, et al.,**
**Plaintiffs,**

**v.** **Case No. 22-C-0610**

**ADVOCATE AURORA HEALTH, INC., and AURORA HEALTH CARE, INC.,**
**Defendants.**

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## DECISION AND ORDER

Plaintiffs in this putative class action anti-trust lawsuit are companies that operate health plans that pay for their employees' medical services. In their first amended complaint, plaintiffs allege that defendants, Wisconsin hospital owners, violated the Sherman Act, 15 U.S.C. § 1 et. seq., and the Clayton Act, 15 U.S.C. § 12 et. seq., by unreasonably restraining trade and creating and attempting to create monopolies in the hospital services market. Plaintiffs also bring analogous state law claims. Before me now is defendants' motion to dismiss the first amended complaint.

## I. BACKGROUND

The plans that plaintiffs operate do not directly negotiate with hospitals regarding the price of services. Instead, they contract with network vendors to negotiate rates with a number of hospitals within the region and offer them as a bundle, i.e. "a network." Plaintiffs contract with two network vendors, Cigna and Trilogy. In markets with more than one hospital, network vendors will typically choose to contract with a hospital based on price and quality of service. When only one hospital exists in a market, network vendors must include that hospital in their networks regardless of price or quality because the

networks would otherwise not be commercially viable. Plaintiffs refer to this latter category as "must-have" hospitals. Plaintiffs allege defendants own several must-have hospitals in eastern Wisconsin.

Plaintiffs allege that defendants leverage these must-have hospitals to require network vendors to accept three types of clauses in their contracts. The first type is an "all-or-nothing" clause under which network vendors must include all of the hospitals that defendants own in eastern Wisconsin in their network. For example, if a network vendor wanted to include in its network a hospital owned by defendants in Racine, which has only one hospital, the all-or-nothing clause would require it to also include the hospitals defendants own in Milwaukee, even though other Milwaukee hospitals might offer higher quality services or lower prices. The second type is an "anti-steering" clause. In a competitive market, health plans have the ability to steer some of their members to lower-cost providers that participate in the network, usually by offering lower co-pays. The anti-steering clauses prohibit health plans from doing this. The third type is a gag clause, which prevents network vendors from disclosing to the plans the prices negotiated with the hospitals owned by defendants. If network vendors refuse to accept these clauses, plaintiffs allege that defendants bar them from contracting with defendants' must-have hospitals.

Plaintiffs allege that these clauses prevent them from steering their employees to lower cost hospitals. Plaintiffs allege, for example, that defendants' hospitals in Green Bay and Milwaukee charge significantly higher prices than other hospitals in those cities. But because of the all-or-nothing clauses, network vendors cannot avoid contracting with them. And were it not for the anti-steering clauses, plaintiffs allege that health plans could

offer patients information about the price of services at different hospitals and incentives, such as lower co-pays, to use a lower-priced provider within the network. Because the health plans cannot do this, defendants' hospitals are able to raise prices in otherwise competitive markets without losing business to lower priced competitors and contributing to increased health care costs.

Plaintiffs also allege that defendants maintain monopolies in eight markets in Wisconsin: Elkhorn, Burlington, Hartford, Marinette, Two Rivers, Sheboygan, Plymouth, and Port Washington. They allege that, according to Medicare data, defendants' hospitals maintain a market share between 58% and 90% in these markets. Plaintiffs allege defendants use anti-steering and gag clauses to maintain these monopolies. Finally, plaintiffs allege that defendants are attempting to monopolize the Oconomowoc market through the use of anti-steering and gag clauses.

## II. DISCUSSION

To avoid dismissal under Rule 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The complaint must, at a minimum, "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. In construing a plaintiff's complaint, I assume that all factual allegations are true but disregard statements that are conclusory. *Iqbal*, 556 U.S. at 678.

**A. Unreasonable Restraint of Trade under Sherman Act**

Section 1 of the Sherman Act prohibits "[e]very contract, combination …, or conspiracy in restraint of trade." 15 U.S.C. § 1. Despite the Act's expansive language, the Supreme Court has interpreted § 1 to prohibit only "unreasonable" restraints of trade. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). To succeed on a claim under § 1, a plaintiff must show (1) a contract, combination or conspiracy; (2) a resultant unreasonable restraint of trade in a relevant market; and (3) an accompanying injury. *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 335 (7th Cir. 2012).

Plaintiffs argue that defendants' contracts with Cigna and Trilogy satisfy the first element. Defendants argue that plaintiffs do not plausibly allege that their contracts with Cigna and Trilogy actually contain the challenged clauses. But plaintiffs allege defendants have imposed these provisions "in all or nearly all of its negotiations with Network Vendors during the relevant time period," including Cigna and Trilogy. ECF no. 21 p. 34 of 85. To the extent that defendants are arguing plaintiffs must include language from the actual contracts, their argument fails. Plaintiffs are not a party to the contracts and cannot be expected to have access to them before discovery. *See In re Broiler Chicken Antitrust Litig.*, 290 F.Supp.3d 772, 804 (N.D. Ill. 2017) ("[T]he pleading standard must take into account the fact that a complaint will ordinarily be limited to allegations pieced together from publicly available information."). And plaintiffs allege enough facts to allow a reasonable inference that the Cigna and Trilogy contracts include the relevant clauses. For instance, plaintiffs quote from a 2020 contract with a different network vendor that includes the challenged provisions and allege that two other network vendors state they

were forced to accept the provisions. Plaintiffs also allege that a consultant who negotiated with defendants states that defendants treat the clauses as "non-negotiable."

Defendants next argue that plaintiffs do not allege that the challenged clauses are unreasonable restraints of trade. The proper framework for analyzing whether the clauses are an unreasonable restraint of trade is the rule of reason. *See Agnew*, 683 F.3d at 335. Under this rule, plaintiffs initially must show that the defendant has "market power," that is the ability to raise prices significantly without going out of business within a given market and that the alleged restraints have an anticompetitive effect in the identified market. *Id*. If plaintiffs meet this burden, defendants may argue that the restraint, on balance, has a procompetitive effect. *Id.* But in considering a motion to dismiss, the focus is on whether plaintiffs have made a prima facie case. *See In re Dealer Mgmt Sys. Antitrust Litigation*, 360 F.Supp.3d 788, 803 (N.D. Ill. 2019) ("[W]hether challenged conduct has a procompetitive effect on balance so as to survive scrutiny" under the rule of reason "presents a factual issue that cannot be resolved" at the pleading stage).

As to the second element, plaintiffs allege that defendants' conduct restrains trade in two relevant markets, the market for hospital services in Milwaukee and the market for hospital services in Green Bay. Anticompetitive effects include increased prices, reduced output, and reduced quality. *Ohio v. Am. Express Co.*, 138 S.Ct. 2274, 2284 (2018). Plaintiffs allege that the offending clauses result in higher prices for hospital services in the Milwaukee and Green Bay markets by allowing defendants' hospitals to raise prices without losing business. The complaint includes numerous allegations of higher prices making this allegation plausible. Plaintiffs, for example, allege the prices at a defendant-owned hospital in Milwaukee for appendectomies and angioplasties are almost double

those of a nearby competitor with similar quality ratings. Similarly, plaintiffs allege that the price of a colonoscopy with a biopsy at a defendant-owned hospital is more than double the price of the same procedure at a nearby competitor with higher quality and safety ratings. Thus, plaintiffs plausibly allege that the clauses have an anticompetitive effect. *See U.S. v. Charlotte-Mecklenburg Hosp. Auth.*, 248 F.Supp.3d 720 (W.D.N.C. 2017) (finding allegations of similar anti-steering clauses plausibly alleged anticompetitive effect).[1]

Defendants next argue that plaintiffs do not allege an injury because they do not explain how the challenged provisions have harmed them. Plaintiffs, however, allege that the challenged clauses result in higher prices and that they pay such prices. Thus, plaintiffs allege a "direct link" between the alleged violations and the claimed antitrust injury. *See Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 997 F.3d 391, 395 (7th Cir. 1993). Defendants also argue plaintiffs do not allege they are the proper party to bring an antitrust action. Because antitrust violations often have far-reaching effects, a plaintiff must show it is in a position to "vindicate the purpose" of the antitrust laws. *McGarry & McGarry, LLC v. Bankr. Mgmt. Sols.*, 937 F.3d 1056, 1064-65 (7th Cir. 2019). Here, because plaintiffs allege a "direct link" between the market restraints and their injury, they are a proper party. *Id*. Thus, defendants' motion as regards the unreasonable restraint of trade claim will be denied.

[1] Defendants argue that plaintiffs are also required to plead "substantial foreclosure" of the relevant market. But this is a requirement only when plaintiffs allege a *per se* violation of the Sherman Act and does not apply under a rule of reason analysis. *See Reifert v. South Cent. Wis. MLS Corp.*, 540 F.3d 312, 319 (7th Cir. 2008).

**B. Monopoly under Sherman Act**

Section 2 of the Sherman Act prohibits firms from entrenching existing monopoly power through anticompetitive conduct. 15 U.S.C. § 2. To succeed on a monopoly claim under § 2, plaintiffs must show that defendants (1) possessed monopoly power in the relevant market and (2) sought to maintain that power through predatory or anticompetitive conduct. *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 854 (7th Cir. 2011). With respect to the first element, a "relevant market" is composed of a product and a geographical area. *Sharif Pharmacy, Inc. v. Prime Therapeutics, LLC*, 950 F.3d 911, 917 (7th Cir. 2020). With respect to the second element, anticompetitive conduct is conduct that impairs "rivals' opportunity to compete in a way that is inconsistent with competition on the merits." *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 452-453 (7th Cir. 2020).

**1. Relevant Markets**

Plaintiffs allege the product at issue is hospital services, which defendants do not challenge. But defendants argue that plaintiffs do not plausibly allege the geographic areas of the relevant markets. To analyze geographic healthcare markets, the Seventh Circuit applies the "hypothetical monopolist test." *Vasquez v. Indiana University Health, Inc.*, 40 F.4th 582, 585 (7th Cir. 2022). This test asks whether a theoretical monopolist in the proposed geographic area could profitably raise prices above competitive levels or if customers would defeat the attempted price increase by buying from outside the region. *Id.* This determination is fact intensive and the "motion-to-dismiss stage does not lend itself to rigorous hypothetical-monopolist analysis." *Id.* at 586. Rather, plaintiffs need only allege a "plausible" geographic market. *Id*.

Plaintiffs plead several geographic markets by reference to "Hospital Service Areas" defined by *The Dartmouth Atlas of Healthcare* ("HSAs"). Plaintiffs allege that these HSAs are a "widely accepted proxy for market definition for inpatient acute care services and are often used in the health care industry to define relevant markets." ECF no. 21 p. 23 of 85. Plaintiffs allege defendants have monopoly power in the following HSAs: Elkhorn, Burlington, Hartford, Marinette, Two Rivers, Sheboygan, Plymouth, and Port Washington. Some of these markets are relatively small, but plaintiffs allege that "distance to a medical provider is one of the most important predictors of provider choice" and that "patients do not typically regard hospitals located many miles away from them as substitutes for local ones." ECF no. 21 p. 23 of 85.

Defendants argue that the HSAs are not appropriate geographical markets because they are calculated based on where patients *currently* go for services, not where patients *would* go if a hypothetical monopolist were to raise prices. But at this stage, plaintiffs are only required to allege a plausible market, and plaintiffs' allegations that distance is the most important predictor of provider choice is plausible. *See FTC v. Advocate Health Care Network*, 841 F.3d 460, 4700 (7th Cir. 2016) ("[M]ost patients prefer to go to nearby hospitals"); s*ee also Sidibe v. Sutter Health*, 667 Fed.App'x 641, 643 (9th Cir. 2016) ("HSAs are areas within which the residents obtain most of their inpatient hospital services; it is not inherently implausible that these residents also would be unwilling to seek treatment elsewhere."). And plaintiffs go beyond alleging that a hypothetical monopolist could raise prices in these markets. They allege that defendants have actually raised their prices to above-market levels. *See Vasquez*, 40 F.4th at 586 (holding that allegations of above-market prices "are by no means necessary in order to

adequately plead a geographic market. But they are sufficient."). Thus, plaintiffs plausibly allege the relevant markets.

**2. Monopoly Power and Anticompetitive Effect**

As to whether plaintiffs allege that defendants have monopoly power in the defined markets, monopoly power may be inferred when a single entity controls a predominant share of the market. *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000). Plaintiffs allege that, according to Medicare data, defendant-owned hospitals control between 58% and 90% of the market share in the identified markets. What constitutes a "predominant share" of a market is a fact intensive question, *see id.*, and defendants do not argue that these numbers are insufficient to show a predominant market share at this stage. Instead, they argue the allegations are not plausible because they are based on Medicare data and therefore do not reflect the private insurance market. But plaintiffs allege that academic research has shown that a hospital's share of the Medicare market is "representative of" its total market share. Thus, the Medicare data at least allows a reasonable inference that defendants' hospitals control a predominant share of the market.

Finally, plaintiffs plausibly allege defendants maintain their monopolies through anticompetitive conduct. They allege that defendants do so by requiring network vendors to accept anti-steering and gag clauses in their contracts. As discussed, these provisions prevent other hospitals from competing with defendants based on price. "[I]mpairing rivals' opportunity to compete in a way that is inconsistent with competition on the merits" is quintessential anticompetitive conduct. *Viamedia*, 951 F.3d at 452-453. Thus,

defendants' motion to dismiss as regards plaintiffs' § 2 of the Sherman Act claim will be denied.

**C. Attempted Monopolization under Sherman Act**

Plaintiffs bring a claim for attempted monopolization of the Oconomowoc market for acute inpatient hospital care under § 2 of the Sherman Act. To state a claim for attempted monopolization, plaintiffs must allege (1) specific intent to achieve monopoly power in a relevant market; (2) predatory or anticompetitive conduct directed to accomplishing this purpose; and (3) a dangerous probability that the attempt at monopolization will succeed. *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 854 (7th Cir. 2011).

Plaintiffs allege that a hospital owned by defendants in Oconomowoc currently controls 37% of the acute inpatient hospital services market and charges rates 60% higher than the only other hospital in the area, Oconomowoc Memorial. Plaintiff further alleges that although Oconomowoc Memorial offers lower prices and higher quality services than the defendants' hospital, its share of the market is steadily decreasing and it is in danger of closing or downsizing. According to plaintiffs, Oconomowoc's steady decrease in market share is attributable to defendants' anti-steering and gag clauses, which prevent the hospital from competing based on price.

Defendants argue that plaintiffs lack standing to bring this claim because they do not allege they participate in the Oconomowoc market. But plaintiffs allege they pay for hospital services "throughout Eastern Wisconsin" and confirm in their brief that this includes Oconomowoc. Defendants next argue that plaintiffs fail to allege "specific intent to monopolize." But specific intent to monopolize may be inferred from anticompetitive

conduct, *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532, 541 (7th Cir. 1986), and, as explained, plaintiffs allege defendants engaged in anticompetitive conduct in the form of the anti-steering and gag clauses. Thus, plaintiffs plausibly allege specific intent to monopolize.

Defendants also argue that plaintiffs do not allege a dangerous probability that the attempt at monopolization will succeed. To determine whether there is a dangerous probability of monopolization, I "consider the relevant market and the defendant's ability to lessen or destroy competition in that market." *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 456 (1993). Plaintiffs allege that Oconomowoc Memorial's share of the market has steadily dropped even though it offers lower prices and higher quality services. This suggests that defendants are able to weaken or destroy competition. Additionally, plaintiffs allege that high barriers to entry in the hospital market, including the significant cost of building new facilities, make it unlikely that other providers will enter the market in an attempt to compete with defendants. Thus, plaintiffs plausibly allege a dangerous chance of defendants achieving a monopoly in Oconomowoc. I will deny defendants' motion as regards this claim.

**C. State Law Claims**

Plaintiffs' claims under the Wisconsin Antitrust Act are analogous to their claims under the Sherman Act. *Conley Publ'g Grp., Ltd. v. Journal Commc'ns, Inc.*, 265 Wis.2d 128, 140-41 (2003). Defendants argue that they should be dismissed for the same reasons as the federal claims. Because I decline to dismiss the federal claims, I will not dismiss the analogous state law claims.

## III. CONCLUSION

For the reasons stated, **IT IS ORDERED** that defendants' motion to dismiss at ECF no. 24 is **DENIED**.

Dated at Milwaukee, Wisconsin, this 28th day of April, 2023.

/s/Lynn Adelman
LYNN ADELMAN
United States District Judge