UNITED STATES DISTRICT COURT
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 Action No. 3:22-cv-00580-jdp Honorable James D. Peterson

DEFENDANTS' MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants, Aspirus, Inc. and Aspirus Network, Inc. (together, "Defendants"), respectfully move to dismiss the Complaint in its entirety for failure to state a plausible claim for relief. In support of this Motion, Defendants incorporate the accompanying Memorandum of Law.

Dated: January 11, 2023

Respectfully submitted,

/s/ R. Brendan Fee

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INTRODUCTION

Plaintiffs, Schierl, Inc. d/b/a Team Schierl Companies and Heartland Farms, Inc., filed this antitrust lawsuit on behalf of a proposed class asserting vague and speculative claims of anticompetitive conduct against Defendants, Aspirus, Inc. ("Aspirus") and Aspirus Network, Inc. ("ANI"). Aspirus is a non-profit, community health system based in Wausau. Aspirus's wholly owned subsidiary, ANI, offers a clinically integrated network of specialty care physicians, hospitals, and health care professionals. Aspirus and ANI together provide a range of health care services with a focus on quality and improved clinical outcomes serving patients throughout Wisconsin and the Upper Peninsula of Michigan, including in many rural areas where access to health care has historically been limited. Plaintiffs are two Wisconsin-based employers that offer self-insured health plans to their employees. They seek to recover damages for what they claim are supracompetitive prices their respective health plans paid for Aspirus and ANI's suite of health care services. In essence, Plaintiffs dress up grievances about the cost of their employee health plans as claims that Defendants have artificially driven up the price of health care in parts of Wisconsin by engaging in "exclusive dealing," "tying," and "price fixing," all supposedly in violation of Sections 1 and 2 of the Sherman Act. But the Complaint—built mainly on legal conclusions and antitrust buzzwords—is incapable of contorting Aspirus and ANI's expanded clinical offerings into violations of the antitrust laws. Instead, the Complaint crumbles under close scrutiny because it suffers from incurable legal defects and because Plaintiffs failed to include in their pleading the requisite factual allegations to support their novel theories. The Complaint should be dismissed in full.

First, Plaintiffs' exclusive dealing claim in Count I fails for multiple independent reasons. The flaws start with the Complaint's failure to plead the threshold requirement of antitrust standing. To establish this prudential standing requirement, an antitrust plaintiff must plead facts

showing the existence of a close or proximate causal nexus between the claimed anticompetitive conduct and the plaintiff's harm. But the Complaint here affirmatively pleads the opposite. That is because the exclusive dealing theory depends on multiple layers of independent decisionmaking that sever the causal chain. The first layer involves innumerable physicians and physician practices, each of which would need to decide whether, absent the alleged exclusivity, to join ANI. Next, health plans operating in Wisconsin would need to assess whether and how they would create a provider network consisting of providers who elected not to join ANI. Courts across the country have recognized that the presence of multiple intervening actors who may make conflicting decisions about doing business with the defendant severs the causal chain and forecloses antitrust standing as matter of law.

Even if Plaintiffs had antitrust standing, which they do not, the Complaint fares no better when it comes to pleading the other essential elements of an exclusive dealing claim. For instance, although the Complaint alleges that *Defendants* "lock" health care providers into "*de facto* exclusive contracts," it later asserts that only *ANI* holds the contractual relationships with providers. As a result, the exclusive dealing claim should be dismissed as against Aspirus. And the exclusive dealing theory directed to ANI fails because the Complaint does not plausibly allege the existence of an actionable exclusive arrangement that substantially foreclosed competition in any relevant antitrust market.

Second, Plaintiffs allege a two-way tying arrangement in Count I whereby Aspirus and/or ANI ties outpatient services to general acute care ("GAC") services or vice versa as part of an "all or nothing" contracting strategy with payers. Plaintiffs concede, as they must, that a cognizable tying claim requires Plaintiffs to plead a "tying" product and "tied" product. Compl. ¶ 13(d). Yet the Complaint fails to assign such roles and instead vacillates between outpatient and GAC

services as the tying or tied products. On top of that fatal pleading defect, the Complaint does not identify which Defendant (Aspirus or ANI) imposed the alleged tying or the mechanism allegedly used to tie the services. As the Seventh Circuit recently explained, these kinds of vague allegations cannot state a plausible tying claim. *Siva v. Am. Bd. of Radiology*, 38 F.4th 569, 574, 581 (7th Cir. 2022).

Third, the Complaint alleges two distinct price-fixing theories, both of which are implausible. Plaintiffs first theorize that Aspirus and/or ANI agreed with "horizontal competitors" to prevent the use of reference-based pricing ("RBP"). Compl. ¶¶ 87-88. Missing from the Complaint, however, are well-pleaded allegations of any direct or circumstantial facts that would plausibly establish the existence of such a conspiracy.[1] At most, the Complaint points to unilateral action by Aspirus or ANI (it is unclear which) to "induce" or "encourage" others to not accept RBP. But these allegations, even if accepted as true, fall far short of demonstrating any meeting of the minds between or among competitors to achieve a common goal of harming competition.

As an alternative theory, Plaintiffs make the remarkable allegation that ANI's setting of reimbursement rates among providers in its network amounts to *per se* price-fixing. *Id.* ¶¶ 13 (d), 38, 87. A *per se* pricing-fixing claim has no place here. The *per se* rule applies to a limited category of conduct that facially or almost always tends to harm competition and where courts have significant experience condemning similar arrangements. Such circumstances are not present here. There are no factual allegations that the ANI network—a model followed by health care systems across the country—facially or almost always restricts competition, and there is not one

[1] Plaintiffs' claim also fails to the extent it alleges an agreement between Aspirus and ANI to fix prices because a parent corporation (Aspirus) and its wholly owned subsidiary (ANI) are legally "incapable of conspiring with each other" to violate the antitrust laws. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984).

published decision of which Defendants are aware (let alone a wealth of authority) where a provider network similar to that operated by ANI has been subject to a claim of *per se* horizonal price fixing. The failure to allege a plausible mode of analysis is fatal to this claim and requires Plaintiffs' price-fixing theory to be dismissed in full.

Fourth, Plaintiffs' duplicative claim in Count II for monopolization under Section 2 of the Sherman Act directed to Aspirus should be dismissed because it is predicated on the same implausible exclusive dealing, tying, and price-fixing theories discussed above.

For all of these reasons, the Complaint should be dismissed.

BACKGROUND

Defendant Aspirus is a nonprofit health system based in Wausau, Wisconsin. Compl. ¶ 22. Aspirus, which is recognized as among the nation's leading health care systems, provides direct access to personalized health care to patients in some of Wisconsin's most rural areas where access to health care has been historically limited. *See id*. ¶¶ 22, 62. Defendant ANI is a clinical network of health care providers, including leading primary and specialty care physicians, hospitals, and health care professionals. *Id*. ¶¶ 7, 23. ANI is a wholly owned subsidiary of Aspirus. *Id*. ¶ 23.

Plaintiff Team Schierl Companies is a Stevens Point, Wisconsin-based organization of five businesses in the "automotive, convenience store, quick-serve restaurant, brand promotion, and commercial real estate business sectors." *Id*. ¶ 20. Plaintiff Heartland Farms, Inc. is a "family-owned farm" in Hancock, Wisconsin. *Id*. ¶ 21. Plaintiffs claim that they each provide a "self-insured health plan to its employees and their families." *Id*. ¶¶ 20-21. Although Plaintiffs allege that they purchased medical care "directly from Aspirus," the Complaint does not specify whether Plaintiffs themselves operate the health plans and paid claims submitted to those plans or whether Plaintiffs contracted with a third party to administrate their plans and pay claims, as commonly occurs.

Plaintiffs seek to represent a damages class of direct purchasers of health care services from Aspirus and ANI, "including commercial and self-funded health insurance plans," running from October 11, 2018 to the present. *Id*. ¶¶ 4, 92. Plaintiffs seek monetary damages and allude at points to unspecified injunctive relief. *Id*. at 39 (Prayer for Relief); *see also id*. ¶¶ 1, 98(h). The Complaint contains two Counts: Count I for violation of Section 1 of the Sherman Act and Count II for violation of Section 2 of the Sherman Act. Plaintiffs assert three theories of anticompetitive harm that form the basis for both Sherman Act claims: "exclusive dealing, anticompetitive tying, and collusion" in the form of price-fixing. *Id*. ¶¶ 13, 74-88.

A. Plaintiffs' Exclusive Dealing Claim.

The crux of Plaintiffs' exclusive dealing claim is that ANI's agreements with providers are "*de facto* exclusive contracts" that "lock" local primary and specialty care providers into the ANI network—which allegedly prevents payers (*i.e.*, health plans and insurers) from creating networks of providers that would hypothetically compete against Defendants and drive down prices. *Id*. ¶¶ 13(a)-(b); *see also id*. ¶¶ 74-80. Plaintiffs do not allege that Aspirus (as opposed to ANI) entered into any such "*de facto* exclusive contracts" with providers. *See id*.

Because ANI's provider agreements are not exclusive by their express terms, Plaintiffs resort to allegations that those agreements are "*de facto*" exclusive. *See id*. ¶¶ 8, 13(b), 15, 35, 76. According to the Complaint, ANI providers are permitted to enter into direct contracts with payers regardless of whether those payers have existing contracts with ANI, where the provider first seeks ANI's consent. *Id*. The Complaint does not allege that ANI has ever withheld consent with respect to any particular provider's request to contract with a payer. *See id*. Nonetheless, Plaintiffs allege that the consent requirement disincentivizes ANI providers from separately contracting with payers because doing so could result in a potential breach of their provider agreements and expulsion from the ANI network. *E.g.*, *id*. ¶ 13(b).

The Complaint alleges that ANI providers want to avoid expulsion from ANI's network. That is supposedly because providers would not want to lose access to referrals from ANI's leading primary and specialty physicians, admitting privileges to high quality hospitals, and negotiated reimbursement rates with payers. *See id.* ¶¶ 13(a)-(b), 15, 35, 75, 79. Plaintiffs speculate that the risk of losing these benefits is what effectively (or *de facto*) "locks" providers into their agreements with ANI and thus restricts other payers from assembling competing provider networks. *See id.*

B. Plaintiffs' Tying Claim.

According to the Complaint, both Aspirus and ANI offer a wide range of inpatient GAC services as well as outpatient services. *See id.* ¶¶ 22-23. The Complaint posits two relevant product markets—a necessary predicate for their Sherman Act claims—one for GAC services and another for outpatient services. GAC services are expansively defined as including "a broad group of medical and surgical diagnostic treatment services that include a patient's overnight stay in the hospital." *Id.* ¶ 10(a); *see also id.* ¶ 51. Outpatient care is a catchall for any "medical services that are not inpatient medical services or that do not require an overnight stay." *Id.* ¶ 10(b); *see also id.* ¶ 52. Plaintiffs allege that Aspirus or ANI (it is unclear which) uses "'all or nothing' contractual offers and/or negotiating tactics" to "tie" some or all of this "broad" category of GAC services to some or all outpatient services and vice versa. *Id.* ¶ 13(d); *see also id.* ¶¶ 81-84.

The Complaint defines "anticompetitive tying" as "where a firm with monopoly in one market (the 'tying market') forces buyers to buy produce from that firm in a separate market (the 'tied' market)." *Id.* ¶ 13(d). The Complaint, however, does not identify a so-called "tying market" or a "tied market." *Id.*; *see also id.* ¶¶ 81-84. Instead, the Complaint alleges that because payers that contract with ANI gain access to the entire ANI network, GAC and outpatient services offered through the ANI network are tied. *See id.* ¶¶ 81-84. The Complaint fails to point to any contractual

provision or policy that requires the purported tying, and it is unclear which Defendant (Aspirus or ANI) is supposedly responsible for the alleged tying.

C. Plaintiffs' Two Distinct Price-Fixing Claims.

The Complaint includes two versions of alleged "horizontal price fixing" that Plaintiffs asserts are "illegal *per se*." *Id.* ¶ 38. First, Plaintiffs allege that Aspirus "colluded with [unspecified] competitors in North-Central Wisconsin" to fix pricing for GAC and outpatient medical services. *Id.* ¶¶ 13(f), 88. In support of this theory, Plaintiffs allege that an unidentified "Aspirus executive called a Marshfield Clinic executive to induce Marshfield Clinic to agree not to accept [reference-based pricing ("RBP")]." *Id.* ¶ 88. According to the Complaint, "RBP uses standard cost benchmarks, often based on Medicare reimbursements rates, to establish a cost of care." *Id.* ¶ 86. Plaintiffs allege that the unknown executive told the Marshfield Clinic that RBP "would lower market prices for provider services." *Id.* ¶ 88. The Complaint does not allege how Marshfield Clinic reacted to this purported call, such as whether it agreed to not accept RBP. *Id.* Plaintiffs also allege that Aspirus "sent letters to ANI providers . . . encouraging them to agree not to accept RBP for their services." *Id.* Again, Plaintiffs do not assert that such ANI providers then agreed not to accept RBP. *See id*.

Second, Plaintiffs assert that ANI effectively fixes the prices of outpatient services offered by its providers. *Id.* ¶¶ 13(e), 87. According to the Complaint, ANI negotiates with payers the reimbursement rates that ANI's providers will accept for outpatient services. *Id.* Plaintiffs contend that because ANI providers allegedly require consent from ANI "before it can establish a direct contract with a payer, Aspirus essentially has determined the prices that will be charged by all ANI Providers." *Id.* ¶ 13(e).

LEGAL STANDARD

To survive a challenge to the sufficiency of the pleadings under Federal Rule of Civil Procedure 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While on a Rule 12 motion the Court should "accept all well-plead facts as true and draw reasonable inferences in plaintiffs' favor," *Always Towing & Recovery, Inc. v. Milwaukee*, 2 F.4th 695, 702 (7th Cir. 2021) (affirming dismissal of antitrust claims), "legal conclusions may *not* be considered," *Agnew v. NCAA*, 683 F.3d 328, 334 (7th Cir. 2012) (emphasis added) (same). A complaint that is alleged in "conclusory fashion"—*i.e.*, a pleading that "fails to allege factual allegations supporting [the claims]"—will not survive a motion to dismiss. *Chi. Studio Rental, Inc. v. Ill. DOC*, 940 F.3d 971, 979 (7th Cir. 2019) (affirming dismissal of claims alleged under Section 1 and Section 2 of the Sherman Act).

Rule 12(b)(6) contemplates early dismissal of theories of injury embedded within antitrust claims where such theories are not legally cognizable or supported by well-pleaded factual allegations. *VBR Tours, LLC v. Nat'l R.R. Passenger Corp.*, No. 14-cv-00804, 2015 WL 5693735, at *6-13 (N.D. Ill. Sept. 28, 2015) (dismissing theories for refusal to deal, essential facilities, and exclusive dealing embedded within a Section 2 claim); *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-md-2836, 2019 WL 6977405, at *5-7 (E.D. Va. Dec. 20, 2019) (dismissing claims insofar as they included a theory of damages for purchases of generic Zetia that were barred by the direct purchaser rule in *Illinois Brick*). This comports with the basic goal of Rule 12(b)(6), which is to ensure that, when the allegations of a pleading fail to plausibly suggest any entitlement to relief, "this basic deficiency [is] . . . exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558. Indeed, the Seventh Circuit has held that "[e]nsuring compliance with [the *Twombly* plausibility] standard is particularly important in the

antitrust context so as to avoid 'the potentially enormous expense of discovery in cases with no reasonably founded hope' of success." *Siva*, 38 F.4th at 575; *Ass'n of Am. Physicians & Surgeons, Inc. v. Am. Bd. of Med. Specialties*, 15 F.4th 831, 834 (7th Cir. 2021) (emphasizing the same).

ARGUMENT

I. Plaintiffs Fail to State Any Claim Under Section 1 of the Sherman Act.

A. Plaintiffs' Exclusive Dealing Theory Is Legally Flawed.

Plaintiffs' exclusive dealing theory suffers from multiple fundamental defects. First, Plaintiffs cannot establish that their claimed injuries were proximately caused by any exclusive arrangements, which is a necessary predicate for antitrust standing. 15 U.S.C. § 15(a). That is because the Complaint relies on a two-step hypothetical that, in the absence of ANI's supposedly *de facto* exclusive arrangements, (i) unspecified health care providers may have elected to join payer networks other than those available through ANI, and (ii) payers in Wisconsin would have established or expanded such networks to include non-ANI providers. *See, e.g.*, Compl. ¶¶ 3, 6, 8, 13(b), 15, 17, 33, 71-72. But the harm flowing from this theory turns on the potential decisions of an untold number of physicians, their practices, and insurance providers. *De Atucha v. Commodity Exch., Inc.*, 608 F. Supp. 510, 516 (S.D.N.Y. 1985) (dismissing for lack of antitrust standing where establishing the causal chain between plaintiff's alleged injury and the challenged conduct would require the court to "reconstruct[]" "the actions of innumerable individual decision-makers"). This necessary guesswork elongates the causal chain past the point of no return, rendering Plaintiffs' harm too remote for purposes of antitrust standing as a matter of law. *See Sanner v. Bd. of Trade*, 62 F.3d 918, 926 (7th Cir. 1995) (explaining that to have antitrust standing, the plaintiff must "demonstrate a direct link between the antitrust violation and the antitrust injury" (citation omitted)). This flaw alone dooms Plaintiffs' exclusive dealing claim.

Second, even if Plaintiffs had antitrust standing, the exclusive dealing claim would still fail. An exclusive dealing claim is predicated on a contractual provision that obligates "a firm to obtain its inputs from a single source." *Paddock Publ'ns v. Chi. Tribune Co*., 103 F.3d 42, 46 (7th Cir. 1996) (affirming dismissal of antitrust claim predicated on alleged "exclusive licensing agreements"). This generally requires a plaintiff's pleading to "identify an agreement with a specific person or entity and . . . identify the parts, services, or contracts involved in the alleged exclusive dealing." *JM Comput. Servs., Inc. v. Schlumberger Techs., Inc.*, No. 95-cv-20349, 1996 WL 241607, at *4 (N.D. Cal. May 3, 1996) (dismissing for failure to plead these "essential" facts). Courts do not, however, automatically "condemn[] exclusive dealing [contracts]" because they are widely viewed to have "procompetitive benefits, such as increasing allocative efficiency, reducing adverse selection and moral hazard barriers to deals, and preventing free-riding." *VBR Tours*, 2015 WL 5693735, at *12 (citations and internal quotation marks omitted) (dismissing). Indeed, it is well-established that "exclusive dealing arrangements violate antitrust laws only when they foreclose competition in a substantial share of the line of commerce at issue[.]" *Republic Tobacco Co. v. N. Atl. Trading Co*., 381 F.3d 717, 737-38 (7th Cir. 2004) (citing *Tampa Elec. Co. v. Nashville Coal Co*., 365 U.S. 320, 320-27 (1961)).

Under this standard, Plaintiffs' exclusive dealing claim is not viable even if Plaintiffs had the required antitrust standing. Specifically, Plaintiffs have not alleged that *Aspirus* engaged in any exclusive contracting. For this reason, any exclusive dealing claim directed to Aspirus should be dismissed. As to ANI, the Complaint is devoid of factual allegations that would plausibly establish the type of exclusivity that creates substantial foreclosure to competitors and, as a result, is actionable under the antitrust laws. Each of these shortcomings is addressed below.

1. Plaintiffs Lack Antitrust Standing for Their Exclusive Dealing Claim.

Plaintiffs lack antitrust standing for their exclusive dealing claim because that claim is

premised on speculation that but for "ANI's exclusive dealing arrangements," non-party providers would have independently decided to join other, competing payer networks that hypothetically could have existed. *E.g.*, Compl. ¶¶ 6, 8, 10(b). This daisy-chain theory fails to satisfy the proximate causation requirement for antitrust standing.

The Clayton Act provides a private right of action for parties that have been injured "by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). Despite this broad language, the Supreme Court has explained that "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an anti-trust violation." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters* ("*AGC*"), 459 U.S. 519, 536 (1983). Instead, "the Supreme Court has required the application of certain doctrines to restrict the scope of relief under [the federal antitrust laws]," and "[o]ne of these restrictive doctrines is that of antitrust standing, or the requirement that a plaintiff demonstrate 'a direct link between the antitrust violation and the antitrust injury.'" *Sanner*, 62 F.3d at 926-27 (quoting *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co*., 998 F.2d 391, 395 (7th Cir. 1993)). The antitrust standing analysis is akin to the "common-law tort limitation of proximate cause," and involves an "analysis of 'the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.'" *Sanner*, 62 F.3d at 927 (collecting cases); *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, No. 09-cv-3690, 2015 WL 3988488, at *17 (N.D. Ill. June 29, 2015) (noting that "the directness inquiry in antitrust-standing law is predicated on the well-known concept of proximate causation").

The Supreme Court's *AGC* decision identified six factors that the Court should consider to assess whether Plaintiffs have antitrust standing, including: "(1) the causal connection between the alleged anti-trust violation and the harm to the plaintiff; (2) improper motive; (3) whether the

injury was of a type that Congress sought to redress with the antitrust laws; (4) the directness between the injury and the market restraint; (5) the speculative nature of the damages; [and] (6) the risk of duplicate recoveries or complex damages apportionment." *Fisher v. Aurora Health Care, Inc.*, 558 F. App'x 653, 655 (7th Cir. 2014) (collecting cases). Where, as here, a plaintiff fails to establish the requisite direct, causal relationship necessary for antitrust standing noted in the first *AGC* factor above, a court "not only may—but [it] must—reject [any request for relief] under Rule 12(b)(6)."[2] *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 449 (6th Cir. 2007).

For their exclusive dealing claim, Plaintiffs allege injuries in the form of increased health plan costs flowing from ANI's purportedly exclusive contracts with providers. Compl. ¶¶ 80, 90-91.[3] ANI's agreements allegedly prevent payers, such as self-funded plans and/or large insurance companies, from assembling a network of providers to compete against ANI. *E.g.*, *id.* ¶¶ 6, 11, 36, 89. This theory, however, hinges on the independent decisionmaking of third parties—namely, unnamed and innumerable providers and health insurance providers. Indeed, Plaintiffs' theory requires the Court to accept that but-for ANI's alleged requirement exclusivity, some number of providers would have decided to join other hypothetical provider networks that may have been created (or none at all) instead of ANI, and then payers would have created a network of non-ANI providers. *Id.* ¶ 80. This causal chain is too attenuated for antitrust standing due to the presence

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[2] Antitrust standing is appropriately challenged on the pleadings. *See generally AGC*, 459 U.S. 519 (affirming dismissal of complaint at the pleading stage for lack of antitrust standing); *Fisher*, 558 F. App'x at 654-56 (affirming dismissal with prejudice for failure to plead a set of facts showing that plaintiff had antitrust standing for its Section 1 and 2 claims); *Midwest Gas Servs. v. Ind. Gas Co.*, 317 F.3d 703, 710 (7th Cir. 2003) (affirming dismissal of certain claims for lack of antitrust standing); *McGarry & McGarry, LLC v. Bankr. Mgmt. Sols.*, 937 F.3d 1056, 1065 (7th Cir. 2019) (same).

[3] The Complaint includes the bare assertion that the alleged conduct also caused a "reduction in quality and choice." Compl. ¶ 91. There are no factual allegations to substantiate these legal conclusions and they should not be afforded any weight. *Agnew*, 683 F.3d at 334 (stating that "legal conclusions may not be considered").

of so many independent decisionmakers between the claimed injury and the alleged conduct. This multistep theory of causation cannot satisfy the first *AGC* factor precisely because it would require the reconstruction of "actions of innumerable individual decisionmakers." *De Atucha*, 608 F. Supp. at 516 (granting a motion to dismiss based on lack of antitrust standing); *Supreme Auto Transp. LLC v. Mittal*, 238 F. Supp. 3d 1032, 1040 (N.D. Ill. 2017) (dismissing state law claims under *AGC* where "[a]lthough plaintiffs [made] conclusory assertions about causal connections and the directness of the injury, the complaint [did] not acknowledge the role of interceding parties" who broke the causal chain between plaintiffs' alleged injury and the challenged conduct); *Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419, 2014 WL 1280464, at *10 (S.D.N.Y. Mar. 28, 2014) (granting motion to dismiss for lack of antitrust standing where the causal chain involved "many independent factors" including decisions by consumers).

Multiple courts have declined to permit plaintiffs to advance antitrust claims, like Plaintiffs' exclusive dealing claim here, that are predicated on causal chains that depend on the independent decision-making of third parties. In *In re Aluminum Warehousing Antitrust Litigation*, for instance, the court observed that plaintiffs' theory of injury required an "indirect chain of causation" that included multiple steps and decisions by independent actors. 520 F. Supp. 3d 455, 485-86 (S.D.N.Y. 2021). Specifically, in that case, the plaintiffs' theory posited that because of steps the defendants took to allegedly manipulate the amount of aluminum in warehouses, market prices of aluminum went up, which in turn distorted a benchmark price that was later embedded into transactions as a price component. *Id.* Even assuming all of the links in this chain could have been forged, the court concluded that the "independent decisions by non-defendant[s]" to charge prices that may or may not incorporate the alleged inflated benchmark price broke "the chain of causation between defendants' actions and plaintiffs' injury." *Id.* at 486

(citations omitted); *see also Reading Indus., Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 13 (2d Cir. 1980) (finding antitrust standing lacking where plaintiff's theory depended on a causal chain that included "the actions of innumerable individual decisionmakers").

Like in *Aluminum Warehousing*, Plaintiffs' exclusive dealing theory depends on the individual decisions of non-parties (a combination of health careproviders and health plan providers) that sever the chain of causation between the challenged conduct (ANI's allegedly exclusive contracts) and Plaintiffs' alleged injury (overcharges to Plaintiffs' health plans). For example, Plaintiffs would not be able to establish their exclusive dealing claim if some number of providers would have independently decided to join ANI, or if health plan providers would not have created networks that omitted all ANI providers. The presence of so many of these variables in the middle of the causal chain is what renders the claimed conduct too remote to the harm. Accordingly, Plaintiffs' exclusive dealing claim should be dismissed for lack of antitrust standing. *NicSand*, 507 F.3d at 449; *Hatchett v. Henry Schein, Inc.*, No. 19-cv-83, 2020 WL 733834, at *7 (S.D. Ill. Feb. 13, 2020) (applying *Aluminum Warehousing* and dismissing where plaintiff failed to plausibly allege a causal connection between the alleged injury and the challenged conduct).

The result does not change if Plaintiffs attempt to characterize their harm as stemming from the foreclosure of "rival providers" instead of payers, as the Complaint occasionally suggests in passing. *See* Compl. ¶ 36. That is because the foreclosure of "rival providers" would cause direct harm to those rival providers, who would then be the "parties who can most efficiently vindicate the purposes of the antitrust laws" and those "rival providers" would have antitrust standing—not Plaintiffs. *Med. Consultants, Ltd. v. Iroquois Mem'l Hosp.*, No. 07-cv-2083, 2008 WL 2477464, at *5 (C.D. Ill. June 16, 2008) (dismissing on this basis); *Chi. Studio Rental*, 940 F.3d at 978 (affirming dismissal of antitrust claims). In other words, Plaintiffs' claimed injuries would be

indirect by definition because they would flow from the more directly harmed "rival providers." This theory would likewise conflict with long-standing antitrust standing principles. *AGC*, 459 U.S. at 535 (explaining limits in antitrust standing requirements are appropriate because Congress did not intend to create a remedy for "every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." (quoting *Blue Shield of Va. v. McCready*, 457 U.S. 465, 476 (1982)); *McGarry*, 937 F.3d at 1065.

Plaintiffs' exclusive dealing claim thus fails no matter how Plaintiffs articulate their attenuated theory of harm.

2. *Plaintiffs Have Not Alleged Any Exclusive Dealing Contract Between Aspirus and Health Care Providers.*

Even if Plaintiffs actually had antitrust standing, the gravamen of their exclusive dealing theory is directed to ANI and *not* co-defendant Aspirus. In particular, the Complaint alleges that ANI's provider agreements "lock" "the vast majority of health care providers in the region into exclusive relationships with ANI," which allegedly prevents the formation of payer networks that would hypothetically compete with ANI. *E.g.*, Compl. ¶¶ 6-8. Fatal to Plaintiffs' exclusive dealing claim directed to Aspirus, Plaintiffs have not alleged the existence of any contractual arrangement between Aspirus and health care providers. *E.g.*, *id.* ¶ 13(b) (alleging that "*ANI* imposes *de facto* exclusive contracts that lock ANI Providers into exclusive deals *with ANI* and foreclose the ANI Providers from contracting with payers to create networks" (emphasis added)). For example, the Complaint does not allege that Aspirus entered into *any* contracts with health care providers—including any such contractual arrangements that restrained "price competition for health care services." *Id.* ¶ 2. Instead, the Complaint centers on "*ANI* exclusive contracts," *id.* ¶ 13(b) (emphasis added)—or contracts between ANI and health care providers—that allegedly prevented the formation of hypothetical payer networks to compete with ANI, *id.* ¶¶ 75, 80.

The failure to allege that Aspirus was a party to any sort of exclusive dealing contract requires dismissal of Plaintiffs' claim against Aspirus. In *In re Dealer Management Systems Antitrust Litigation*, the court dismissed the plaintiffs' exclusive dealing claim to the extent the plaintiffs failed to plead the existence of a contract between the defendant and car dealers that required such car dealers to purchase and use the defendant's Dealer Management System exclusively, "which is necessary to state a claim for exclusive dealing." 360 F. Supp. 3d 788, 799-801 (N.D. Ill. 2019). Similarly, in *VBR Tours*, the court dismissed the plaintiff's exclusive dealing theory as "implausible" because, like here, plaintiff failed to identify an exclusive contract between the defendants (*i.e.*, Amtrak and a tour operator that allegedly should have competed with plaintiff). 2015 WL 5693735, at *12. The same result is warranted with respect to Plaintiffs' exclusive dealing claims against Aspirus.

3. There Are No Well-Pleaded Facts Plausibly Establishing ANI's Provider Agreements Amount to Exclusive Contracts That Substantially Foreclosed Competition.

Plaintiffs' exclusive dealing claim focused on ANI still fails because the Complaint is devoid of facts to plausibly establish (i) that ANI's contracts with providers amounted to actionable exclusive arrangements, or (ii) that those contracts substantially foreclosed other payer networks or individual providers from entering the market. *VBR Tours*, 2015 WL 5693735, at *12 (dismissing where, like here, "[p]laintiff's theory [was] implausible for two reasons . . . there [was] no exclusivity" and plaintiff failed to show that defendants' agreement "forclos[ed] competition" "in a substantial share of the line of commerce at issue").

a. Plaintiffs Do Not Allege Any Type of Exclusivity in ANI's Provider Agreements That Is Actionable Under the Sherman Act.

As noted above, to state an exclusive dealing claim Plaintiffs must first plausibly show the existence of an exclusive contract, which is a "contract [that] obliges a firm to obtain its inputs

from a single source." *Paddock*, 103 F.3d at 46. Here, Plaintiffs allege that ANI enters into "exclusive contracts" with providers but fails to plausibly allege how those contracts require any "exclusive dealing." Compl. ¶¶ 13, 74-80. For example, Plaintiffs do not point to any specific provision in ANI's provider contracts that demands unconditional exclusivity. On the contrary, Plaintiffs concede that ANI's provider contracts *permit* providers to enter into contracts with payers that are in or outside of ANI's network, as long as providers obtain ANI's consent. *Id.* ¶ 76. Missing from the Complaint are any well-pleaded factual allegations that ANI has ever withheld such consent to stifle competition. *See id*. Instead, Plaintiffs assert in conclusory fashion that "Aspirus . . . withholds consent for ANI members to enter into contracts with payers that do not contract with Aspirus." *See id*. But, as the Seventh Circuit has explained, merely "[s]aying so is not enough: [Plaintiffs] must instead plead facts making it plausible" that ANI has unreasonably withheld its consent to restrain competition in a relevant antitrust market. *See Siva*, 38 F.4th at 578 (affirming dismissal of tying claim where, *inter alia*, plaintiff failed to plausibly allege the tying of two distinct and separate products); *see also Iqbal*, 556 U.S. at 681 (explaining that conclusory allegations are "not entitled to be assumed true" at the pleading stage).

As a result, Plaintiffs are left only with their amorphous theory that ANI's provider contracts "operate as perpetual *de facto* exclusive commitments." Compl. ¶ 79. Plaintiffs allege that providers are "*de facto*" "locked" into exclusive contracts with ANI because exiting the contracts *may* "risk" providers "losing access to the ANI referral network, Aspirus admitting privileges, and access to ANI's favorable reimbursement rates." *Id.* But Plaintiffs do not allege that any provider has ever actually lost these privileges upon exiting a contract with ANI. This speculative theory of harm to providers is simply insufficient to establish plausibly the essential element of exclusivity needed for an exclusive dealing claim. *Twombly*, 550 U.S. at 555 ("Factual

allegations must be enough to raise a right to relief above the speculative level.").

Equally implausible is Plaintiffs' assertion that because Aspirus or ANI "force" or "coerce" providers to sign network agreements, those agreements are thus "effectively" exclusive arrangements. *See* Compl. ¶¶ 8, 13(a), 13(c), 15. As an initial matter, there are no well-pleaded factual allegations that plausibly support the inference that any provider was forced to deal with Aspirus or ANI. *Id.* ¶¶ 74-80. Nor would such allegations, if they were actually made, cure Plaintiffs' failure to plead facts plausibly showing that the challenged provider agreements themselves create the claimed "*de facto*" exclusivity in operation.[4] *Id*. ¶¶ 15, 35, 75.

In short, the Complaint does not back up its conclusory allegations with facts that would suggest the claimed "*de facto* exclusivity" exists and operates in the way Plaintiffs' hypothesize. Without such support, the exclusive dealing theory against ANI cannot proceed. *VBR Tours*, 2015 WL 5693735, at *12 (dismissing exclusive dealing claim where "there [was] no exclusivity").

b. There Is No Support for the Legal Conclusion that ANI's Conduct <u>Substantially Foreclosed Competition in any Relevant Market</u>.

There are other pleading defects in Plaintiffs' exclusive dealing allegations. Pleading exclusivity is not enough for an antitrust claim; rather, a plaintiff must also plead facts to show that the exclusivity caused substantial foreclosure of competitors in a relevant market. *VBR Tours*, 2015 WL 5693735, at *12-13 (dismissing where plaintiff failed to plausibly plead substantial foreclosure); *see also In re Keurig Green Mt. Single-Serve Coffee Antitrust Litig*., 383 F. Supp. 3d 187, 234 (S.D.N.Y. 2019) (nothing that "a plaintiff 'must allege as a threshold matter a substantial

[4] Plaintiffs further seek to prop up their allegations of exclusivity by claiming that a sample of ANI affiliated physician practices shows that those practices do not discount as much as Plaintiffs would like. Compl. ¶ 78. Plaintiffs conflate concepts here too. Allegations of high prices do not themselves support the plausible inference that ANI's provider agreements are "effectively" exclusive arrangements.

foreclosure of competition in the relevant market'" (citation omitted)).

Plaintiffs here posit that ANI's claimed exclusivity with providers substantially foreclosed competition in the alleged markets for GAC and outpatient services. *E.g.*, Compl. ¶ 74. Less clear is who or how any entity was foreclosed from the market because of the alleged exclusive dealing. *See id*. ¶¶ 74-80. While long on speculation, the Complaint contains no well-pleaded factual allegations that any payer, provider, or patient was forced to take, or were prohibited from taking, any action due to ANI's contracts with providers. *Id*. Specifically, Plaintiffs do not allege any facts plausibly showing that ANI's provider contracts: (i) precluded any specific payer from forming networks that favor, or direct patients to, other provider networks over ANI; (ii) forced any provider, patient, or employer either to purchase any plan that included, or to use, Aspirus or ANI's facilities or services; or (iii) forced any competitor to do anything differently affecting the cost or access to services, among other things. *Id*. Without these essential allegations, "there are no facts that allow the [C]ourt to evaluate the effect of the [alleged] exclusive dealing arrangements." *Eastman v. Quest Diagnostics, Inc*., 724 F. App'x 556, 558 (9th Cir. 2018) (dismissing where plaintiffs similarly failed to allege, *inter alia*, how the purportedly exclusive contracts impacted the defendant's competitors any relevant market); *see also Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) (explaining that exclusive arrangements are "cause for antitrust concern" only where plaintiff can show that the arrangement "is likely to keep at least one significant competitor of the defendant from doing business in a relevant market" and "that the probable (not certain) effect of the exclusion will be to raise prices above (and therefore reduce output below) the competitive level, or otherwise injure competition").

Instead of including the necessary allegations to support an exclusive dealing claim, the Complaint falls back on allegations that foreclosure should be based on Aspirus and ANI's

respective market shares in the alleged GAC and outpatient markets. Compl. ¶ 35 (alleging that ANI contracts "prevent payers from accessing a substantial share of the Outpatient Market—at least 75%"); *id*. ¶ 36 (alleging that Aspirus's market share of 65% of the GAC market is equivalent to the market share rival providers are foreclosed from). But even accepting these market shares as true, they do not represent the incremental amount of market share that other payers or out-of-network providers were foreclosed from *because of* the alleged exclusive dealing arrangements. *Id.* Put simply, the lack of any well-pleaded factual allegations concerning the degree of foreclosure due to the alleged exclusivity is fatal to the exclusive dealing claim.

B. The Complaint Does Not Plead the Essential Elements of a Tying Claim.

The Complaint attempts to allege a tying arrangement whereby Aspirus and/or ANI (it is unclear which) ties some unspecified outpatient services to its GAC services or vice versa as part of an "all or nothing" contracting strategy with payers. *E.g.*, Compl. ¶¶ 10(d), 81-84. The failure to specify which products are tying or tied is fatal to the tying claim and requires its dismissal.

A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). The Seventh Circuit has explained that "many [ties] 'are fully consistent with a free, competitive market'" and are "illegal only when the seller 'exploit[s] . . . its control over the tying product to force the buyer into the purchase of a tied product' and in so doing 'coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market." *Siva*, 38 F.4th at 573 (collecting cases). To state a claim for tying, Plaintiffs must plead facts plausibly showing that: "(1) the tying arrangement is between two distinct products or services, (2) the defendant has sufficient economic power in the tying market to appreciably restrain free competition in the market for the tied

product, and (3) a not insubstantial amount of interstate commerce is affected."[5] *Ass'n of Am. Physicians & Surgeons, Inc. v. Am. Bd. of Med. Specialties*, No. 14-cv-02705, 2020 WL 5642941, at *4 (N.D. Ill. Sept. 22, 2020), *aff'd*, 15 F.4th 831 (7th Cir. 2021).

As a threshold requirement, a tying claim requires that one product be identified as the tying product and another, separate product be identified as the tied product. The Complaint acknowledges as much. Compl. ¶ 13(b) (alleging that "anticompetitive tying is where a firm with a monopoly in one market (the 'tying' market) forces buyers to buy products from that firm in a separate market (the 'tied' market)"). Despite this bedrock requirement, the Complaint fails to assign such roles. Nor does the Complaint identify which Defendant (Aspirus or ANI) is responsible for such tying or the contractual mechanism used to effectuate the alleged tying. Instead, Plaintiffs assert that some unspecified GAC service or services—which allegedly "consist[] of a *broad* group of medical and surgical diagnostic and treatment services," Compl. ¶ 10(a) (emphasis added)—is somehow tied to an outpatient care service or services—which are defined as all services that "are not inpatient medical services or that do not require an overnight stay," *id.* ¶ 10(b). The Complaint does not allege what services within these broad categories are the tying service and what services are tied, or the mechanism(s) by which any tie is allegedly effectuated. Instead, the Complaint vacillates between the categories of services and references them interchangeably as tying and tied in conclusory fashion.

For example, the Complaint alleges that "Aspirus" (it is unclear which Defendant) "uses its dominant market power in the Outpatient Market to force [payers] to accept [some unidentified] services in the GAC Market." *Id.* ¶ 83. But, on the other hand, Plaintiffs also assert that "Aspirus"

[5] Plaintiffs must allege sufficient facts to plausibly establish these threshold elements even if Plaintiffs are asserting their tying claim under a *per se* theory, as they contend. Compl ¶ 38; *see also Ass'n of Am. Physicians & Surgeons,* 2020 WL 5642941, at *4.

(again, it is unclear which entity) "uses its market power in the GAC market . . . to force payers to accept . . . [some unidentified] Outpatient Services." *Id.* ¶ 13(d). The Complaint fails to allege (i) which Defendant (Aspirus or ANI) allegedly ties any such service or services within these categories; (ii) any contractual provision or other conduct that would require the tying of any such service or services; and (ii) whether payors (or their insureds) must pay for any specific GAC or outpatient services that are unwanted or unrequired. *See id.* ¶¶ 81-84. Without these essential allegations, Defendants (and the Court) simply do not have the requisite notice of the challenged conduct. Fed. R. Civ. P. 8(a)(1); *see also St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 625 (7th Cir. 2007) (explaining that "a district court should dismiss a complaint if 'the factual detail . . . [is] so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8'").

In *Siva*, the Seventh Circuit recently underscored the importance of dismissal in this precise circumstance where a plaintiff omitted the requisite factual allegations concerning the claimed tying agreement in their complaint. *E.g.*, *Siva*, 38 F.4th at 575. In affirming the dismissal of a tying theory in that case, the Court of Appeals admonished that "[e]nsuring compliance with [the *Twombly* plausibility] standard is particularly important" in this context "so as to avoid 'the potentially enormous expense of [antitrust] discovery in cases with no reasonably founded hope' of success." *Id.* at 575.

Siva is not an outlier. It is not at all unusual for a court to dismiss a tying claim where, as here, a complaint is similarly short on well-pleaded factual allegations. For example, in *Association of American Physicians & Surgeons*, the plaintiff, Association of American Physicians & Surgeons, Inc. ("AAPS"), alleged that the defendant, American Board of Medical Specialties ("AMBS"), conspired with "health insurers and hospitals" to tie AMBS's certification program to

access to health plan networks and medical staff privileges at hospitals. 2020 WL 5642941, at *1-2, 4-5; *see id.* at *4 (explaining that AAPS alleged that "AMBS induc[ed] insurance companies and hospitals to require or 'tie' [AMBS's certification] as a condition of being in-network or on staff"). The court dismissed AAPS's tying theory because—as is the case here—it was "unclear [from the pleadings] which products or services are 'tying' or 'tied.'" *Id.* at *5. Absent any clear allegations about which products were tied and how, the court held the "tying claim [could not] proceed" past the motion-to-dismiss stage. *Id.* The Seventh Circuit agreed that "[p]lain and simple, . . . AAPS's allegations [were] conclusory and without factual support." *Ass'n of Am. Physicians & Surgeons*, 15 F.4th at 834; *see also Wholesale All., LLC v. Express Scripts, Inc.*, 366 F. Supp. 3d 1069, 1079 (E.D. Mo. 2019) (dismissing where plaintiff failed to plead "the existence of an explicit agreement conditioning the purported tying product . . . on the purchase of the purported tied product"); *Adelphia Recovery Tr. v. Bank of Am., N.A.*, 646 F. Supp. 2d 489, 494 (S.D.N.Y. 2009) (dismissing where plaintiff failed to "identify some specific tying"). Plaintiffs' tying claim similarly lacks in the requisite detail and it should be dismissed as a result.

The failure to ascribe tying and tied product designations has repercussions for all of the other elements in Plaintiffs' tying claim. That is, Plaintiffs cannot plausibly show that any Defendant "has sufficient economic power in [any] *tying market* to appreciably restrain free competition in the market for the *tied product*," or that "a not insubstantial amount of interstate commerce [was] affected" by such tying. *Ass'n of Am. Physicians & Surgeons*, 2020 WL 5642941, at *4 (emphasis added). Plaintiffs' tying claim should be dismissed for this reason as well.

C. The Complaint Does Not Allege a Claim for Horizontal Price-Fixing.

Equally meritless is Plaintiffs' attempt to state a claim for horizontal price fixing. Plaintiffs allege two distinct theories of *per se* price-fixing. First, Plaintiffs assert that "Aspirus [it is unclear which Aspirus entity or both] colluded with competitors in North-Central Wisconsin, including

Marshfield Clinic . . . to prevent price competition for health care services." Compl. ¶¶ 13(f), 88. Second, Plaintiffs allege that Aspirus "uses ANI" to "fix" pricing through ANI's negotiations with payers of reimbursement rates that its providers will accept for their services. *Id.* ¶¶ 13(e), 87. Based on the Complaint's allegations, both theories fail to supply a plausible basis for a *per se* price-fixing claim.

To state a claim for horizontal price-fixing, Plaintiffs must plausibly allege the existence of an agreement (or conspiracy) among competitors to fix prices. *Obiefuna v. Hypotec, Inc.*, 451 F. Supp. 3d 928, 944 (S.D. Ind. 2020) (finding that "[h]orizontal-price fixing exists only when there is a conspiracy between or among two or more competitors") (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007)). Pleading such an agreement requires that a complaint plausibly allege facts showing that the "conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Copperweld*, 467 U.S. at 771 (citing *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)); *Omnicare, Inc. v. UnitedHealth Grp., Inc.,* 629 F.3d 697, 706 (7th Cir. 2011) (stating that a conspiracy requires facts that demonstrate that the conspirators "had a conscious commitment to a common scheme designed to achieve an unlawful objective"). In other words, the complaint must include "enough factual matter (taken as true) to suggest that [a price-fixing] agreement was made." *Twombly*, 550 U.S. at 556. Plaintiffs have not met this threshold pleading burden here.

With respect to their first theory, Plaintiffs do not allege that Aspirus or ANI agreed (or shared a "unity of purpose," "common design and understanding," or a "meeting of [the] minds") with any competitor to fix prices. *Copperweld*, 467 U.S. at 771. At most, Plaintiffs contend that Aspirus or ANI took the unilateral action of contacting the Marshfield Clinic and ANI providers regarding RBP. Compl. ¶ 88. The Complaint does not allege that the Marshfield Clinic or any

ANI provider reciprocated with an agreement to reject RBP in response to Aspirus, Inc. or ANI's alleged overture. *Id*. (referring to the letters sent to ANI providers as "encouragement to agree not to accept RBP"). In short, Plaintiffs' horizontal price-fixing claim fails because there are no plausible allegations of a meeting of the minds and a specific intent by two or more competitors to fix prices. *Obiefuna*, 451 F. Supp. 3d at 944-46 (dismissing horizontal price-fixing claim for failure to plausibly allege the existence of an agreement between two competitors to fix prices).

Plaintiffs' second price-fixing theory fares no better. According to the Complaint, ANI's negotiation of reimbursement rates with payers for health care services amounts to *per se* price-fixing. Compl. ¶¶ 13(d), 87; *see also* ¶ 38 (alleging "horizontal price fixing" that is "illegal *per se*"). However, the *per se* framework applies in limited instances and only to a specific category of conduct that "facially appears to be one that would always or almost always tend to restrict competition and decrease output." *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984); *Bunker Ramo Corp. v. United Bus. Forms, Inc.*, 713 F.2d 1272, 1284 (7th Cir. 1983) (cautioning "against over-zealous applications of the *per se* doctrine" and noting "a judicial reluctance to extend its use"). The *per se* rule is only applied where courts have had "considerable experience with that type of conduct and application of the rule of reason has inevitably resulted in a finding of anticompetitive effects." *Bunker Ramo*, 713 F.2d at 1284 (collecting cases). And the Seventh Circuit has explained that, like here, a plaintiff's "attachment of the *per se* label is simply inadequate in itself to sustain" a price fixing claim. *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1108 (7th Cir. 1984) (affirming dismissal of purported antitrust claim that plaintiff attempted to plead as a *per se* offense).

Notwithstanding the nationwide prevalence of provider networks, such as the ANI network, these networks have not historically been subject to *per se* treatment for alleged price

fixing due to how they collectively negotiate with payers. Defendants are unaware of any reported case where a clinically integrated network of health care providers similar to ANI was found to have been subject to *per se* treatment under the Sherman Act for alleged price fixing.

At most, any alleged pricing restraint is only ancillary to ANI's core purpose of delivering direct access to personalized health care. *See* Compl. ¶ 22 (discussing Aspirus's "wide range" of premier health care services). But courts have found that such ancillary restraints "cannot be deemed unlawful *per se*," which means that Plaintiffs' *per se* claim should be dismissed. *Deslandes v. McDonald's USA, LLC*, No. 17-cv-4857, 2018 WL 3105955, at *7-8 (N.D. Ill. June 25, 2018) (dismissing *per se* claim because the court found that the restraint was ancillary). The failure to allege an antitrust claim under a plausible mode of analysis (*i.e.*, the *per se* rule) is dispositive of Plaintiffs' price-fixing claim directed to ANI at the pleadings. *See id.*; *Olean Wholesale Grocery Coop., Inc. v. Agri Stats, Inc.*, No. 19-cv-8318, 2020 WL 6134982, at *8 (N.D. Ill. Oct. 19, 2020) (dismissing "per se allegation" because it was "conclusory" and not plausible); *Ass'n of Am. Physicians & Surgeons*, 2020 WL 5642941, at *5-6 (dismissing amended complaint with prejudice where plaintiff did not plausibly allege tying claim under either *per se* or rule of reason frameworks); *see also In re Zetia (Ezetimibe) Antitrust Litig*., 400 F. Supp. 3d 418, 423 (E.D. Va. 2019) (dismissing with prejudice plaintiffs' claim that an alleged "reverse payment" patent settlement agreement could form the basis for a *per se* offense).

II. Plaintiffs' Duplicative Section 2 Claims Also Fails.

Plaintiffs' claim for monopolization under Section 2 of the Sherman Act in Count II is entirely duplicative of Count I and fails for the same reasons. Compl., Count II. To state a monopolization claim, a plaintiff "must plausibly allege (1) that [a single Defendant] has achieved monopoly power in a relevant market and (2) that it achieved monopoly power through anti-competitive or exclusionary conduct." *Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178, 2011

WL 7324582, at *12 (W.D. Wis. June 7, 2011). Specifically, a plaintiff is required to allege the acquisition of monopoly power through some cognizable theory of anticompetitive harm. *Id*. The claim must be dismissed if the complaint falls short in plausibly showing such anticompetitive conduct because "growth or development due to superior product or business acumen" is not unlawful. *Mitsubishi Elec. Corp. v. IMS Tech., Inc*., No. 96-cv-499, 1997 WL 630187, at *5 (N.D. Ill. Sept. 30, 1997) (quoting *United States v. Grinnell Corp*., 384 U.S. 563, 571 (1966)). Indeed, "[a]n allegation of market share alone is insufficient" "to survive a motion to dismiss." *Id.*

Here, the monopolization claim should be dismissed because Plaintiffs have not included any plausible allegations that any Defendant achieved monopoly power through anticompetitive means. The Complaint alleges that "Aspirus" (it is unclear which Defendant or both) "maintained and/or gained power" "[t]hrough the alleged Scheme"—which is defined as the exact same conduct underlying the Section 1 claim in Count I. Compl. ¶ 13; *see also id*. ¶ 105 (predicating the Section 1 claim on the same purported "Scheme"). But, as explained above, Plaintiffs' exclusive dealing, tying, and price-fixing theories (underlying both Counts) are not viable and thus cannot form the basis for a monopolization claim. As a consequence, Plaintiffs' monopolization claim similarly fails. *VBR Tours, LLC*, 2015 WL 5693735, at *15 (concluding that Section 1 and 2 claims based on theories of refusal to deal, essential facilities, and exclusive dealing failed for the reasons where the "factual allegations remain the same" for both claims); *see also In re Zinc Antitrust Litig*., 155 F. Supp. 3d 337, 383 (S.D.N.Y. 2016) (dismissing Section 2 claim that "rel[ied] on the same allegations and theories" as the plaintiffs' Section 1 claim).

Plaintiffs' Section 2 claim should also be dismissed to the extent that it asserts a conspiracy to monopolize among "Aspirus and its controlled subsidiaries." Compl. ¶ 109. As an initial matter, the Complaint only refers to a parent-subsidiary relationship with respect to Aspirus and

ANI. *Id.* ¶ 23. The pleadings do not describe any other "controlled subsidiaries." As a result, the claim fails under Rule 8 because the allegations do not "give the defendant[s] fair notice of what the . . . claim is," whom the claim is being asserted against, "and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (citation omitted).

Even if the Court were to infer that "Aspirus and its controlled subsidiaries" refers to Aspirus and ANI, Plaintiffs' Section 2 claim would still fail under the Supreme Court's decisions in *Copperweld*, *American Needle*, and their progeny. The Supreme Court has long held that a parent corporation and its wholly owned subsidiary are legally "incapable of conspiring with each other" to violate the antitrust laws. *See Copperweld*, 467 U.S. at 771. The Court explained that "although a parent corporation and its wholly owned subsidiary are 'separate' for the purposes of incorporation or formal title, they are controlled by a single center of decisionmaking and they control a single aggregation of economic power." *Am. Needle v. NFL*, 560 U.S. 183, 194 (2010). And, as such, the Court reasoned that "joint conduct by two such entities does not 'depriv[e] the marketplace of independent centers of decisionmaking.'"[6] *Id.*

Here, Plaintiffs allege that ANI is a wholly owned subsidiary of Aspirus, Inc. Compl. ¶ 23. The Complaint does not suggest that Aspirus and ANI were separate decisionmakers such that any joint conduct between them would deprive the relevant markets of independent decisionmaking. Accordingly, Plaintiffs' Section 2 claim should be dismissed to the extent it

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[6] Although *Copperweld* and *American Needle* address conspiracies to restrain trade in violation of Section 1, courts in this Circuit have applied these precepts to conspiracy to monopolize claims. *E.g.*, *In re Dealer Mgmt. Sys. Antitrust Litig.*, No. 18-cv-864, 2018 WL 6629250, at *11 (N.D. Ill. Oct. 22, 2018); *see also Jones v. Varsity Brands, LLC*, No. 22-cv-02892, 2022 WL 3042065, at *6 (W.D. Tenn. Aug. 1, 2022) ("It follows that the rationale in *Copperweld*, which considers a parent company and its wholly-owned subsidiaries as a single enterprise, may also apply to 'foreclose a claim of conspiracy to monopolize under section 2 of the Sherman Act' if those are the only entities alleged to have conspired.").

asserts that Aspirus and ANI formed a conspiracy to monopolize. *H.R.M., Inc. v. Tele-Commc'ns, Inc.*, 653 F. Supp. 645, 648 (D. Colo. 1987) (dismissing conspiracy to monopolize claim pursuant to the teachings of *Copperweld*).

CONCLUSION

For these reasons, Plaintiffs' Complaint should be dismissed in its entirety.

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Respectfully submitted,

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