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' REPLY MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' Opposition (Dkt. No. 34) employs various tactics to create the illusion that the Complaint plausibly alleges actionable antitrust claims. None make it so. Plaintiffs urge the Court to rubber stamp their exclusive dealing, tying, and price-fixing claims because "[c]ourts have repeatedly recognized similar conduct by dominant health care systems." Opp. at 6-7 & nn.4-5. But *none* of Plaintiffs' cases support the viability of the Complaint's legal theories under Seventh Circuit law. On the contrary, Plaintiffs are asking the Court to depart from controlling law in multiple ways (see *infra* at 6-7, 8, 14-15, 19-21, 23-24), and a ruling allowing Plaintiffs' Complaint to survive would create new law in this Circuit (see *infra* at 9-10, 11, 13, 14-15). The fact that other factually distinguishable health care antitrust cases have made it past the motion-to-dismiss stage or settled says nothing about the sufficiency of the pleadings *in this case*.

Plaintiffs' Opposition also urges the Court to find that, even if Plaintiffs' theories of exclusive dealing, tying, and horizontal price-fixing each independently fail, somehow the sum of those implausibly pleaded theories results in a viable Complaint. Opp. at 7-8, 12, 19, 36-37. This too is an invitation to run afoul of settled Seventh Circuit precedent. The Court of Appeals has held that a plaintiff cannot manufacture plausible antitrust claims by aggregating allegations of nonactionable conduct. *Mayor & City Council of Balt. v. AbbVie Inc.* ("*Humira*"), 42 F.4th 709, 714-15 (7th Cir. 2022) (affirming dismissal). The reason for that is simple: "0 + 0 = 0." *Id*. at 715. Here, each of Plaintiffs' three theories is not plausible for the reasons in Defendants' Opening Brief and detailed below. Plaintiffs cannot create a viable claim when the sum of its component parts is zero. At bottom, Plaintiffs' claims, whether viewed individually or collectively, are not plausible. The Complaint should thus be dismissed in its entirety.

First, the Opposition confirms that Plaintiffs' exclusive dealing theory (Count I) suffers from several dispositive defects. With respect to the antitrust standing requirement, Plaintiffs do

not dispute that to trace their alleged antitrust injury of higher prices to claimed *de facto* exclusivity in Aspirus Network, Inc.'s ("ANI") contracts with third-party providers, the Court would have to reconstruct the intervening decisions of an untold number of third-party providers and payers. The multitude of interdependent links required for Plaintiffs to prove their exclusive dealing claim fails *AGC*'s[1] proximate cause test for antitrust standing. Opening Br. at 10-15, Dkt. No. 26. Contrary to Plaintiffs' argument, Opp. at 28-29, merely pleading the legal conclusion that Plaintiffs are direct purchasers, and thus purportedly have standing under the Supreme Court's *Illinois Brick* decision, does *not* free them from their obligation to plead sufficiently proximate harm under *AGC*. Seventh Circuit law could not be clearer on this point. *Loeb Indus., Inc. v. Sumitomo Corp*., 306 F.3d 469, 481 (7th Cir. 2002); *see id*. at 475 ("We find that *Illinois Brick* presents no obstacle to any of the plaintiffs' claims but that the claims . . . are precluded under *AGC*.").

Plaintiffs also concede they have failed to plead the existence of any exclusive agreement between Aspirus, Inc. ("Aspirus") and any health care provider, Opp. at 27 n.15, which is independently dispositive as to Aspirus. Plaintiffs fare no better in establishing the elements of an exclusive dealing claim directed to ANI. Even setting aside the absence of Court of Appeals authority endorsing the viability of a *de facto* exclusive dealing theory, Plaintiffs have failed to plead facts to plausibly show that ANI's agreements with providers function in a way that creates exclusivity that is otherwise lacking in express terms. The Opposition also confirms that the Complaint contains no well-pleaded allegations that the "limited exclusivity" provision in ANI's provider contracts foreclosed *any* payer from assembling a network to compete with ANI. *See* Opp. at 23-27. Each of these failings independently doom Plaintiffs' exclusive dealing claim.

[1] *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters* ("*AGC*"), 459 U.S. 519 (1983).

Second, the Opposition confirms Plaintiffs pleaded a "two-way" tying theory (Count I) that interchangeably treats GAC and inpatient services as the tying and tied services. Opp. at 8, 15-19. Plaintiffs' novel theory fails under Seventh Circuit law, which instead requires well-pleaded facts showing that Defendants used their alleged monopoly power over a specific product or service (a "tying" product) to achieve a second monopoly in the market for a distinct product or service (the "tied" product). Plaintiffs cite no case—in this Circuit or otherwise—endorsing their two-way tying theory and thus this claim fails as a matter of law.

Third, Plaintiffs' two distinct theories of horizontal price-fixing (Count I) independently fail. As to the theory that Aspirus conspired with Marshfield Clinic to refuse to accept Referenced-Based Pricing ("RBP"), the Complaint lacks any facts to support the inference of such an agreement. The undisputed absence of any plausibly pleaded agreement requires dismissal of this theory. And Plaintiffs' *per se* price-fixing theory based on ANI's negotiation of reimbursement rates with payers on behalf of its clinically integrated network is unprecedented. The Opposition does not cite *any* examples of judicial experience applying the *per se* rule to this type of alleged conduct, or *any* precedent that would support the notion that ANI's clinically integrated provider network—a business model used by health care providers across the country—can be categorically condemned by courts as inherently anticompetitive. Nor have Plaintiffs provided any basis to depart from the Supreme Court's repeated pronouncement that the rule of reason is the presumptive mode of analysis for antitrust claims. The legal flaws at the core of the *per se* price-fixing claims are apparent from the face of the Complaint and they should be dismissed.

Fourth, Plaintiffs' monopolization claim (Count II) fails because there is no dispute that it is exclusively predicated on these same implausible exclusive dealing, tying, and price-fixing theories. Opp. at 35-36. Contrary to Plaintiffs' argument, *id*. at 36-37, Plaintiffs' three theories

of alleged harm—that are not otherwise actionable on their own—cannot together yield a viable monopolization claim. That is because, in the context of Section 2 claims—like with all antitrust claims—"0 + 0 = 0." *Humira*, 42 F.4th at 715; *see also Eatoni Ergonomics, Inc. v. Rsch. in Motion Corp.*, 486 F. App'x 186, 191 (2d Cir. 2012) ("[When] alleged instances of misconduct are not independently anti-competitive . . . they are not cumulatively anticompetitive either.").

For the foregoing reasons, Defendants' motion to dismiss should be granted.

ARGUMENT

In an attempt to salvage their claims, Plaintiffs' Opposition urges the Court to view the exclusive dealing, tying, and price-fixing claims as part of one indivisible "overarching scheme" to restrain trade. Opp. at 7, 9, 15, 36. When viewed in this light, it would be improper, according to Plaintiffs, to dismiss any one of the Complaint's claims. As support for their argument, Plaintiffs turn to the Supreme Court's 1962 decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, which states that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." 370 U.S. 690, 699 (1962); *see* Opp. at 7, 12, 19.

But *Continental Ore* does not give Plaintiffs a free pass to proceed to costly antitrust discovery just because a collection of defective claims is couched as an anticompetitive scheme. Courts have clarified that *Continental Ore* had *nothing* to do with assessing the sufficiency of the pleadings, and instead "stands for the principle that the jury is entitled to give whatever weight it chooses to the repetitive nature of the [evidence of] alleged injuries to the plaintiffs." *In re Processed Egg Prod. Antitrust Litig.*, 206 F. Supp. 3d 1033, 1042 (E.D. Pa. 2016) ("Subsequent decisions have acknowledged that the holding in *Continental Ore* was not intended to limit a court's individual assessment of the legality of the various components of an alleged conspiracy."), *aff'd*, 962 F.3d 719 (3d Cir. 2020); *see also* Section II *infra*.

Courts in the Seventh Circuit and across the country have long reached similar conclusions. *U.S. Futures Exch., LLC v. Bd. of Trade of City of Chi., Inc.*, 346 F. Supp. 3d 1230, 1249 (N.D. Ill. 2018), *aff'd*, 953 F.3d 955 (7th Cir. 2020) ("[C]ourts interpreting *Continental Ore* have made clear [that] separate theories of antitrust liability still *must be assessed individually*." (emphasis added)); *Intergraph Corp. v. Intel Corp*., 195 F.3d 1346, 1366-67 (Fed. Cir. 1999) ("*Continental Ore* did not hold . . . that the degrees of support for each legal theory should be added up. Each legal theory must be examined for its sufficiency and applicability, on the entirety of the relevant facts."); *Zenith Radio Corp. v. Matsushita Elec. Indus*. Co., 513 F. Supp. 1100, 1166-67 (E.D. Pa. 1981) (rejecting plaintiffs' use of *Continental Ore* to "resist[] attacks on the legal sufficiency of their conspiracy allegations," holding that Supreme Court's holding was "plainly was not intended to preclude analysis of the legal basis of the conspiracy allegations of an antitrust plaintiff").

Ultimately, Plaintiffs' characterization of their three claims as one scheme in no way changes their obligations to plausibly plead viable legal claims, which they have failed to do for the multiple reasons set forth below and in Defendants' Opening Brief.

I. Plaintiffs' Exclusive Dealing, Tying, and Price-Fixing Allegations Do Not State a Claim Under Section 1 of the Sherman Act.

A. Plaintiffs Lack Antitrust Standing to Pursue, and Have Failed to Plead, an Actionable Exclusive Dealing Claim.

1. *Plaintiffs' Allegation That They Are Direct Purchasers Does Not Solve Their Dispositive Antitrust Standing Problem.*

As explained in Defendants' Opening Brief, to find an antitrust injury traceable to the claimed exclusivity in ANI's contracts with providers, the Court must speculate about the individual decision-making of innumerable third-parties, namely: (1) physicians and physician practices (*e.g.*, whether each of which would decide, absent the alleged exclusivity, to join ANI or another health care network); and (2) payers (*e.g.*, whether and how they would create a competing

provider network consisting of providers who elected not to join ANI). Opening Br. at 10-15. Plaintiffs do not dispute (because they cannot) that the Court would have to reconstruct these intervening decisions of an untold number of third-party providers and payers to forge a tenuous yet necessary connection between the alleged exclusive dealing and the claimed harm in the form of higher health care costs. Opp. at 28-34. For this reason alone, Plaintiffs' exclusive dealing claim fails to satisfy *AGC*'s proximate cause requirement.[2] *AGC*, 459 U.S. at 540-41; *Fisher v. Aurora Health Care, Inc*., 558 F. App'x 653, 656 (7th Cir. 2014) (affirming dismissal where "connection between [the] alleged injury and the alleged antitrust violation [was] tenuous at best"); *O'Neill v. Coca-Cola Co*., 669 F. Supp. 217, 224 (N.D. Ill. 1987) ("Pure speculation, or vaguely defined links are not sufficient to establish a chain of causation that demonstrates a threat of antitrust injury."); *see also* Opening Br. at 10-15.

In response, Plaintiffs again resort to distractions. They contend antitrust standing is established because Plaintiffs also claim to be direct purchasers of Aspirus's health care services. Opp. at 28-29. That misstates the law. The Seventh Circuit has repeatedly explained that there is a distinction between "the proximate cause requirements of *AGC*" and the "direct purchaser rule of *Illinois Brick*." *E.g*., *Loeb Indus.*, 306 F.3d at 481; *Int'l Bhd. of Teamsters v. Philip Morris*, 196 F.3d 818, 828 (7th Cir. 1999) ("The direct-purchaser doctrine of *Illinois Brick* and the direct-injury doctrine of [*AGC*] are analytically distinct."); *see also Supreme Auto Transp., LLC v. Arcelor Mittal USA, Inc*., 902 F.3d 735, 743 (7th Cir. 2018) (discussing this analytical difference). In

[2] Plaintiffs' "anticompetitive broth" characterization also does not save them from having to plead facts to show that their injuries are proximately linked to the exclusive dealing. Courts have been clear that a plaintiff cannot "shore up [its] position regarding antitrust injury" by relying on *Continental Ore*. *Mercatus Grp. LLC v. Lake Forest Hosp.*, 695 F. Supp. 2d 811, 822 (N.D. Ill. 2010) ("The Seventh Circuit has recognized that the *Continental Ore* case 'does not address either antitrust standing or antitrust injury.'"), *aff'd*, 641 F.3d 834 (7th Cir. 2011).

particular, "[u]nlike *Illinois Brick*, which only [has] implications for plaintiffs who made purchases in the defendants' product distribution chain, *AGC* applies to *all potential antitrust plaintiffs* whether they are related to the defendants as purchasers or not." *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 813 (N.D. Ill. 2017) (emphasis added). There is no ambiguity here: Plaintiffs cannot circumvent the requirements of *AGC* by asserting that they are direct purchasers.[3]

Indeed, numerous courts have dismissed direct purchaser actions for lack of antitrust standing where, as here, there was not a sufficiently direct relationship between the anticompetitive conduct and the purported injury. *E.g.*, *Loeb Indus.*, 306 F.3d at 475 ("We find that *Illinois Brick* presents no obstacle to any of the plaintiffs' claims but that the claims of the scrap copper dealers are precluded under *AGC*."); *Nypl v. JPMorgan Chase & Co.*, No. 15-cv-9300, 2017 WL 1133446, at *7 (S.D.N.Y. Mar. 24, 2017) (direct purchaser plaintiffs failed to allege a "sufficiently direct relationship" between plaintiffs' purchases of FX end-user products and defendants' alleged anticompetitive conduct in FX spot transactions); *In re Digit. Music Antitrust Litig.*, 812 F. Supp. 2d 390, 402, 404-05 (S.D.N.Y. 2011) (direct CD purchasers did not establish a sufficiently close relationship between prices of CDs and alleged misconduct with respect to "internet music").[4]

The proximate causation requirement is in place to limit the reach of private actions under

[3] The Supreme Court's decision in *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019), does not hold otherwise. Opp. at 9, 28-29. On the contrary, the Court cites approvingly to the portion of the Seventh Circuit's *Loeb* decision that describes *AGC* and *Illinois Brick* as *separate* "limitations on which parties may bring suit for antitrust violations." *Pepper*, 139 S. Ct. at 1521 (citing *Loeb*, 306 F.3d at 481-82). And, unlike here, the "sole question" presented on appeal dealt with *Illinois Brick*'s direct purchaser rule—not *AGC*'s distinct limitation on standing. *Id.* at 1520.

[4] Plaintiffs erect a strawman by suggesting that Defendants should identify some set of plaintiffs who may have antitrust standing to pursue an exclusive dealing claim. Opp. at 30. But Defendants have no obligation to divine who would be better suited to bring an antitrust claim predicated on Plaintiffs' attenuated exclusive dealing theory. Nor do Defendants in their Opening Brief suggest as much. Opening Br. at 14-15 (explaining that Plaintiffs will not have antitrust standing even if they attempt to collapse the causal chain by characterizing their harm as stemming from the foreclosure of "rival providers" instead of payers, which the Opposition does not attempt to do).

the Sherman Act because "Congress did not intend to allow 'every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.'" *AGC*, 459 U.S. at 535 (quoting *Blue Shield of Va. v. McCready*, 457 U.S. 465, 476 (1982)); *McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., Inc.*, 937 F.3d 1056, 1064 (7th Cir. 2019). Here, the Complaint and the Opposition's concessions make clear that Plaintiffs could only be, at most, "tangentially affected" by the alleged exclusivity in ANI's contracts with providers. Plaintiffs thus do not have antitrust standing to seek relief from any claimed "ripples of harm" purportedly flowing from ANI's provider contracts.[5] *See id*.

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

Plaintiffs concede that they have failed to plead the existence of any sort of exclusive dealing agreement between Aspirus and any health care provider. Opp. at 27 n.15. As such, binding Seventh Circuit authority requires dismissal of their exclusive dealing claim against Aspirus. *See Zummo v. City of Chi.*, 798 F. App'x 32, 33 (7th Cir. 2020) (affirming dismissal where, as here, plaintiff failed to allege "an agreement or conspiracy between [the defendant] and anyone else, as Section 1 liability requires") (quoting *Alarm Detection Sys. v. Vill. of Schaumburg*, 930 F.3d 812, 827 (7th Cir. 2019)); *In re Dealer Mgmt. Sys. Antitrust Litig.*, 360 F. Supp. 3d 788, 799-801 (N.D. Ill. 2019) (dismissing claim where, as here, plaintiffs failed to plead the existence of an exclusive dealing agreement); *VBR Tours, LLC v. Nat'l R.R. Passenger Corp.*, No. 14-cv-

[5] Plaintiffs criticize Defendants for not seeking dismissal of all their claims under *AGC*. Opp. at 32. There is no requirement for Defendants to do so. The exclusive dealing claim is particularly attenuated; the tying and price-fixing claims do not necessarily require the Court to reconstruct the decision-making of an untold number of third parties to trace the alleged conduct to the asserted injury. In all events, courts routinely dismiss a particular claim or theory for lack of antitrust standing. *See, e.g.*, *Saint Francis Hosp. & Med. Ctr., Inc. v. Hartford Healthcare Corp.*, No. 3:22-cv-50, 2023 WL 1967133, at *13-14 (D. Conn. Feb. 13, 2023) (dismissing a particular theory for lack of antitrust standing).

00804, 2015 WL 5693735, at *12 (N.D. Ill. Sept. 28, 2015) (same); Opening Br. at 15-16.

Plaintiffs argue that Aspirus is liable because it received some unspecified benefit from ANI's allegedly exclusive agreements with providers and that Aspirus and ANI are single economic actors under *Copperweld* and its progeny. Opp. at 27 n.15. But these are not cognizable substitutes for plausibly alleging that Aspirus agreed with a third party to restrain trade. Indeed, Plaintiffs have cited no authority holding as much. *See id*. Thus, the exclusive dealing claim against Aspirus should be dismissed.[6]

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 against ANI also fails because, as the Opposition confirms, there are no well-pleaded allegations that the challenged "limited exclusivity" provision in ANI's providers contracts substantially foreclosed competition in a relevant antitrust market.

a. Plaintiffs' Concessions Make Clear That They Have Failed Plausibly to Allege Actionable Exclusivity.

Plaintiffs concede that ANI's provider contracts do not expressly demand exclusivity, and instead argue that their claim nevertheless survives Rule 12 scrutiny under a "*de facto*" exclusivity dealing theory. Opp. at 20-23. As a threshold matter, Plaintiffs cite no cases where the Court of Appeals has held that *de facto* (as opposed to express) exclusive dealing is a cognizable claim

[6] This argument also fails because there are no allegations in the Complaint that Aspirus is liable for exclusive dealing under the theory it received some benefit from ANI's provider contracts or because Defendants' "are a single economic unit for antitrust purposes." Opp. at 27 n.15. Those assertions appear for the first time in Opposition, so they cannot be credited. *Thomason v. Nachtrieb*, 888 F.2d 1202, 1205 (7th Cir. 1989) ("It is a basic principle that the complaint may not be amended by the briefs in opposition to a motion to dismiss . . . ."); *Car Carriers, Inc. v. Ford Motor Co*., 745 F.2d 1101, 1107 (7th Cir. 1984) (same).

under the antitrust laws and defense counsel is aware of none.[7] Opp. at 20-23. On the contrary, the Seventh Circuit has required the existence of an "exclusive dealing contract." *Paddock Publ'ns, Inc. v. Chi. Trib. Co.*, 103 F.3d 42, 46 (7th Cir. 1996). Plaintiffs instead focus only on the claimed "practical effect" of ANI's agreements. Opp. at 20-21. Even if the Court were to adopt Plaintiffs' approach, Plaintiffs have not plausibly alleged facts establishing that the practical effect of ANI's contracts was to "lock" any providers into the ANI network. Indeed, any such finding would require the Court to engage in multiple layers of "sheer speculation," which would again run afoul of controlling authority. *E.g.*, *Taha v. Int'l Bhd. of Teamsters, Local 781*, 947 F.3d 464, 469 (7th Cir. 2020) ("[W]hen considering the viability of a claim in the face of a Rule 12(b)(6) challenge, we may reject sheer speculation . . . .").

Specifically, Plaintiffs' *de facto* exclusive dealing theory hinges on at least two speculative predicates: (1) providers would be dissuaded from seeking ANI's permission to contract with a payer outside of its network—as ANI providers are entitled to do under the "limited exclusivity" provision alleged to exist in their contracts—due to a hypothetical "threat of punishment"; and (2) ANI would arbitrarily withhold consent from such providers and enforce the limited exclusivity provision in a manner that would bely the contract's plain language. Opp. at 21-23. Plaintiffs have not supported either layer of speculation with any well-pleaded facts. Indeed, Plaintiffs concede that the Complaint includes no allegations showing that any ANI provider expected to receive, or in fact received, any form of "punishment" for requesting to contract with an outside

[7] Only the Third and Eleventh Circuit Courts of Appeal have recognized such a theory. *See, e.g.*, *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1182 (9th Cir. 2016); *CollegeNet, Inc. v. Common Application, Inc.*, 355 F. Supp. 3d 926, 951 (D. Or. 2018). While at least one district court decision from the Northern District of Illinois recently permitted a *de facto* exclusive dealing claim to proceed past the motion-to-dismiss stage, Plaintiff cites no similar decisions from the Court of Appeals or this District. *See* Opp. at 21 (citing *In re Surescripts Antitrust Litig.*, 608 F. Supp. 3d 629, 647 (N.D. Ill. 2022)).

payer. *Id*. For example, there are no allegations that any ANI provider was ever expelled from ANI or lost access to ANI's "referral network" for negotiating with an out-of-network payer. *Id*. Likewise, there are no well-pleaded facts that ANI deceived providers by agreeing to include the limited exclusivity provision in its provider contracts (as opposed to a full exclusivity provision), but later treated that term differently. And Plaintiffs concede that they have not alleged even a single instance in which ANI had ever withheld its consent and thereby prevented a provider from contracting with an out-of-network payer. *Id*. at 22-23. Instead, Plaintiffs rely on inference and innuendo that ANI *might* act in a certain way that *might* result in harm to competition. But such inferences are unwarranted without any well-pleaded factual allegations to support them. *Bell v. City of Country Club Hills*, 841 F.3d 713, 716 (7th Cir. 2016) (explaining that "the complaint's factual allegations must raise the claim above a mere 'speculative level'").

Nor does the Opposition cite any case—from this Circuit or elsewhere—that supports the sufficiency of this speculative pleading. For example, *United Shoe* and *ZF Meritor*—on which Plaintiffs heavily rely, Opp. at 20-23—do not address the sufficiency of the pleadings. Moreover, those decisions are factually inapposite as there was evidentiary proof of anticompetitive harm in those cases.[8] Plaintiffs' attempt to rely on these distinguishable cases is unavailing, and their

[8] For example, in *United Shoe*, the Supreme Court affirmed a district court's holding that, based on the post-trial "voluminous record" before it, the government had proven that the defendant's machinery leases were unlawfully exclusionary. *United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 455-57 (1922). Specifically, the contracts were exclusionary because, among other evidence, they contained at least seven "drastic provisions" that "practically" prevented the use of shoe machines that the defendant did not manufacture. *Id*. There are no such allegations here. Plaintiffs' reliance on two Third Circuit decisions in *ZF Meritor* and *LePage's* is equally misplaced. In *ZF Meritor*, the Third Circuit emphasized, *inter alia*, the length of defendant's agreement—five-to-seven years—and that the defendant did not face any meaningful competition in the preceding twenty years. *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 284-88 (3d Cir. 2012). In *LePage's*, the Third Circuit held that at trial, the plaintiff adduced "powerful evidence" demonstrating that bundled rebates and discounts offered to major suppliers were designed to and did operate as exclusive dealing arrangements, and thus the lack of any express exclusivity

exclusive dealing claim should fail for lack of actionable exclusivity. *Shire US, Inc. v. Allergan, Inc.*, 375 F. Supp. 3d 538, 557-58 (D.N.J. 2019) (distinguishing *ZF Meritor* based on its extreme facts in evidence and dismissing exclusive dealing claim under Rule 12); *see also VBR Tours*, 2015 WL 5693735, at *13 (distinguishing *ZF Meritor* and *LePage's* and dismissing under Rule 12).

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

Plaintiffs do not dispute they are required to plead facts showing that the alleged exclusivity caused substantial foreclosure in a relevant market. *See Paddock*, 103 F.3d at 46; Opening Br. at 18-20. Here, this requires factual allegations to plausibly show that ANI's provider contracts had the effect of substantially foreclosing payers from assembling networks of providers that could compete with ANI. Opp. at 23-24 (quoting Compl. ¶ 13(b)). But the Opposition confirms that there are no such allegations that any specific payer was precluded from forming a network in Wisconsin.[9] *Id*. at 23-27. The Court's analysis could (and should) stop there: Plaintiffs' claim fails because "there are no facts that allow the court to evaluate the effect of the [alleged] exclusive dealing arrangement[]." *See Eastman v. Quest Diagnostics, Inc*., 724 F. App'x 556, 558 (9th Cir. 2018) (dismissing); *see also Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 737-38 (7th Cir. 2004) ("[E]xclusive dealing arrangements violate antitrust laws only when they foreclose

requirements was not a sufficient reason for judgment as a matter of law. *LePage's Inc. v. 3M*, 324 F.3d 141, 157-58 (3d Cir. 2003). In all events, "*LePage's* is of course not the law of this circuit, and it has been roundly criticized." *FTC v. Church & Dwight Co.*, 665 F.3d 1312, 1316 (D.C. Cir. 2011) (citing authority criticizing *LePage's* expansive holding as, *inter alia*, inappropriately "condem[ing] behavior that does not obviously reduce, and may even promote, consumer welfare").

[9] Specifically, while Plaintiffs assert "Defendants are wrong" that "the Complaint contains no well-pleaded factual allegations that any payer . . . was forced to take, or [was] prohibited from taking, any action due to ANI's contracts with providers," Plaintiffs fail to cite any allegations from their Complaint plausibly describing a circumstance in which a payer was forced to abandon a plan to assemble a competing provider network due to ANI's provider contracts. Opp. at 25.

competition in a substantial share of the line of commerce at issue.").

Plaintiffs instead urge a series of inferences in an attempt to suggest ANI's provider contracts foreclosed (1) some unalleged measure of "price and quality competition," and (2) some unidentified "insurance companies" from developing tiered networks. Opp. at 24-25. Both theories of substantial foreclosure are implausible.

First, the theory that ANI's provider contracts foreclosed competition by "eliminat[ing] price and quality competition between ANI providers who would normally compete . . . to be included in insurance networks" is unsupported by any well-pleaded allegations. Opp. at 24. The Complaint is devoid of *facts* linking ANI's allegedly exclusive provider contracts to an increase in any providers' billed costs or a reduction in quality of their services. *See* Compl. ¶¶ 74-80. In short, this argument is unsupported by the pleadings and cannot be accepted (even for purposes of this Rule 12 motion) without running afoul of controlling law. *E.g.*, *Siva v. Am. Bd. of Radiology*, 38 F.4th 569, 575 (7th Cir. 2022) (emphasizing the importance of ensuring compliance with *Twombly*'s plausibility-based pleading standard); *Ass'n of Am. Physicians & Surgeons, Inc. v. Am. Bd. of Med. Specialties*, 15 F.4th 831, 834 (7th Cir. 2021) (same).

Second, Plaintiffs' contention that unspecified "restraints" foreclosed competition by "effectively preventing insurance companies from developing 'tiered' networks" is also unavailing. Opp. at 24-25. As a threshold matter, it is unclear from the pleadings and Opposition what "restraints" Plaintiffs contend foreclosed the development of these networks, and this theory should fail for that reason alone. *See id*. In all events, Plaintiffs "point[] to no case, in this circuit or elsewhere, in which [such] conduct . . . has been found to violate antitrust law." *Saint Francis Hosp.*, 2023 WL 1967133, at *13-14 (rejecting identical theory). And at least one court unequivocally held that a "refusal to participate in tiered networking programs [does not] violate[]

the antitrust law." *Id*. The Court should likewise reject Plaintiffs' invitation to create new, conflicting law here by finding, for the first time, that an alleged refusal to participate in a tiered network somehow constitutes a plausible basis for an exclusive dealing claim.

Plaintiffs are thus left only with allegations of Aspirus's market shares in the purported markets for GAC and outpatient services as a supposed measure of substantial foreclosure. Opp. at 26-27. But, as the Opposition admits, Plaintiffs have not alleged what fraction of those purported market shares is attributable to the alleged exclusive dealing, as opposed to Aspirus's lawful business operations. *Id*. As a result, Plaintiffs' alleged market share figures tell the Court nothing about the degree to which payers were supposedly foreclosed due to the alleged anticompetitive conduct. Indeed, there are no allegations that would allow the Court plausibly to find that any portion of Aspirus's market shares was gained through exclusionary conduct rather than because "its [health care services] [are] better, or because it has demonstrated greater business acumen, or because it reached domination through historical accident." *Tennant Co. v. Hako Minuteman, Inc*., 651 F. Supp. 945, 959 (N.D. Ill. 1986) (explaining that"[m]onopoly power alone, however, does not violate the Sherman Act" in the Section 2 context). And, in all cases, Plaintiffs cite no decisions holding that merely alleging a market share figure is alone sufficient to proceed to discovery on an exclusive dealing theory. Opp. at 23-27. Plaintiffs' exclusive dealing claim should be dismissed for this reason as well. *VBR Tours*, 2015 WL 5693735, at *12-13 (dismissing where plaintiff failed plausibly to plead substantial foreclosure).

B. Plaintiffs' Novel "Two Way" Tying Claim Fails as a Matter of Law.

It is blackletter law that to plead a tying claim, a plaintiff must plausibly allege that a defendant "exploit[ed]" its economic power over a specific product or service (the "tying" product) to coerce the purchase of a distinct product or service (the "tied" product). *Siva*, 38 F.4th at 574; Opening Br. at 20-23. The Opposition confirms that the Complaint does not make any such

distinction between a specific tying and tied product or service, and instead asserts a "two-way tie" that vacillates between GAC and outpatient services as being tying and tied. Opp. at 8, 15-19. Plaintiffs cite no Seventh Circuit authority for their novel theory, *id*., which is contrary to binding Court of Appeals precedent affirming dismissal of a tying theory that likewise failed to distinguish between a tying and tied product or service. *Ass'n of Am. Physicians & Surgeons, Inc. v. Am. Bd. of Med. Specialties*, No. 14-cv-02705, 2020 WL 5642941, at *4-5 (N.D. Ill. Sept. 22, 2020) (dismissing Plaintiffs' theory because it was "unclear [from the pleadings] which products or services are 'tying' or 'tied.'"), *aff'd*, 15 F.4th 831 (7th Cir. 2021).[10]

Indeed, Plaintiffs' "two-way" tying of services that Aspirus or ANI allegedly already monopolizes (Compl. ¶¶ 14, 59-65) does not state a cognizable tying claim under well-established Seventh Circuit law. As Judge Posner explained, the "traditional antitrust concern" with ties "is that if the seller of the tying product is a monopolist, the tie-in will force anyone who wants the monopolized product to buy the tied product from him as well, and the result will be a second monopoly." *Sheridan v. Marathon Petroleum Co.*, 530 F.3d 590, 592 (7th Cir. 2008); *see also Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984) (the "essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms"). This "traditional antitrust concern" that makes up the "essential characteristic" of a tying claim is undisputedly missing here. Absent from the Complaint are any well-pleaded allegations that either Defendant used its supposed monopoly

[10] Contrary to Plaintiffs' assertion, Defendants are not "arguing that a Complaint must allege the *exact contractual language*" used to effectuate the alleged tying. Opp. at 18-19 (emphasis added). Rather, the Complaint fails to state a plausible tying claim because it does not allege with *any* specificity which Defendant (Aspirus or ANI) is responsible for such tying or the contractual mechanism, generally, that a Defendant used to enforce the alleged tying. Opening Br. at 21.

power in a tying market to create a monopoly in a second, distinct market, within which it lacks monopoly power. Thus, Plaintiffs' tying theory fails both legally and as a matter of common sense: if a defendant had monopoly power in the tying *and* tied markets, as Plaintiffs allege here, then a tie would be unnecessary to bring about the alleged anticompetitive harm in either market.

In contrast, the "traditional antitrust concern" is present in the cases that Plaintiffs claim support their novel theory. Opp. at 16. For example, in *Sidibe*, plaintiffs alleged that the defendant "use[d] its market power for inpatient services in seven [] markets (the Tying Markets, where it is the only or dominant hospital) to [unlawfully tie inpatient services] in four other geographic markets (the Tied Markets, where it faces competition from other providers)." *Sidibe v. Sutter Health*, No. 12-cv-04854, 2021 WL 879875, at *1 (N.D. Cal. Mar. 9, 2021); *see also UFCW & Emps. Benefit Tr. v. Sutter Health*, No. CGC-14-538451, 2019 WL 3856011, at *5 (Cal. Super. June 13, 2019) (similarly alleging that same defendant "linked access to hospitals in markets it dominated (the tying product) to the health plans' purchase of in-network status in other markets (the tied product)"). Likewise, in *Davis*, plaintiffs alleged that the defendant used its alleged monopoly power over specific acute inpatient services (the tying services) in one market to gain monopoly power over a distinct set of outpatient services (the tied services) in a separate market where it faced competition from other providers. Compl. ¶¶ 226-27, 240, *Davis v. HCA Healthcare, Inc.*, No. 21-cv-3276, 2022 WL 17902953 (N.C. Super.). None of these cases support Plaintiffs' novel "two-way" theory.

Plaintiffs' last-ditch attempt to analogize the two-way tying theory to "block-booking" is also unavailing. Opp. at 17. "Block-booking is the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period." *United States v. Paramount*

Pictures, 334 U.S. 131, 156 (1948). In *Paramount Pictures*, the Supreme Court explained that block-booking could run afoul of the public policy goals animating copyright law—that is, to "reward" the "author or artist" for "creative genius" with exclusive rights to her work—if the practice is used to coerce the purchase of lesser quality films. *Id*. at 158. By contrast, here, Plaintiffs do not allege that Defendants used a copyright (or any other intellectual property rights) to a superior service to coerce the purchase of lesser-quality copyrighted service. Moreover, Plaintiffs cite no cases analogizing block-booking to conduct even remotely similar to what is alleged in the Complaint. The Court should decline to create new law through the expansion of a 1940s-era doctrine that clearly does not apply to these facts.[11]

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

Plaintiffs allege two distinct theories of *per se* price-fixing (1) that "Aspirus colluded with competitors in North-Central Wisconsin, including Marshfield Clinic . . . to prevent price competition for health care services," Compl. ¶¶ 13(f), 88, and, separately, (2) 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. When "each legal theory" is "examined for its sufficiency separately," it becomes apparent that both iterations of Plaintiffs' *per se* price-fixing claim fail. *PNY Techs., Inc. v. SanDisk Corp.*, No. 11-cv-04689, 2012 WL 1380271, at *5 n.4 (N.D. Cal. Apr. 20, 2012) (dismissing).

As to Plaintiffs' first price-fixing theory, the Opposition fails to point to any *agreement*

[11] Beyond plausibly alleging a tie of two distinct products, Plaintiffs are required plausibly to allege that a Defendant "has sufficient economic power in the tying market to appreciably restrain free competition in the market for the tied product, and . . . a not insubstantial amount of interstate commerce is affected." *Ass'n of Am. Physicians & Surgeons*, 2020 WL 5642941, at *4. Plaintiffs' "all-or-nothing," flip-flopping theory—that, *inter alia*, fails to specify a tying and tied market—effectively precludes any analysis under these elements.

between Aspirus and Marshfield Clinic (or any other competitor for that matter) to "not accept lower prices through RBP."[12] *Compare* Opp. at 10-11, *with Havens v. Mobex Network Servs., Ltd. Liab. Co*., 820 F.3d 80, 91 (3d Cir. 2016) (explaining that "[t]he existence of an agreement is the hallmark of a Section 1 claim" (citation omitted)); Opening Br. at 23-26. Instead, Plaintiffs confirm that their Complaint is limited to the allegation that Aspirus took the *unilateral* action of supposedly contacting the Marshfield Clinic (only) regarding RBP. Opp. at 10-11; *see also id*. at 11-12. There are no well-pleaded factual allegations plausibly establishing that Aspirus and Marshfield Clinic thereafter *agreed* to any sort of pricing restraint. Because this theory is unsupported by any "factual matter (taken as true) to suggest that [a price-fixing] agreement was made" between Aspirus and Marshfield Clinic, it should be dismissed. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *Obiefuna v. Hypotec, Inc*., 451 F. Supp. 3d 928, 944 (S.D. Ind. 2020) (dismissing horizontal price-fixing claim for failure to plausibly allege the existence of an agreement between two competitors to fix prices); *see also Omnicare, Inc. v. UnitedHealth Grp., Inc.,* 629 F.3d 697, 706 (7th Cir. 2011) (a conspiracy requires facts that demonstrate that the conspirators "had a conscious commitment to a common scheme designed to achieve an unlawful objective"); *Slep-Tone Entm't Corp. v. Elwood Enters*., 165 F. Supp. 3d 705, 713 (N.D. Ill. 2015) ("[u]nilateral action is not a [Section 1] violation; allegations of concerted actions are required").

Plaintiffs' second price-fixing theory fares no better. The Opposition confirms that Plaintiffs have alleged this theory only as a *per se* claim. Opp. at 10-14. *Per se* treatment is applied

[12] The Court should reject Plaintiffs' assertion—made for the first time in Opposition—that Aspirus competes with "independent" providers affiliated with the ANI network (which Plaintiffs label as "ANI Providers"). Opp. at 10. There are no well-pleaded allegations in the Complaint describing how or why Aspirus would compete with its own affiliated providers, and there is thus no plausible basis to make that unpled assumption for purposes of evaluating this Motion. *W. Palm Beach Firefighters' Pension Fund v. Conagra Brands, Inc*., 495 F. Supp. 3d 622, 663 (N.D. Ill. 2020) (holding that the court "cannot simply assume" facts not plead in the complaint).

to certain limited practices, such as horizontal price-setting, bid rigging, and market allocation, because courts have significant judicial experience with those practices such that no in-depth analysis is needed to condemn them under the antitrust laws. Opening Br. at 25-26. Yet the Opposition effectively concedes that there is no judicial experience with Plaintiffs' second price-fixing theory by failing to cite *any* analogous case where a court has applied the *per se* rule in evaluating how a clinically integrated provider network negotiates with insurance providers. *See* Opp. at 10-14. Plaintiffs are thus asking this Court to become the *first* to categorically condemn under the strict *per se* rule a business model that is widely used across the country and helps deliver a diverse offering of high-quality health care to patients in Wisconsin. *See* Compl. ¶ 22 (describing Aspirus's "wide range of GAC and Outpatient Services in North-Central Wisconsin").

Plaintiffs' argument invites legal error. Applying the *per se* rule would run afoul of long-standing Supreme Court law holding that a court may classify a business practice as a *per se* violation of the antitrust laws "only after considerable experience." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979) (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607-608 (1972)); *Car Carriers*, 745 F.2d at 1108 ("the *per se* label must be applied with caution and we will expand that class of violations 'only after the courts have had considerable experience with the type of conduct challenged and application of the Rule of Reason has inevitably resulted in a finding of anticompetitive effects'" (citation omitted)). The lack of *any* precedent involving an allegation of price-fixing directed to a clinically integrated network of health care providers similar to ANI alone dooms Plaintiffs' *per se* claim.

Plaintiffs attempt to sidestep these inconvenient legal precepts by trying to flip the burden and demanding that Defendants show why Plaintiffs' theory *should not* be regarded as *per se* illegal. *See* Opp. at 13. This tactic runs headlong into decades of Supreme Court law holding that

the rule of reason *presumptively* applies and that it is a claimant's burden to overcome that presumption, which Plaintiffs have not done and cannot do here. In *Texaco Inc. v. Dagher*, the Supreme Court explained that the "Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." 547 U.S. 1, 5 (2006). By contrast, the Court explained that "[*p*]*er se* liability is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality,'" and noted its "reluctance" to apply the *per se* rule in new circumstances (as would be the case here). *Id*. (citations omitted). It is thus *Plaintiffs'* obligation to plead a plausible basis for application of the exceptional *per se* rule. They have not done so.

Consistent with Supreme Court precedent, the Seventh Circuit has admonished that merely attaching a *per se* label to a business practice "is simply inadequate in itself to sustain the complaint; the defendants' alleged activity must be scrutinized to determine whether such a characterization is appropriate." *Car Carriers*, 745 F.2d at 1108 (citing *Bunker Ramo Corp. v. United Bus. Forms, Inc*., 713 F.2d 1272, 1284 (7th Cir. 1983)). In scrutinizing Plaintiffs' allegations and their arguments in Opposition, Plaintiffs have not alleged the type of horizontal price-fixing that "facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Id*.; *see also A-Abart Elec. Supply v. Emerson Elec. Co*., 956 F.2d 1399, 1402 (7th Cir. 1992) (*per se* review is only available where the alleged conduct is so "manifestly anticompetitive" that it is has no "redeeming value"). Instead, the Complaint challenges ANI's negotiation of reimbursement rates with payers on behalf of its network of clinically integrated providers, Compl. ¶¶ 23, 87—a practice not at all analogous to the paradigmatic price-fixing scenario where horizontal competitors agree to set a specific price for

goods or services, which is likely why it has never been deemed *per se* unlawful by any court.

Moreover, the *per se* rule is only appropriate where the challenged conduct lacks "any redeeming virtue" such that it can be "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *A-Abart Elec. Supply*, 956 F.2d at 1402; *Rice v. Norman Williams Co*., 458 U.S. 654, 659 n.5 (1982). No such presumption is warranted here. Indeed, ANI facilitates a range of health care services with a focus on quality and improved clinical outcomes; it serves patients throughout Wisconsin and the Upper Peninsula of Michigan, including in many rural areas where access to health care has historically been limited. *See* Opening Br. at 1. Such "redeeming virtue[s]" provide another independent reason why the *per se* rule is inapplicable to ANI's operations.

At most, the alleged pricing restraints employed by ANI could be considered "ancillary" to ANI's broader operations. Restraints that are ancillary to or part of a broader agreement are categorically exempt from *per se* scrutiny.[13] Opening Br. at 26; Opp. at 14. That is exactly the case here. Plaintiffs allege that Aspirus's "hospitals," "primary and specialty care physicians," and "allied health care professionals" provide, *inter alia*, "more than 40 specialties" of high-quality

[13] In determining whether an alleged horizontal restraint is a *per se* violation, the Seventh Circuit has instructed district courts to "distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote." *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985). As Judge Easterbook put it, "[i]f two people meet one day and decide not to compete, the restraint is 'naked'; it does nothing but suppress competition." *Id*. By contrast, "[a] restraint is ancillary when it may contribute to the success of a cooperative venture that promises greater productivity and output." *Id*. at 189. Specifically, "[i]f the restraint, viewed at the time it was adopted, may promote the success of this more extensive cooperation, then the court must scrutinize things carefully under the Rule of Reason." *Id*. Here, ANI's "negotiat[ion] [of] contracts on behalf of its members with employers and health plans" (*i.e*., the alleged pricing restraint), Compl. ¶ 23, cannot possibly be characterized as only suppressing competition, *Polk Bros.*, 776 F.2d at 188—it is at most ancillary to supporting ANI's diverse network of health care providers. *See* Compl. ¶ 23.

health care to patients in North-Central Wisconsin, Compl. ¶¶ 1,7, 23, and ANI's negotiation of "favorable reimbursement rates" (*i.e.*, the alleged price-fixing) is alleged to be only *one* way in which ANI can control costs and attract qualified providers to its network. *See id*. ¶¶ 35, 75, 79. Under these circumstances, the rule of reason must apply to any such claim.

Plaintiffs ignore this principle and go all-in on the inapt *per se* variant of their price-fixing claim without pleading facts sufficient to exempt their theory from the ancillary restraint rule. Contrary to Plaintiffs' argument, the Court need not wait to dismiss this claim. Rather, a Rule 12 motion is the proper vehicle to jettison this legally flawed and factually unsupported theory. *See* Opp. at 10-15. For example, in *Deslandes v. McDonald's USA, LLC*, the Court determined via a Rule 12 motion that plaintiff "alleged a horizontal restraint that is ancillary to franchise agreements for McDonald's restaurants" and dismissed it because it was improperly pled as a *per se* violation. No. 17-cv-4857, 2018 WL 3105955, at *7 (N.D. Ill. June 25, 2018). The Court should follow this analogous case law—which Plaintiffs fail to address in Opposition—and dismiss Plaintiffs' *per se* claim now. *Deslandes*, 2018 WL 3105955, at *7-8 (dismissing *per se* claim); *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).

In a last-ditch effort, Plaintiffs argue their second price-fixing theory should proceed as a rule of reason claim in the alternative. Opp. at 14-15. But Plaintiffs have not pleaded a rule of reason price-fixing claim—the rule of reason is mentioned nowhere in the Complaint and Plaintiffs expressly label the alleged price-fixing as a *per se* violation. Compl. ¶ 38. The Court should reject

Plaintiffs' attempt to amend their defective pleadings in opposition to Defendants' Motion and dismiss the price-fixing claim directed to ANI.[14] *Car Carriers*, 745 F.2d at 1107 ("[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.").

II. Plaintiffs' Section 2 Claim, Indisputably Predicated on Plaintiffs' Exclusive Dealing, Tying, and Price-Fixing Allegations, Also Fails.

As discussed in Section I *supra*, each of the theories underlying Plaintiffs' Section 1 claim is independently implausible. Because it is undisputed that Plaintiffs' Section 2 claim is exclusively predicated on these same implausible theories, Opp. at 35-36, Plaintiffs have also failed to state a claim for monopolization. *E.g.*, *VBR Tours, LLC*, 2015 WL 5693735, at *15 (dismissing Section 2 claim because it was based on the same defectively plead refusal to deal, essential facilities, and exclusive dealing theories underpinning plaintiff's Section 1 claim).

Contrary to Plaintiffs' argument, Opp. at 36-37, their three theories of alleged harm—that are not otherwise actionable on their own—cannot together yield a viable monopolization claim. Put simply, "0 + 0 = 0." *Humira*, 42 F.4th at 715; *Eatoni Ergonomics*, 486 F. App'x at 191 ("[When] alleged instances of misconduct are not independently anti-competitive . . . they are not cumulatively anticompetitive either."). In *Humira*, the Seventh Circuit affirmed dismissal of Section 1 and Section 2 claims premised on, *inter alia*, the plaintiffs' theory that multiple patent settlement agreements, when viewed together, violated the antitrust laws. 42 F.4th at 714-15.

[14] To sustain their price-fixing claim under the rule of reason, Plaintiffs were required "to plead that the exchange had an anti-competitive effect on a given market in a given geographical area." *Olean*, 2020 WL 6134982, at *5 (citing *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 321 (7th Cir. 2006)). Here, Plaintiffs do not plausibly allege the anticompetitive effects of ANI's provider contracts (specifically) on a properly defined antitrust market. Instead, Plaintiffs only vaguely describe anticompetitive effects allegedly resulting from all of the conduct alleged in the Complaint. Compl. ¶¶ 90-91. Indeed, Plaintiffs' Opposition fails to point to any allegations specifically describing any anticompetitive effects that ANI's negotiation of reimbursement rates with payers had on a relevant antitrust market.

While there was nothing "fishy or anticompetitive about the settlements" when "viewed by themselves," the plaintiffs averred that they together violated the antitrust laws. *Id*. The court dismissed the plaintiffs' claims for the same basic reason that dooms Plaintiffs' Complaint here: the sum of multiple allegations of unactionable conduct does not equal a well-pleaded claim. *See id*. at 715; *see also No Spill LLC v. Scepter Canada, Inc.*, No. 18-cv-02681, 2022 WL 1078435, at *8 (D. Kan. Apr. 6, 2022) (dismissing "overarching antitrust violation [where] *none* of the underlying conduct constitute[ed] independent antitrust harm" (emphasis in original)).

Eatoni is also instructive. In that case, the Second Circuit reviewed each of the plaintiff's theories of anticompetitive conduct underlying the plaintiff's monopolization claim separately—including the plaintiff's refusal to deal, denial of access to an essential facility, and patent infringement theories—and found that they were each implausible. 486 F. App'x at 189-91. Consequently, the court rejected the plaintiff's argument that the defendant's "*overall course of conduct* . . . cumulatively establish[ed] a § 2 violation." *Id*. at 191 (emphasis added). That court held that "[b]ecause these alleged [theories] of misconduct [were] not independently anti-competitive, . . . they [were] not cumulatively anti-competitive either." *Id*.[15] The Court should apply this same reasoning and dismiss Plaintiffs' Section 2 claim.

Plaintiffs cite in a footnote dictum in *Mishawaka* stating that it "is the mix of the various ingredients of utility behavior in a monopoly broth that produces the unsavory flavor." Opp. at 36-37 (citing *City of Mishawaka, Ind. v. Am. Elec. Power Co*., 616 F.2d 976, 986 (7th Cir. 1980)). This is a redux of Plaintiffs' *Continental Ore* "anticompetitive scheme" argument. Like in

[15] *See also City of Groton v. Conn. Light & Power Co*., 662 F.2d 921, 928-29 (2d Cir. 1981) ("[R]eject[ing] the notion that if there is a fraction of validity to each of the basic claims and the sum of the fractions is one or more, the plaintiffs have proved a violation of section 1 or section 2 of the Sherman Act.").

Continental Ore (*see supra* at 4), the *Mishawaka* court noted that the finder of fact should examine evidence of anticompetitive harm holistically rather than in a vacuum. *Mishawaka*, 616 F.2d at 986. Courts have drawn a sharp distinction between that concept of viewing the evidence of an "antitrust conspiracy as a whole to judge the character of the conspiracy and intent" (under *Continental Ore* and *Mishawaka*) and the courts' obligation to assess "separate theories of antitrust liability . . . individually." *U.S. Futures Exch.*, 346 F. Supp. 3d at 1248-49; *Intergraph*, 195 F.3d at 1366 ("In *Continental Ore* the Court held that the 'factual components' of a case should be viewed together, *not* the pieces of legal theory." (emphasis added)).

This distinction is not controversial. Courts across the country have similarly rejected the argument that Plaintiffs advance here. *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, No. 13-md-2445, 2017 WL 3967911, at *8 n.10 (E.D. Pa. Sept. 8, 2017) (rejecting argument and considering "product hopping" and "delay" theories underpinning plaintiffs' monopolization claim separately at the motion to dismiss stage because "[l]ogically, . . . if none of the alleged conduct is exclusionary or anticompetitive, it cannot collectively violate section 2 of the Sherman Act"); *see also Intergraph*, 195 F.3d at 1366-67 (rejecting plaintiff's argument that its "theories of antitrust liability . . . should be taken together"); *BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr.*, 176 F. Supp. 3d 606, 617-18 n.10 (W.D. La. 2016) (separately addressing theories that defendant violated Section 2 by (1) "acquir[ing] . . . competing healthcare providers," (2) "us[ing] punitive non-compete contracts with its physicians," and (3) "restrict[ing] patient referrals to other [defendant] providers").[16]

[16] Plaintiffs simply ignore extensive authority requiring the Court to assess the sufficiency of each legal theory alleged and instead rely on decisions in which courts have unremarkably acknowledged that evidence of the character and effect of the alleged anticompetitive conduct can be reviewed as a whole and not "every single action in an anticompetitive scheme be, on its own, anticompetitive." *In re Intuniv Antitrust Litig.*, 496 F. Supp. 3d 639, 680 (D. Mass. 2020); *Klein*

The Court should follow this well-developed body of authority and dismiss Plaintiffs' Section 2 claim because Plaintiffs have failed to allege any plausible theory that Defendants "achieved monopoly power through anti-competitive conduct or exclusionary conduct 'as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'"[17] *Apple, Inc. v. Motorola Mobility, Inc*., No. 11-cv-178, 2011 WL 7324582, at *12 (W.D. Wis. June 7, 2011) (citing *United States v. Grinnell Corp*., 384 U.S. 563, 571 (1966)); *VBR Tours, LLC*, 2015 WL 5693735, at *15; *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).

v. Meta Platforms, Inc., No. 20-cv-08570, 2022 WL 17477101, at *2 (N.D. Cal. Dec. 6, 2022) ("a plaintiff 'can state a Section 2 claim by alleging a series of practices that are anticompetitive, even if some of the activities would be lawful if viewed in isolation'" (citation omitted); *see In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 383 F. Supp. 3d 187, 229-30 (S.D.N.Y. 2019) (assessing the allegations as a whole to assess the nature of the conspiracy and anticompetitive effect). None of these cases hold that is appropriate for the Court to ignore the dictates of *Twombly* and *Iqbal* by declining to assess the plausibility of each legal theory asserted.

[17] Contrary to Plaintiffs' argument, Judge Crabb correctly articulated the elements of a monopolization claim in *Apple*, as supported by *Grinnell*. Opp. at 36 (criticizing the "standard" used by Judge Crabb in *Apple*). In any case, Plaintiffs' quibbling with Judge Crabb's use of the word "achieved" as opposed to "acquired or maintained" is immaterial because, as explained in this section, Plaintiffs have failed plausibly to allege that Defendants achieved, acquired, or maintained monopoly power through any anticompetitive conduct, as required to plausibly allege a monopolization claim. *Apple*, 2011 WL 7324582, at *12; *Mitsubishi Elec. Corp. v. IMS Tech., Inc*., No. 96-cv-499, 1997 WL 630187, at *5 (N.D. Ill. Sept. 30, 1997) (dismissing).

CONCLUSION

For these reasons, and for the reasons stated in Defendants' Opening Brief, Plaintiffs' Complaint should be dismissed in its entirety.

Dated: March 13, 2023

Respectfully submitted,

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