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PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (JANUARY 30, 2020)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SAMUEL A. GURROLA,

Plaintiff-Appellant,

v.

WALGREEN COMPANY,

Defendant-Appellee.

No. 17-51108

Appeal from the United States District Court for the Western District of Texas USDC NO. 3:17-CV-78

HIGGINBOTHAM, SMITH,
and SOUTHWICK, Circuit Judges

PER CURIAM:*

Appellant Samuel Gurrola, owner of Palafox Pharmacy in Anthony, Texas, sued Appellee Walgreen Company ("Walgreens") for alleged violations of the Sherman and Clayton Acts, breach of contract, and

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

civil conspiracy. According to Gurrola's pro se complaint, he accepted Walgreens' offer to purchase his pharmacy in 2014. In furtherance of the sale, Gurrola allowed "an in[formation] gathering business called Infoworks" to access Palafox's computer records, including sales reports, customer lists, and doctor lists. Then, according to Gurrola, Walgreens backed out of the deal without justification and used the data it had obtained during the due-diligence process to appropriate more than 90% of Palafox's business for itself. Gurrola alleged that Walgreens' conduct in the Palafox deal was part of a wider scheme to obtain "monopolistic control[]" of the area's pharmacy market "through buyouts and forceouts."

Walgreens moved to dismiss Gurrola's complaint under Federal Rule of Civil Procedure 12(b)(6). The district court granted Walgreens' motion, finding that Gurrola had failed to allege facts sufficient to state any of his claims. The court denied as moot Gurrola's motion for a restraining order against Walgreens agents who he claimed had stalked him.[1] Gurrola now appeals both the dismissal of his claims and the denial of his motion for a restraining order. We address each of Gurrola's arguments in turn, reviewing the district court's dismissal for failure to

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[1] The district court also denied Gurrola's motion for leave to amend his complaint to include allegations of racially motivated harassment dating from 1989. Gurrola does not challenge the denial of leave to amend.

state a claim *de novo*[2] and its denial of injunctive relief for abuse of discretion.[3]

First, Gurrola contends that the district court erred in finding that he failed to state a Clayton Act claim. Gurrola's complaint alleged a violation of Section 3 of the Clayton Act, which prohibits restrictive agreements, including exclusive-dealing arrangements, that "may . . . substantially lessen competition or tend to create a monopoly in any line of commerce."[4] The district court found that Gurrola had failed to allege facts to support a Section 3 claim, and Gurrola does not appear to challenge that determination on appeal.[5]

Instead, he contends that the district court should have found that he stated a claim under Section 7 of the Clayton Act, which bars anticompetitive mergers and acquisitions.[6] However, Gurrola's complaint alleged

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2 *See Stokes v. Gann*, 498 F.3d 483, 484 (5th Cir. 2007) (per curiam).

3 *See Anderson v. Jackson*, 556 F.3d 351, 355–56 (5th Cir. 2009).

4 15 U.S.C. § 14.

5 *See Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 625 (5th Cir. 2002) (internal quotation marks omitted) (quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961)) (To state a Section 3 claim, a plaintiff must (1) identify the relevant product market; (2) identify the relevant geographic market; and (3) "show that the competition foreclosed by the arrangement constitutes a substantial share of the relevant market."). To the extent Gurrola might intend to challenge the district court's Section 3 analysis, that challenge fails. His complaint asserts that Walgreens engaged in exclusive dealing, but it does not identify with whom Walgreens agreed to deal, nor the goods in which it was dealing, nor how the arrangement constrained or might constrain competition.

6 *See* 15 U.S.C. § 18.

only a Section 3 violation. Any claims under other sections of the Act were not raised before the district court and are therefore waived.[7]

Next, Gurrola contends that the district court erred in finding that he failed to state a Sherman Act monopolization claim. To state a claim for monopolization under Section 2 of the Sherman Act, a plaintiff must show "that the asserted violator 1) possesses monopoly power in the relevant market and 2) acquired or maintained that power willfully, as distinguished from the power having arisen and continued by growth produced by the development of a superior product, business acumen, or historic accident."[8] As we have repeatedly observed, simply "[h]aving or acquiring a monopoly is not in and of itself illegal."[9]Rather, "[t]he illegal abuse of power occurs when the monopolist exercises its power to control prices or exclude competitors from the relevant market for its products."[10]

The district court correctly found that Gurrola did not plead sufficient facts to state a monopolization claim. Gurrola alleged that Walgreens had acquired a 99.99% "market share"; however, at no point did he define the relevant market or allege facts from which it would be plausible to infer that Walgreens engaged

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7 *See Celanese Corp. v. Martin K. Eby Constr. Co.*, 620 F.3d 529, 531 (5th Cir. 2010) ("[A]rguments not raised before the district court are waived and will not be considered on appeal.").

8 *Stearns Airport Equip. Co., Inc. v. FMC Corp.*, 170 F.3d 518, 522 (5th Cir. 1999).

9 *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, 776 F.3d 321, 334 (5th Cir. 2015).

10 *Id.*

in anticompetitive conduct. The complaint states only that Walgreens expanded via "buyouts" and "force-outs," and that Walgreens considered buying Gurrola's pharmacy. These conclusory allegations are insufficient to show that Walgreens willfully acquired its market power or used that market power for anti-competitive purposes.

Third, Gurrola argues that the district court erred in dismissing his breach-of-contract claim. Gurrola's complaint alleged that he made an oral contract with Walgreens in which the latter would pay $1.5 million over multiple years to acquire his pharmacy. In Gurrola's view, Walgreens breached this contract when it backed out of the sale. However, any unwritten contract that is "not to be performed within one year from the date of making the agreement" is unenforceable under Texas's statute of frauds.[11] Thus, the alleged multi-year oral contract was unenforceable, and the district court's dismissal of Gurrola's breach-of-contract claim was proper.[12]

Finally, Gurrola claims that he was entitled to a protective order against Walgreens' alleged harassment and stalking. However, the district court's jurisdiction over Gurrola's motion for a restraining order ended when it dismissed the entire case in

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11 TEX. BUS. & COM. CODE § 26.01(b)(6).

12 On appeal, Gurrola makes a new allegation that Walgreens fraudulently misrepresented the identity of its purported agent. This argument is waived because it was not raised below and, in any case, Gurrola fails to allege the elements of a fraud claim. *See Shandong Yinguang Chem. Indus. Joint Stock Co. v. Potter*, 607 F.3d 1029, 1032–33 (5th Cir. 2010).

which the motion was filed. It was therefore proper for the court to deny the motion as moot.

For these reasons, we affirm the judgment of the district court. We also deny Gurrola's "Motion to Reverse District Court's Ruling," which is duplicative of his appeal.

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS EL PASO DIVISION (NOVEMBER 15, 2017)

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS EL PASO DIVISION

SAMUEL A. GURROLA,

Plaintiff,

v.

WALGREEN COMPANY,[1]

Defendant.

Case No. EP-17-CV-00078-DCG

Before DAVID C. GUADERRAMA, United States District Judge

Before the Court is Defendant Walgreen Company's' ("Defendant" or "Walgreen") "Motion to Dismiss" (ECF No. 4). Therein, pursuant to Federal Rule of Civil Procedure 12(b)(6),Walgreen moves to dismiss this case. Also before the Court is Plaintiff Samuel A. Gurrola's ("Plaintiff' or "Mr. Gurrola") "Motion for Leave of Court to Amend and Supplement Pleadings" (ECF No. 25) ("Motion for Leave to Amend Petition").

[1] Walgreen points out that its correct name is Walgreen Co. Mot. to Dismiss at 2.

For the reasons that follow, the Court GRANTS Walgreen's motion and DENIES Mr. Gurrola's motion.

I. BACKGROUND

Walgreen, an Illinois corporation, owns a pharmacy by that name in Anthony, Texas, a small town near and on the west of El Paso, Texas. Mr. Gurrola owns a pharmacy named Palafox Pharmacy, also in Anthony, Texas. On March 16, 2017, Mr. Gurrola brought this lawsuit against Walgreen. Original Pet., ECF No. 1.

Thereafter, on April 10, 2017, Walgreen filed the Motion to Dismiss. Mr. Gurrola filed a response to that motion, Pl.'s Resp. to Mot. to Dismiss, ECF No. 8, and Walgreen followed by filing a reply, Def. Reply, ECF No. 9. On July 31, 2017, Mr. Gurrola filed the Motion for Leave to Amend Petition. The parties briefing on that motion was completed by August 25, 2017. Mr. Gurrola also filed several other motions; among them are: a motion for entry of default (ECF No. 5), a motion for subpoenas (ECF No. 19), a motion for Rule 11 sanctions (ECF No. 22), and a motion for a temporary restraining order (ECF No. 36).

II. STANDARD GOVERNING MOTIONS TO DISMISS

Under Rule 8(a), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Federal Rule of Civil Procedure 12(b)(6) allows a party to seek dismissal of a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). On a Rule 12(b)(6) motion, a court accepts well-pleaded facts as true and construes

them in the light most favorable to the plaintiff. *Gines v. D.R. Horton, Inc.,* 699 F.3d 812, 816 (5th Cir. 2012). But a court does not accept as true "'conclusory allegations, unwarranted factual inferences, or legal conclusions.' *Ferrer v. Chevron Corp.,* 484 F.3d 776, 780 (5th Cir. 2007) (quoting *Plotkin v. IP Axess Inc.,* 407 F.3d 690, 696 (5th Cir.2005)).

A complaint will survive a motion to dismiss if its facts, accepted as true, "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). To meet the "facial plausibility" standard, a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). While the complaint does not need detailed factual allegations, its "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555. Mere "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "an unadorned, the-defendant-unlawfully-harmed-me accusation" will not do. *Id.; Iqbal,* 556 U.S. at 678. Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal,* 556 U.S. at 679.

While complaints generally need to contain only a short and plain statement of the claim, allegations of fraud must "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b); *see also Wheeler v. JP Morgan Chase Bank Nat'l Ass'n,* No. H-15-117, 2015 WL 1758071, at *3 (S.D. Tex. Apr. 17, 2015) ("[C]laims for fraud must state more

than facts sufficient to make a plausible claim to relief they must meet the Rule 9(b) pleadings standard."). Rule 9(b) requires, at a minimum, that a plaintiff set forth the "who, what, when, where, and how" of the alleged fraud. *United States ex rel. Steury v. Cardinal Health, Inc.,* 625 F.3d 262, 266 (5th Cir. 2010) (internal quotation marks and citation omitted); *see also Herrmann Holdings Ltd. v. Lucent Techs. Inc.,* 302 F.3d 552, 564-65 (5th Cir. 2002) ("This Court interprets Rule 9(b) strictly, requiring a plaintiff pleading fraud to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent."). But "[t]he particularity demanded by Rule 9(b) necessarily differs with the facts of each *case." Tuchman v. DSC Commc'ns Corp.,* 14 F.3d 1061, 1067-68 (5th Cir. 1994). Thus, Rule 9(b)'s "pleading requirements may be relaxed when the facts relating to the fraud are 'peculiarly within the perpetrator's knowledge.' *Gonzalez v. Bank of Am. Ins. Servs., Inc.,* 454 F. App'x 295, 298 n.3 (5th Cir. 2011) (per curiam) (quoting *United States ex rel. Doe v. Dow Chem. Co.,* 343 F.3d 325, 330 (5th Cir. 2003)).

Finally, courts are to liberally construe *a pro se* complaint. *Andrade v. Gonzales,* 459 F.3d 538, 543 (5th Cir. 2006); *see also Erickson v. Pardus, 551* U.S. 89, 94 (2007) (IA] *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers."). Likewise, courts are to liberally construe *pro se* briefs and apply less stringent standards to them than to parties represented by counsel. *Andrade v. Gonzales,* 459 F.3d 538, 543 (5th Cir. 2006); *Grant v.*

Cuellar, 59 F.3d 523, 524 (5th Cir. 1995) *(per curiam).* Nevertheless, *a pro se litigant* must still brief his issues. *Grant,* 59 F.3d at 524.

III. DISCUSSION

By its motion, Walgreen moves to dismiss each of Mr. Gurrola's claims. Liberally construing Mr. Gurrola's pleading, the Court understands him to assert claims for (1) monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2; (2) exclusive dealing in violation of Section 3 of the Clayton Act, 15 U.S.C. § 14; (3) civil conspiracy; (4) breach of contract; (5) fraud. Original Pet. at 1-5. As discussed fully below, for each of the claims, Mr. Gurrola's petition fails to state a claim upon which relief can be granted, and therefore, Walgreen's motion should be granted.

A. The Sherman Act, § 2

Section 2 of the Sherman Act prohibits three activities: (1) actual monopolization, (2) attempt to monopolize, and (3) conspiracy to monopolize. 15 U.S.C. § 2; *Ancar v. Sara Plasma, Inc.,* 964 F.2d 465, 470 (5th Cir. 1992). Here, Mr. Gurrola accuses Walgreen of actual monopolization. To prevail on a claim for actual monopolization, a plaintiff must establish two elements: 1) the defendant possesses monopoly power in the relevant market and 2) it acquired or maintained that power "willfully," as distinguished from the power having arisen and continued by growth produced by the development of a superior product, business acumen, or historic accident. *Stearns Airport Equip. Co. v. FMC Corp.,* 170 F.3d 518, 522 (5th Cir. 1999). A plaintiff must plead facts sufficient

to support both elements to survive a motion to dismiss.

Regarding the first element, monopoly power is "the power to control price or exclude competition." *United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 391 (1956). Moreover, "the relevant market has both geographic dimensions and product dimensions." *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.,* 732 F.2d 480, 487 (5th Cir. 1984). The relevant geographic market is the "area of effective competition . . . in which the seller operated, and to which the purchaser can practically turn for supplies." *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 359 (1963). The relevant geographic markets must reflect the realities of competition. *Doctor's Hosp. of Jefferson, Inc. v. Se. Med All., Inc.,* 123 F.3d 301, 311 (5th Cir. 1997). The plaintiff must "demonstrate[e] not just where consumers currently purchase the product, but where consumers could turn for . . . sources of the product if a competitor raises prices." *Id.*

However, "[Waving or acquiring a monopoly is not in and of itself illegal." *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n,* 776 F.3d 321, 334 (5th Cir. 2015). As the United States Supreme Court made clear, "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct." Verizon Commc'ns, Inc. v. Law Offices of Curtis V Trinko,* 540 U.S. 398, 407 (2004) (emphasis in original). This is because "[t]he mere possession of monopoly power . . . is an important element of the free-market system." *Id.* at 407.

Consequently, the plaintiff must plead facts sufficient to support the second element, L *e.,* the willful acquisition or maintenance of the monopoly power. To do so, the plaintiff must sufficiently allege that the defendant acquired or maintained monopoly power through anticompetitive conduct. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V Trinko,* 540 U.S. 398, 407-08 (2004); *Abraham & Veneklasen Joint Venture,* 776 F.3d at 334; *Stearns Airport Equip. Co.,* 170 F.3d at 522; *see also Heatransfer Corp. v. Volkswagenwerk A. G.,* 553 F.2d 964, 981 (5th Cir. 1977) ("The willful acquisition or maintenance of the monopoly power can be demonstrated by conduct designed to barricade access to markets or inhibit production." (internal quotation marks and citation omitted)); *Intergraph Corp. v. Intel Corp.,* 195 F.3d 1346, 1353 (Fed. Cir. 1999) ("Unlawful monopolization requires both the existence of monopoly power and anticompetitive conduct.").

In his petition, Mr. Gurrola appears to define the relevant geographic market to encompass only Canutillo, Texas; Anthony, Texas; Anthony, New Mexico; the far eastern part of Las Cruces, New Mexico; and Chaparral, New Mexico. Original Pet. at 1-2. He refers to this area as the "New Mexico/West Texas corridor." *Id* at 3. He alleges that in January 2010, Walgreen opened its store in Anthony, New Mexico; at the time, there were five other pharmacies in that corridor, including Palafox Pharmacy (also in Anthony, Texas), which he owns. *Id.* at 1-2. But today, only two pharmacies remain in business: Walgreen and Palafox. *Id* at 2. He further alleges that Walgreen's share of the market grew from 5% in 2010 to 99.99% today. *Id. at* 1, 3.

As an initial matter, Mr. Gurrola's allegation that Walgreen has 99.9% market share and his legal conclusion that Walgreen possesses monopoly power (he calls it "monopolistic control") are problematic. This is because his definition of the geographic market excludes, for example, the western part of the City of El Paso, but includes the small town of Chaparral, New Mexico, even though El Paso and Chaparral are equal distance away from his pharmacy or the Anthony, Texas Walgreen.

In any event, in its motion, Walgreen challenges only the second element of actual monopolization, *i.e.,* the willful acquisition or maintenance of the monopoly power.

Specifically, Walgreen argues that the Original Petition fails to allege any anticompetitive actions on the part of Defendant. Mot. to Dismiss ¶ 8. The Court agrees. Mr. Gurrola alleges that Walgreen's "aggressive behavior" gave rise to its "monopolistic control" in the geographic market "through buyouts and forceouts." Original Pet. at 1. This is merely a conclusory allegation, which is insufficient to survive a motion to dismiss. *See Fernandez-Montes v. Allied Pilots Ass'n,* 987 F.2d 278, 284 (5th Cir. 1993) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."). Specifically, the Petition does not allege what the "aggressive behavior" was and how Walgreen forced other pharmacies out of business—much less allege facts to plausibly show that such actions by Walgreens were anticompetitive. Moreover, buying out horizontal competitor, without more, is not anticompetitive, because "in a competitive market, buying out competitors is not merely

permissible, it contributes to market stability and promotes the efficient allocation of resources." *United States v. Syufy, Enters.,* 903 F.2d 659, 673 (9th Cir. 1990); *see also id* at 662 (rejecting the United States' argument that one "may not get monopoly power by buying out your competitors"). Consequently, the Court grants Walgreen's motion on this ground.

B. The Clayton Act, § 3

Section 3 of the Clayton Act makes it unlawful to sell goods on the "condition, agreement, or understanding" that the purchaser refrain from dealing with competitors of the seller if the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 14. Exclusive-dealing arrangements may be challenged under Section 3 of the Act. *Apani Sw., Inc. v. Coca-Cola Enterprises, Inc.,* 300 F.3d 620, 625 (5th Cir. 2002). Exclusive dealing "occurs when a seller agrees to sell its output of a commodity to a particular buyer, or when a buyer agrees to purchase its requirements of a commodity exclusively from a particular seller." *Id.* The Supreme Court has interpreted Section 3 of the Clayton Act to mean that exclusive dealing agreements are not per se illegal, but are prohibited only if performance of the arrangement will foreclose competition in a substantial share of the affected line of commerce. *Tampa Elec. Co. v. Nashville Coal Co.,* 365 U.S. 320, 327 (1961).[2]

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2 When assessing whether an exclusive-dealing arrangement has the probable effect of substantially lessening competition, courts conducts a three-part inquiry. *Apani Sw., Inc.,* 300 F.3d at 625. First, the relevant product market must be identified by considering interchangeability and cross-elasticity of demand.

Mr. Gurrola's petition alleges that "through *exclusive dealing* defendant has acted and is acting in violation of § 3 of the Clayton Act." Original Pet. at 3 (emphasis added). The Petition fails to allege any facts to support exclusive dealings; it does not even identify the buyer(s)/seller(s) with whom Walgreen entered into exclusive dealings. Consequently, Mr. Gurrola's petition fails to state a claim under the Clayton Act. *See Bowlby v. City of Aberdeen, Miss.,* 681 F.3d 215,219 (5th Cir. 2012) ("A complaint is insufficient if it offers only labels and conclusions or a formulaic recitation of the elements of a cause of action. (internal quotation marks and citation omitted)). The Court therefore grants Walgreen's motion on this ground.

C. Civil Conspiracy

Civil conspiracy is a derivative action premised on an underlying tort. *Tilton v. Marshall,* 925 S.W.2d 672, 681 (Tex.1996). It is a way "to extend liability in tort beyond the active wrongdoer to those who have merely planned, assisted, or encouraged his *acts." Carroll v. Timmers Chevrolet, Inc.,* 592 S.W.2d 922, 925-26 (Tex. 1979) (internal quotation marks and citation omitted). Thus, a "defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least

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Id. Second, the relevant geographic market must be identified, by careful selection of the market area in which the seller operates and to which the purchaser can practicably turn for supplies. *Id.* Finally, a plaintiff must show that the competition foreclosed by the arrangement constitutes a 'substantial share of the relevant market. *Id.* That is, the opportunities for other traders to enter into or remain in that market must be significantly limited. *Id.*

one of the named defendants liable." *Tilton,* 925 S.W.2d at 681.

Walgreen argues that Mr. Gurrola's petition fails to allege an underlying tort for which it can be held liable for conspiracy. Mot. to Dismiss ¶ 12. Mr. Gurrola alleges that in May 2015, a Walgreen pharmacist named Richard filed "a negative report" about Palafox Pharmacy to the Texas State Board of Pharmacy for purposes of having Palafox "disciplined." Original Pet. at 5. The petition also alleges that in August 2015, another Walgreen pharmacist named Judy "improperly accused the Palafox Pharmacy of hanging up on her." *Id.*

Neither Richard, nor Judy are named as defendants in this action. Moreover, Mr. Gurrola does not state what underlying tort, arising from the two alleged incidents, was committed by Richard and Judy. Nevertheless, to the extent Mr. Gurrola's allegations may be liberally construed as a alleging that Richard and Judy each committed a tort of defamation or business disparagement, *see In re Lipsky,* 460 S.W.3d 579, 591 (Tex. 2015) ("Business disparagement and defamation are similar in that both involve harm from the publication of false information."), the Court analyzes the pleading sufficiency of Mr. Gurrola's petition for such claims. The elements of a defamation claim are: (1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases. *Id.* at 593. The elements of a business disparagement claim are: (1) the defendant published false and disparaging information about it, (2) with malice, (3) without

privilege, (4) that resulted in economic damages to the plaintiff. *Id.* at

As an initial matter, in his proposed amended petition, Mr. Gurrola appears to clarify that Richard "threatened" Mr. Gurrola and others at Palafox that "Walgreen was going to file a negative complaint," and further that Judy also "threatened" Mr. Gurrola and others at Palafox with the alleged accusation. Mot. for Leave to Am. Pet., Attach. at 5, ECF No. 25-1. So, it is unclear whether Richard and Judy "published" or communicated the alleged negative report and accusation to a third party; if they did not do so, claims of defamation or business disparagement would be unavailing.

Be that as it may, construing the factual allegations in Mr. Gurrola's Original Petition as true and in the light most favorable to him, the Court finds that the petition fails to sufficiently allege at least one element of the defamation and business disparagement claims. Regarding the May 2015, the petition fails to allege what statements were made in the negative report, and more critically, why the statements were false. Regarding the August 2015, the petition fails to allege facts from which it can be plausibly inferred that Judy's accusation was defamatory (for purposes of the defamation claim) or disparaging and resulted in economic damages (for purposes of the business disparagement claim). The Court therefore grants Walgreen's motion on this ground.

D. Breach of Contract

Under Texas law, to plead a claim for breach of contract, a plaintiff must allege: (1) the existence of a valid contract; (2) that he performed or tendered per-

formance under the contract; (3) that the defendant breached the contract; and (4) that the plaintiff sustained damages as a result of the breach. *Sport Supply Grp., Inc. v. Columbia Cas. Co.,* 335 F.3d 453, 465 (5th Cir. 2003). To establish the first element, *i.e.,* the existence of a valid contract, five elements must be present: (1) an offer; (2) an acceptance in strict compliance with the terms of that offer; (3) a meeting of the minds; (4) each party's consent to the terms; and (5) execution and delivery of the contract with intent that it be mutual and binding. *Coffel v. Stryker Corp.,* 284 F.3d 625, 640 n.17 (5th Cir. 2002).

Mr. Gurrola alleges that in September 2014, Walgreen contacted him "to *see* if Palafox Pharmacy could be sold to [Walgreen]," and he accepted the offer of $1.5 million. Original Pet. at 3. As "[t]he first step," Mr. Gurrola provided Walgreen representatives, including its district manager, Mark Saenz access to Palafox's business records on sales, customer lists, and doctor lists. On October 16, 2014, Mr. Saenz and Mr. Gurrola "shook hands to signify the deal was closed." *Id.* at 3-4. Two days later, Mr. Saenz "confronted" Mr. Gurrola with an order from the Texas State Board of Pharmacy that required Mr. Gurrola to take a national exam within four months. *Id* at 4. Mr. Saenz said "because [Mr. Gurrola] could not be there to transfer the records[,] Walgreen could not buy [Palafox]."

In its motion, Walgreen argues that Mr. Gurrola's petition contains no allegation of a contract, and further that even if the handshake deal to purchase Palafox was an agreement, it is unenforceable under the statute of frauds. Mot. to Dismiss § 11. The Court agrees.

In certain kinds of transactions, the statute of frauds "require[es] agreements to be set out in a writing signed by the parties." *Haase v. Glazner,* 62 S.W.3d 795, 799 (Tex. 2001). The statute of frauds renders an oral contract that falls within its purview unenforceable. *Holloway v. Dekkers,* 380 S.W.3d 315, 320 (Tex. App.—Dallas 2012, no pet.). The statute of frauds encompasses agreements that are "not to be performed within one year from the date of making the agreement." Tex. Bus. & Comm. Code § 26.01(b)(6). "Thus, when a promise or agreement, either by its terms or by the nature of the required acts, cannot be completed within one year, it falls within the statute of frauds and is not enforceable unless it is in writing and signed by the person to be charged." *Holloway,* 380 S.W.3d at 320.

Mr. Gurrola's petition alleges that upon transfer of Palafox to Walgreen, he was to receive $800,000 as the first payment and additional $600,000 "in *yearly increments* for a total of $1,500,000.00." Original Pet. at 6 (emphasis added). By its terms, therefore, the "agreement" could not be performed within one year from the date of its making. Consequently, the alleged oral agreement is unenforceable because it falls within the purview of the statute of frauds. The Court therefore grants Walgreen's motion on this ground.

E. Fraud

The elements of common law fraud are:

> (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a

> positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury.

Allstate Ins. v. Receivable Fin. Co., 501 F.3d 398, 406 (5th Cir. 2007) (citing *In re FirstMerit Bank, NA.,* 52 S.W.3d 749, 758 (Tex. 2001)). To be actionable, the misrepresentation must be "one concerning a material fact; a pure expression of opinion will not support an action for fraud." *Transp. Ins. v. Faircloth,* 898 S.W.2d 269, 276 (Tex. 1995).

Mr. Gurrola appears to allege that the October 16, 2014 handshake between Mr. Saenz and Mr. Gurrola "signify[ing] the deal was closed" was an actionable misrepresentation by Mr. Saenz. *See* Mot. to Dismiss at 3. He argues that Walgreen, through Mr. Saenz, made a "false proposition" and "offer" to buy his business in order to gain access to his business records, but then "withdrew its proposition" and "offer." Pl.'s Resp. to Mot. to Dismiss at 3-4. In other words, according to Mr. Gurrola, Walgreen's promise to buy his business, which it failed to perform, was an actionable as fraud.

A promise to do an act in the future can constitute actionable misrepresentation "'only when made with the intention, design and purpose of deceiving, and with no intention of performing the act' at the time the promise was made." *Clardy Mfg. Co. v. Marine Midland Bus. Loans Inc.,* 88 F.3d 347, 360 (5th Cir. 1996) (quoting *Airborne Freight Corp. v. C.R. Lee Enters., Inc.,* 847 S.W.2d 289, 294 (Tex. App.—El Paso 1992, writ denied)). "Mere breach of an agreement is not enough in itself to establish that

the speaker made the promise with no intention of fulfilling it." *Gillum v. Republic Health Corp.,* 778 S.W.2d 558, 571 (Tex. App.—Dallas 1989, no writ).

Even if the handshake could be construed as a promise to buy Mr. Gurrola's business, his petition alleges no facts from which it can be plausibly inferred that Mr. Saenz made the promise with no intention of performing it at the time he made the promise. *See Priddy v. Rawson,* 282 S.W.3d 588, 598 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) ("Fraud is never presumed, and when it is alleged, the facts sustaining it must be clearly shown."). The Court therefore grants Walgreen's motion on this ground.

F. Mr. Gurrola's Motion for Leave to Amend Petition

Finally, the Court addresses the merits of Mr. Gurrola's Motion for Leave to Amend Petition. Upon granting a Rule 12(b)(6) motion, "the usual course of action . . . is to allow a plaintiff to amend his or her complaint." *Waste Control Spec, L.L.C. v. Envirocare of Tex., Inc.,* 199 F.3d 781, 786 (5th Cir. 2000). But a court need not do so, if the plaintiff has already pleaded his best case and it would be futile to permit him to replead. *See Brown v. DFS Servs., L.L.C.,* 434 F. App'x 347, 352 (5th Cir. 2011) *(per curiam)* (*"[I]t* is not reversible error 'in any case where the pleadings, when viewed under the individual circumstances of the case, demonstrate that the plaintiff has pleaded his best case.' (emphasis in original) (quoting *Jacquez v. Procunier,* 801 F.2d 789, 791 (5th Cir. 1986)).

In his proposed amended petition, Mr. Gurrola does not allege facts that cure the above-mentioned pleading deficiencies in his Original Petition. The

only new factual allegation he advances is that Palafox Pharmacy is no longer in business and therefore, Walgreen controls 100% of the market share. Mot. for Leave to Am. Pet., Attach. at 2-3. He also asserts a new claim for "Ethnic Slurs and Invasion of Privacy," based on Walgreen's litigation conduct in this case and on a 1989 illegal search and seizure allegedly perpetrated by someone who is now a Walgreen employee, but then was an employee of the United States Army. The Court finds that Mr. Gurrola has pleaded his best case, and that granting him leave to amend would be futile.

IV. CONCLUSION

Accordingly, IT IS ORDERED that Defendant Walgreen Company's "Motion to Dismiss" (ECF No. 4) is GRANTED.

IT IS THEREFORE ORDERED that Plaintiff Samuel A. Gurrola's claims against Defendant Walgreen Company are DISMISSED.

IT IS FURTHER ORDERED that Plaintiff Samuel A. Gurrola's "Motion for Leave of Court to Amend and Supplement Pleadings" (ECF No. 25) is DENIED.

IT IS FINALLY ORDERED that all pending motions, if any, are DENIED AS MOOT and the District Clerk SHALL CLOSE this case.

So ORDERED and SIGNED this 15th of November 2017.

/s/ David G. Guarderrama
David G. Guarderrama
United States District Judge