APPENDIX

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APPENDIX A

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File Name: 19a0078p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-3863

[Filed April 25, 2019]

THE MEDICAL CENTER AT ELIZABETH PLACE, LLC, *Plaintiff-Appellant*,	)
v.	)
ATRIUM HEALTH SYSTEM, et al., *Defendants-Appellees.*	)

Appeal from the United States District Court
for the Southern District of Ohio at Dayton.
No. 3:12-cv-00026—Walter H. Rice, District Judge.

Argued: April 25, 2018

Decided and Filed: April 25, 2019

Before: BATCHELDER, SUTTON, and WHITE,
Circuit Judges.

COUNSEL

ARGUED: Richard A. Ripley, RUYAK CHERIAN LLP, Washington, D.C., for Appellant. Shay Dvoretzky, JONES DAY, Washington, D.C., for Appellees. **ON BRIEF:** Richard A. Ripley, Brittany V. Ruyak, RUYAK CHERIAN LLP, Washington, D.C., James A. Dyer, Patrick O'Shaughnessy, SEBALY, SHILLITO + DYER, Dayton, Ohio, for Appellant. Shay Dvoretzky, Robert Stander, JONES DAY, Washington, D.C., Melinda K. Burton, FARUKI IRELAND COX RHINEHART & DUSING P.L.L., Dayton, Ohio, Thomas Demitrack, JONES DAY, Cleveland, Ohio, for Appellees.

BATCHELDER, J., delivered the opinion of the court in which SUTTON, J., joined, and WHITE J., joined in part. SUTTON, J. (pp. 24–26), delivered a separate concurring opinion. WHITE, J. (pp. 27–30), delivered a separate opinion dissenting in part.

OPINION

ALICE M. BATCHELDER, Circuit Judge. This is a case about competition among hospitals in Dayton, Ohio. When Medical Center at Elizabeth Place, LLC ("MCEP") opened in 2006, it was an acute care, for-profit hospital owned by 60 physicians and one corporate shareholder. By 2009, MCEP's existence as a physician-owned enterprise came to an end when it sold an ownership interest to Kettering Health Network, a competitor in the Dayton healthcare market. MCEP alleges that it failed because of the anticompetitive actions of Premier Health Partners

("Premier"), a dominant healthcare network in the Dayton area. MCEP alleges that Premier contracted with area physicians and payers (insurers and managed-care plan providers) on the condition that they did not do business with MCEP. Because payers provide patients and physicians provide services, it is difficult to run a viable hospital when one, let alone both, is in short supply.

So, whether by licit or illicit means, Premier won that competition. In this litigation, the parties competed again. This time, MCEP pushed all its chips to the center of the table on one hand of cards: a claim that Premier had engaged in conduct so devoid of benefit to the market as to be per se illegal under the Sherman Act. Such claims apply only to a limited range of conduct. To be per se illegal, a defendant's conduct has to be so obviously anticompetitive that it has no plausibly procompetitive features—a high hurdle for plaintiffs claiming restraint of trade. Once they clear it, however, plaintiffs receive a corresponding reward: they need not undergo the often arduous process of showing that the challenged conduct was anticompetitive. As one of our sister circuits has described it, "[t]he per se rule is the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score." *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1362-63 (5th Cir. 1980).[1]

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[1] The other approach to determining whether a restraint of trade is "unreasonable" is the "rule of reason." *In re Southeastern Milk Antitrust Litigation*, 739 F.3d 262, 270 (6th Cir. 2014). "If the rule of reason is used, plaintiffs must additionally show that the

The question before us is whether MCEP successfully played its hand. The district court from which MCEP appeals found that MCEP's per se claim failed because the record showed that Premier's contracts with payers and physicians had plausibly procompetitive features. That holding says nothing about whether Premier's conduct was on balance procompetitive or anticompetitive. This opinion likewise reaches no decision on the ultimate economic merits of Premier's actions because to do so would go beyond our charge. We must address only the question of per se illegality, and as to that, we agree with the district court that MCEP failed to meet the high standard required for per se claims. We **AFFIRM**.

I.

MCEP alleges a conspiracy between the Premier hospitals that implicates, without naming as defendants, payers and physicians in the Dayton area. During the course of this multi-year litigation, various legal issues raised in this case have been ruled on by U.S. District Judge Black, a Sixth Circuit appellate panel, and then, after the matter was remanded and Judge Black recused himself, District Judge Rice, who granted the motion for summary judgment presently before us.

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restraint produced anticompetitive effects within the relevant product and geographic markets, while the per se rule is reserved for restraints that are so clearly unreasonable that their anticompetitive effects within geographic and product markets are inferred." *Id*.

Factual Background

MCEP is an acute-care hospital located in Dayton, Ohio, that opened in September 2006 with 60 physician owners and one corporate shareholder, Regent Surgical Health. Defendants in this case comprise four hospitals—Miami Valley Hospital (owned by MedAmerica Health), Good Samaritan Hospital (owned by Catholic Health Initiatives), Atrium Medical Center (owned by Atrium Health Systems), and Upper Valley Medical Center—as well as a joint operating company, Premier Health Partners ("Premier"), formed through a joint operating agreement among those four hospitals.[2] This joint operating agreement merged some of the hospitals' healthcare functions but allowed them to retain control of others. *Med. Ctr. at Elizabeth Place v. Atrium Health Sys.* ("*MCEP I*"), 817 F.3d 934, 936-37 (6th Cir. 2016). Hospital Defendants comprise a dominant healthcare network in the Dayton area, with more than a 55% share of Dayton's inpatient surgical services.

In spite of its dominant market position, the record leaves no doubt that Hospital Defendants felt threatened by the possibility of MCEP's presence in the Dayton medical market. Five months before MCEP opened for business, Hospital Defendants held a board meeting at which, "[b]y consensus, the Board supported management's efforts" to oppose MCEP. Executives from Premier told an MCEP shareholder that Hospital

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[2] In this opinion, we refer to the four hospitals and the joint operating company collectively as "Hospital Defendants" except where otherwise noted.

Defendants "would do whatever they needed to do in order to stop [MCEP] from opening."

Hospital Defendants' underlying concern appears to have been that MCEP's for-profit, physician-owned model of healthcare would "bankrupt" their hospitals. A letter written by primary care physicians (most of whom were affiliated with Hospital Defendants), addressed to physicians in the Dayton healthcare market, expressed the dynamic they found worrisome:

> There is currently widespread opposition among not-for-profit community hospitals across the country toward physician owned inpatients [sic] hospitals such as this. The physician investors are doing so for reasons of profitability. MVH and GSH offer the range of services and the quality of care necessary to enable surgeons to care for their patients. A physician owned specialty hospital will take the better-insured and more profitable patients away from Premier (along with ancillary services), leaving our local hospitals with only the more complex and underinsured patients.

MCEP, for its part, wrote a "Dear Colleague" letter the next month, responding:

- While MCEP's business model will "create a competitive environment to deliver better and more efficient healthcare in Dayton," it will not drive hospitals out of business;
- MCEP "will not turn away patients on the basis of payor classification";

- "Premier generates about $1 billion in revenues and currently has a cash reserve of over $1 billion. As a non-profit, Premier pays no taxes. . . . [MCEP] will have revenues that are a fraction of Premier's, and our physician-owned hospital will pay corporate, personal and property taxes";
- "[C]omprehensive studies have confirmed that physician-run hospitals have fewer medical errors, shorter turnover times, fewer infections and greater cost efficiencies."

Citing Hospital Defendants' board-meeting consensus and their letter to physicians, MCEP alleges that Hospital Defendants blocked MCEP from gaining meaningful access to the Dayton market through a series of anticompetitive acts that amounted to a group boycott of MCEP. In its Amended Complaint, MCEP made only a per se claim; MCEP made no claim under the rule of reason. MCEP's Amended Complaint alleges that Hospital Defendants:

- financially coerced commercial health insurers or managed care plan providers (such as Anthem, UnitedHealthcare, Private Healthcare Systems, etc.) "to refuse to permit [MCEP] full access to their respective networks";
- financially coerced commercial health insurers or managed care plans to reimburse MCEP at suppressed rates far below what Hospital Defendants demanded for the same services;

- threatened retributive financial consequences to physicians who affiliated with MCEP, and followed through on threats, "including terminating leases that the physicians had with the Defendants for office space";
- offered payments to physicians "who agreed not to work with or at [MCEP]; and who agreed to divest ownership in the Medical Center";
- financially coerced physicians affiliated with Hospital Defendants from "admitting patients to [MCEP] or referring patients to physicians who treated patients at [MCEP]"; and
- deliberately poached physicians from MCEP who made up a "disproportionately high number of admissions and then prohibited them from admitting patients to [MCEP]."

Beyond these allegations, MCEP claims that, in the course of litigation, it discovered two additional agreements that comprised part of the actionable group boycott.[3] First, MCEP alleges an agreement among the payers, induced by Hospital Defendants, not to offer MCEP a managed care contract. Second, MCEP alleges

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[3] While there is some dispute about exactly when these claims were first brought to Hospital Defendants' attention, there does not appear to be any dispute that the claims were raised (though the Complaint was not amended to reflect the new claims) in MCEP's opposition to Hospital Defendants' initial motion for summary judgment before Judge Black.

an agreement among primary care physicians not to do business with physicians who invested in MCEP (Hospital Defendants refer to this as the "physician conspiracy"). Hospital Defendants describe the relationship of these agreements to the original allegation using the metaphor of a hub, spoke, and rim. For these claims, the Hospital Defendants form the hub; the vertical agreements the Hospital Defendants made with payers and physicians to exclude MCEP are the spokes; and the discrete agreements to boycott MCEP, among the payers and among the physicians, are at the rim.

MCEP alleged only the "hub" agreement in its Amended Complaint. Hospital Defendants argue that the "rim conspiracy" claim is a new, *and untimely*, Sherman Act Section 1 claim. MCEP, for its part, maintains that the additional agreements are simply evidence of the overarching Section 1 conspiracy alleged in their Amended Complaint. Regardless of the exact scope of the alleged boycott, MCEP alleges that one existed, that it was orchestrated by Hospital Defendants, and that it prevented MCEP from succeeding as a going concern. MCEP claims that, but for Hospital Defendants' conduct, it would have been able to contract with payers and physicians, which would have, in turn, increased competition in the Dayton healthcare market for consumers of general inpatient surgical services.

Procedural History

This case was before Judge Black in Cincinnati from January 30, 2012, to April 19, 2017. During that time, Judge Black granted Hospital Defendants' motion for

summary judgment on the ground that the MCEP's antitrust claim lacked the necessary plurality of actors.

On appeal to this court, a divided panel reversed Judge Black and rejected Hospital Defendants' motion for summary judgment. The panel held that a reasonable juror could find that Premier comprised multiple competing entities and, therefore, could engage in concerted action. *MCEP I*, 817 F.3d at 945. The panel did not address other issues raised before it, such as whether MCEP's additional rim conspiracy claims were untimely. *Id*. at 939.

On remand, Hospital Defendants moved again for summary judgment arguing, among other things, that MCEP's allegation of a per se antitrust violation failed as a matter of law. Hospital Defendants argued that their alleged restraints on trade were plausibly procompetitive which, they argued, is sufficient to defeat a per se antitrust claim. Because MCEP pleaded only a per se claim, if Hospital Defendants had succeeded in this argument, the case would have been dismissed. Judge Black denied Hospital Defendants' renewed motion for summary judgment, rejecting Hospital Defendants' argument on two alternative bases: *first*, the claimed procompetitive effects of the challenged conduct are subject to genuine dispute and are therefore an improper basis for summary judgment, and *second*, Hospital Defendants "failed to evidence that their joint contracting has any efficiency-enhancing purpose to which such an agreement is necessary." *Med. Ctr. at Elizabeth Place v. Premier Health Partners*, 2016 WL 9460026, at *5 (S.D. Ohio Oct. 6, 2016).

The case was set for trial. But on April 19, 2017, Judge Black recused himself and the case was re-assigned to Judge Rice.[4] Before Judge Rice, Hospital Defendants moved to "Clarify Issues for Trial," which all parties now agree amounted to a motion for reconsideration of Judge Black's October 6, 2016, order denying Hospital Defendants' motion for summary judgment. Less than a week before trial was set to begin, Judge Rice granted Hospital Defendants' motion for summary judgment and dismissed the Amended Complaint with prejudice. Judge Rice declined to apply the "law of the case" doctrine, holding that Judge Black had clearly erred. He found that while Judge Black correctly articulated the standard for a per se claim—that the challenged conduct must have no plausible procompetitive effect—Judge Black failed to acknowledge that the record showed that the Hospital Defendants' challenged restraints had such plausible procompetitive effects. Judge Rice also rejected MCEP's argument that the Amended Complaint implicitly included claims of rim conspiracies among the payers and among the physicians—claims that all agree, if proven, would constitute a per se violation—explaining that those claims were not contained in the Amended Complaint, that MCEP's attempt to "wedge this new claim into the existing allegations" was improper, and that the Hospital "Defendants would be severely prejudiced if MCEP were permitted to amend its Complaint [again] at this late date." MCEP asks us to reverse Judge Rice's decision granting Hospital

[4] Judge Black explained that, as a "Cincinnati duty-stationed Judge," he could not preside over a trial in Dayton.

Defendants' motion for summary judgment and to remand the case for trial.

II.

Summary judgment is warranted if, viewing the facts in the light most favorable to the nonmoving party, no material fact is subject to a genuine dispute. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986).[5] We review de novo grants of summary judgment. *Expert Masonry, Inc. v. Boone Cty.*, 440 F.3d 336, 341 (6th Cir. 2006).

The parties dispute what de novo review should entail in this case. MCEP claims that Judge Rice's decision to not apply the "law of the case" doctrine was critical to his decision to grant Hospital Defendants' motion for summary judgment, and therefore we must review Judge Rice's "law of the case" decision de novo. According to MCEP, Judge Rice could reconsider Judge Black's denial of summary judgment only by finding that Judge Black clearly erred. So, MCEP says, if

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[5] If a presumption against summary judgment in antitrust cases is ever appropriate, it is not here. This circuit has applied a presumption against summary judgment in antitrust actions only when the case demanded a fact-intensive inquiry under the rule of reason into issues of intent and motive. *In re Southeastern Milk Antitrust Litig.*, 739 F.3d 262, 270 (6th Cir. 2014) (quoting *Expert Masonry, Inc. v. Boone Cty.*, 440 F.3d 336, 341 (6th Cir. 2006)); *but see In re ATM Antitrust Litigation*, 554 F. Supp. 2d 1003, 1010 (N. D. Cal. 2008) (opining that "any presumption against the granting of summary judgment in complex antitrust cases has now disappeared") (citation omitted). Unlike in a rule of reason claim, in a per se claim intent and motive are not critical determinations. *See* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 1910a (3rd ed. 2011).

Judge Rice was wrong that Judge Black committed clear error, then we must reverse his "law of the case" judgment. For their part, Hospital Defendants argue that we should simply review de novo Judge Rice's substantive legal conclusions, separate and apart from Judge Rice's "law of the case" conclusion.

Ultimately, the Hospital Defendants have the better of this argument. *First*, we review for abuse of discretion Judge Rice's decision to reconsider Judge Black's pre-transfer order. *See United States v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990). MCEP argues that abuse of discretion is not the proper standard of review in a case transferred from one district court to another, in which a pre-transfer ruling of one judge is altered by a post-transfer decision of a different judge. We have foreclosed this argument by holding—in precisely the scenario identified by MCEP—that abuse of discretion remains the proper standard of review. *See Gillig v. Advanced Cardiovascular Sys. Inc.*, 67 F.3d 586, 590 (6th Cir. 1995).[6]

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[6] MCEP cites *Jimkoski v. State Farm Mut. Auto. Ins. Co.*, 247 F. App'x 654 (6th Cir. 2007), for the proposition that Judge Rice's "law of the case" decision—specifically his finding that Judge Black committed clear error—should be reviewed de novo. This misapplies *Jimkoski*. Read in context, *Jimkoski* simply acknowledged that where a motion for reconsideration concerns summary judgment, we do not review the district court's decision to grant summary judgment for abuse of discretion. *Id.* at 659. To do so would insulate the district court's merits decision from the proper standard of review—de novo—simply because the motion that the district court ruled on was a motion for reconsideration. That concern is not present in this case because we review for abuse of discretion the decision to grant a motion for reconsideration (here that means we review the "law of the case"

Second, we can find that Judge Rice abused his discretion in disturbing Judge Black's denial of summary judgment only if we have a "definite and firm conviction that [Judge Rice] committed a clear error in judgment" such as "rel[ying] upon clearly erroneous factual findings, appl[ying] the law improperly, or us[ing] an erroneous legal standard." *See Garner v. Cuyahoga Cty. Juvenile Ct.*, 554 F.3d 624, 634 (6th Cir. 2009) (citation and quotation marks omitted). Of these potential bases for abuse of discretion, MCEP argues only that Judge Rice improperly applied the law, a question that we review de novo.

III.

MCEP's raises two substantive claims on appeal. *First*, MCEP argues that the district court erred by declining to apply the per se rule to Hospital Defendants' allegedly anticompetitive conduct. *Second*, MCEP argues that the district court erred in rejecting MCEP's "horizontal rim claims" due to untimeliness. Neither argument has merit.

A.

Per se claim

Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Because virtually every

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decision for abuse of discretion). But we still review de novo the merits of the district court's grant of summary judgment.

agreement between parties has the potential to be considered a restraint of trade, antitrust jurisprudence limits the range of restraints within the reach of antitrust law to agreements that *unreasonably* restrain trade. *In re Southeastern Milk Antitrust Litig.*, 739 F.3d 262, 270 (6th Cir. 2014). A restraint on trade may be found to be unreasonable per se or under the "rule of reason." *Id*. As MCEP makes only a per se claim, the question before us is whether Judge Rice erred in granting Hospital Defendants' motion for summary judgment on the grounds that Hospital Defendants' conduct falls outside per se illegality. Judges Black and Rice did not agree in their answer to the underlying question and the prior Sixth Circuit panel declined to address it. *MCEP I*, 817 F.3d at 939 (explaining that "[t]his appeal looks only at . . . whether defendants' conduct is the result of two or more entities acting in concert").

Although a motion for summary judgment against a per se claim involves underlying facts, the propriety of per se treatment "is normally a question of legal characterization that can often be resolved by the judge on a motion . . . for summary judgment." *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 373 F.3d 57, 61 (1st Cir. 2004). There is a presumption against applying the per se rule "[u]nless the restraint falls squarely into a *per se* category." *Southeastern Milk*, 739 F.3d at 271. As explained in *Expert Masonry*, "a *plaintiff* must satisfy each element of the *per se* . . . test[] . . . in its allegations in order to survive pre-trial termination." 440 F.3d at 344 (emphasis added). In *Southeastern Milk*, the court held that, even where a factual dispute exists between the parties over whether

a challenged restraint is obviously anticompetitive—and therefore deserving of per se treatment—the defendants producing "evidence that the agreement at issue may have had procompetitive aspects . . . indicate[s] that this situation would not fall into the categories of *per se* unreasonable restraints on trade." 739 F.3d at 274. The court concluded that "[t]herefore, especially at the summary judgment stage, this is not a 'clear cut' case of an obviously anticompetitive trade restraint, and thus the district court was correct to apply the default standard of the rule of reason." *Id*. Hence, at the summary judgment phase, the right question to ask regarding per se claims is whether the plaintiff has shown that the challenged restraint is so obviously anticompetitive that it should be condemned as per se illegal. If, in spite of the plaintiff's efforts, the record indicates that the challenged restraint is plausibly procompetitive, then summary judgment for the defendants is appropriate.

Per se claims against joint ventures

The question before us is further delineated by the fact that the challenged restraints exist within a joint venture, which the Supreme Court has noted "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld Corp v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984). At the same time, joint ventures often superficially resemble horizontal concerted action because they involve horizontal competitors joining together to restrain trade in some way, such as by coordinating prices. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 4 (2006) (denying a per se horizontal price fixing claim brought by a plaintiff

against a joint venture created by Texaco and Shell Oil that unified their respective gasoline refining and marketing operations in the western United States under two brands).

Because joint ventures often have procompetitive efficiencies, when a joint venture is itself challenged as anticompetitive, that claim is reviewed under the rule of reason. *Copperweld Corp.*, 467 U.S. at 768. But when the *conduct* of the joint venture is challenged, the relationship of the challenged conduct to the joint venture is analyzed to see if the conduct is reasonably related to the joint venture's procompetitive features (and therefore should be judged under the rule of reason), or is a naked restraint lurking beneath the veneer of a legitimate joint venture (and therefore deserves per se condemnation). *See Nat. Collegiate Athletic Assn. v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 113-15 (1984) (observing that a "naked" restraint, subject to the per se rule, can exist even though it is contained in a joint venture agreement that is, overall, quite competitive). The Supreme Court has distinguished three categories of restraints: (1) restraints that are core to the joint venture's efficiency enhancing purpose; (2) restraints that are ancillary to the joint venture's efficiency enhancing purpose; and (3) restraints that are nakedly unrelated to the purpose of the joint venture. *See Dagher*, 547 U.S. at 7-8. Only the last of these three justifies per se treatment. *Id.*

Core activity

Core activity is activity that is "integral to the running" of the venture. *Id.* at 7-8. In *Dagher*, the

Supreme Court rejected a per se claim against horizontal price-setting by two competitors on the ground that the price-setting "involve[d] the core activity of the joint venture itself." *Id*. at 7.

Hospital Defendants claim that the challenged panel limitation—but not the other challenged restraints—qualifies as core activity. They argue that because *Dagher* described price setting as a core activity for the joint venture in that case, and because panel limitations are a "pricing term" in Hospital Defendants' contracts with payers, the panel limitations are "core activity."

This argument is not persuasive. *Dagher* does not stand for the general proposition that restraints in contracts that are price related are always core activity for joint ventures. *Dagher*'s holding was tailored to the specific joint venture before it. *Id*. at 5-6. This argument may be dismissed simply by noting that the definition of "core activity" provided by *Dagher*, "integral to the running" of the joint venture, *id*. at 7-8, cannot seriously be argued of Hospital Defendants' panel limitations. Hospital Defendants continue to operate as a joint venture today even though the panel limitation clauses have been removed from their contracts with payers.

Joint venture's ancillary restraints

Restraints that are "ancillary to the legitimate and competitive purposes of the business association" fall between "core" activity and "naked" restraints. *Id*. at 7. These are restraints by a joint venture that are not "integral to the running" of the joint venture, *id*. at 8,

"but may contribute to the success of a cooperative venture." *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985). A restraint is ancillary if it bears a *reasonable* relationship to the joint venture's success. *See Major League Baseball Props., Inc. v. Salvino*, 542 F.3d 290, 339-40 (2d Cir. 2008) (Sotomayor, J., concurring).

Predictably, the parties spill considerable ink contesting what counts as "reasonable." MCEP urges the panel to accept Judge Black's version of the ancillary-restraints doctrine. We decline to do so because Judge Black framed the ancillary-restraints inquiry incorrectly in two ways: by applying too high a standard to determine what qualifies as "reasonable" and by placing an evidentiary burden on Hospital Defendants to meet that standard. Judge Black rejected Hospital Defendants' argument that their restraints bore a reasonable relationship to the joint venture's success, holding that they "failed to evidence that their joint contracting has any efficiency-enhancing purpose to which such an agreement is necessary." Under this standard, only restraints that are *necessary* to a joint venture's efficiency-enhancing purposes qualify as ancillary. Further, Judge Black held that Hospital Defendants must provide "undisputed proof" that the restraint is necessary to prevent a per se claim from proceeding to trial.

Judge Black's sole source of authority for this version of the ancillary-restraints doctrine is a guidance document put out by the Federal Trade Commission and the United States Department of Justice on collaboration among competitors. *See* Dep't

of Justice & FTC, *Antitrust Guidelines for Collaborations Among Competitors* § 3.3, at 10-25 (Apr. 2000). But the citation is of dubious relevance to the ancillary-restraints doctrine because the cited section deals with joint ventures only under the rule of reason, not the per se rule.

To bolster Judge Black's approach, MCEP cites *NaBanco v. Visa U.S.A., Inc.*, 779 F.2d 592, 601 (11th Cir. 1986), and *In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d 827, 872 (N.D. Ill. 2010), for the proposition that an ancillary restraint must be *necessary* to achieve the joint venture's efficiency-enhancing purpose. *NaBanco* supports MCEP's preferred formulation, but *In re Sulfuric Acid* does not. *In re Sulfuric Acid* echoes the ancillary-restraints inquiry articulated by the Seventh Circuit in *Polk Brothers*: "A court must ask whether an agreement promoted enterprise and productivity at the time it was adopted. If it *arguably* did, then the court must apply the Rule of Reason to make a more discriminating assessment." 743 F. Supp. 2d at 872 (quoting *Polk Bros.*, 776 F.2d at 189) (emphasis added).

Hospital Defendants, on the other hand, describe the standard as whether there exists a *plausible* procompetitive rationale for the restraint.[7] The Second,

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[7] Hospital Defendants, at one point, argue that the correct legal standard for determining whether a restraint is ancillary or naked is whether the challenged restraint is "completely unrelated to the purpose of a lawful joint venture." But this mischaracterizes the ancillary-restraints doctrine. "The per se rule would collapse if every claim of economies from restricting competition, however implausible, could be used to move a horizontal agreement not to

Seventh, Eighth, and Ninth Circuits adopt this approach.[8]

Perhaps most destructive to MCEP's argument is then-Judge Sotomayor's concurrence in *MLB Properties*, 542 F.3d at 338. Although MCEP cites that concurrence five times in its briefing, Judge Sotomayor categorically rejected the position MCEP asks this court to adopt. She described ancillary restraints as requiring "a *reasonable* procompetitive justification, related to the efficiency-enhancing purposes of the joint venture." *Id.* at 339 (emphasis added). Then, in defining what qualifies as "reasonable," she expressly rejected the formulation that MCEP argues here: "Under the ancillary restraints doctrine, a challenged restraint need not be essential, but rather only reasonably ancillary to the legitimate cooperative aspects of the venture." *Id.* at 340 n.11 (citations and internal quotation marks omitted); *see also Polk Bros.*,

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compete from the per se rule to the Rule of Reason category." *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 595 (7th Cir. 1984).

[8] *See MLB Properties*, 542 F.3d at 338-39 (Sotomayor, J., concurring); *Craftsmen Limo,, Inc. v. Ford Motor Co.*, 363 F.3d 761, 776 (8th Cir. 2004) ("When determining whether to apply the rule of reason analysis to non-price advertising restrictions related to product safety, the issue is not whether the restrictions *were* procompetitive, but whether they *could be*."); *Paladin Assoc., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1154-55 (9th Cir. 2003) ("When a defendant advances plausible arguments that a practice enhances overall efficiency and makes markets more competitive, per se treatment is inappropriate, and the rule of reason applies."); *Polk Bros.*, 776 F.2d at 189.

776 F.2d at 189 (explaining that a restraint is ancillary if it *may* promote the success of a joint venture).

The question of what relationship a challenged restraint must have to a joint venture in order to qualify as ancillary splits the Circuits—the Eleventh Circuit on the one hand, and the Second, Seventh, Eighth, and Ninth Circuits on the other. We follow the majority of Circuits and hold that a joint venture's restraint is ancillary and therefore inappropriate for per se categorization when, viewed at the time it was adopted, the restraint "may contribute to the success of a cooperative venture." *Polk Bros.*, 776 F.2d at 189. That approach better accords with Supreme Court guidance. As the Ninth Circuit in *Paladin Associates* explained:

> The Supreme Court generally has treated as per se illegal joint efforts by firms to disadvantage a competitor by persuading customers to deny that competitor relationships the competitor needs in the competitive struggle. But in these cases, the practices generally were not justified by plausible arguments that the practices enhanced overall efficiency and made markets more competitive.

328 F.3d at 1154-55. In a footnote that follows the court elaborated:

> This is so because plausible arguments that a practice is procompetitive make us unable to conclude "the likelihood of anticompetitive

> effects is clear and the possibility of countervailing procompetitive effects is remote."

Id. at 1155 n.8 (quoting *Stationers*, 472 U.S. at 294).

Paladin faithfully applies the Supreme Court's holding in *Stationers*. Condemning as per se illegal restraints that, while not necessary to achieving a joint venture's efficiency-enhancing purpose nevertheless plausibly relate to that purpose, would run counter to the Supreme Court's instruction to avoid applying the per se rule to situations where efficiencies are being served. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 894 (2007) (holding that per se treatment is inappropriate where "it cannot be stated with any degree of confidence that [the challenged restraint] 'always or almost always tends to restrict competition and decrease output'") (quoting *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988)).

MCEP's second but related argument, which was adopted by Judge Black, is that Hospital Defendants bear the burden of proving that a challenged restraint is procompetitive, and therefore ancillary, because the question of the procompetitiveness of a restraint is "quintessentially one of fact." Judge Black's inclination to defer to the fact finder has an intuitive appeal in the summary judgment context. And it would be correct had MCEP brought a claim under the rule of reason. *See Perceptron, Inc. v. Sensor Adaptive Mach., Inc.*, 221 F.3d 913, 919 (6th Cir. 2000) ("[T]he rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.")

(citation omitted). For a per se claim, however, Judge Black's conclusion is erroneous. Whether challenged conduct belongs in the per se category is a question of law. *See Ariz. v. Maricopa Cty. Med. Socy.*, 457 U.S. 332, 337 n.3, 354 (1982) (characterizing the per se rule as a "rule of law"); *MM Steel, L.P. v. JSW Steel (USA) Inc.*, 806 F.3d 835, 847 (5th Cir. 2015) ("The decision to analyze the conspiracy under a per se theory of liability is a question of law that we review de novo."). In *Craftsmen Limousine, Inc. v. Ford Motor Co.*, the Eighth Circuit likewise found that whether a given restraint falls within the per se category is a question of law, citing a well-respected treatise on antitrust law for the proposition that "although a court's determination that the per se rule applies 'might involve many fact questions, the selection of a mode of analysis is entirely a question of law.'" 363 F.3d 761, 772 (8th Cir. 2004) (citing Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 1909b (1998)). And it is a question of law where certain presumptions apply. As we explained in *Expert Masonry*, the "*plaintiff* must satisfy each element of the per se . . . test[] . . . in its allegations in order to survive pre-trial termination." 440 F.3d at 344 (emphasis added). The Supreme Court has likewise held that because a plaintiff failed to make a threshold showing that the challenged conduct had the characteristics necessary to justify per se condemnation, rule of reason analysis should apply instead. *Stationers*, 472 U.S. at 298 ("A plaintiff seeking application of the *per se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects.").

If the record in this case reveals a plausible way in which the challenged restraints contribute to the procompetitive efficiencies of the joint venture, then "the possibility of countervailing procompetitive effects" is not remote and per se treatment is improper. *Id*. at 294. What are Premier's procompetitive efficiencies? The joint operating agreement of Hospital Defendants' joint venture, Premier, states the following goals:

> (1) To provide a broad scope and a continuum of health care services with a focus upon community health benefit.
>
> (2) To improve cost effectiveness and efficiencies in the delivery of health care services.
>
> (3) To increase the quality of health care services in the greater Miami Valley Region.
>
> (4) To integrate physicians and other health care providers with the JOC Network.
>
> (5) To have the capacity to assume and manage financial risk.
>
> (6) To improve the health status of the greater Miami Valley Region.

We analyze Hospital Defendants' challenged restraints in light of these goals.[9]

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[9] The challenged conduct evaluated in this section is limited to MCEP's claim of illegal concerted action among the Hospital Defendants, not the additional "rim conspiracy" claims. The reason for this is that we conclude in the next section that Judge Rice did not abuse his discretion by ruling that MCEP's effort to plead those claims was untimely.

MCEP challenges two kinds of conduct on the part of Hospital Defendants. First, MCEP argues that Hospital Defendants restrained trade through "panel limitations," wherein Hospital Defendants stipulated to payers that if they added MCEP to their networks, Hospital Defendants would be able to renegotiate prices. Second, MCEP alleges that Hospital Defendants took direct concerted action against MCEP by cutting off patient referrals to MCEP-affiliated physicians, evicting MCEP-affiliated physicians from office space owned by Hospital Defendants, and agreeing with third parties to refuse to deal with MCEP-affiliated physicians.

Panel limitations. Courts have found such restraints of trade supported by procompetitive justifications. *Stop & Shop Supermarket Co v. Blue Cross & Blue Shield*, 373 F.3d 57, 62 (1st Cir. 2004) (finding that closed networks can allow payers to reduce customer premiums because providers will exchange better rates for guaranteed volume). Likewise in *Methodist Health Servs. Corp. v. OSF Healthcare Sys.*, where the Seventh Circuit addressed panel limitations as a mere variant on the accepted restraint of exclusive dealing arrangements:

> But what is more common than exclusive dealing? It is illustrated by requirements contracts, which are common, and legal, and obligate a buyer to purchase all, or a substantial portion of, its requirements of specific goods or services from one supplier. [The Hospital Defendants'] deals with the health insurance companies are a form of requirements contract,

> for the deals require the companies to limit the network of providers from which they obtain the health care that their insurance contracts obligate them to obtain for their insureds. And an insurance company may get better rates from a hospital in exchange for agreeing to an exclusive contract, as exclusivity will drive a higher volume of business to the hospital.

859 F.3d 408, 410 (7th Cir. 2017).

MCEP claims that Hospital Defendants' argument that panel limitations help ensure volume is a pretext. In support of this claim, MCEP points to evidence showing that Premier's contract with insurer Aetna had a volume-based discount that automatically lowered Premier's rates when billing volume increased past certain benchmarks. Thus, even without panel limitations, Hospital Defendants had financially incentivized insurers to maintain a high volume of patients getting services from Hospital Defendants. To MCEP, this evidence reveals that the only possible purpose of the panel limitation in Hospital Defendants' contract with Aetna was "purely punitive."

We are not persuaded. A panel limitation and a price schedule are two distinct methods directed toward the common goal of keeping patients (customers) coming through the doors. A pricing schedule is a discount that incentivizes payers to keep volume up. A panel limitation, meanwhile, forces payers to confront the risk of renegotiating their contract with Hospital Defendants if they choose to send their insureds (customers) to a competing provider. Moreover, it is plausible that Hospital

Defendants would deploy a "belt and suspenders" approach to a matter as crucial for a hospital system as maintaining patient (customer) volume. It is plausible that panel limitations, by lowering the cost of Hospital Defendants' services, contribute to the efficiency-enhancing purposes of the joint venture, specifically improving "cost effectiveness and efficiencies in the delivery of health care services."

Concerted action regarding physicians. MCEP's claims concerning Hospital Defendants' *direct* concerted action toward physicians can be divided into two categories: (1) threatened loss of patient referrals; and (2) non-compete agreements.

1. Threatened loss of patient referrals[10]

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[10] MCEP also argues that Hospital Defendants waived the right to move for summary judgment on this theory of liability because they failed to argue before Judge Black that their direct concerted action should be viewed under the rule of reason. Likely, MCEP intends to say that Hospital Defendants' *forfeited* the argument. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993). Under forfeiture doctrine, "parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992). At worst, MCEP is claiming that Hospital Defendants are making a "new argument to support what has been [their] consistent claim." *Lebron v. Natl'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Hospital Defendants did not forfeit the right to move for summary judgment on MCEP's claim that Hospital Defendants' direct concerted action is per se illegal because Hospital Defendants have consistently argued that MCEP's per se claim does not apply to the challenged conduct.

This alleged restraint centers around evidence found in a letter sent by Hospital Defendants to Dayton-area doctors informing them of Hospital Defendants' opposition to MCEP. The letter, signed by 94 primary care physicians, discusses the consequences that MCEP's presence could have on the Dayton healthcare market. The primary concern expressed in the letter was that the profit-driven MCEP "will take the better insured and more profitable patients away from Premier" and leave "local hospitals with only the more complex and underinsured patients." At the conclusion of the letter, the physicians wrote:

> We, the primary care network of physicians for Premier, strongly oppose [MCEP]. We believe it will have only negative impacts on our community, our hospitals and our network. We do not support the physicians who invest in these inpatient hospitals. We do look forward, however, to our continued efforts to work with the specialists of our hospital medical staffs and do our part within Premier to continue to improve the delivery of cost-effective, highest quality healthcare to the people of our community.

MCEP claims that doctors who signed the letter "understood [it] to mean that signatories would stop referring patients to anyone who invested in MCEP."

Hospital Defendants argue that the letter, in expressing the opinion of Premier and its affiliated physicians, does not constitute a *restraint*, and therefore cannot qualify as illegal conduct under antitrust laws. They are right. In *Am. Council of*

Podiatrists v. Am. Bd. of Podiatric Surgery, Inc., we held that, in the absence of a showing by the plaintiff that allegedly anticompetitive communication was (1) "false" and (2) "difficult or costly for the plaintiff to counter," we would apply a presumption that speech has "*de minimis* effect on competition." 323 F.3d 366, 370-72 (6th Cir. 2003). MCEP's claim fails under both of these prongs. MCEP has not shown that Hospital Defendants' "Dear Physician" letter was untrue, and MCEP countered the "Dear Physician" letter, without any apparent difficulty, with a "Dear Colleague" letter of its own.

2. Non-compete agreements

MCEP claims that Hospital Defendants terminated the leases of multiple MCEP-affiliated doctors who rented space in Hospital Defendants' hospitals. Judge Rice rejected this argument on the grounds that Hospital Defendants have a legitimate interest as a joint venture in preventing free riding by physicians who will reap the benefits of training and convenient office space at their hospitals and "then refer their patients elsewhere or invest in other hospitals." Hospital Defendants had a plausible concern that, without these contracts, physicians who invested in MCEP could rent office space at a Premier-associated hospital, free ride on the reputation and facilities of that hospital, and then refer patients out to MCEP. Preventing such a misalignment of incentives is plausibly related to Hospital Defendants' goal of "integrat[ing] physicians and other health care providers with the JOC Network."

MCEP also alleges that Hospital Defendants' non-compete agreements with physicians in the Dayton area qualify as concerted conduct subject to per se condemnation. Hospital Defendant Good Samaritan purchased the Dayton Heart Hospital in 2008. As characterized by MCEP, a condition of the purchase by Good Samaritan Hospital was that individual owners of Dayton Heart Hospital were paid in full only if they agreed "(i) not to invest in MCEP, and (ii) if they already owned shares, they would divest if MCEP began to offer cardiac services" over the next five years. MCEP cites no case law holding that vertical non-compete contracts entered into by joint ventures qualify as conduct that is anticompetitive per se.[11] And this circuit, as well as the common law,[12] have long recognized that "[l]egitimate reasons exist to uphold

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[11] Instead MCEP cites to *E. States Retail Lumber Dealers' Assoc. v. United States*, 234 U.S. 600 (1914), and *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1373 (6th Cir. 1988) (per curiam). Neither case concerns joint ventures or the ancillary-restraints doctrine. *Coop. Theatres of Ohio* is inapposite, as it concerns market allocation rather than a group boycott. 845 F.2d at 1368.

[12] "It must have been obvious from the beginning that the flat ban against such restraints of trade covered more than the rationale of the rule required. The rule might prevent desirable transfers of property. The most valuable asset of a business might be the good will of the public toward its owner. Should he wish to sell the business the owner could not get a price reflecting the asset of good will or the true going concern value of his business unless he could promise the purchaser not to return to compete with the business sold." Robert Bork, *Ancillary Restraints & the Sherman Act*, 15 ABA Section of Antitrust Law Proceedings 211, 213 (1959) (footnote omitted).

noncompetition covenants even though by nature they necessarily restrain trade to some degree." *Perceptron, Inc.*, 221 F.3d at 919 (quoting *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981)). It is MCEP's burden to show that per se treatment of allegedly anticompetitive conduct is justified. *Stationers*, 472 U.S. at 298. In this context, MCEP's failure to produce any on-point precedent is damning, as we refuse to apply the per se rule in the absence of judicial experience with the challenged restraint. *See Broad. Music, Inc., v. Columbia Broad. Sys. Inc.*, 441 U.S. 1, 9 (1979) (concluding that "it is only after considerable experience with certain business relationships that courts classify them as *per se* violations") (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607-08 (1972)).

MCEP's other arguments in support of its per se claim. *First*, MCEP argues that we are bound by precedent to find that Hospital Defendants' restraints qualify for per se treatment. To that end, MCEP cites to *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). *Klor's*, however, did not concern a legitimate joint venture, so its approach to alleged horizontal restraints does not bear on the legal framework established above. *Id.* at 208-09. MCEP also argues that *Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404 (6th Cir. 1982), which followed *Klor's* approach, controls. But *Com-Tel*, like *Klor's*, does not contain ancillary-restraints analysis because it does not concern a joint venture.

Second, MCEP argues that we are bound by "law of the case" to find in its favor because, in *MCEP I*, we

implicitly rejected a number of the arguments that Hospital Defendants make here. We need not guess at the contours of *MCEP I*'s holding—we said expressly that it concerned "only . . . whether defendants' conduct is the result of two or more entities acting in concert or whether defendants, based on their participation in the joint operating agreement, function as a single entity in the market place." *MCEP I*, 817 F.3d at 939.

B.

Rim Conspiracy claims

MCEP argues that Judge Rice erred in dismissing its Section 1 claims of concerted action based on "rim" conspiracies—that is, agreements (induced by Hospital Defendants) to boycott MCEP made among the payers as well as independent physicians. The rim conspiracies are distinct from the alleged conspiracy among the Hospital Defendants. MCEP argues that Hospital Defendants orchestrated two additional conspiracies—one among payers to collectively "hold the line" against MCEP by excluding it from their market, the other a "physician conspiracy" in which Hospital Defendants induced Dayton-area physicians to collectively refuse to refer patients to MCEP. As Judge Rice noted, this issue is significant. Hospital Defendants "conceded that, if MCEP could prove that the payers agreed among themselves not to offer MCEP a managed care contract and that Premier orchestrated that agreement, the *per se* rule would apply to that claim." If the district court erred by precluding these rim conspiracy claims, then even if Judge Rice was correct that MCEP has no triable per se claim of concerted action among Hospital Defendants (the "hub"

claim), the case would need to be remanded and set for trial on MCEP's rim conspiracy claim.

MCEP argues that the rim conspiracy claims are not new. Instead, MCEP characterizes the rim agreements as additional evidence found through discovery that supports the overarching group boycott claim advanced in the Amended Complaint. MCEP undermines that position, however, by claiming simultaneously that "[t]he payer agreement and physician agreement . . . represent additional horizontal concerted action that *independently* requires imposition of the per se rule whether the jury finds the Defendants to be a single entity or multiple actors."

But MCEP's Amended Complaint includes neither an allegation of an agreement among the payers nor an agreement among the physicians.[13] Instead, the Amended Complaint alleges an agreement among the Hospital Defendants to financially induce payers and physicians to boycott MCEP. There is no "rim" conspiracy without alleged *agreement* among the parties at the rim (among the payers and physicians, respectively). *See Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 436 (6th Cir. 2008). Because the Amended Complaint lacks an essential element for MCEP's "rim" conspiracy

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[13] MCEP's counsel acknowledged this fact in the course of a deposition, asserting: "I'll represent to you [to the deponent] that *there was not an allegation of an outer rim in the complaint*, but that MCEP contends that the evidence developed through discovery establishes the existence of an outer rim, meaning an understanding among two or more payers that each had agreed with the defendants not to expand their hospital panel."

claims, the Amended Complaint does not include those claims.

Faced with that omission, MCEP claims that Judge Rice erred by not permitting MCEP to submit a Second Amended Complaint to add the rim conspiracy claims. We review for abuse of discretion the district court's decision to deny such a motion. *Super Sulky, Inc. v. U.S. Trotting Ass'n*, 174 F.3d 733, 740 (6th Cir. 1999). We will overturn the district court's decision only if we have a "definite and firm conviction that the court below committed a clear error in judgment in the conclusion it reached upon a weighing of the relevant factors." *Taylor v. United States Parole Comm'n*, 734 F.2d 1152, 1155 (6th Cir. 1984) (citation omitted); *see also John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008). The standard for a motion to amend is governed by the general principle that "cases should be tried on their merits rather than the technicalities of pleadings," which is in turn moderated by the exception that judges should allow amendment only when doing so does not "cause prejudice to the defendants" or undue delay. *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982).

The district court found that Hospital Defendants "would be severely prejudiced if MCEP were permitted to amend its Complaint at this late date" primarily for the reason that a proper adjudication of the rim conspiracy claims would require a new round of discovery that could last well over a year. The district court was unmoved by MCEP's arguments that amending its complaint would not cause prejudice because Hospital Defendants had been "on notice" of

the rim conspiracy claims since MCEP filed its Omnibus Opposition to Defendants' Motions for Summary Judgment.

The district court did not abuse its discretion by concluding that its allowing MCEP to amend its complaint for a second time would require a new round of discovery that would cause undue delay and prejudice Hospital Defendants by significantly extending litigation that began in 2012. *Tefft* does not save MCEP on this point. In that case, it was "obvious that the facts as set forth in Tefft's original complaint would support [the new] cause of action . . . as well as [the original cause of action]." *Id.* at 639. That is not the case here, where the facts as set forth in MCEP's Amended Complaint do *not* support MCEP's different rim conspiracy claims. This case is more like *Super Sulky*, where a plaintiff moved to amend his complaint to add an additional Section 1 theory that was absent from the original complaint, but *had* been raised in response to a motion for summary judgment—in short, the circumstance here. The district court denied that plaintiff's motion to amend and we affirmed. *Super Sulky*, 174 F.3d at 740-41.

Judge Rice did not abuse his discretion when he denied MCEP's motion to amend its complaint.[14]

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[14] MCEP raised two additional claims on appeal—that the district court erred in dismissing Catholic Heath Initiatives and that the case should be remanded to Judge Black rather than Judge Rice. Both arguments are mooted because we affirm the district court's summary judgment in favor of Hospital Defendants.

IV.

Because Judge Rice was correct to find that the challenged restraints do not fall within the circumscribed categories of per se condemnation, we AFFIRM the district court's grant of summary judgment.

CONCURRENCE

SUTTON, Circuit Judge, concurring. I join Judge Batchelder's thoughtful opinion in full. I write separately to discuss the law-of-the-case doctrine and to explain why it does not apply to the prior panel's decision.

What we call law of the case has two parts. The first part, known as the "mandate rule," is vertical. A lower court "is bound by the decree [of a higher court] as the law of the case, and must carry it into execution according to the mandate." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). The rule springs from the hierarchical structure of our judicial system and leaves no room for discretion. If the U.S. Supreme Court resolves an issue in a case and remands the matter to us, we are duty bound to follow the mandate of the superior court. So too at the trial level. If we decide an issue and remand the case, the trial court must carry out its duties in accordance with that mandate. *See* Bryan A. Garner et al., *The Law of Judicial Precedent* 459–60 (2016).

The second part, the part implicated by this case, is horizontal. It "expresses the practice of courts generally to refuse to reopen what has been decided" by an earlier panel of the same court in the same case. *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (Holmes, J.). Unlike its upward counterpart, the sideways version of the law of the case is "not a limit to [a court's] power." *Id.* A later panel of an appellate

court, like a district court, "has the power to revisit prior decisions of its own or of a coordinate court in any circumstance." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). That is what happened when Judge Rice took over this case, reconsidered Judge Black's opinion, came to a different conclusion, and granted summary judgment to Premier. *See supra* at 7; Garner, *supra*, at 474, 487–88.

Today, we sit in essentially the same position as Judge Rice. A prior panel of our court decided that Premier was not a single entity under the Sherman Act. *See Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, 817 F.3d 934, 936 (6th Cir. 2016). One judge dissented. *Id.* at 945 (Griffin, J., dissenting). Now the case has returned.

As I see it, the dissent got it right. Section 1 of the Sherman Act "does not reach conduct that is wholly unilateral." *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (quotation omitted). Officers and divisions within a single entity cannot collude in a way that violates § 1. Single-entity status depends on economic realities rather than labels. Whether or not they keep their separate corporate identities, participants in a joint venture merge into a single entity if (1) their agreement creates a "complete unity of interest," *id.* at 771, and (2) they receive orders from a single decisionmaking center, *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 194 (2010).

Premier qualified as a single entity.

Complete unity of interest? Check. The hospitals shared profits and losses according to a distribution

schedule that did not change based on any one hospital's performance. That means that each hospital in the joint venture benefited when another hospital succeeded even if that other hospital drew patients and profits away.

Single decisionmaking center? Check again. Premier served as the "operator" for all the joint venture's health system activities and had the power to negotiate managed care contracts, fire hospital executives, dictate their budgets, and plot the strategic course each hospital took. *Med. Ctr.*, 817 F.3d at 950 (Griffin, J., dissenting).

The law-of-the-case doctrine does not prohibit us from reviewing that ruling. And I would suggest we do so in this case save for one reality: It makes no difference to the outcome. Either way, Premier rightfully prevails.

No doubt, it's often said that courts at all levels should be "loathe" to overturn their earlier opinions unless they are "clearly erroneous" and cause a "manifest injustice." *Christianson*, 486 U.S. at 817 (quotations omitted). But what does that mean? Surely, a legal ruling does not become more insulated from reversal by a senior court every time the junior court refuses to reconsider a prior ruling. The "clear error" and "manifest injustice" phrases must refer to something else. They instead are a reminder that courts should not lightly reconsider prior rulings in the same case—lest we scramble the expectations of the parties *and* encourage serial efforts to revisit prior rulings. These are, in other words, self-enforced standards, not the standard a senior court uses to

review a reconsidered ruling. There is no such thing as upholding an erroneous, but not clearly erroneous, legal ruling in this setting. Accordingly, if a court revisits a prior legal ruling, that does not transform the standard of review from de novo to clear error. *See* Garner, *supra*, at 447.

DISSENT

HELENE N. WHITE, Circuit Judge, dissenting in part. I agree with the majority's conclusion that the rule of reason applies to the alleged conspiracy involving concerted action by the Hospital Defendants. However, I disagree with the majority's determination regarding the rim conspiracy involving the payers.

The majority acknowledges that there is evidence of horizontal concerted action among the payers, orchestrated by Defendants, not to provide MCEP a managed-care contract (i.e., the "rim conspiracy"), and that the per se rule would apply to that conspiracy. The majority nevertheless concludes that MCEP cannot present that evidence to a jury because (1) it constitutes a separate, unpled claim from the conspiracy claim that MCEP pled; and (2) Judge Rice did not abuse his discretion in determining that allowing MCEP to amend its complaint to include this claim would prejudice Defendants. Because the allegations in MCEP's Amended Complaint encompass this rim conspiracy; the evidence was known by Defendants early in the proceedings; this court discussed the evidence of a rim conspiracy in the first appeal; Judge Black relied on the evidence of a rim conspiracy in denying Defendants' summary judgment motions after remand; and Defendants failed to seek the purported necessary additional discovery in a timely fashion, I would reverse the grant of summary judgment and remand for trial. Accordingly, I respectfully dissent.

The majority's recitation of the procedural history of this case omits important details that bear on whether the rim conspiracy should proceed to trial. After Defendants moved for summary judgment on the basis that they were a single entity and thus incapable of conspiring, MCEP affirmatively raised the rim conspiracy, arguing in opposition to Defendants' motion that evidence of concerted action by the payers—what MCEP called "an additional facet to th[e] conspiracy" it pled (R. 139, PID 10136)—meant that the plurality requirement was met and that the alleged conspiracy would still be subject to per se treatment even if Defendants were a single entity. In reply, Defendants did not argue that the rim conspiracy constituted a separate and untimely alleged conspiracy; and they did not argue that they needed additional discovery regarding this concerted action. Rather, they argued only that there was insufficient evidence of the rim conspiracy, forfeiting any timeliness argument.

It was not until the first appeal that Defendants challenged the rim-conspiracy claim as not encompassed within MCEP's Amended Complaint, and therefore untimely. Defendants also argued that they would be prejudiced by adding this new theory to the case, and stressed at oral argument in the first appeal that they would need additional discovery to defend against the allegation of horizontal concerted action by the payers. Despite Defendants' argument, the prior panel expressly considered evidence of the rim conspiracy in its majority opinion:

> Plaintiff has submitted evidence that each insurer knew that the other insurers had

> included this [panel] limitation in their contracts, as demonstrated by the excerpt below from a Dayton industry publication:
>
> > Premier has threatened to revoke privileges for physicians participating in [plaintiff hospital] and contracts with health plans such as Anthem and UnitedHealth are known to be contingent on excluding [plaintiff hospital] from the network.
>
> In addition to this published account, plaintiff also offered evidence from insurance company emails and defendant hospitals' Board of Directors meetings that, in addition to demonstrating knowledge among the insurers of the restriction on adding new hospitals to their networks in their managed-care contracts with defendant hospitals, the insurance companies regularly monitored each other to ensure that the other insurance companies were complying with the contract restriction on dealing with a new hospital.

Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys., 817 F.3d 934, 941–42 (6th Cir. 2016) (hereafter *MCEP I*) (second and third alterations in original) (internal citation omitted).

After remand, Judge Black issued an order requesting briefing regarding the effects of the opinion in *MCEP I* on Defendants' previously filed summary judgment motions. In their reply brief, Defendants summarily argued, for the first time before the district

court, that the horizontal concerted action by the payers was not pled and that adding that theory to the case would prejudice them. Defendants did not request additional discovery on that issue, however.

In denying Defendants' remaining summary judgment motions, to support his conclusion that the per se rule applies to MCEP's antitrust claim, Judge Black discussed and relied on evidence that at the behest of Defendants, the payers joined in an agreement not to deal with MCEP.[1]

After Judge Black denied Defendants' remaining summary judgment motions, and despite this court's and Judge Black's opinions indicating that the rim conspiracy was part of the case and Defendants' representation to this court that they would need additional discovery to defend against that theory,

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[1] Because Judge Black construed MCEP's claim as encompassing the rim conspiracy, his conclusion that the per se rule applied to MCEP's claim is reasonable. Further, despite the majority's conclusion "that then-Judge Sotomayor's concurrence in *MLB Properties*" is "[p]erhaps most destructive to" Judge Black's framing of the ancillary-restraints doctrine (Maj. Op. at 13), then-Judge Sotomayor's concurrence in *MLB Properties* stated at several points that the restraint must be "reasonably necessary" to the efficiency-enhancing benefits of the joint venture. *See, e.g.*, 542 F.3d at 338 (explaining that a per se approach may apply to joint ventures where "a particular challenged restraint is not reasonably necessary to achieve any of the efficiency-enhancing benefits of a joint venture and serves only as naked restraint against competition"). Thus, the majority's critique of Judge Black's formulation of the ancillary-restraints doctrine—requiring the restraint to be necessary to an efficiency-enhancing purpose of the joint venture—is not entirely fair given the broader context of his ruling.

Defendants still did not request additional discovery. Instead, more than seven months later, after Judge Black recused himself and only a couple of months before trial was scheduled to begin, Defendants made the same untimeliness argument to Judge Rice, arguing that they would be prejudiced if the rim conspiracy was included at trial and that they would need 12–18 months of additional discovery. As the majority explains, Judge Rice accepted those arguments, finding that the rim conspiracy was not alleged in the Amended Complaint and that MCEP could not file a Second Amended Complaint because Defendants would be prejudiced by the delay.

Given this chronology, I would reverse the district court's grant of summary judgment and allow the rim conspiracy, which all agree is subject to the per se rule, to proceed to trial. This conclusion is not dependent on whether the law of the case applies, but rather on whether the issue was fairly included in the case. First, MCEP's Amended Complaint expressly alleges a group boycott subject to per se condemnation involving Defendants and the payers. The horizontal concerted action by the payers, orchestrated and monitored by Defendants, can reasonably be construed as part of this single, overarching conspiracy. This conclusion is reinforced by Defendants' failure to argue in their summary judgment briefs before the first appeal that the rim conspiracy was not encompassed within the Amended Complaint; and this court's and Judge Black's express reliance on evidence of the rim conspiracy when discussing the merits of this case.

Second, Defendants' prejudice argument is unavailing in light of their failure to (1) argue prejudice in their initial summary judgment briefing, and (2) seek the discovery they told this court they would need in October 2015, despite the opportunity to do so for months. Rather than seek the discovery they claimed to need, Defendants moved forward with trial preparations before deciding to try their untimeliness argument a third time on a different judge after it failed to persuade either this court or Judge Black.

More fundamentally, the majority's affirmance of the dismissal of the rim conspiracy deprives MCEP of any remedy based on a pleading technicality even though all agree that there is sufficient evidence that Defendants and the payers conspired to exclude MCEP from the market in a way that is per se illegal—i.e., in a way that is "so inherently anticompetitive that [the agreement] is illegal per se without inquiry into the harm it has actually caused." *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (citation omitted). Because "cases should be tried on their merits rather than the technicalities of pleadings," *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982), I would remand the rim conspiracy for trial.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 3: 12-cv-26

JUDGE WALTER H. RICE

[Filed August 9, 2017]

THE MEDICAL CENTER AT ELIZABETH PLACE, LLC,	)
Plaintiff,	)
v.	)
PREMIER HEALTH PARTNERS, *et al.*,	)
Defendants.	)

DECISION AND ENTRY SUSTAINING DEFENDANTS' MOTION TO CLARIFY ISSUES FOR TRIAL (DOC. #195), WHICH THE COURT CONSTRUES AS A MOTION FOR RECONSIDERATION OF JUDGE TIMOTHY BLACK'S OCTOBER 6, 2016, SEALED ORDER RESOLVING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT (DOC. #183);

SUSTAINING DEFENDANTS' SEALED MOTION TO PRECLUDE TRIAL OF UNPLE[D] "RIM CONSPIRACY" CLAIM (DOC. #190); SUSTAINING DEFENDANTS' MOTION TO PRECLUDE TRIAL OF UNPLED "PHYSICIANS" CONSPIRACY (DOC. #194); OVERRULING AS MOOT DEFENDANTS' SEALED MOTION TO PRECLUDE LAY WITNESS THOMAS MALLON FROM TESTIFYING ON DAMAGES (DOC. #199), DEFENDANTS' MOTION TO EXCLUDE PREJUDGMENT INTEREST FROM PLAINTIFF'S CALCULATION OF DAMAGES (DOC. #200), DEFENDANTS' SEALED MOTION TO EXCLUDE TESTIMONY OF DR. HARRY E. FRECH III ON DAMAGES (DOC. #205), DEFENDANTS' SEALED MOTION TO EXCLUDE OPINIONS OF PLAINTIFF'S DAMAGES EXPERT HARRY E. FRECH, III, FOR FAILURE TO COMPLY WITH FED. R. CIV. P. 26(e) AND 26(a)(2)(B) (DOC. #201), DEFENDANTS' SEALED MOTION TO EXCLUDE TESTIMONY RELATING TO PREMIER'S CASH RESERVES (DOC. #202), DEFENDANTS' SEALED MOTION TO EXCLUDE TESTIMONY ABOUT CATHOLIC HEALTH INITIATIVES (DOC. #203), DEFENDANTS' SEALED MOTION TO EXCLUDE TESTIMONY OF JAMES L. WATSON (DOC. #204), DEFENDANTS' SEALED MOTION TO EXCLUDE TESTIMONY REGARDING HEARSAY FROM NON-TESTIFYING PHYSICIANS (DOC. #206), DEFENDANTS' SEALED MOTION IN LIMINE

TO EXCLUDE HEARSAY OF MANAGED CARE FACILITY REPRESENTATIVES (DOC. #208), PLAINTIFF THE MEDICAL CENTER AT ELIZABETH PLACE'S MOTION IN LIMINE NO. 1 TO EXCLUDE EVIDENCE OF DEFENDANTS' PURPORTED JUSTIFICATIONS FOR THEIR ANTICOMPETITIVE CONDUCT (DOC. #210), AND PLAINTIFF THE MEDICAL CENTER AT ELIZABETH PLACE'S SEALED MOTION IN LIMINE NO. 2 TO EXCLUDE EVIDENCE OF KETTERING HEALTH NETWORK'S NON-COMPETE PROVISIONS (DOC. #211); DISMISSING PLAINTIFF'S SHERMAN ACT CLAIM WITH PREJUDICE; JUDGMENT TO ENTER IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFF; TERMINATION ENTRY

Plaintiff, The Medical Center at Elizabeth Place, LLC ("MCEP"), a 26-bed adult acute-care hospital, filed suit against Premier Health Partners, Atrium Health System, Catholic Health Initiatives, MedAmerica Health Systems Corporation, Samaritan Health Partners, and UVMC ("the Hospital Defendants" or "Defendants"), alleging a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. MCEP alleges that Defendants orchestrated a group boycott of MCEP, which cut off access to necessary managed care contracts, physicians, and funding.

This case is currently before the Court on remand following the Sixth Circuit Court of Appeals' reversal of Judge Timothy Black's decision granting summary

judgment in favor of Defendants on the question of whether MCEP's claim lacks the necessary plurality of actors. *Medical Ctr. at Elizabeth Place v. Atrium Health Sys.,* 817 F.3d 934 (6th Cir. 2016).

On October 6, 2016, on remand, Judge Black issued a Sealed Order overruling several other motions for summary judgment, which he had previously overruled as moot. Doc. #183. One of the motions overruled was Defendants' Sealed Motion for Summary Judgment that the *Per Se* Rule Does Not Apply and that Plaintiff's Claim Should Be Dismissed. Doc. #132. Earlier this year, Judge Black recused himself, and this case was re-assigned to the undersigned. Doc. #186. Trial is set to begin on August 14, 2017.

Although the parties have filed numerous motions in limine, the Court must first address Defendants' Motion to Clarify Issues for Trial, Doc. # 195. The Court construes this as a motion for reconsideration of that portion of Judge Black's Sealed Order Resolving Defendants' Motions for Summary Judgment, Doc. #183, that held that the *per se* rule applies to MCEP's claim. Two other pending motions also have the potential to affect the scope of claims to be tried: (1) Defendants' Sealed Motion to Preclude Trial of Unple[d] "Rim Conspiracy" Claim, Doc. # 190; and (2) Defendants' Motion to Preclude Trial of Unpled "Physicians" Conspiracy, Doc. #194.

The Court held oral argument on August 2, 2017. For the reasons set forth below, the Court concludes that Judge Black's October 6, 2016, decision was clearly erroneous, because MCEP's Sherman Act claim is not subject to *per se* condemnation. Because MCEP

has disavowed any reliance on a rule of reason analysis, the Court agrees with Defendants that this claim must be dismissed.

At the outset, it is important to state what this decision is about and, more importantly, what it is not. MCEP has alleged that Defendants violated Section 1 of the Sherman Act by a series of actions and threats that severely restricted MCEP's ability to compete in the marketplace, and eventually required its sale of a 49% share to the Kettering Health Network. These allegations have neither been proven nor failed of proof in court; nor will they ever be, as a result of this decision. MCEP's allegations remain just that – allegations.

This decision represents the legal equivalent of "inside baseball." It merely reflects this Court's firm opinion that MCEP's claims, contentions and allegations must be considered by a different legal standard from that which MCEP maintains is applicable and, therefore, this case must be dismissed without those claims, contentions and allegations being tested in a court of law before a duly impaneled jury. This decision should not be considered either as a failure of proof by MCEP or an exoneration of the Defendants.

I. Overview of Relevant Law

Antitrust laws exist to protect competition, not competitors. *Expert Masonry, Inc. v. Boone Cty.,* 440 F.3d 336, 346 (6th Cir. 2006). Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of [a] trust or otherwise, or conspiracy, in

restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

Despite this very broad language, only *unreasonable* restraints are actionable. *State Oil Co. v. Khan,* 522 U.S. 3, 10 (1997). The unreasonableness of a restraint of trade may be proven in one of two ways. Although a handful of categories of restraints are deemed to be *per se* unreasonable, the vast majority must be assessed, on a case-by-case basis, under a more exacting "rule of reason" standard. Accordingly, the court must initially determine, as a matter of law, whether the challenged restraint is *per se* unreasonable or whether it should be evaluated under the rule of reason. *In re Southeastern Milk Antitrust Litig.,* 739 F.3d 262, 271 (6th Cir. 2014).

"[C]ondemnation *per se* is an unusual step, one that depends on confidence that a *whole category* of restraints is so likely to be anticompetitive that there is no point in searching for a potentially beneficial instance." *Polk Bros., Inc. v. Forest City Enter., Inc.,* 776 F.2d 185, 189 (7th Cir. 1985) (emphasis added). As the Sixth Circuit explained in *Expert Masonry,* these restraints "have such a clear lack of any redeeming virtue that any restraint of that type is conclusively presumed to be unreasonable." 440 F.3d at 342 (quoting *Bailey's, Inc. v. Windsor Am., Inc.,* 948 F.2d 1018, 1027 (6th Cir. 1991)).

The plaintiff in a *per se* case need not prove the challenged restraint's effect on the market; the anticompetitive effects are implied. The plaintiff need prove only that "(1) two or more entities engaged in a conspiracy, combination, or contract;" (2) "to effect a

restraint or combination prohibited *per se;"* (3) "that was the proximate cause of the plaintiff's antitrust injury." *Expert Masonry,* 440 F.3d at 342.

"The most important *per se* categories are naked horizontal price-fixing, market allocation, and output restrictions." Group boycotts are also sometimes included in this category. *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield,* 373 F.3d 57, 61 (1st Cir. 2004). The Supreme Court has cautioned, however, that "easy labels do not always supply ready answers." *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.,* 441 U.S. 1, 8 (1979). *See also Augusta News Co. v. Hudson News Co.,* 269 F.3d 41, 47 (1st Cir. 2001) ("The categorical descriptions of *per se* offenses are quite misleading for anyone not well versed in antitrust."). As discussed below, the fact that a challenged restraint is labeled by MCEP as a "group boycott" does not necessary mean that it is automatically subject to *per se* condemnation.

The vast majority of restraints are subject to a "rule of reason" analysis which requires a "case-by-case evaluation of their effect on competition." *Expert Masonry,* 440 F.3d at 342 (quoting *Bailey's,* 948 F.2d at 1027). This is the prevailing standard. As economic and business structures continue to become more complex, the rule of reason appears to have gained even more traction. As noted in *Khan,* courts are reluctant to adopt *per se* rules in connection with "restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." 522 U.S. at 10 (quoting *FTC v.*

Indiana Fed'n of Dentists, 476 U.S. 447, 458-459 (1986)).

The rule of reason requires the fact finder to "weigh[] all of the circumstances of a case," to determine whether the challenged restraint of trade is unreasonable. Relevant factors include information about the relevant business, the nature and history of the restraint, the justification offered by the defendant, and the existence of any anticompetitive effects flowing from the restraint. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877, 885-86 (2007).

If the rule of reason applies, a plaintiff must first establish:

> (1) that the defendants contracted, combined, or conspired; (2) that the scheme produced anticompetitive effects; (3) that the restraint affected relevant product and geographic markets; (4) that the object of the scheme and the conduct resulting from it was illegal; and (5) that the scheme was a proximate cause of the plaintiff's antitrust injury.

Expert Masonry, 440 F.3d at 343. The burden (not of proof but of production) then shifts to the defendant to "come forward with evidence of the restraint's procompetitive effects to establish that the alleged conduct justifies the otherwise anticompetitive injuries." *Id.* If the defendant satisfies this burden of production, the burden shifts back to the plaintiff to show "that any legitimate objectives can be achieved in a substantially less restrictive manner." *Id.* (quoting

Nat'l Hockey League Players Ass'n v. Plymouth Whalers, 325 F.3d 712, 718 (6th Cir. 2003)).

An intermediate standard of review is the "quick look" approach under the rule of reason. It is based on the premise that, if a challenged restraint has obvious anticompetitive benefits, an elaborate market analysis is not necessarily required. Competitive harm is presumed. The defendant must then come forward with evidence of a procompetitive reason for the restraint. *California Dental Ass'n v. FTC,* 526 U.S. 756, 770 (1999). "Where procompetitive justifications are proffered, their logic must be assessed and rejected in order to avoid reverting to full-scale rule of reason analysis." *Deutscher Tennis Bund v. ATP Tour, Inc.,* 610 F.3d 820, 832 (3d Cir. 2010).[1]

There are two types of restraints of trade. Horizontal restraints involve direct competitors at the same level of the market structure, *i.e.,* two distributors or two suppliers. *Expert Masonry,* 440 F.3d at 344. They are deemed to be more threatening and may, in some cases, be subject to a *per se* analysis. *Id.* Vertical restraints involve parties "upstream or downstream of one another," a manufacturer and a supplier, for example. *Id.* Vertical restraints are almost always subject to the rule of reason. *See Leegin,* 551 U.S. at 907; *Khan,* 522 U.S. at 22.

In *Texaco, Inc. v. Dagher,* 547 U.S. 1 (2006), the Supreme Court set forth the analytical framework for reviewing restraints of trade by a legitimate joint

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[1] Neither party has advocated for a "quick look" approach to this case.

venture. In that case, Texaco and Shell formed a joint venture called Equilon, to consolidate their gasoline refining and marketing operations in part of the United States. The gasoline produced by Equilon was sold at the same price under the Texaco and Shell names. Service station owners alleged that the unification of gas prices under both brands was price-fixing, and was a *per se* violation of Section 1 of the Sherman Act.

The Supreme Court disagreed. It noted that "this Court presumptively applies rule of reason analysis." *Id.* at 5. The Court held that it is not *per se* illegal "for a lawful, economically integrated joint venture to set the prices at which the joint venture sells its products." *Id.* at 3. "As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells." *Id.* at 7.

The Ninth Circuit had reached the opposite conclusion by invoking the ancillary restraints doctrine, which "governs the validity of restrictions imposed by a legitimate business collaboration, such as a . . . joint venture, on *nonventure* activities." *Id.* at 7 (emphasis added).[2] Under that doctrine, the court must

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[2] An ancillary restraint is one that is "subordinate and collateral to a separate, legitimate transaction" and "serves to make the main transaction more effective in accomplishing its purpose." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,* 792 F.2d 210, 224 (D.C. Cir. 1986). For example, Atlas Van Lines uses independent agents to move household goods between two points. Atlas does the advertising, finds the customers, sets the rates, chooses routes, collects revenue and pays the agents. It instituted a policy prohibiting agents from *also* contracting to handle interstate carriage on their *own.* The court held that this restraint was "ancillary" in that it enhanced the efficiency of the enterprise

determine whether the challenged restraint "is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid." *Id.* The Court concluded that the ancillary restraints doctrine has no application "where the business practice being challenged involves the core activity of the joint venture itself – namely, the pricing of the very goods produced and sold by Equilon." *Id.* at 7-8.

Accordingly, under *Dagher,* a joint venture's *core* activities are subject to a rule of reason analysis. *Non-core* activities that are naked restraints on trade are *per se* unreasonable. However, if the challenged restraint is "ancillary to the legitimate and competitive purposes of the joint venture," it may be deemed valid by the factfinder under the rule of reason.

II. Relevant Procedural History

A. Allegations in Amended Complaint (Doc. #7)

Premier Health Partners ("Premier") is a not-for profit corporation formed in 1995 pursuant to a Joint Operating Agreement ("JOA") among Catholic Health Initiatives, MedAmerica Health Systems Corporation, Atrium Health System, and UVMC (the "Hospital Defendants"). Doc. #7, PageID#37. The Hospital Defendants aggregate market share of general inpatient surgical services in the relevant geographical

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by eliminating the problem of the "free ride," *i.e.,* agents using Atlas's reputation, equipment, facilities and services in conducting business for their own profit.

area exceeds 55%. Premier manages many of the business functions of these four area hospitals, including negotiating managed care contracts with insurance providers ("insurers"). *Id.* at PageID#48.

MCEP is a physician-owned, 26-bed acute-care hospital, which opened in 2006. *Id.* at PageID#37. MCEP alleges that the Hospital Defendants "set out on an agreed course of concerted action which Defendants admit was designed to eliminate [MCEP] and any other specialty hospital." *Id.* at PageID#50. In furtherance of this conspiracy, the Hospital Defendants, through Premier, allegedly engaged in the following overt acts:

> (a) coercing, compelling, co-opting or financially inducing commercial health insurers or managed care plan providers, including Anthem, UnitedHealthcare, Private Healthcare Systems, HealthSpan, Humana, Aetna, Cigna, and Medical Mutual of Ohio to refuse to permit [MCEP] full access to their respective networks;
>
> (b) threatening punitive financial consequences to physicians who affiliated with [MCEP] and following through on punitive measures against physicians who did affiliate with [MCEP], including terminating leases that the physicians had with the Defendants for office space;
>
> (c) offering payments to physicians who agreed not to work with or at [MCEP];

> and who agreed to divest ownership in [MCEP];
>
> (d) coercing, compelling, co-opting or financially inducing physicians affiliated with or employed by the Hospital Defendants from becoming members of [MCEP], admitting patients to [MCEP] or referring patients to physicians who treated patients at [MCEP];
>
> (e) hiring as employees key physicians affiliated with [MCEP] who accounted for a disproportionately high number of admissions and then prohibiting them from admitting patients to [MCEP]; and
>
> (f) coercing, compelling, co-opting or financially inducing commercial health insurers or managed care plans to provide reimbursement rates that were below market and below the rates and on different terms from what the Hospital Defendants demanded for the exact same services.

Id. at PageID##51-52.

Eventually, in 2009, MCEP was forced to sell a 49% interest to Kettering Health Network, the other major health care provider in the area, "in exchange for Kettering's commitment to seek managed care contracts for [MCEP] on terms comparable to hospitals in the Kettering network." *Id.* at PageID##52-53.

MCEP alleges that the Hospital Defendants conspired to reduce output in the relevant markets, including by "orchestrating group boycotts" of MCEP, and authorized Premier to take the steps necessary to implement the conspiracy. *Id.* at PageID#54. MCEP further alleges that this conduct is not "reasonably related to or necessary for Premier's performance of any of the joint functions specified under the JOA[,]" and that the Hospital Defendants' conduct constitutes a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

B. Sealed Order Granting Defendants' Motion for Summary Judgment as Plaintiff's Claim Lacks the Necessary Plurality of Actors (Doc. #162)

On October 20, 2014, Judge Black issued a Sealed Order Granting Defendants' Motion for Summary Judgment as Plaintiff's Claim Lacks the Necessary Plurality of Actors. Doc. #162. He concluded that Premier controlled the operations of the Defendant Hospitals, and that Defendants operated as a single, unified economic unit incapable of conspiring, rendering their conduct outside the scope of Section 1 of the Sherman Act. *See Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 767-68 (1984). Judge Black also noted that, under *Dagher,* Premier is a legitimate joint venture and that "the challenged conduct in this case – managed care contracting and physician relations – is a core function of the Premier health system." Doc. #162, PageID#15932.

Given that MCEP's failure to show the necessary plurality of actors was dispositive, Judge Black

overruled as moot all other pending motions for summary judgment, including Defendants' Motion for Summary Judgment that the *Per Se* Rule Does Not Apply and that Plaintiff's Claim Should Be Dismissed, Doc. #132.

C. Appeal to Sixth Circuit

MCEP appealed, arguing that the district court erred in holding that Defendants were a single entity incapable of conspiring. According to MCEP, three separate agreements formed the "hub and spokes" conspiracy to boycott MCEP: (1) an agreement at the hub, among the Hospital Defendants; (2) an agreement at the spokes, between the Hospital Defendants and the insurers, involving "Panel Limitations" in the managed care contracts, whereby, if the insurers added other hospitals to their networks, the Hospital Defendants could terminate or renegotiate the contracts; and (3) an agreement at the rim, whereby the insurers agreed to "hold the line" in their refusal to add MCEP to their managed care networks. MCEP argued that, in granting summary judgment, the district court erred by failing to consider evidence of the "rim conspiracy" among the insurers, which would have been independently sufficient to satisfy the "plurality of actors" requirement.

MCEP further argued that the district court erred in holding that Premier's joint venture status insulated its conduct from antitrust scrutiny. According to MCEP, the district court mischaracterized the challenged conduct as "managed care contracting and physician relations" and then erroneously concluded that these were "core activities" of the joint venture.

MCEP urged the appellate court to instead view the challenged restraint as the joint negotiation and policing of provisions that prohibited the insurers from contracting with MCEP, and that operated to exclude MCEP from the marketplace. Citing *Major League Baseball Properties, Inc. v. Salvino, Inc.,* 542 F.3d 290, 338-39 (2d Cir. 2008) (Sotomayor, J., concurring in judgment), MCEP argued that, because this "group boycott" promotes no legitimate objective of the joint venture, it must be evaluated apart from the joint venture as a *per se* horizontal concerted action.

In response, Defendants argued that MCEP's "rim conspiracy" claim was untimely, and that no triable evidence supported this new theory. They noted that the Amended Complaint contains *no* allegations of a separate agreement among the insurers to "hold the line," and MCEP never amended its Complaint to assert such a claim. Defendants suggested that this is why the district court declined to address this argument.

Defendants further argued that the district court correctly concluded that Premier is a single entity for antitrust purposes. They noted that the ancillary restraint doctrine does not apply either to a single entity or to a legitimate joint venture's core activity such as the pricing of its own goods or services. Under *Dagher,* core activities of a legitimate joint venture are subject to a rule of reason analysis. Defendants also argued that, even if the ancillary restraint doctrine applied, the result would be the same, given that the rate-for-volume provisions in the managed care contracts had undisputed plausible efficiency

justifications. Defendants suggested that, because MCEP had pled only a *per se* claim, but the challenged restraints were subject to a rule of reason analysis, the district court's summary judgment decision could be affirmed on this alternative basis.

On March 22, 2016, the Sixth Circuit issued an Opinion reversing the district court's order on the "plurality of actors" element, and remanding the case for further proceedings. *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.,* 817 F.3d 934 (6th Cir. 2016). The court concluded that:

> Based on defendants' stated intent to keep plaintiff out of the Dayton market, the evidence of coercive conduct threatening both physicians and insurance companies with financial loss if they did business with plaintiff, evidence of continued actual and self-proclaimed competition among the defendant hospitals, and evidence that the defendant hospitals' business operations are not entirely unitary, we conclude that there is a genuine issue of material fact as to whether the defendant hospitals' network constitutes a single entity or concerted action among competitors for purposes of Section 1 of the Sherman Act.

Id. at 938.

The court's decision was specifically limited to "the element addressed by the district court," *i.e.,* whether Defendants' conduct was the result of two or more entities acting in concert or whether Defendants, based on their participation in the JOA, functioned as a

single entity. *Id.* at 939. The court noted that, in determining this issue, it must look at the actual conduct of the parties to the joint venture. *Id.* at 940. In discussing the alleged boycott, the court cited to contractual provisions ("Panel Limitations"), which restricted the insurers' ability to add new hospitals to their networks. The Sixth Circuit then stated that "[n]egotiating contracts that explicitly exclude the insurers' ability to contract with other parties is anticompetitive on its face and normally serves no proper business function, a fact recognized by the district court in its first order denying the motion to dismiss." *Id.* at 941. Evidence showed that the insurers knew of the Panel Limitations in each other's contracts, and regularly monitored each other's compliance. *Id.* at 941-42.

Notably, the Sixth Circuit did not consider whether this separate "rim" agreement among the insurers could independently satisfy the "plurality of actors" element.[3] Likewise, the Sixth Circuit made absolutely no mention of *Dagher*. Nor did it address Defendants' argument that the district court's decision could be affirmed on the alternate ground that MCEP's claim was governed by the rule of reason and not the *per se* rule.

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[3] At oral argument, one judge pointed out that it appeared that the district court had not addressed this argument because it was untimely. Oral Arg. Tr. at 11-13.

D. Sealed Order Resolving Defendants' Motions for Summary Judgment (Doc. #183) on Remand

When Judge Black granted summary judgment to Defendants on the "plurality of actors" element, he overruled as moot four other pending motions for summary judgment, including Defendants' Motion for Summary Judgment that the *Per Se* Rule Does Not Apply and that Plaintiff's Claim Should Be Dismissed, Doc. #132. On remand, he issued a Sealed Order overruling these previously-filed motions. Doc. #183.

In their Motion for Summary Judgment that the *Per Se* Rule Does Not Apply, Defendants noted that the Supreme Court has held that not all group boycotts are *per se* illegal. If there are plausible arguments that the challenged restraints have legitimate efficiency justifications, they are instead governed by the rule of reason. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.,* 472 U.S. 284, 293-94 (1985). Defendants argued that because the rate-for-volume clauses in Premier's contracts with its insurers, and the non-compete clauses in Premier's contracts with its physicians, have plausible efficiency justifications, the alleged group boycott of MCEP cannot be deemed a *per se* violation of § 1 of the Sherman Act. Citing *Dagher,* 547 U.S. at 7, Defendants also argued that, because Premier was a legitimate joint venture, and the pricing of its products and the hiring of physicians were "core activities" of the joint venture, the rule of reason applied.

Judge Black rejected these arguments. He prefaced his decision by noting that the Sixth Circuit had cited

evidence of *two* discrete horizontal agreements – one among the Hospital Defendants to prevent MCEP from competing, including precluding MCEP from obtaining managed care contracts with insurers, and another among those insurers not to offer MCEP managed care contracts. He also noted that the Sixth Circuit had stated that "[n]egotiating contracts that explicitly exclude the insurers' ability to contract with other parties is anticompetitive on its face and normally serves no proper business function, a fact recognized by the district court in its first order denying the motion to dismiss." Doc. #183, Page ID#16481 (citing *Medical Ctr. at Elizabeth Place,* 817 F.3d at 941).

Citing *Nynex Corporation v. Discon, Inc.,* 525 U.S. 128 (1998), and *Total Benefits Planning Agency v. Anthem Blue Cross & Blue Shield,* 552 F.3d 430 (6th Cir. 2008), Judge Black noted that group boycotts involving horizontal agreements among direct competitors are one of the categories of restraints that courts have deemed *per se* anticompetitive.

Judge Black acknowledged that volume-based pricing, whereby a hospital is willing to accept discounted prices from an insurer in return for access to an expected volume of patients, is "prevalent in managed care contracting in the Dayton area and elsewhere across the United States." Doc. #183, PageID#16488 n. 7. He also acknowledged that this "expected volume can be realized either because the insurer offers a large number of members or because the insurer limits the size of its hospital network and in that way channels its volume to fewer hospitals." *Id.* However, he found "no record evidence demonstrating

the rate for volume analyses regarding any of the managed care contracts," and "no evidence that Defendants increased rates when payers successfully negotiated Panel Limitations out of their contracts." *Id.*

Judge Black rejected Defendants' argument that their joint contracting with the insurers was a legitimate joint venture activity that should be analyzed under the rule of reason. He wrote:

> [T]his argument ignores the ancillary restraint doctrine. The ancillary restraint doctrine "recognizes that a restraint that is unnecessary to achieve a joint venture's efficiency-enhancing benefits may not be justified based on those benefits. Accordingly, a challenged restraint must have a reasonable procompetitive justification, related to the efficient-enhancing purposes of the joint venture." *Major League Baseball Props., Inc. v. Salvino, Inc.,* 542 F .3d 290, 339 (2d Cir. 2008). Where that nexus does not exist, the challenged restraint must be evaluated apart from the rest of the venture, *i.e.,* as horizontal concerted action. *Id.* at 339.
>
> The Panel Limitations that Defendants jointly negotiated with payers restricted output by excluding MCEP, which payers considered a viable price competitor to Defendants. Defendants argue that the MCEP exclusion permitted them to provide price reductions.
>
> However, the legitimacy of the "rate for volume" rationale is the subject of a genuine

> dispute, which precludes it from being the basis for this summary judgment argument. Even assuming the rate for volume rationale is legitimate, it is simply Defendants bribing payers in exchange for a commitment to not bring in a rival that the Defendants would have to deal with for the payer's business. Defendants have failed to [produce] evidence that their joint contracting has any efficiency-enhancing purpose to which such an agreement is necessary.
>
> Accordingly, a jury could reasonably conclude from this evidence that the "rate for volume" language is nothing more than a provision seeking to provide cover for excluding competitors. Alternatively, a jury could find that whatever discount was given was payment for the payer's agreement to the Panel Limitation commitment and completely unrelated [to] volume-sensitive pricing.

Doc. #183, PageID##16487-90 (footnotes omitted).

According to Judge Black, "[t]he ancillary restraint doctrine requires undisputed proof (at summary judgment) that the 'non-venture' activity (the agreement to exclude a rival from the payer's network) is joint conduct that is necessary for the Defendants to achieve whatever efficiency-enhancing purpose collective negotiation brings and that there are not less restrictive alternatives." *Id.* at PageID#16489 n.8. He found that Defendants had failed to make this showing.

Judge Black summed up as follows:

> As the Court previously concluded, "[o]rganizing a group boycott of MCEP does not promote any legitimate objective of the JOA or achieve any procompetitive benefits." (Doc. 37 at 12). Accordingly, since the alleged restraint bears no relationship to some procompetitive justification or legitimate function of the joint venture, the challenged restraint must be evaluated on its own and can be *per se* illegal even if the remainder of the joint venture is lawful. *Blackburn v. Sweeney,* 53 F.3d 825, 828-29 (7th Cir. 1995) (applying *per se* rule to a provision in a law partnership dissolution agreement that restrained the territories where former partners could advertise after finding the provision to be non-ancillary to the rest of the agreement).
>
> Accordingly, the Court finds, as a matter of law, that the appropriate standard for evaluating the challenged conduct is the *per se* rule.

Id. at PageID##16490-91 (footnote omitted).

III. Defendants' Motion to Clarify Issues for Trial (Doc. #195)

On June 16, 2017, after this case was reassigned to the undersigned judge, Defendants filed a Motion to Clarify Issues for Trial, Doc. #195. They maintain that Judge Black's October 6, 2016, Order, is not only ambiguous and confusing, but also clearly erroneous. The Court construes Defendants' Motion to Clarify

Issues for Trial as a motion for reconsideration of that portion of Judge Black's October 6, 2016, Sealed Order Resolving Defendants' Motions for Summary Judgment, Doc. #183, dealing with the question of whether MCEP's claim is governed by the *per se* rule or the rule of reason.

As previously noted, Judge Black found that the alleged group boycott consists of two discrete horizontal agreements – an overarching conspiracy among Defendants to prevent MCEP from competing (the "hospital conspiracy" claim), and another conspiracy, allegedly orchestrated by Defendants, among the insurers not to offer MCEP a managed care contract (the "rim conspiracy" claim). Defendants maintain that Judge Black improperly conflated these two conspiracy claims, and wrongly concluded that the *per se* rule applies to both.

Defendants ask the undersigned to "disentangle" them, and to preclude trial of *both* claims because: (1) the "hospital conspiracy" claim was pled as a *per se* claim, but is governed by the rule of reason; and (2) the "rim conspiracy" claim was not pled at all.[4] At a minimum, Defendants ask the Court to clarify that the rule of reason governs the "hospital conspiracy" claim, and that the *per se* rule applies only to the "rim conspiracy" claim.

Defendants maintain that, to the extent that Judge Black concluded that the *per se* rule governs the

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[4] Defendants have filed a separate motion to preclude trial of the unpled "rim conspiracy" claim. Doc. #190. That motion will be addressed below.

hospital conspiracy claim, that holding is clearly erroneous. Moreover, the Order is confusing because, even though he concludes that the *per se* rule applies, he appears to have inadvertently evaluated the hospital conspiracy claim under the rule of reason. In addition, although the determination of which standard applies is a question of *law,* Judge Black found that a *factual dispute* concerning the *legitimacy* of the proffered procompetitive justifications for the rate-for-volume clauses precluded summary judgment on this issue.

MCEP urges the Court to summarily deny Defendants' Motion to Clarify and sanction Defendants for filing it because it ignores the "law of the case" doctrine. Given that Judge Black's decision was issued nine months ago, and trial is imminent, MCEP also argues that Defendants' motion is untimely.

MCEP insists that there are not two separate conspiracy claims. Although the group boycott involved two types of concerted horizontal action, the Amended Complaint alleges just *one overarching conspiracy* to effectuate a group boycott against MCEP. MCEP maintains that Judge Black thoroughly analyzed the relevant issues and correctly concluded that the *per se* rule applies to the *entire overarching conspiracy*. Citing *Continental Ore Co. v. Union Carbide* & *Carbon Corp.,* 370 U.S. 690, 699 (1962), MCEP argues that it would be inappropriate to "dismember" the hospital conspiracy from the rim conspiracy and apply different standards to each. MCEP further argues that Defendants' purported justifications for the restraints

are simply not plausible and, in any event, cannot save the group boycott from *per se* condemnation.

Defendants offer very little explanation for why they waited more than eight months to seek "clarification" of Judge Black's Order. They maintain only that they were waiting on two appellate court decisions that might support their position, and were concentrating their efforts on settlement negotiations. Nevertheless, the Court questions why they could not have raised these issues much sooner than they did.

A court typically reconsiders an interlocutory order only when there is "(1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice." *Louisville/Jefferson Cty. Metro Gov't v. Hotels.com, L.P.,* 590 F.3d 381, 389 (6th Cir. 2009) (quotation omitted). As MCEP notes, there have been no changes in the controlling law, and there is no new evidence. The only element that has changed is the judge assigned to try this case. All of these factors weigh against reconsideration.

Nevertheless, in the view of the undersigned, Defendants have raised a very substantial question about whether MCEP's antitrust claim must be analyzed under the *per se* rule or the rule of reason. Given that MCEP has alleged only a *per se* claim, and has disavowed reliance on a rule of reason analysis, this question is both crucial and potentially dispositive. Moreover, given the importance of this case, the Court feels compelled to address and to resolve this issue before allowing the parties to embark on what is destined to be a very lengthy and expensive trial.

A. Law of the Case Doctrine Does Not Preclude Reconsideration

"District courts have authority both under common law and [Federal Rule of Civil Procedure] 54(b) to reconsider interlocutory orders and to reopen any part of a case before entry of final judgment." *Rodriguez v. Tennessee Laborers Health & Welfare Fund,* 89 F. App'x 949, 959 (6th Cir. 2004). *See also Am. Civil Liberties Union v. McCreary Cty.,* 607 F.3d 439, 450 (6th Cir. 2010) (noting that where the district court has not yet entered final judgment, it is "free to reconsider or reverse its decision for any reason.").

MCEP argues, however, that the "law of the case" doctrine should preclude reconsideration of Judge Black's decision. This doctrine exists to prevent relitigation of issues in a case that have already been decided. "[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California,* 460 U.S. 605, 618 (1983).

The Sixth Circuit has noted that the "'law of the case' doctrine is 'directed to a court's common sense' and is not an 'inexorable command.'" *Hanover Ins. Co. v. Am. Eng'g Co.,* 105 F.3d 306, 312 (6th Cir. 1997) (quoting *Petition of U.S. Steel Corp.,* 479 F.2d 489, 494 (6th Cir. 1973)). MCEP acknowledges that the "law of the case" doctrine is only a *prudential* consideration, but notes that the Supreme Court has held that "[a] court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule[,] courts should be loathe to do so in the absence of extraordinary circumstances such as where

the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 817 (1988) (quoting *Arizona,* 460 U.S. at 618 n.8).

Revisiting Judge Black's decision on the applicability of the *per se* rule so soon before the trial is scheduled to begin is, needless to say, less than ideal, particularly given the massive amounts of time and money that have already been poured into this litigation. Moreover, the undersigned has the utmost personal and professional respect for Judge Black, who is a gifted jurist and a thoughtful legal scholar.

Nevertheless, the undersigned, having thoroughly reviewed the procedural history of this case and the parties' briefs on Defendants' Motion to Clarify, and having carefully researched this extremely complicated area of the law,[5] is convinced that Judge Black's finding – that the *per se* rule applies to MCEP's Sherman Act claim – is clearly erroneous. For the reasons set forth below, the Court concludes that this is one of those "extraordinary circumstances" in which reconsideration is warranted.

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[5] One district court has called the application of the *per se* doctrine to joint ventures "one of the darkest corners of antitrust law . . . an area that is unsettled, unclear, unwieldy and unequivocally complex." *In re ATM Fee Antitrust Litig.,* 554 F. Supp. 2d 1003, 1007 (N.D. Cal. 2008) (internal quotation omitted) .

B. Internal Inconsistencies in Judge Black's Summary Judgment Opinions

The Court agrees with Defendants that several aspects of Judge Black's legal analysis are internally inconsistent and in need of clarification. As an aside, the Court notes that, in his October 20, 2014, Order, granting summary judgment to Defendants on the "plurality of actors" element, Judge Black found that Premier was a legitimate joint venture, and that the "challenged conduct–managed care contracting and physician relations – is a core function of the Premier health system." Doc. #162, PageID#15932. Under *Dagher,* 547 U.S. at 7-8, this factual finding would have *required* the conclusion that the *rule of reason* applies. Nevertheless, because that Order was limited to the question of whether MCEP could satisfy the "plurality of actors" element, and because the Sixth Circuit declined to address the question of whether MCEP's claim was governed by the *per se* rule, this apparent inconsistency is ultimately of little import.

The October 6, 2016, Order, is more problematic. MCEP alleged a *per se* illegal group boycott. Defendants argued that they were entitled to summary judgment because MCEP's claim was not subject to *per se* condemnation. Quoting *Salvino,* 542 F.3d at 339 (Sotomayor, J ., concurring in judgment), Judge Black noted that, under the ancillary restraint doctrine, "a restraint that is unnecessary to achieve a joint venture's efficiency-enhancing benefits may not be justified based on those benefits. Accordingly, a challenged restraint must have a reasonable procompetitive justification, related to the efficient-

enhancing purposes of the joint venture." If that nexus does not exist, it "must be evaluated apart from the rest of the venture, *i.e.,* as horizontal concerted action." Doc. #183, PageID##16487-88. Judge Black ultimately concluded that orchestrating a group boycott bears no relationship to some procompetitive justification or legitimate function of the joint venture, and that the *per se* rule therefore applied. *Id.* at PageID#16490-91.

Along the way, however, he found that "the legitimacy of the 'rate for volume' rationale is *the subject of a genuine dispute,"* which precluded it from being the basis for Defendants' argument that the Panel Limitations permitted them to provide price reductions. *Id.* at PageID##16488-89 (emphasis added). In a footnote, he stated that "[t]he ancillary restraint doctrine requires undisputed proof (at summary judgment) that the 'non-venture' activity (the agreement to exclude a rival from the payer's network) is joint conduct that is necessary for the Defendants to achieve whatever efficiency-enhancing purpose collective negotiation brings and that there are not less restrictive alternatives." *Id.* at PageID# 16489 n.8 (citing Federal Trade Commission, Antitrust Guidelines for Collaborations Among Competitors at 24). He found that Defendants failed to make this showing. *Id.*

This language is troubling for a number of reasons. First, it imposes an unwarranted evidentiary burden on Defendants at this stage of the litigation. As Defendants' counsel explained at oral argument on August 2, 2017, Defendants were not seeking a ruling that their conduct was *lawful;* they were simply

seeking a ruling that, *as a matter of law,* the *per se* rule does not apply to MCEP's Sherman Act claim. Accordingly, as explained more fully below, to succeed on this argument, all Defendants had to do was show that the challenged restraint, *i.e.,* the Panel Limitations, was *plausibly* necessary to achieve a procompetitive objective of the joint venture. They had no duty to *prove* that there was no genuine issue of material fact concerning the *legitimacy* of the rate-for-volume rationale. Whether the restraint is actually anticompetitive in nature is a question of fact for the jury to decide in the context of a rule of reason analysis.

Second, as Defendants point out, Judge Black's factual finding, that rate-for-volume pricing is prevalent in managed care contracts throughout the United States, would appear to *require* a finding that the challenged restraints are at least *plausibly* necessary to achieve a procompetitive objective of the joint venture, and that they are related to the efficiency-enhancing purposes of the joint venture. The rule of reason would, therefore, necessarily apply.

Third, Judge Black's reliance on the section of the Federal Trade Commission Guidlelines for Collaborations Among Competitors that he cited is puzzling. That section, Section 3.36(b), is a subsection of Section 3.3, entitled "Agreements Analyzed Under the *Rule of Reason."* (emphasis added). Had MCEP asserted a rule of reason claim, and had Defendants moved for summary judgment on that claim, this section of the Guidelines might be relevant. However, under the circumstances presented here, the

evidentiary burdens allegedly imposed by this section appear to be inapplicable to the analysis.

For all of these reasons, the Court agrees that Defendants' motion seeking clarification of Judge Black's Order was warranted, despite its extreme untimeliness.

C. Analysis

As previously noted, the Court construes Defendants' Motion to Clarify Issues for Trial, Doc. #195, as a motion for reconsideration of Judge Black's conclusion that the restraints of trade at issue are subject to *per se* condemnation.

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877, 886-87 (2007), the Supreme Court cautioned that the *per se* rule should be applied to a challenged restraint only if a court "can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." Likewise, the Sixth Circuit has held that the *per se* rule should be applied "reluctantly and infrequently, informed by other courts' review of the same type of restraint, and only when the rule of reason would likely justify the same result." *In re Southeastern Milk Antitrust Litig.,* 739 F.3d at 271.

Defendants maintain that, under the analytical framework for joint ventures set forth in *Dagher,* the rule of reason applies, either because the challenged restraints, *i.e.,* the Panel Limitations and non-compete clauses, are "core activities" of the joint venture, or because they are plausibly necessary to achieve a procompetitive objective of the joint venture. MCEP, on

the other hand, maintains that Premier's joint venture status is immaterial. According to MCEP, because "group boycotts" are *per se* unreasonable restraints of trade, Defendants' purported procompetitive justifications are irrelevant.

For the reasons set forth below, the Court concludes that, regardless of whether the challenged restraints are analyzed as activities of a legitimate joint venture under *Dagher,* or whether they are instead characterized as a "group boycott," a category of restraints often, but not always, subject to *per se* condemnation, the rule of reason applies. In short, the challenged restraints at issue in this case do not have "such a clear lack of any redeeming virtue" that they should be "conclusively presumed to be unreasonable." *Expert Masonry,* 440 F.3d at 342 (quotation omitted). Therefore, they cannot be deemed *per se* unreasonable restraints of trade. A more thorough rule of reason analysis is required to determine whether they violate Section 1 of the Sherman Act.

1. Joint Venture Analysis

In determining whether MCEP's claim is subject to the *per se* rule or the rule of reason, the Court starts with the undisputed premise that Premier Health Partners is a legitimate joint venture. Under the Joint Operating Agreement, the Hospital Defendants are owned, controlled and operated independently. However, their income streams are consolidated, and Premier manages many of their business functions, including the negotiation of each hospital's managed care contracts with insurers.

MCEP points out that the Premier joint venture is perhaps not as fully integrated as the joint venture at issue in *Dagher*. In the Court's view, the degree of integration is clearly relevant to the first element of a Sherman Act claim, *i.e.,* whether there is a plurality of actors, but has little relevance to the question of whether a challenged restraint of a joint venture is subject to *per se* condemnation. MCEP has pointed to no authority indicating that the analytical framework for joint ventures, as set forth in *Dagher,* does not apply to the circumstances presented here.

a. Analytical Framework

In determining whether the *per se* rule applies, it makes a difference that Premier is a joint venture. Joint ventures are not insulated from *per se* violations of antitrust laws. *Salvino,* 542 F.3d at 336-37 (Sotomayor, J., concurring in judgment). However, because they "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively," their conduct is much more likely to be judged under the rule of reason. *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 768 (1984). "[C]ourts must be cautious in condemning a joint venture's acts of cooperation as *per se* unreasonable, for fear of punishing the very conduct that society should aim to protect." *In re A TM Antitrust Litig.,* 554 F. Supp. 2d 1003, 1011-12 (N .D. Cal. 2008).

Accordingly, "competitors engaged in joint ventures may be permitted to engage in a variety of activities that would normally be illegal under a *per se* rule when such activities are necessary to achieve the significant efficiency-enhancing purposes of the venture." *Salvino,*

542 F .3d at 337 (Sotomayor, J., concurring in judgment). *See also Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield,* 373 F.3d 57, 61 (1st Cir. 2004) (noting that labels such as "group boycott" are only "minimally useful," given that "many arrangements that are literally concerted refusals to deal have potential efficiencies and are judged under the rule of reason.").

"In short, to protect the efficiency-enhancing potential of joint ventures and cooperatives, the rule of reason is the favored method of analysis for these ventures, preventing courts from intervening before a full market analysis is completed." *Salvino,* 542 F.3d at 338 (Sotomayor, J., concurring in judgment). *See also In re New Energy Corp.,* 739 F.3d 1077, 1079 (7th Cir. 2014) ("Joint ventures have the potential to improve productivity as well as the potential to affect prices; that's why in antitrust law they are analyzed under the Rule of Reason rather than a rule of per se illegality."); *Polk Bros., Inc. v. Forest City Enter., Inc.,* 776 F.2d 185, 188 (7th Cir. 1985) (holding that the rule of reason is the norm "[w]hen cooperation contributes to productivity through integration of efforts").

As previously noted, *Texaco, Inc. v. Dagher,* 547 U.S. 1 (2006), sets forth the analytical framework for reviewing restraints of trade by a legitimate joint venture. If the challenged conduct involves a "core activity" of the joint venture, such as setting prices for its own goods or services, it is subject to a rule of

reason analysis. *Id.* at 7.[6] If the challenged conduct involves restrictions imposed on a "nonventure activity," the ancillary restraints doctrine comes into play, whereby the court "must determine whether the restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid." *Id.*

A treatise on antitrust law explains the analysis governing "nonventure" activities as follows. The first question is "whether the restraint is of a type potentially subject to *per se* condemnation." Holmes, W. and Mangiaracina, M., *Antitrust Law Handbook* § 2:22. If not, it is analyzed under the rule of reason. If it *is* of a type potentially subject to *per se* condemnation, then the court must ask "whether the restraint is plausibly necessary to achieving a procompetitive objective of the venture." *Id.* If the restraint is plausibly necessary, the rule of reason applies. Only "if the restraint is of a *per se* character and *not* plausibly necessary to a legitimate joint venture objective" is application of the *per se* rule appropriate. *Id.*

As MCEP's counsel pointed out at oral argument, a defendant can almost always concoct some reason why the challenged restraint is *plausibly* necessary to achieve a procompetitive objective of the joint venture. Accordingly, bare assertions by counsel are insufficient

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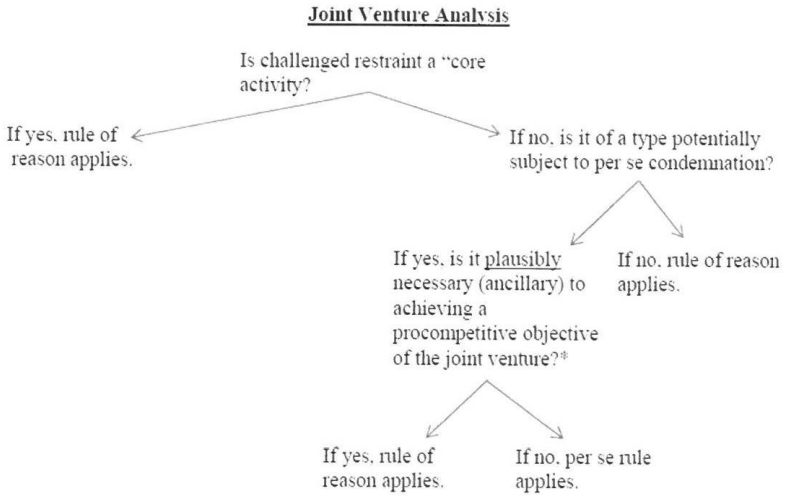
[6] Merriam-Webster defines "core" as "a basic, essential or enduring part." https://www.merriam-webster.com/dictionary/core. The Court has found no caselaw defining this term in a relevant legal context.

to establish plausibility. In the view of the undersigned, a number of other factors should be considered in assessing the plausibility of a proffered justification, including the prevalence of similar restraints in the industry, the circumstances giving rise to the particular challenged restraint at issue, and a healthy dose of common sense.

The following diagram shows the proper analytical framework:



> *Whether the challenged restraint is actually necessary to achieve a procompetive objective of the joint venture is a question of fact to be decided by the jury.

Using this analytical framework, the Court then turns to the question of whether the challenged

restraints at issue are subject to the *per se* rule or the rule of reason.

b. Rate-for-Volume Pricing/Panel Limitations in Contracts with Insurers

MCEP's claim focuses on certain provisions contained in the contracts between the Defendant Hospitals and the insurers. As Judge Black explained in his October 6, 2016, Sealed Order, the price at which a hospital sells its services to an insurer is often linked to the volume of patients that the insurer can be expected to direct to that hospital over the course of the contract. This rate-for-volume pricing is "prevalent in managed care contracting in the Dayton area and elsewhere across the United States." Doc. #183, PageID#16488 n. 7. MCEP conceded at oral argument that, as a general matter, no court has held rate-for volume pricing to be *per se* illegal.

The problem, according to MCEP, is how Defendants went about obtaining the benefit of their bargain. Given that it is the physicians who decide where to refer their patients, an insurer has no way to *guarantee* a certain volume of patients; however, as explained at oral argument, the expected volume can be *estimated* based on past hospital admissions. Judge Black noted that the expected volume can be realized "either because the insurer offers a large number of members or because the insurer limits the size of its hospital network and in that way channels its volume to fewer hospitals." *Id.*

The managed care contracts that Premier negotiated on the behalf of the individual hospitals contain a "Panel Limitations" clause, which is the chief challenged restraint at issue. It does not expressly prohibit the insurer from adding other hospitals to its managed care networks. Rather, it provides that, if the insurer *does* add other hospitals to the network, thereby diluting the expected volume, the hospital has the option to terminate the contract or renegotiate the rates at which it will sell the services at issue.

MCEP acknowledges that these Panel Limitations are vertical restraints (between parties "upstream or downstream" of each other), which are typically analyzed under a rule of reason. Citing *Com-Tel, Inc. v. DuKane Corp.,* 669 F.2d 404, 409 (6th Cir. 1982), MCEP nevertheless argues that the *per se* rule applies because Defendants enforced the Panel Limitations in a way that prevented MCEP, a *horizontal* competitor, from obtaining crucial managed care contracts. In other words, according to MCEP, the Panel Limitations operated to exclude MCEP from the market, thereby rendering a *per se* analysis appropriate.

In *Business Electronics Corporation v. Sharp Electronics Corporation,* 485 U.S. 717 (1988), the Supreme Court appears to have rejected this view. It stated that "a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement." *Id.* at 730 n.4. *See also In re Southeastern Milk Antitrust Litig.,* 739 F.3d at 273 ("The conspiracy's effect on the plaintiff, however, is not the sole means of determining whether a restraint is horizontal or vertical. The agreement which causes

the effect is determinative."). It would appear, therefore, that the Panel Limitations are vertical restraints subject to the rule of reason.

Nevertheless, assuming *arguendo* that *DuKane* is still good law, and that the Panel Limitations could be deemed *per se* unreasonable based on their *effect* on MCEP, a horizontal competitor of Defendants, the Court will proceed to analyze them under the analytical framework of *Dagher*. The result is the same.

The first question is whether the Panel Limitations involve a "core activity" of the joint venture. *Dagher* held that the pricing of the very goods or services produced by a joint venture is a core activity subject to the rule of reason. 547 U.S. at 7-8. To the extent that the Panel Limitations operate to ensure a certain volume of patients, and that volume, in turn, forms the basis of the discounted prices offered to the insurer, the Panel Limitations are intricately intertwined with "internal pricing decisions," which were found to be core activities in *Dagher*.[7] Accordingly, the rule of reason applies.

However, even if the Panel Limitations are viewed as "nonventure" restraints, based on the fact that they reach outside of the joint venture to impose potential

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[7] Notably, in the course of deciding that MCEP's claim lacked the necessary plurality of actors, Judge Black found that the challenged restraints, "managed care contracting and physician relations," were "core functions" of the joint venture under *Dagher*. Doc. #162, PageID#15932. The Sixth Circuit did not disturb this finding on appeal.

negative consequences on insurers who decide to add new hospitals to their managed care networks, the rule of reason still applies.

As explained above, the next question would be whether the Panel Limitations are a naked restraint of a type typically subject to *per se* analysis. If they are not, the rule of reason applies. If they are, the Court must ask whether they are plausibly necessary to achieve a procompetitive objective of the joint venture.

On appeal, the Sixth Circuit stated, "[n]egotiating contracts that explicitly exclude the insurers' ability to contract with other parties is anticompetitive on its face and normally serves no proper business function, a fact recognized by the district court in its first order denying the motion to dismiss." *Medical Ctr. at Elizabeth Place v. Atrium Health Sys.,* 817 F. 3d at 941. Pointing to this statement, MCEP argues that the Sixth Circuit definitively held that this claim is subject to the *per se* rule.[8] This Court disagrees for several reasons.

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[8] MCEP also argues that, because Defendants also argued on appeal – as an alternate ground for affirming Judge Black's opinion – that MCEP's claim was not subject to the *per se* rule, and because the Sixth Circuit did not discuss this alternate ground for affirmance, we should assume that the Sixth Circuit impliedly rejected it. Given the Sixth Circuit's explicit statement that the appeal concerned only the *first* element of the Sherman Act claim, *i.e.,* plurality of actors, such an inference is unwarranted. Moreover, the Sixth Circuit was not required to address the alternate ground for affirmance. *See Portman v. Cty. of Santa Clara,* 995 F.2d 898, 910 (9th Cir. 1993) ("Although we may affirm the grant of summary judgment on any basis presented in the record, we are not obliged to do so.").

First, the Sixth Circuit explicitly stated that "[t]his appeal looks *only* at the element addressed by the district court, which is the first element: whether defendants' conduct is the result of two or more entities acting in concert or whether defendants, based on their participation in the joint operating agreement, function as a single entity in the market place." *Id.* at 939 (emphasis added). Because the question of whether the Panel Limitations provision is a *per se* unreasonable restraint of trade is completely irrelevant to the first element of the claim, the Sixth Circuit's statement, that "[n]egotiating contracts that explicitly exclude the insurers' ability to contract with other parties is anticompetitive on its face and normally serves no proper business function," is nothing more than dicta.

Second, it is based on the false premise that Premier's contracts explicitly prohibited the insurers from adding other hospitals to the network. As discussed above, that was not the case. Although the insurers may face adverse financial consequences if they did so, they were not prohibited from adding other hospitals to the network.

Third, as counsel for Defendants pointed out at oral argument, courts have repeatedly rejected antitrust challenges to short-term exclusive contracts between insurers and hospitals. *See, e.g., Methodist Health Services Corp. v. OSF Healthcare Sys.,* 859 F.3d 408, 410 (7th Cir. 2017) (noting that "an insurance company may get better rates from a hospital in exchange for agreeing to an exclusive contract, as exclusivity will drive a higher volume of business to the hospital."). Accordingly, the Sixth Circuit's statement that such

provisions are anticompetitive on their face does not appear to comport with the law.[9]

Based on the foregoing, in this Court's view, the Panel Limitations are not a naked restraint of the type typically subject to *per se* analysis. The rule of reason would therefore apply. Assuming *arguendo* that the Panel Limitations are, in fact, of a type typically subject to a *per se* analysis (as the Sixth Circuit appeared to state), the result would be the same. The question would then become whether the Panel Limitations are plausibly necessary to achieve a procompetitive objective of the joint venture. If they are not plausibly necessary, they are subject to *per se* condemnation. Otherwise, they are subject to the rule of reason.

Judge Black found that there was no evidence that the hospitals increased their rates after the Panel Limitations were removed from the contracts. At this stage, however, the only question is whether the Panel Limitations were *plausibly* necessary to achieve a procompetitive objective of the joint venture at the time the agreement was made. *Polk Bros.,* 776 F.2d at 189. They clearly were.

The Panel Limitations help ensure that patient volume at the hospitals remains steady. This is the *quid pro quo* for the discounted rates that the hospitals offer the insurers, and the only real way that the hospitals can protect the benefit of their bargain. In

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[9] The Court notes that the Sixth Circuit did qualify its statement by saying that such restraints "*normally* serve[] no proper business function." 817 F.3d at 939 (emphasis added).

turn, the discounted rates given to the insurers arguably will result in lower premiums and more choices for the consumers. *See Abraham v. Intermountain Health Care, Inc.,* 461 F.3d 1249, 1261 (10th Cir. 2006) (noting that "there is substantial empirical evidence that selective contracting allows managed care companies to contain health care costs–the more restrictive the panel, the lower the cost of the premium to the subscriber."). Given that Defendants have presented *plausible* efficiency justifications for the Panel Limitations, related to the efficiency-enhancing purposes of the joint venture, the rule of reason applies as a matter of law.

Defendants have no evidentiary burden at this stage to prove that the Panel Limitations were, in fact, necessary to achieve a procompetitive purpose. After reviewing all of the evidence in this case, a jury could ultimately conclude that the Panel Limitations are an unreasonable restraint of trade, and that Defendants used the Panel Limitations in an anticompetitive manner to exclude MCEP from the market. However, because the Panel Limitations are plausibly necessary to achieve a procompetitive objective of the joint venture, this finding must be made only after considering all relevant factors under a full rule of reason analysis. The Panel Limitations are not subject to *per se* condemnation.

c. Non-Compete Clauses

MCEP also challenges Defendants' enforcement of certain non-compete provisions in leases and employment contracts of physicians who invested in MCEP, who were affiliated with MCEP, or who

referred patients to MCEP. Again, because these are purely vertical restraints (between the employer and employee), the Court believes that the *per se* rule does not apply, regardless of any negative effects on MCEP. *Business Elec. Corp.,* 485 U.S. at 730 n.4. Nevertheless, the Court will analyze the non-compete provisions under *Dagher*.

Defendants argue that because physicians are necessary to the operation of the joint venture, the non-compete provisions included in the employment contracts and leases should be deemed core activities subject to the rule of reason. The Court tends to agree. But even if the non-compete provisions are deemed "non-core," the result is the same, because they are not of a type typically subject to *per se* analysis and, even if they were, they are plausibly necessary to achieve a procompetitive objective of the joint venture. The non-compete provisions arguably operate to make the joint venture agreement more productive. The hospitals provide training to the physicians and provide nearby office space in order to increase patient volume. They do not want the physicians to reap the benefits of the training and the convenient office space, and then refer their patients elsewhere or invest in other hospitals.

Accordingly, under the framework set forth in *Dagher,* the rule of reason applies to the non-compete provisions also. Again, after considering all of the evidence, a jury might reject Defendants' arguments, but because there are plausible procompetitive justifications for the non-compete provisions, the challenged restraints must be subjected to a full rule of reason analysis.

2. Group Boycott Analysis

MCEP argues that Defendants' status as a joint venture is immaterial where a horizontal group boycott is alleged. According to MCEP, because group boycotts are *per se* unreasonable restraints on trade, it is improper to consider whether the challenged restraints are plausibly necessary to achieve some procompetitive objective of the joint venture. The Court disagrees.

Even though a restraint of trade may fall into one of the categories traditionally labeled *per se* unreasonable, this does not mean that it is *per se* unreasonable in the context of a joint venture. As one court explained, "well-settled doctrines of antitrust law do not always map smoothly onto the relatively contemporary concept of joint ventures. It is not appropriate to assume that a restraint imposed by members of a joint venture is *per se* unreasonable, merely because the same conduct by competitors would be judged under the *per se* rule." *In re ATM Fee Antitrust Litig.,* 554 F. Supp. 2d at 1011. *See also In re Sulfuric Acid Antitrust Litig.,* 703 F.3d 1004, 1013 (7th Cir. 2012) (holding that, even though price fixing is *per se* illegal, it may be subject to rule of reason analysis in the context of a legitimate joint venture).

Moreover, it is true that group boycotts have often been included on the list of "classes of economic activity that merit *per se* invalidation under § 1 [of the Sherman Act]." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.,* 472 U.S. 284, 293 (1985). Nevertheless, "[t]here is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per*

se doctrine." *Id.* at 294 (quoting L. Sullivan, Law of Antitrust 229-230 (1977)).

In earlier antitrust cases, such as *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959), the Supreme Court stated that group boycotts have traditionally fallen into the "forbidden category" and "have not been saved by allegations that they were reasonable in the specific circumstances." *Id.* at 212. Although the law has evolved, and group boycotts are no longer considered automatically subject to the *per se* rule, courts have continued to cite *Klor's* and other early cases for that outdated proposition. *See, e.g., Com-Tel, Inc. v. DuKane,* 669 F.2d 404, 408 (6th Cir. 1982) (citing *Northern Pac. Ry. Co. v. United States,* 356 U.S. 1 (1958) for the proposition that group boycotts are *per se* illegal); *Expert Masonry,* 440 F.3d at 344 (citing *Fashion Originators' Guild v. Federal Trade Comm'n,* 312 U.S. 457 (1941) for the proposition that group boycotts are typically viewed under the *per se* rule "regardless of any alleged ameliorative rationale.").

In *Northwest Wholesale Stationers,* the Supreme Court clarified that "not all concerted refusals to deal [*i.e.*, group boycotts] are predominately anticompetitive." 472 U.S. at 298. It identified three characteristics of the kinds of group boycotts that have been deemed *per se* illegal. First, they involve joint efforts to disadvantage competitors by cutting off access to necessary suppliers or customers. *Id.* at 294. Second, the defendants typically possess a "dominant position in the relevant market." *Id.* Third, "the practices were generally not justified by plausible

arguments that they were intended to enhance overall efficiency and make markets more competitive." *Id.* When these factors are present, "the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote." *Id.*

The Court went on to say that "a concerted refusal to deal need not necessarily possess all of these traits to merit *per se* treatment." *Id.* at 295. Nevertheless, *Northwest Wholesale Stationers* instructs that, although the presence of a plausible procompetitive justification may not be dispositive, it certainly cannot be ignored in determining whether *per se* condemnation is warranted.

One treatise states that if the alleged group boycott arguably serves a plausible procompetitive objective, "then the analysis shifts to a full rule of reason inquiry." Holmes, W. and Mangiaracina, M., Antitrust Law Handbook, § 2:16. *See also Paladin Assocs., Inc. v. Montana Power Co.,* 328 F.3d 1145, 1155 (9th Cir. 2003) ("When a defendant advances plausible arguments that a practice enhances overall efficiency and makes markets more competitive, *per se* treatment is inappropriate, and the rule of reason applies.").

In this case, assuming *arguendo* that the alleged group boycott involved efforts to disadvantage MCEP by cutting off access to necessary managed care contracts, physicians and/or investors, and assuming *arguendo* that Premier possesses a "dominant position in the relevant market," the Court–for the reasons set forth above–finds that the challenged restraints at issue (Panel Limitations and non-compete provisions) were nevertheless plausibly "intended to enhance

overall efficiency and make markets more competitive." *Northwest Wholesale Stationers,* 472 U.S. at 294. The alleged group boycott is therefore not subject to *per se* condemnation.

The case of *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield,* 373 F.3d 57 (1st Cir. 2004), is closely analogous to this one. Blue Cross, in exchange for better prices, entered into a three-year exclusive contract with certain pharmacies, creating a "closed network." A few other pharmacies were later allowed to join the network, but Stop & Shop and Walgreen were excluded. They sued, alleging antitrust violations.

The district court dismissed their *per se* claims, and the First Circuit affirmed. The court held that "the closed network is simply an exclusive dealing arrangement which is not a *per se* violation of the antitrust laws." *Id.* at 62 (citing *Tampa Elec. Co. v. Nashville Coal Co.,* 365 U.S. 320, 327-29 (1961)). "Because such agreements can achieve legitimate economic benefits (reduced cost, stable long-term supply, predictable prices), no presumption against such agreements exists *today." Id.* at 65 (emphasis added).

As to the fact that the contract precluded the network from admitting any other new pharmacies, the court concluded that:

> this is a possible antitrust violation, but it is not a *per se* violation. The reason is that the closed pharmacy arrangement is valuable to participating pharmacies in part because it directs volume to them; thus, the

> United/Provider pharmacies had a direct interest, in exchange for allowing CVS to compete for their captive subscribers, in not only being allowed to compete for Blue Cross' customers but in making sure that yet additional new member pharmacies did not unreasonably dilute this benefit.
>
> This does not mean that the ancillary restriction is lawful[,] but only that *per se* condemnation is not appropriate. Joint ventures involving direct competitors not infrequently exclude other competitors. *Cf. N.W. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.,* 472 U.S. 284, 296-97, 105 S.Ct. 2613, 86 L.Ed .2d 202 (1985).

Id. at 63.

Likewise, in *Levine v. Central Florida Medical Affiliates, Inc.,* 72 F.3d 1538, 1550-51 (11th Cir. 1996), the Eleventh Circuit held that an agreement to exclude certain providers from a multiprovider network is subject to the rule of reason, and that panel limitations do not constitute a *per se* illegal group boycott.

The Court finds the reasoning in these cases to be very persuasive. Defendants' alleged attempts to exclude MCEP from the market by cutting off access to insurers, physicians and investors may well constitute an antitrust violation. In fact, on appeal of this case, the Sixth Circuit noted that "[t]he summary judgment record leaves little doubt on the question of the intent of the network to prevent plaintiff hospital from entering the Dayton healthcare market." *Med. Ctr. at Elizabeth Place,* 817 F.3d at 937-38. Nevertheless,

Defendants' stated intent is not enough to bring the challenged restraints within the *per se* rule. *See Nynex,* 525 U.S. at 137-38 (holding that a stated motive to drive a competitor from the market does not necessarily lead to a finding that this was a *per se* illegal "boycott"). Given the facts presented here, MCEP's claim is subject to the rule of reason.

There is yet another reason why the Court believes that MCEP's claim is subject to a rule of reason analysis. The fact that the case involves rate-for-volume pricing and non-compete provisions that are commonplace in the health care industry, many of which existed in Defendants' contracts long before MCEP came into existence, leads the Court to conclude that these are not the types of restraints that lack such redeeming value that they should categorically be subject to *per se* condemnation. In addition, because courts do not have a great deal of experience in the complex area of managed care contracting, it is inappropriate to condemn such practices as *per se* violations of the Sherman Act. *See, e.g., Diaz v. Farley,* 215 F.3d 1175, 1184 (10th Cir. 2000) (holding that the relative inexperience of courts in understanding internal hospital scheduling practices made it "wholly inappropriate to justify condemning one type of scheduling practice as *per se* violative of the Sherman Act"); *Cohlmia v. Ardent Health Servs., LLC,* 448 F. Supp. 2d 1253, 1267 (N.D. Okla. 2006).

3. Conclusion

MCEP has pled only a *per se* violation of Section 1 of the Sherman Act. For the reasons set forth above, the Court concludes that Judge Black's conclusion that

the *per se* rule applies to MCEP's claim is clearly erroneous. Regardless of whether the challenged restraints are analyzed as activities of a joint venture under *Dagher,* or completely outside of the joint venture, as a horizontal agreement to exclude MCEP from the marketplace, *i.e.,* a group boycott, the result is the same.

Under the circumstances presented here, the Court cannot say that the challenged restraints are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *Dagher,* 547 U.S. at 5 (quoting *National Soc. of Prof'l Engineers v. United States,* 435 U.S. 679, 692 (1978)). Accordingly, the rule of reason applies, and MCEP's claim must be dismissed.

The Third Circuit has noted that:

> While pleading exclusively *per se* violations can lighten a plaintiff's litigation burdens, it is not a riskless strategy. If the court determines that the restraint at issue is sufficiently different from the *per se* archetypes to require application of the rule of reason, the plaintiff's claims will be dismissed. *E.g., AT&T Corp. v. JMC Telecom, LLC,* 470 F.3d 525, 531 (3d Cir. 2006); *see also Texaco v. Dagher,* 547 U.S. 1, 7 n.2, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006) (declining to conduct a rule of reason analysis where plaintiffs "ha[d] not put forth a rule of reason claim"). *See generally* 11 Hovenkamp, *supra,* ¶1910b (discussing the cost-benefit analysis involved in deciding whether to pursue an exclusively *per se* theory of liability).

In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 317 (3d Cir. 2010). *See also Diaz,* 215 F. 3d at 1182 (where plaintiffs conceded that they did not have sufficient evidence to support a rule of reason claim, and the appellate court agreed that the *per se* rule was inapplicable, the district court's order dismissing the antitrust claim must be affirmed). Given that MCEP has disavowed any reliance on a rule of reason analysis, and its claim is not subject to *per se* condemnation or analysis under a *per se* standard, the Court DISMISSES MCEP's Sherman Act claim WITH PREJUDICE.

IV. Defendants' Motions to Preclude Trial of Unpled Conspiracy Claims (Docs. #190, 194)

MCEP has alluded to three separate "agreements" in this case: (1) an agreement among the Hospital Defendants to exclude MCEP from the market place (what Defendants call the "hospital conspiracy"); (2) an agreement among the insurers not to offer MCEP a managed care contract (what Defendants call the "rim conspiracy"); and (3) an agreement among Defendants' primary care physicians and independent primary care physicians not to do business with investors in MCEP (what Defendants call the "physicians conspiracy").

The Amended Complaint alleges only an agreement among the Hospital Defendants. Defendants have moved to preclude trial of the other two "unpled conspiracies." Docs. ##190, 194. The Court's finding, that MCEP's Sherman Act claim is not subject to *per se* condemnation and must be dismissed, would appear to render these motions moot. Nevertheless, in an

abundance of caution, the Court will briefly address them.

MCEP has never moved to amend its Complaint to assert allegations of separate agreements among the insurers, or among the physicians.[10] At oral argument and in their reply brief, however, Defendants conceded that, if MCEP could prove that the insurers agreed among themselves not to offer MCEP a managed care contract and that Premier orchestrated that agreement, the *per se* rule would apply to that claim. Doc. #236, PageID#20286. The same could presumably be true of the alleged agreement among primary care physicians employed by Premier and independent primary care physicians.

To the extent that MCEP could argue that, instead of dismissing the Sherman Act claim on the ground that the *per se* rule does not apply to the "hospital conspiracy," as pled, the Court should allow MCEP to amend its Complaint to assert these previously-unpled allegations, the Court rejects this suggestion.

A. Defendants' Sealed Motion to Preclude Trial of Unple[d] "Rim Conspiracy" Claim (Doc. #190)

Defendants filed a Sealed Motion to Preclude Trial of Unple[d] "Rim Conspiracy" Claim, Doc. #190.

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[10] MCEP maintains that these are not separate claims, but are merely "additional evidence" of the overarching conspiracy claim pled in the Amended Complaint. Given that the Amended Complaint already names all of the relevant parties as coconspirators, MCEP contends that no amendment was needed.

Although the Amended Complaint alleges that Defendants "orchestrated group boycotts," and that they coerced insurers into refusing to offer managed care contracts to MCEP, it contains no allegation that the *insurers* ever agreed *with each other* not to offer managed care contracts to MCEP. Moreover, MCEP has never sought leave to amend its Complaint to assert such a claim.

According to Defendants, the possibility of a "rim conspiracy" among the insurers was first mentioned by MCEP's attorney during Dr. David Argue's deposition on June 10, 2014, well after the discovery deadline, and after expert reports had been exchanged. Doc. #190-2, PageID##16589-90. Discovery had allegedly revealed evidence that the insurers were aware of the panel restrictions in each other's contracts with Defendants, had agreed to "hold the line" in their refusal to offer MCEP managed care contracts, and had monitored each other's commitments to this agreement. MCEP later raised allegations of a "rim conspiracy" in its memorandum in opposition to Defendants' motions for summary judgment, Doc. #139, and again on appeal.

Defendants note that MCEP raised this new claim only *after* they moved for summary judgment on the question of whether MCEP could establish the "plurality of actors" element of its Sherman Act claim – MCEP asserting that, even if the Hospital Defendants could not satisfy this element because they were a "single entity," a conspiracy *among the insurers* could.

Defendants objected to this "newly-minted" claim. They surmise that the district court agreed that the

"rim conspiracy" claim was untimely; after all, its decision granting summary judgment in Defendants' favor on the plurality element makes sense only if the court deemed the new rim conspiracy claim to be improper. Likewise, although MCEP raised the issue on appeal, and the Sixth Circuit mentioned the alleged agreement among the insurers in its opinion, the appellate court did not conduct any separate analysis of the "rim conspiracy" claim. Oral argument transcripts indicate that at least one judge believed that this claim was untimely, and that MCEP should have sought leave to amend the Complaint. Oral Arg. Tr. at 11-13.

Given that a "rim conspiracy" claim was not pled in the Amended Complaint, Defendants conducted no discovery on the relationships *among the insurers,* and sought no expert witness opinions on this topic. They argue that they would, therefore, be severely prejudiced if the Court now allowed MCEP to pursue this claim. Doc. #190-1, PageID##16579-85. *See Super Sulky, Inc. v. United States Trotting Ass'n,* 174 F.3d 733 (6th Cir. 1999) (refusing to allow trial of new conspiracy claim raised for the first time in opposition to summary judgment motion).

Defendants further note that a claim based on a horizontal agreement among the Hospital Defendants would be analyzed very differently than a claim based on a horizontal agreement among the insurers. Because the Hospital Defendants have entered into a joint operating agreement, the key question, the factual dispute, is whether Premier constitutes a single entity

incapable of conspiring, or whether the individual hospitals should be viewed as separate actors.

In contrast, there is no question that the insurers are separate entities. The focus there is on whether the insurers actually agreed among themselves and with Premier to exclude MCEP from the marketplace. Proof of such a claim would focus on factors set forth in *Re/Max International, Inc. v. Realty One, Inc.,* 173 F.3d 995 (6th Cir. 1999):

> (1) whether the defendants' actions, if taken independently, would be contrary to their economic self-interest; (2) whether the defendants have been uniform in their actions; (3) whether the defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy; and (4) whether the defendants have a common motive to conspire.

Id. at 1009.

At oral argument, counsel for Defendants estimated that, if the Court were to allow MCEP to amend its Complaint to assert a "rim conspiracy" claim, Defendants would need 12-18 months of additional fact discovery, followed by new expert witness opinions and new dispositive motions. Given that this litigation was initiated more than five years ago and substantial resources have already been expended, he argued that Defendants would be severely prejudiced if the Court permitted such an amendment. MCEP counters that Defendants' claims of prejudice are spurious, given that

Defendants passed up numerous opportunities to seek discovery on this topic.

The Court agrees with Defendants that the "rim conspiracy" is a separate claim not encompassed within the allegations of the conspiracy alleged in the Amended Complaint. MCEP has unsuccessfully tried to wedge this new claim into the existing allegations. If MCEP wanted to pursue a claim based on this separate agreement among the insurers, orchestrated by the Defendants, it should have moved to amend the Complaint. Given that the evidence needed to defend against a "rim conspiracy" claim is significantly different than what is needed to defend against the claim that was actually pled, the Court agrees that Defendants would be severely prejudiced if MCEP were permitted to amend its Complaint at this late date. The Court therefore SUSTAINS Defendants' Sealed Motion to Preclude Trial of Unple[d] "Rim Conspiracy" Claim, Doc. #190.

B. Defendants' Motion to Preclude Trial of Unpled "Physicians" Conspiracy (Doc. #194)

Defendants have also moved to preclude MCEP from pursuing at trial, or introducing any evidence of a purported "agreement among Defendants' primary care physicians and independent primary care physicians not to do business with investors in [MCEP]." Doc. #194. This allegation of yet a *third* horizontal agreement was not brought to Defendants' attention until May 26, 2017, when they received MCEP's draft of the Proposed Final Pretrial Order. Unlike the "rim conspiracy" claim, it was not raised in

response to the motions for summary judgment or on appeal.

As before, MCEP denies that this is a separate claim or a new theory. MCEP again tries to wedge this new agreement into the Amended Complaint, citing allegations that the Hospital Defendants coerced doctors not to affiliate with MCEP or refer their patients to physicians who treated patients at MCEP. The Amended Complaint, however, contains no allegation of a separate agreement *among the physicians*. If MCEP wanted to rely on this purported agreement, it needed to amend its Complaint.

Defendants have not had the opportunity to conduct discovery, seek expert witness testimony, or move for summary judgment on this claim. Doc. #194-1. As such, allowing MCEP to present evidence of a separate agreement among the physicians would be unfairly prejudicial to Defendants. The Court therefore SUSTAINS Defendants' Motion to Preclude Trial of Unpled "Physicians" Conspiracy, Doc. #194.

V. Conclusion

For the reasons stated above, Defendants' Motion to Clarify Issues for Trial, Doc. #195, which the Court construes as a motion for reconsideration of Judge Black's October 6, 2016, Sealed Order Resolving Defendants' Motions for Summary Judgment, Doc. #183, is SUSTAINED. The Court finds that Judge Black's conclusion that MCEP's Sherman Act claim is governed by the *per se* rule is clearly erroneous. Given that MCEP has pled only a *per se* claim, but the rule of

reason applies, the Court DISMISSES MCEP's Sherman Act claim WITH PREJUDICE.

The Court also SUSTAINS Defendants' Sealed Motion to Preclude Trial of Unple[d] "Rim Conspiracy" Claim, Doc. #190, and Defendants' Motion to Preclude Trial of Unpled "Physicians" Conspiracy, Doc. #194.

The following other motions in limine are OVERRULED AS MOOT:

- Defendants' Sealed Motion to Preclude Lay Witness Thomas Mallon from Testifying on Damages (Doc. #199);
- Defendants' Motion to Exclude Prejudgment Interest from Plaintiff's Calculation of Damages (Doc. #200);
- Defendants' Sealed Motion to Exclude Testimony of Dr. Harry E. Frech III on Damages (Doc. #205);
- Defendants' Sealed Motion to Exclude Opinions of Plaintiff's Damages Expert Harry E. Frech, Ill, for Failure to Comply with Fed. R. Civ. P. 26(e) and 26(a)(2)(B) (Doc. #201);
- Defendants' Sealed Motion to Exclude Testimony Relating to Premier's Cash Reserves (Doc. #202);
- Defendants' Sealed Motion to Exclude Testimony about Catholic Health Initiatives (Doc. #203);

- Defendants' Sealed Motion to Exclude Testimony of James L. Watson (Doc. #204);
- Defendants' Sealed Motion to Exclude Testimony Regarding Hearsay from Non-Testifying Physicians (Doc. #206);
- Defendants' Sealed Motion In Limine to Exclude Hearsay of Managed Care Facility Representatives (Doc. #208);
- Plaintiff The Medical Center at Elizabeth Place's Motion in Limine No. 1 to Exclude Evidence of Defendants' Purported Justifications for Their Anticompetitive Conduct (Doc. #210); and
- Plaintiff The Medical Center at Elizabeth Place's Sealed Motion in Limine No. 2 to Exclude Evidence of Kettering Health Network's Non-Compete Provisions (Doc. #211).

Judgment shall enter in favor of Defendants and against Plaintiff.

The captioned case is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

Date: August 9, 2017

/s/Walter H. Rice
WALTER H. RICE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 3: 12-cv-26

JUDGE WALTER H. RICE

[Filed August 14, 2017]

THE MEDICAL CENTER AT ELIZABETH PLACE, LLC,	)
Plaintiff,	)
v.	)
PREMIER HEALTH PARTNERS, *et al.*,	)
Defendants.	)

ADDENDUM TO DECISION AND ENTRY SUSTAINING DEFENDANTS' MOTION TO CLARIFY ISSUES FOR TRIAL, WHICH THE COURT CONSTRUED AS A MOTION FOR RECONSIDERATION (DOC. #267)

On August 9, 2017, the Court issued a Decision and Entry (Doc. #267) Sustaining Defendants' Motion to Clarify Issues for Trial (Doc. #195), which the Court construed as a Motion for Reconsideration of that portion of Judge Timothy Black's October 6, 2016, Order (Doc. #183) overruling Defendants' Motion for Summary Judgment that the *Per Se* Rule Does Not Apply and that Plaintiff's Claim Should Be Dismissed (Doc. #132). The Court concluded that Judge Black's ruling was clearly erroneous and that, because the *per se* rule does not apply and Plaintiff has disavowed any reliance on the rule of reason, Plaintiff's Sherman Act claim must be dismissed with prejudice.

To the extent that the Decision and Order may not have *explicitly* set forth the procedural vehicle by which such dismissal was proper, this Addendum simply seeks to clarify that Defendants are, in fact, entitled to summary judgment on their Motion for Summary Judgment that the *Per Se* Rule Does Not Apply and that Plaintiff's Claim Should Be Dismissed (Doc. #132).

Date: August 14, 2017

/s/Walter H. Rice
WALTER H. RICE
UNITED STATES DISTRICT JUDGE

APPENDIX D

AO 450 (Rev. 11/11) Judgment in a Civil Action

UNITED STATES DISTRICT COURT
for the
Southern District of Ohio

Civil Action No. 3: 12-cv-26

[Filed August 9, 2017]

The Medical Center at Elizabeth Place, LLC	)
Plaintiff	)
	)
v.	)
	)
Premier Health Partners, et al.,	)
Defendant	)
	)

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus post judgment interest at the rate of _____ % per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)*

_____ recover costs from the plaintiff *(name)* _____.

☑ other: DISMISSING PLAINTIFF'S SHERMAN ACT CLAIM WITH PREJUDICE; JUDGMENT IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFF

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☑ decided by Judge Walter H. Rice on a motion for Decision and Entry

Date: 8/9/17 *CLERK OF COURT*

/s/Kaylin Atkinson [SEAL]
Signature of Clerk or Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:12-cv-26

Judge Timothy S. Black

[Filed April 19, 2017]

MEDICAL CENTER AT ELIZABETH PLACE, LLC,	)
Plaintiff,	)
vs.	)
MEDAMERICA HEALTH SYSTEMS CORPORATION, *et al.*,	)
Defendants.	)

ORDER OF RECUSAL AND RE-ASSIGNMENT

This District Judge hereby **RECUSES** himself from this civil case and directs the Clerk of Court to re-assign this case to the docket of District Judge Walter H. Rice, who has agreed to proceed to jury trial in Dayton on August 14, 2017, as the parties desire (which this Cincinnati duty-stationed Judge cannot).

IT IS SO ORDERED.

Date: April 19, 2017

s/ Timothy S. Black
Timothy S. Black
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:12-cv-26

Judge Timothy S. Black

[Filed October 6, 2016]

THE MEDICAL CENTER AT ELIZABETH PLACE,	)
Plaintiff,	)
vs.	)
PREMIER HEALTH PARTNERS, *et al.*,	)
Defendants.	)

SEALED ORDER RESOLVING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT (Docs. 129, 130, 132, 133)[1]

[1] Pursuant to S.D. Ohio Civ. R. 79.3 and paragraph 14 of the Stipulated Protective Order (Doc. 43), this Order contains citations to exhibits, deposition testimony, and other documents produced in this case that have been designated "Confidential" or "Highly

This civil action is before the Court on: (1) Defendant Catholic Health Initiatives motion for summary judgment (Doc. 129); (2) Defendants' motion for summary judgment on statute of limitations (Doc. 130); (3) Defendants' motion for summary judgment on the *per se* rule (Doc. 132); (4) Defendants' motion for summary judgment based on Plaintiff's failure to present evidence of antitrust injury (Doc. 133); Plaintiff's omnibus memorandum *contra* (Doc. 139); and Defendants' reply memoranda (Docs. 155, 156, 157, 158, 159).[2]

I. BACKGROUND FACTS[3]

MCEP maintains that Defendants designed and implemented a plan to deny MCEP access to supply (managed care contracts and physicians) and demand (physician referrals) that MCEP needed to compete as a 26-bed adult acute-care hospital in Dayton, Ohio. This alleged plan secured the cooperation and agreement of members of the Defendants' Joint Operating Agreement ("JOA") and their subsidiary Hospitals with the oversight of Defendant Premier Health Partners, nearly all of the health insurers

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Confidential—Outside Counsels Eyes Only." Accordingly, this Order is docketed under seal.

[2] Defendants include Premier Health Partners, Atrium Health System, Catholic Health Initiatives, MedAmerica Health Systems Corporation, Samaritan Health Partners, and UVMC (collectively "Defendants").

[3] *See also* the parties' undisputed facts at Doc. 129, Ex. 1; Doc. 130, Ex. 1; Doc. 132, Ex. 1; Doc. 133, Ex. 1; and Doc. 139, Ex. 1.

operating in Dayton, and certain independent medical professionals.

On March 23, 2016, the Sixth Circuit reversed and remanded this Court's Order granting summary judgment to Defendants, holding that this Court erred in concluding that MCEP's claim lacked the necessary plurality of actors. (Doc. 173). Specifically, the Sixth Circuit determined that "[b]ecause plaintiff presented evidence of conduct and business operations that raise the possibility of concerted action among defendant hospitals, the question remains upon remand whether hospitals that had previously pursued their own interests separately, and that continue to seem to compete, combined unlawfully to restrain competition." *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, 817 F.3d 934, 945 (6th Cir. 2016). Moreover, while the Sixth Circuit expressly stated that the circuit court "look[ed] only at the element addressed by the district court, which is the first element: whether defendants' conduct is the result of two or more entities acting in concert or whether defendants, based on their participation in the joint operating agreement, function as a single entity in the market place" *Id. at* 939, the following findings by the Sixth Circuit have a direct impact on the *per se* and antitrust injury motions:

- When viewing the record in the light most favorable to MCEP, a reasonable juror might conclude that, aside from a business relationship pursuant to the joint operating agreement, defendant hospitals maintained separate identities and acted more like competitors than one unit. (*Id.* at 945).

- MCEP has submitted evidence that each insurer knew that the other insurers had included this limitation ("Panel Limitations") in their contracts. (*Id.* at 941).

- MCEP also offered evidence from insurance company emails and defendant hospitals' Board of Directors meetings that, in addition to demonstrating knowledge among the insurers of the restriction on adding new hospitals to their networks in their managed-care contracts with defendant hospitals, the insurance companies regularly monitored each other to ensure that the other insurance companies were complying with the contract restriction on dealing with a new hospital. (*Id.* at 942).

- Negotiating contracts that explicitly exclude the insurers' ability to contract with other parties is anticompetitive on its face and normally serves no proper business function, a fact recognized by the district court in its first order denying the motion to dismiss. (*Id.* at 941).

Based on these findings, the Sixth Circuit instructs that MCEP submitted evidence sufficient to demonstrate that the group boycott underlying MCEP's Sherman Section 1 claim involves two discrete horizontal agreements; (1) an agreement among the Defendants as separate actors and competitors of MCEP to prevent MCEP from competing, including precluding MCEP from obtaining managed care contracts from insurers; and (2) an agreement among those insurers, orchestrated and monitored by the Defendants' concerted action, not to offer MCEP a

managed care contract. *See Med. Ctr. at Elizabeth Place*, 817 F.3d 934.

II. STANDARD OF REVIEW

A motion for summary judgment should be granted if the evidence submitted to the Court demonstrates that there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party has the burden of showing the absence of genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. *Celotex*, 477 U.S. at 323. All facts and inferences must be construed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

A party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248 (1986).

III. ANALYSIS

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Although the Sherman Act, by its terms, prohibits every agreement "in restraint of trade," the United States Supreme Court recognizes

that Congress intended to outlaw only "unreasonable restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

> [T]o establish a claim under Section 1, the plaintiff must establish that the defendants contracted, combined or conspired among each other, that the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets, that the objects of any conduct pursuant to that contract or conspiracy were illegal and that the plaintiff was injured as a proximate result of that conspiracy.

Crane & Shovel Sales Corp. v. Buckyrus-Erie Co., 854 F.2d 802, 805 (6th Cir. 1988).

The two major types of antitrust conspiracies to restrain trade are horizontal and vertical. *Care Heating & Cooling, Inc. v. Am. Standard, Inc.*, 427 F.3d 1008, 1013 (6th Cir. 2005). "Horizontal conspiracies involve agreements among competitors at the same level of market structure to stifle trade, such as agreements among manufacturers or among distributors to fix prices for a given product[.]" *Id.* Vertical restraints are combinations of persons at different levels of the market structure, such as manufacturers and distributors. *See United States v. Topco Assoc.*, 405 U.S. 596, 608 (1972). Horizontal restraints have been characterized as "naked restraints of trade with no purpose except stifling competition," *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963), and therefore, *per se* violations of the Sherman Act. While vertical restrictions may reduce intrabrand competition by limiting the number of sellers of a particular

product competing for a given group of buyers, vertical restrictions also promote interbrand competition by allowing a manufacturer to achieve certain efficiencies in the distribution of its products. *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54 (1977).

A threshold requirement of the Sherman Act is that the challenged agreement be entered into by multiple parties. 15 U.S.C. § 1. Conduct by a single entity is not covered by Section 1 -- the statute applies only to joint conduct. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1983). As the Sixth Circuit has held, the plurality requirement has been met. *Med. Ctr. at Elizabeth Place*, 817 F.3d 934.

A. Anticompetitive Effect ("*Per Se* Motion")

The appropriate standard for evaluating the challenged conduct—rule of reason or *per se*—is a question of law for the Court to decide. *Food Lion, LLC v. Dean Foods Co.*, (*In re Re. Milk Antitrust Litig.*), 739 F.3d 262, 271 (6th Cir. 2014) ("[t]he district court's decision to use the rule of reason is a question of law…, which we review *de novo*."). While the selection of a mode of analysis (*per se* or rule of reason) is a question of law, sometimes "underpinning that purely legal decision are numerous factual questions." *In re Wholesale Grocery Products Antitrust Litig.*, 752 F.3d 728, 733-34 (8th Cir. 2014).

MCEP alleges that Defendants participated in a *per se* illegal group boycott of which MCEP was a target in violation of Section 1 of the Sherman Act. Specifically, MCEP alleges that Premier's contracts with insurers and employment or lease agreements with physicians

should be condemned as automatically, or *per se*, illegal under Section 1 of the Sherman Act. Defendants argue that the rule of reason, not the *per se* rule, applies and consequently MCEP's *per se* claim must be dismissed.

The Supreme Court has made it clear that the "'rule of reason' [is] the prevailing standard of analysis." *GTW Sylvania*, 433 U.S. at 49. The rule of reason requires the fact finder to "weigh[] all of the circumstances of a case," including the nature of the challenged restraint, the justification offered by the defendant for the challenged restraint, and the existence of any anticompetitive effects flowing from the challenged restraint, "in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007).

The second mode of analysis is the *per se* rule, that is limited to specific restraints that always, or almost always, harm competition without any redeeming competitive benefits. *GTW Sylvania*, 433 U.S. at 50 (the *per se* rule should be reserved for "manifestly anticompetitive" conduct having a "pernicious" and anticompetitive effect without "any redeeming virtue"). The *per se* rule applies only after "considerable" judicial experience confirms the existence of "naked restraint[] of trade with no purpose except stifling of competition." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). The *per se* standard recognizes there are some methods of restraint that are so inherently and facially anti-competitive that an elaborate and burdensome inquiry into a demonstrable economic impact on

competition in a relevant market is not required. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

A court, in performing its gatekeeping function, must evaluate only whether "the charged party offers a plausible competitive justification for the restraint." *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 33 (D.C. Cir. 2005). If the court reaches that conclusion, the court cannot apply the *per se* rule, but instead the court must "engage in a more searching analysis of the market circumstances surrounding the restraint" in a rule of reason analysis. *Id.*

When determining whether to use the *per se* rule or the rule of reason, courts must consider the type of restraint at issue—whether it is horizontal or vertical. *Expert Masonry Inc. v. Boone County, KY*, 440 F.3d 336, 344 (6th Cir. 2006).

An agreement "between competitors at the same level of the market structure" is horizontal. *Sancap Abrasives Corp. v. Swiss Indus. Abrasives*, 19 F. App'x 181, 191 (6th Cir. 2001). Horizontal restraints are considered to be more threatening, and thus result in *per se* treatment more regularly. *Expert Masonry*, 440 F.3d at 344.[4]

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[4] *See also Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404, 409 (6th Cir. 1982) (evidence of horizontal concerted action in boycott demanded application of *per se* doctrine); *Klors v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959) (group boycotts with horizontal concerted action are *per se* illegal regardless of justification, even when they operated to lower prices).

Vertical restraints—agreements between parties "at different levels of the market structure, such as manufacturers and distributors"—have more redeeming qualities (*e.g.*, allowing for distribution efficiencies) and are subjected to the rule of reason. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435 (6th Cir. 2008).

This Court previously held that MCEP alleged a conspiracy, "the multiplicity of actors as well as the effect of [which] was predominately horizontal, and therefore illegal." (Doc. 37 at 11 n. 9). Boycotts are *per se* illegal where they involve "horizontal agreements among direct competitors." *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998). The Sixth Circuit reaffirmed *per se* condemnation where the group boycott involves "a horizontal agreement among competitors." *Total Benefits Planning Agency*, 552 F.3d at 435.

In *Total Benefits*, various Anthem Blue Cross and Blue Shield entities allegedly entered into vertical agreements with independent insurance agents that those agents would not do business with the plaintiff. *Id.* at 435-36. The plaintiff claimed the requisite horizontal agreement existed among the Anthem defendants. *Id.* at 435. The Sixth Circuit disagreed, holding that because the Anthem defendants were sister corporations with a common parent, they were incapable of conspiring. *Id.* In this case, however, the Sixth Circuit held the opposite: the evidence supported a finding that the Defendants were separate entities and competitors and thus capable of conspiring. *Med. Ctr. at Elizabeth Place*, 817 F.3d 934.

Defendants argue that their joint contracting with payers, which delivered the agreements that MCEP challenges here, is legitimate joint venture activity that should be analyzed under the rule of reason. However, this argument ignores the ancillary restraint doctrine. The ancillary restraint doctrine "recognizes that a restraint that is unnecessary to achieve a joint venture's efficiency-enhancing benefits may not be justified based on those benefits. Accordingly, a challenged restraint must have a reasonable procompetitive justification, related to the efficient-enhancing purposes of the joint venture." *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 339 (2d Cir. 2008).[5] Where that nexus does not exist, the challenged restraint must be evaluated apart from the rest of the venture, *i.e.*, as horizontal concerted action. *Id.* at 339.

The Panel Limitations[6] that Defendants jointly negotiated with payers restricted output by excluding MCEP, which payers considered a viable price competitor to Defendants. Defendants argue that the MCEP exclusion permitted them to provide price reductions.

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[5] The ancillary restraint doctrine provided that an otherwise unlawful restraint may be lawful if "ancillary to the main purpose of a lawful contract…" *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898).

[6] Defendants' managed care agreements with Dayton payers contained provisions restricting the number and/or identity of hospitals that a particular payer could have in its managed care networks (herein referred to as "Panel Limitations").

However, the legitimacy of the "rate for volume"[7]

[7] Insurers enter into contracts with hospitals and other health care providers to purchase health care services. (Doc. 128-17 at 52, 55, 283-84, 288-89). The insurers then create networks of those providers that they sell to employers or other groups that offer health care services to their members. (*Id.* at 53-54, 59-60, 285-86). Because they are buyers, insurers seek to negotiate discounted rates in their negotiations with hospitals. (*Id.* at 55-56, 283-85, 288-89). Hospitals, in turn, seek patients, and hospitals are often willing to accept discounted prices in return for the expectation of increased patient volume. (*Id.* at 283-84, 288). The ensuing contracts between hospitals and insurers often link discounted rates to access to an expected volume of parties. (Doc. 128-40 at 555; Doc. 128-14 at 63; Doc. 128-28 at 45; Doc. 128-37 at 43). The expected volume can be realized either because the insurer offers a large number of members or because the insurer limits the size of its hospital network and in that way channels its volume to fewer hospitals. (Doc. 128-17 at 283-84, 286, 288). Such volume-based pricing is prevalent in managed care contracting in the Dayton area and elsewhere across the United States. (Doc. 128-7 at 69-73). However, here, there is no record evidence demonstrating the rate for volume analyses regarding any of the managed care contracts.

MCEP requested this information in discovery but none was produced. Moreover, there is no evidence that Defendants increased rates when payers successfully negotiated Panel Limitations out of their contracts. UHC negotiated the Panel Limitation out of the 2010 managed care contract with the Defendants. (Doc. 128-8 at 271). UHC stated that it had no knowledge that rates were affected. (*Id.* at 327). MMO did not have to give a rate concession to eliminate its Panel Limitations from the Defendants' contract. (Doc. 128-14 at 193). Similarly, Humana had no knowledge of any effect on rates where it removed the Panel Limitation from its 2010 contract. (Doc. 149-18 at ¶¶ 6, 9, 10). Third, the Panel Limitations are the way Defendants keep a payer's volume "static." (Doc. 128-33 at 244). In other words, they reduce competition for the volume. None of the contracts guarantee them any volume, so Defendants have to compete with the in-

rationale is the subject of a genuine dispute, which precludes it from being the basis for this summary judgment argument.[8] Even, assuming the rate for volume rationale is legitimate, it is simply Defendants bribing payers in exchange for a commitment to not bring in a rival that the Defendants would have to deal with for the payer's business. Defendants have failed to evidence that their joint contracting has any efficiency-enhancing purpose to which such an agreement is necessary.

Accordingly, a jury could reasonably conclude from this evidence that the "rate for volume" language is nothing more than a provision seeking to provide cover for excluding competitors. Alternatively, a jury could find that whatever discount was given was payment for the payer's agreement to the Panel Limitation commitment and completely unrelated volume-sensitive pricing.

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network KHN hospitals for any volume. (*Id.* at 185) (Defendants have to compete with KHN for UHC, notwithstanding the Panel Limitation)). Further, Defendants must acknowledge that a new hospital could just as likely take volume from KHN (which, by the way, does not have this provision in any of its managed care contracts) rather than the Defendants.

[8] The ancillary restraint doctrine requires undisputed proof (at summary judgment) that the "non-venture" activity (the agreement to exclude a rival from the payer's network) is joint conduct that is necessary for the Defendants to achieve whatever efficiency-enhancing purpose collective negotiation brings and that there are not less restrictive alternatives. FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS at 24. Defendants fail to make this showing.

The decision to apply the *per se* rule turns on "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output … or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broad. Music, Inc. v. Columbia Broad, Sys., Inc.*, 441 U.S. 1, 8, 19-20 (1979).[9] To succeed in this claim, MCEP need not prove completion of the conspiracy or any overt acts; the illegal agreement itself constitutes the offense. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330 (1991).

As this Court previously concluded, "[o]rganizing a group boycott of MCEP does not promote any legitimate objective of the JOA or achieve any procompetitive benefits." (Doc. 37 at 12).[10] Accordingly, since the alleged restraint bears no relationship to

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[9] The *per se* rule applies to conduct taken under the mantle of a joint venture when the challenged restraint is not reasonably related to any of the efficiency-enhancing benefits of a joint venture, and serves instead only as a naked restraint against competition. *See, e.g., Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 229 (D.C. Cir. 1986).

[10] In fact, the Sixth Circuit determined that MCEP submitted evidence sufficient to demonstrate that the group boycott underlying its Section 1 claim involves two discrete horizontal agreements: (1) an agreement among the Defendants as separate actors and competitors of MCEP to prevent MCEP from competing, including precluding MCEP from obtaining managed care contracts from insurers; and (2) an agreement among those insurers, orchestrated and monitored by the Defendants' concerted action, not to offer MCEP a managed care contract. *Med. Ctr. at Elizabeth Place*, 817 F.3d at 941-43.

some procompetitive justification or legitimate function of the joint venture, the challenged restraint must be evaluated on its own and can be *per se* illegal even if the remainder of the joint venture is lawful. *Blackburn v. Sweeney*, 53 F.3d 825, 828-29 (7th Cir. 1995) (applying *per se* rule to a provision in a law partnership dissolution agreement that restrained the territories where former partners could advertise after finding the provision to be non-ancillary to the rest of the agreement).

Accordingly, the Court finds, as a matter of law, that the appropriate standard for evaluating the challenged conduct is the *per se* rule.

A *per se* antitrust claim requires proof of: (1) "two or more entities engaged in a conspiracy, combination, or contract;" (2) "to effect a restraint or combination prohibited *per se*, wherein the anticompetitive effects are implied;" and (3) "that was the proximate cause of plaintiff's antitrust injury." *Expert Masonry, Inc.,* 440 F.3d at 342. The Sixth Circuit already determined that the plurality requirement has been met. *Med. Ctr. at Elizabeth Place*, 817 F.3d 934. With respect to the remaining elements, MCEP claims that: (1) Defendants reached an agreement with one or more supplier or customer, under which the supplier or customer agreed to restrict the manner in which it would do business with MCEP; (2) the understanding(s)/agreement(s) involved two or more actors at the customer/supplier level (*i.e.*, payers and/or doctors); and (3) MCEP suffered antitrust injury to its property or business as a result.

1. ***Panel Limitations***

MCEP articulates evidence regarding agreements between Defendants and payers and the denial of managed care contracts with MCEP. (Doc. 139 at 64-71).[11] The payers understood that each had contractually committed to Defendants not to add hospitals to their respective networks. Direct evidence of this understanding comes from an internal United Healthcare Services, Inc. ("UHC")[12] document: "Premier has language in all of their payer contracts that provides them some exclusivity. This prevented any payer from contracting with Dayton Heart." (Doc. 141-8 at 8763).[13]

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[11] *See, e.g., Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cr. 1999) (evidence that conduct would have been contrary to conspirator's self-interest without the conspiracy constitutes circumstantial proof of agreement); *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 545 (2nd Cir. 1993) (evidence that defendant ignored its own standards in determining whether to deal with plaintiff "strongly suggests" that its stated reason for denial might be a sham supporting the inference of an agreement).

[12] UHC is the second largest private payer in the Dayton area.

[13] *See, e.g.,* A *Dayton Daily News* article reported "Premier Health Partners has included language in Anthem's and some other insurers' contracts that disqualifies Dayton Heart from their networks." ("Dayton Heart now in Anthem Fold," Dayton Daily News (January 21, 2005)). Another article reported "Premier Health Partners routinely requires insurers to leave Dayton Heart out of their networks if they want to include Premier's market-leading system." (Insurance deals often leave out Dayton Heart; Premier Health Partners says specialty hospital siphons more profitable serves away from its hospital group," Dayton Daily

The payers had an agreement that each would comply with their respective commitments to Defendants. MCEP argues that each payer agreed to comply with the Panel Limitations, *i.e.*, "hold the line," so long as the other payers did the same. For example, Medical Mutual of Ohio's ("MMO")[14] contract with Defendants stated:

> If Hospital [Defendants] enters into an agreement with another payer with a significant level of membership in the Dayton, Ohio market, and that agreement contemplates or allows that payer's inclusion of more than (1) other hospital in Montgomery County (excluding Children's Medical Center) in its [managed care networks], MMO may likewise include more than one other hospital in its [managed care] network(s), and

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News (July 22, 2007)). A 2008 industry report available to payers states "Premier has threatened to revoke privileges for physicians participating in Elizabeth Place and contracts with health plans such as Anthem and United Health[care] are known to be contingent on excluding those [physician-owned hospital] facilities from the network." (HealthLeaders InterStudy, "Dayton Market Overview 2008," at 7-8 (April 2008), Doc. 146 at 122207, 122213-14). This evidence establishes that the understanding between Defendants and payers existed. *Heartland Surgical Specialty Hosp. v. Midwest Div., Inc.*, 527 F. Supp. 2d 1257, 1307-08 (D. Kan. 2007) (evidence that rival hospital defendants discussed publicly the competitive threat of specialty hospitals and that any payers were able to negotiate lower reimbursement rates in exchange for including network configuration clauses to exclude plaintiff "permit[s] an inference of conspiracy").

[14] MMO is the third largest private payer in the Dayton area.

> the inpatient and outpatient rates contained herein shall remain unaffected.

(Doc. 132-17 at 38). MMO acknowledged that this provision meant that if the Defendants had a contract with a "significant" rival of MMO, that rival could add a hospital to its Dayton managed care networks beyond Defendants and KHN (MMO's current network in Dayton), without incurring the automatic rate increase that such a move by MMO would otherwise trigger. (Doc. 128-14 at 179-180). MMO considered Anthem, UHC, and possibly Aetna and Humana as "significant" rivals. (*Id.* at 180). MMO sought this provision and agreed that the provision was intended to assure that MMO "competitors with HMO products would not have an advantage on having a hospital in its network that MMO could not sign without incurring a rate increase." (*Id.* at 181). MMO did precisely that. When Anthem added Dayton Heart Health ("DHH")[15] in 2005 after Anthem's contract with Defendant Hospitals MVH and GSH expired, Anthem then had DHH and Kettering Health Network ("KHN")[16] in its managed care networks. When Anthem resigned Defendants to a managed care contract in January 2006, its managed care networks were comprised of Defendants KHN and DHH. (Doc. 128-14 at 197-198). This triggered the

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[15] DHH was a physician-owned cardiac specialty hospital in Dayton from September 1999 until May 2008, when Defendant Good Samaritan Hospital purchased it for $55 million and merged it out of existence. (Tab 116 – PX475 at 2).

[16] KHN is a healthcare system in Dayton and is comprised of seven acute care hospitals. It acquired 50% ownership in MCEP effective December 31, 2008. (Doc. 141-2 at 1).

provision, allowing MMO to add DHH to its managed care networks without breaching its Panel Limitation. (*Id.* at 197). A jury could find that this negotiated "escape clause" supports an inference that payers agreed not to expand their managed care networks.

UHC told MCEP that it would be able to give MCEP a managed care contract if MCEP: (i) sold itself to Defendants; (ii) sold itself to KHN; or (iii) got a managed care contract from Anthem. (Doc. 128-25 at 138-39; Doc. 128-37 at 195-96; Doc. 142-1 at 124439). UHC did not tell MCEP that a contract with Anthem would create a breach of the "hold the line" agreement among payers. Rather, UHC stated that since UHC had stood by Defendants in 2005 while the Defendants were out of contract with Anthem, Defendants assured UHC that it would not be competitively disadvantage vis a vis Anthem. (Doc. 128-37 at 81-82; Doc. 128-25 at 240; Doc. 142-1 at 124439). However, Defendants admit that during the negotiations for the 2005 UHC contract containing the Panel Limitation that "UHC was positioning themselves to say that they wanted to assure that if their competitors had a panel of X, that they would be able to have a panel of X as well without being disadvantaged on the rates"; in other words, UHC sought a concept similar to MMO's "escape" clause. (Doc. 128-33 at 165-66 (discussing Doc. 143-31 at 141733)). Defendants, however, deny providing that assurance. (*Id.* at 166). Thus UHC's statement to MCEP about Anthem was pretext from which a jury could infer an agreement.

Next, on at least one occurrence, a payer used Defendants to discipline another payer for not "holding

the line." When MMO signed DHH to a managed care contract in 2007, UHC complained to Defendants. (Doc. 142-30 at UHC9795). During a July 2007 meeting, UHC stated that having DHH in both Anthem's and MMO's networks was "creating a disadvantage for UHC." (*Id.*) Defendants responded that they would send MMO a termination letter the very next day, because MMO had entered into a contract with DHH. (Doc. 128-8 at 243) ("Q. So this letter of termination to Medical Mutual of Ohio that's going to be issued the day after this meeting was because Medical Mutual of Ohio had entered into a contract with Dayton Heart? A. That was the assumption, yes. Q. Is that what he told you? A. Yes, I believe – I mean, yes, that was.").

Record evidence also establishes that Defendants monitored compliance among the payers of the Panel Limitations and shared compliance of one payer with others. (Doc. 143-30). For example, after the 2009 KHN investment, a number of payers appeared on MCEP's website, prompting Premier's CFO to question "how is this possible with our contracts?" (Doc. 143-29 at 167895). Mark Shaw, vice president of managed care, decision support, and chief revenue officer at Premier, advised senior management that his team was challenging the payers' right to add MCEP, and reported that Aetna had agreed with Defendants' position and would terminate the addendum that added MCEP. (Doc. 147-27 at 142396-98; Doc. 148 at 167166; Doc. 148-1). Shaw concludes: "we will continue to resolve breeches [sic] and our other [payer] contracts and will keep you apprised." (*Id.*)

As part of this effort, Defendants confronted Emerald Health Network,[17] accusing it of breaching the Panel Limitation. (Doc. 147-17 at 108880). When EHN responded disavowing any contract with MCEP (Doc. 143-33 at 142441), Defendants forwarded this to HealthSpan.[18] (Doc. 142-23). At the time, HealthSpan was fighting Defendants over HealthSpan's intent to contract with MCEP. HealthSpan admitted that the email it received from Defendants disclosed that a competitor of HealthSpan had committed not to contract with MCEP. (Doc. 128-28 at 211). There was no business reason to send HealthSpan the EHN statement of compliance with its contract, except as an assurance to HeathSpan that one of its rivals was "holding the line."

Additionally, the evidence shows that once the "line" was broken, numerous payers contracted with MCEP in short order: (1) in January 2009 KHN began negotiations with Anthem for a managed care contract for MCEP that took effect April 10, 2009 (Doc. 142-17); (2) on February 27, 2009 MCEP confirmed with Aetna a discussion about MCEP's affiliation with KHN and getting a managed care contract (Doc. 148-26 at REG372) and less than a week later Aetna agreed to give MCEP access to its managed care networks (Doc. 145-19 at 71875); (3) on March 4, 2009, MCEP spoke with Humana about a managed care contract (Doc.

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[17] EHN formed one of the first PPOs in Ohio. http://tinyurl.com/mudldqd.

[18] HealthSpan offers a PPO product to employers in Dayton that self-insure. (Doc. 128-28 at 19-20).

146-3 at PBC 211) and within two months, Humana forwarded MCEP a executed managed care contract (Doc. 143-2 at 1); and (4) on April 13, 2009, MCEP informed UHC that it had a managed care contract with Anthem. (Doc. 145-22 at 143386). UHC responded on April 17 that it was moving forward with internal discussion to determine "if and how" UHC wanted to handle. (*Id.*) Within one month, UHC gave MCEP a rate proposal. (Doc. 145-15 at 143423). This rush to sign MCEP supports a conclusion that payers' inaction with respect to MCEP was the result of an agreement at the payer level to "hold the line" on the Panel Limitations.

2. Employment contracts, non-compete agreements, and lease agreements

Next, MCEP claims that the direct actions against doctors (*i.e.*, non-compete clauses, employment agreements, termination of lease agreements, and the Dear Doctor letters) are facets of the Defendants' overall conspiracy. Collusion among horizontal competitors to reduce, or eliminate competition is a quintessential *per se* violation of the antitrust laws. *See, e.g, United States v. Coop. Theaters of Ohio, Inc.*, 845 F.2d 1367, 1373 (6th Cir. 1988) (agreement between movie theater booking agents to refrain from soliciting each other's customers is a *per se* violation, even though the booking agents remained free to accept unsolicited business from these customers).

The record demonstrates that the Defendants put concerted pressure on physicians affiliated with MCEP or considering such an affiliation. Defendants met with these physicians and let them know of the opposition

and the punishment for affiliation. (Doc. 139 at 32-33). The payers were aware of this part of the plan. For example, an Anthem email circulated internally a copy of a *Dayton Daily News* article about Defendants threatening investors with loss of privileges. (Doc. 144-16). In that email string, an Anthem employee discloses "I just received a copy of the premier (sic) letter [referenced in the article]. I will scan and attach it in a follow up note." (*Id*.)

Premier's CEO admits that he would never consider contractually committing employed doctors to refer only within the Defendants. (Doc. 128-29 at 184). Premier's former VP of Business Development believes that referrals should be the decision of "the doctor, the patient, and the specialist and the doctors." (Doc. 128-3 at 221). Drs. Toth and Wilcher, as well as the physicians in the GILD,[19]9 explained that their divestment of MCEP stock was the result of pressure brought about by the Defendants' plan, including the loss of referrals. (Doc. 139 at 33-34).

Furthermore, Defendants terminated Drs. Stein and Sobol's lease, which covered Suite 303 in the Samaritan North Hospital Center, Lakeside Building in approximately July 2007. (Doc. 147-20). After Defendants evicted Drs. Stein and Sobol because of their ownership in MCEP, Suite 303 remained vacant and without rent from August 2007 through at least December 2008, resulting in $72,171.80 in lost rent ($4245.40 x 17 months). (*Id*.) Suite 303 sat vacant with no rental revenue from August 2007 until March 2008

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[19] GILD was a specialty practice. (Doc. 128-15 at 82).

(7 months) until GSH secured another tenant, Montgomery Orthopedic Surgeons ("MOS"), to expand into that space. (*Id*.) Even then, the rent MOS paid was 5% less that what Dr. Patel paid. (*Id*.)

Defendants claim there was no business reason to lease space to a competitor. (Doc. 128-4 at 181-182). However, when MOS signed the lease for Dr. Patel's space, it contained a non-compete provision (Doc. 141-24 at 90); but, the lease MOS had for its existing space in the building, Suite 227, did not (Doc. 128-11 at 237-38). Further, when GSH extended the lease for this existing space in 2008-2009, it expressly authorized Dr. Cook to keep his MCEP investment. (Doc. 141-22). Additionally, despite knowing for almost three years that Drs. Jacob and Goldstick were MCEP investors, GSH let them stay in their month to month lease until June 2009 (Doc. 146-26 at 90958), two years longer than GSH permitted Drs. Sobol and Patel remain in their respective month to month leases.

Accordingly, MCEP has alleged sufficient facts to maintain a claim for a *per se* violation. Specifically, MCEP has evidenced: (1) plurality of actors (*Med Ctr. at Elizabeth Place*, 817 F.3d 934); (2) the Panel Limitations, employment contracts, non-compete agreements, and lease agreements are all examples of Defendants combining unlawfully to restrain competition; and (3) these unlawful restraints were the proximate cause of antitrust injury (*see infra* at Section III.B). Therefore, Defendants' motion for summary judgment that the *per se* claim does not apply (Doc. 132) is **DENIED**.

B. Antitrust Injury

1. Standard

Antitrust injury is an essential element of every antitrust claim and the plaintiff bears the burden of proof on that threshold requirement. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 335 (1990).

> It is not enough to simply allege that an individual competitor suffered adverse effects from the defendant's contract or conspiracy. Rather, "[a]ntitrust injury is (1) injury of the type the antitrust laws were intended to prevent and (2) injury that flows from that which makes the defendants acts unlawful."… "It ensures that the injury should reflect the anticompetitive effect" of the defendant's actions. This "ensures that plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior."

In re Se. Milk Antitrust Litig., 739 F.3d at 284. "Per se rules relieve plaintiffs of the burden of proving anticompetitive effects which are assumed, but they do not excuse plaintiffs from showing that their injury was caused by the anticompetitive aspects of the illegal act." *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1444 (9th Cir. 1995). *See also Expert Masonry*, 440 F.3d at 342 ("[i]f a court determines that a practice is illegal per se, further examination of the practice's impact on the market or the procompetitive justifications for the practice is unnecessary for finding a violation of antitrust law.").

The purpose of the antitrust injury requirement is to "ensure[] that plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." *In re Se. Milk Antitrust Litig.*, 739 F.3d at 284. The Supreme Court's seminal articulation of this part of the inquiry is whether the injury "flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). A simply stated form of the inquiry is that "'the injury should reflect the anticompetitive effect' of the defendant's actions." *In re Se. Milk Antitrust Litig.*, 739 F.3d at 284 (quoting *Brunswick*, 429 U.S. at 489).

"To survive [Premier's] motion for summary judgment, [MCEP] must establish that there is a genuine issue of material fact as to whether [the alleged conspiracy] caused [MCEP] to suffer a cognizable injury." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). In the antitrust context, the only cognizable injury is an "injury of the type the antitrust laws were intended to prevent," specifically, an injury resulting from harm to "competition, not competitors." *Brunswick*, 429 U.S. at 488-89. Evidence of injury to MCEP as a single competitor in the marketplace is irrelevant to this threshold determination. *Wee Care Child Ctr., Inc. v. Lumpkin*, 680 F.3d 841, 848 (6th Cir. 2012) ("adverse effects suffered by an individual competitor cannot establish an antitrust injury")[20]

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[20] *See also Indeck Energy Servs., Inc. v. Consumers Energy Co.*, 250 F.3d 972, 977 (6th Cir. 2000) (affirming dismissal when "the only harm allegedly suffered by [the plaintiff] was in the company's

2. Cognizable Injury

MCEP claims that Premier engaged in conduct that resulted in reduced quality and inflated prices for consumers in the Dayton area. Defendants maintain that this is nothing more than a theory of harm to MCEP as a competitor as a result of a loss of access to patients, which alone is not a cognizable injury to competition in the market as a whole. *See, e.g., Park Ave. Radiology Assocs., P.C. v. Methodist Health Sys.*, No. 98-5668, 1999 U.S. App. LEXIS 29986 at 12-16 (6th Cir. Nov. 10, 1999) (no standing to challenge agreement that denied plaintiff access to patients).

a. Panel Limitations

From MCEP's first day of business until it sold part of its business to KHN in 2009 (a sale allegedly forced by Defendants' boycott), MCEP was the only non-specialty acute-care hospital operating in Dayton independent of Defendants and KHN. (Doc. 149-12 at ¶ 11).[21] Throughout that time, MCEP was unable to get

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capacity as a competitor in the marketplace, not as a defender of marketplace competition").

[21] The only reason MCEP sold part of its business to KHN was to get access to the payers' managed care networks through the KHN contracts with those payers. (Doc. 149-12 at ¶ 13).

managed care contracts with (1) UHC;[22] (2) Humana;[23] (3) CIGNA;[24] (4) Aetna;[25] (5) PHCS;[26] (6) EHN;[27] and (7) HealthSpan.[28] Additionally, MCEP's managed care

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[22] UHC did not contract with MCEP until: (1) Anthem contracted with MCEP; and (2) UHC was certain they could add MCEP without reaching the Panel Limitations. (Doc. 139 at 17-18, 62-63).

[23] Humana made an unequivocal commitment not to expand the Dayton network for the 2008 calendar year and did not contract MCEP until that commitment expired. (Doc. 139 at 26-27, 63).

[24] Cigna requested permission to add MCEP in 2008 and was rejected by Defendants. (Doc. 139 at 27-28, 64).

[25] After Aetna expressed interest in July 2007 about contracting with MCEP, Aetna signed a contract with a Panel Limitation commencing in 2008 with an additional commitment to keep MCEP out of network. (Doc. 139 at 24-26, 64). After the 2009 KHN investment, Aetna signed MCEP, but tried to back out when Defendants warned them that it was a breach of Aetna's agreement with Defendants. (Doc. 139 at 26).

[26] PHCS tried to negotiate the Panel Limitation out of Defendants' contract for 2008; when unsuccessful, PHCS refused MCEP a managed care contract. (Doc. 139 at 29-30, 65).

[27] EHN would not contract with MCEP because of the Panel Limitation. When MCEP got access to EHN, thorough the KHN Investment, EHN told MCEP that it could not be in network because of its contract with Defendants. (Doc. 139 at 30-31, 65).

[28] HealthSpan would not contract with MCEP because of the "hold the line" understanding among the big payers, particularly Anthem and UHC. However, HealthSpan admits that it is important to match its Hospital Panel to those of the larger payers so as to be viewed as a viable alternative to those rivals. (Doc. 128-28 at 189-190).

contract with MMO was delayed because of Defendants' conduct.[29]

MCEP argues that lack of access to managed care plans severely impeded its ability to compete with KHN and Defendants. Being out of network with a payer raised the patient's out-of-pocket costs if the patient had a procedure performed at MCEP. (Doc. 149-12 at ¶ 15; Doc. 128-8 at 309).[30] Also, some payers advised physicians operating under their own professional managed care agreement with the payer that the professional risked not receiving her professional fees for procedures performed at out-of-network facilities like MCEP. (Doc. 149-12 at ¶ 15; Doc. 144-14 (internal Anthem email acknowledging "utilization decreased at the facility [MCEP] due to increasing provider dissatisfaction with OON (out of network) reimbursement."). These factors, among others, allegedly deterred physicians from utilizing MCEP. (Doc. 149-12 at ¶ 15). With respect to this lost

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[29] MMO's escape clause permitted them to sign MCEP. MMO, like HealthSpan, concedes that it is important for its network to match its rivals. In August 2007, MMO asked about MCEP's contracting status with Anthem. (Doc. 142-28 at 126808). MMO explained "[n]obody else was contracted with Medical Center at Elizabeth Place at that time, so I'm assuming if the largest payor in the area [Anthem] is willing to contract with them, then we might be a little more interested in contracting with them, as well." (Doc. 128-14 at 230).

[30] Payers acknowledge that all other things being equal, it benefits the payer and their customers from a financial perspective to have a procedure performed at the lowest cost facility. (Doc. 128-22 at 205-206; Doc. 128-8 at 310-311; Doc. 128-28 at 193). In that regard, Defendant Hospitals were the highest-priced provider in Dayton.

case value, MCEP did not even have the opportunity to price compete.

Additionally, some payers advised MCEP that it might not receive any payments on services provided out of network if the procedure did not meet certain specific criteria. (Doc. 149-12 at ¶ 16; *e.g.,* Doc. 144-18 at 443; Doc. 144-19 at 449). Dayton's largest payer, Anthem, took the position that out-of-network status meant out of contract. (Doc. 128-19 at 162, 165). As a result, whatever benefits covered an out-of-network claim, Anthem would pay the patient instead of MCEP, forcing MCEP to pursue the patient to collect the balance due from Anthem for the services. (Doc. 128-19 at 164-166; Doc. 149-12 at ¶ 16). Anthem did this to deter out-of-network facilities from accepting out-of-network procedures. (Doc. 128-19 at 166-167). The manner in which payers handle out-of-network claims created uncertainty with respect to anticipated revenue and raised MCEP's costs, both of which adversely affected MCEP to expand output price compete. (Doc. 149-12 at ¶ 16).

This changed once MCEP was able to participate in managed care networks in 2009, an event precipitated solely because MCEP sold an ownership interest to KHN. First, the number of cases increased substantially with respect to each payer with which MCEP had in-network status. (Doc. 149-12 at ¶ 18). Anthem deemed the April 2009 signing of MCEP to all of Anthem's managed care networks as "[a] good resolution which drives competition and will assist our coc [community of care] in this market especially over time." (Doc. 142-13 at 104395). The Anthem

representatives responsible for the MCEP contract explained internally the basis for this conclusion:

> [U]tilization decreased at the facility [MCEP] due to increase in provider dissatisfaction with OON [out of network] reimbursement. The recent decline in utilization at MCEP indicates higher utilization at other community facilities, most likely the Premier Health Partners and the Kettering Medical Center. It is anticipated that, with MCEP as a contracted provider, the utilization will return and drive savings by diverting those members from the high cost community hospitals to MCEP. Additionally, MCEP has available capacity and feels confident that the utilization will increase under the new contract terms.
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> ***
>
> The main cost savings will be deemed by the shifting of members from both Dayton Medical Systems to the Medical Center at Elizabeth Place.

(*Id*.) Anthem agreed that "the MCEP rates compared to the Premier rates would drive competition in the market." (Doc. 128-19 at 233-234).

UHC acknowledged a similar dynamic once MCEP had access to UHC's managed care networks. There was an increase in cases at MCEP after it gained in-network status and UHC acknowledged that pushing volume to MCEP would generate savings. (Doc. 128-8 at 307, 310-311, 113; Doc. 143-9 (reflecting increase in Humana cases at MCEP after MCEP gained in

network status). The evidence also supports the conclusion that Defendants and Anthem had an agreement that, in exchange for the Equal Rate provision, Anthem agreed that it would not add any hospitals, including MCEP, to its Dayton managed care networks. (Doc. 139 at 19-24, 67-69).

Accordingly, the Court finds that there is an issue of fact as to whether lack of managed care plan access impeded MCEP's ability to exert pricing pressure, as well as on the issue of MCEP's improved competitive capability once it acquired access to managed care contracts from the conspiring payers.[31]

There is also evidence of loss of specific physician's caseloads. For example: Dr. Toth sold his shares in MCEP in 2011. (Doc. 149-12 at ¶ 30). At that time, he told MCEP's Chair it was because of pressure Defendants were putting on GILD that resulted in a significant drop of refusals Dr. Toth received from GILD. (Doc. 128-15 at 82-83, 105-107). After Toth sold back his shares, he stopped doing any procedures at MCEP. (Doc. 149-12 at ¶ 30).

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[31] Moreover, the Sixth Circuit determined that "Plaintiff has submitted evidence that each insurer knew that the other insurers had included this limitation [negotiating contracts that explicitly exclude the insurers' ability to contract with other parties] in their contracts, as demonstrated by the excerpt below from a Dayton industry publication: 'Premier has threatened to revoke privileges for physicians participating in [plaintiff hospital] and contracts with health plans such as Anthem and UnitedHealth are known to be contingent on excluding [plaintiff hospital] from the network.'" *Med. Ctr. at Elizabeth Place*, 817 F.3d at 941.

The physicians who make up GILD—Drs. Lutter, Stu Weprin and Patel—sold back their MCEP shares. (Doc. 149-12 at ¶ 28). Dr. Lutter told MCEP's Chair at the time that the divestment was because of pressure that Defendants were putting on GILD. (Doc. 128-15 at 105-106). GILD has a contract with GSH to provide services to GSH patients. (Doc. 148-23 at 231715; Doc. 148-22 at 231704). After the GILD physicians divested in MCEP, they stopped sending any specimens to MCEP's pathology lab. (Doc. 149-12 at ¶ 28).

Dr. Scott Wilcher forfeited his MCEP shares in 2011. (Doc. 149-12 at ¶ 30). At the time Wilcher stated that the reason for this decision was pressure he was feeling from Defendants on his practice. (Doc. 149-12 at ¶ 30). When Dr. Wilcher divested in MCEP, he stopped doing any procedures at MCEP. (*Id*.)

Accordingly, this evidence creates a genuine dispute about whether MCEP's antitrust injury flows from the agreements that Defendants formed among themselves and with the payers. Therefore, Defendants' motion for summary judgment on antitrust injury is **DENIED**.

C. Statute of Limitations

The parties agree that the Clayton Act has a four year statute of limitations. 15 U.S.C. § 15(b). Generally, an antitrust "cause of action occurs and the statute begins to run when a defendant commits an action that injures a plaintiff's business." *Zenith RadioCorp. v. Hazeltine Research, Inc.*, 401 U.S. 32, 338 (1971). However, MCEP alleges that this general rule has several major caveats: (1) injunctive relief; (2) discovering the claim; and (3) continuing violations.

The commencement of the statute of limitations is a question of fact. *In re Beef Indust. Antitrust Litig.*, 600 F.2d 1148, 1169-70 (5th Cir. 1979).

MCEP argues that the claims arose within the limitations period because: (1) its request for injunctive relief is not subject to any statute of limitations; (2) the injurious actions occurred during the limitations period caused it cognizable injury; (3) the injurious acts cloaked in pretext demand a tolling that the limitations period be postponed under the discovery rule; and (4) the ongoing nature of Defendants' conspiracy reflects a continuing violation that the Defendants and their co-conspirators fine-tuned and modified, such that all injurious acts giving rise to MCEP's claim occurred within the limitations period.

Defendants argue that most (but not all) "overt" acts at issue in this case occurred prior to the limitations period.[32] Defendants also contend that any conduct which occurred during the limitations period should be ignored because it is a reaffirmation of prior conduct, or even if not, the conduct that did occur during the limitations period failed to cause new injury to MCEP.

1. Injunctive Relief

Injunctive claims are not subject to the four-year statute of limitations. *United States v. Am. Elec. Power Serv. Corp.*, 137 F. Supp. 2d 1060, 1067-68 (S.D. Ohio 2001) (citing *Hommberg v. Armbrecht*, 327 U.S. 392,

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[32] MCEP commenced this action on January 30, 2012. (Doc. 7). Consequently, the operative day for the limitations period is January 30, 2008.

396 (1946) ("…statute of limitations historically do not control measures of equitable relief.")).

MCEP seeks injunctive relief against Defendants to stop all conduct foreclosing MCEP from the relevant market or that unreasonably impairs its ability to compete in the relevant market. MCEP argues that its equitable claim is still viable because Defendants have active Panel Limitations in their contracts with PHCS, Cigna, and EHN. These payers have not offered MCEP a managed care contract. Injunctive relief would void these Panel Limitations and enjoin Defendants from pursuing similar restraints in the future. Furthermore, if successful, MCEP seeks equitable relief enjoining Defendants from: (1) imposing or enforcing restrictions on patient referrals; and (2) enforcing various non-competes against it.

The concurrent remedy doctrine provides that "equity will withhold its relief [] where the applicable statute of limitations would bar the concurrent legal remedy." *Sierra Club v. Dayton Power & Light, Inc.*, No. 2:04cv905, 2005 U.S. Dist. LEXIS 42473, at *11-12 (S.D. Ohio Aug. 12, 2005). MCEP has pled a single *per se* claim for violation of Section 1 of the Sherman Act and has requested concurrent remedies in the form of treble damages and injunctive relief. (Doc. 7 at 19-20). Accordingly, MCEP's request for injunctive relief must be denied to the extent that it seeks equitable relief for claims that are barred by the statute of limitations.

Therefore, while injunctive claims are not subject to the four-year statute of limitations, to the extent MCEP seeks equitable relief for claims barred by the

statute of limitations, such claims are also barred by the concurrent remedy doctrine.

2. Discovery Rule

Next, Defendants contend that because their alleged wrongful conduct began, to a limited extent, in 2006, MCEP's claim is barred. However, the statute of limitations on a Section 1 conspiracy claim does not begin until the date plaintiff has knowledge of the conspiracy and the injurious acts taken by the conspiracy, sufficient to proceed with a claim. *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1021 (6th Cir. 1999).

> The rule that postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured is the 'discovery rule' of federal common law, which is read into statutes of limitations in federal-question cases (even when those statutes of limitations are borrowed from state law) in the absence of a contrary directive from Congress.

Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. Ill. 1990). "This principle is based on the general rule that accrual occurs when the plaintiff discovers that 'he has been injured and who caused the injury.'" *In re Copper Antitrust Litig.*, 436 F.3d 782, 789 (7th Cir. 2006). MCEP is not seeking to toll the limitations period. Instead, MCEP contends that under the discovery rule, much of what Defendants argue is time-barred is timely because the accrual occurred after January 30, 2008. Specifically, MCEP alleges that

insurers provided pretextual excuses as to why they could not extend managed care contracts, so MCEP did not have knowledge of the conspiracy and the injurious acts before January 30, 2008.[33]

a. Anthem

MCEP maintains that its claim related to Anthem's refusal to contract did not accrue until at least 2009. Specifically, MCEP alleges that in May 2007, Anthem fabricated a company policy that MCEP had to be open at least one year to become eligible for a traditional contract, and there would not be time for a managed care contract. Anthem pursued this "policy" with MCEP into 2008, when it looked like MCEP might get a traditional/indemnity contract—a non-managed care product that Defendants state no longer exists—Anthem severed rate negotiations under false pretenses, which left MCEP hanging until the 2009 KHN investment. Additionally, MCEP claims that the fact that Anthem never gave it a final and permanent refusal provides an independent basis to conclude that its claim accrued post January 2008.

The Court finds that this evidence creates a genuine dispute about whether Anthem's inaction was the result of the "hold the line" conspiracy among its rival

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[33] Defendants argue that the Supreme Court does not recognize a discovery rule for Clayton Act claims. *See Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321 (1981); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997). Despite Defendants' argument otherwise, the Court does not interpret either *Zenith* or *Klehr* to find that the discovery rule does not apply in Clayton Act cases.

payers and that MCEP could not have known about the conspiracy prior to January 30, 2008.

b. Aetna

After committing to Defendants that Aetna would abide by the concerted inaction by excluding MCEP from Aetna's managed care networks for 2008, Aetna scripted the reason it would provide for denying hospitals managed care contracts:

> Dayton/Non-Expansion Messages. At this time, upon further review of the market, we've decided not to expand our network in Dayton. Why? [Dayton Heart and St. E's Place both indicating they are more cost competitive than competitors.] Strategically we are going to remain partnered with our current network for the time being. We determine our strategy based on a number of factors—which include cost and market stability. While we believe Dayton Heart/St. E's Place is cost competitive, we feel it is more important at this time for our network to remain stable.

(Doc. 142-10; Doc. 148-19). This script does not provide MCEP any information that Aetna's denial was untoward, particularly since Aetna sought out MCEP for inclusion in its managed care hospital panel. MCEP only learned about Defendants' alleged complicity with Aetna after the 2009 KHN investment when Aetna reported to KHN that it was reluctant to add MCEP, because of Aetna's managed care contract with Defendants. (Doc. 128-42 at 80-82).

This evidence creates a genuine dispute about whether Aetna's inaction was the result of the "hold the line" conspiracy among its rival payers, thereby linking Aetna's inaction to that of its rivals. Aetna would not tell MCEP the actual reason for the July 2007 denial, but told KHN about Defendants' involvement in 2009, after other payers had contracted with MCEP. A reasonable jury could conclude that Aetna came clean with KHN because the payer "line" had been broken, so Aetna was willing to contract with MCEP, but reluctant because of the potential punitive consequences the Panel Limitation imposed for that breach.

c. Cigna

When MCEP initially approached Cigna regarding a managed care contract in 2007, Cigna declined, stating "after speaking with Sr. management regarding bringing Medical Center at Elizabeth's Place into our network, they have decided not to pursue a contract at this time. There is a possibility of opening our network up early to mid-next year but at this time we are not pursuing any additional facility contracts." (Doc. 130-32). When MCEP approached Cigna about a managed care contract in October 2007, Cigna stated that it could not contract now, citing "staff shortages." (Doc. 130-51). However, Cigna testified that it did not recall a concern about shortages; instead Cigna stated that it did not contract with MCEP because the Dayton market was already an accommodation market with a robust network, "we already had via our deals with Premier and Kettering, so I don't know that it was a concern about shortage." (Doc. 128-26 at 116-118). On

February 14, 2008, Cigna denied MCEP a contract because "they [were] not interested in proceeding." (Doc. 130-50).

Later in 2008, Cigna sought Defendants' approval to add three hospitals to its network: (1) Wayne Hospital; (2) Butler County Medical Center; and (3) MCEP. (Doc. 142-25). Defendants "approved" the addition of Wayne and Butler, but not MCEP. (*Id.*) In March 2009, Cigna amended its agreement with Defendants to add two new hospitals to the list of those already included in the network. (Doc. 141-14). MCEP still does not have a managed care contract with Cigna. (Doc. 145-6).

A jury could find that Cigna's 2007 decisions to deny MCEP a managed care contract were not final (*e.g.*, Cigna was not interested in contracting at this time, and it was experiencing staff shortages), and the pretext Cigna gave for the denial prevented MCEP from discovering the conspiracy. Further, a reasonable jury could find that Defendants' March 2009 amendment constitutes an injurious act in the limitations period, because Defendants and Cigna met and agreed to "fine-tune" their agreement in furtherance of the conspiracy. *Midwestern Mach. Co. Inc. v. Nw. Airlines, Inc.*, 392 F.3d 265, 269 (8th Cir. 2004).

d. Humana

When MCEP approached Humana in 2007 about a managed care contract, Humana replied in October 2007 that it was hopeful "things would be changing." (Doc. 142-4). However, on November 19, 2007, Humana

told MCEP it was still working on the Kettering contract, which would define what Humana would be able to do with MCEP and advised MCEP to check back in early 2008. (Doc. 142-6 at 130786; Doc. 128-37 at 135). A month earlier, on October 16, 2007, Humana committed to Defendants that "Humana will not expand it's (sic) Dayton hospital network beyond Premier and the Kettering Health network during the term of the agreement." (Doc. 142-29). The Defendants acknowledged that commitment and the parties extended their contract through 2008. (Doc. 143-1 at 270).

After checking back on February 14, 2008, Humana informed MCEP that it was unable to contract. (Doc. 142-4). In 2008, Humana did not expand its network in Dayton beyond the Defendants and KHN. (Doc. 128-22 at 225). Humana's contract with Defendants expired on December 31, 2008, and along with it the commitment not to expand its Dayton hospital network. (*Id.* at 143-144). By May 2009, Humana signed MCEP to a managed care contract. (Doc. 143-2 at 1010). A jury could find that Humana's response to MCEP's inquiry in late 2007 was not final or permanent. Further, the misinformation about the importance of the Kettering (not Defendants') contract negotiations during that time creates a genuine dispute about whether and when MCEP should have known the denial was because of an agreement with Defendants.

Accordingly, under the discovery rule, a jury could reasonably find that what Defendants argue is time-barred is timely because the accrual occurred after January 30, 2008.

3. Continuing violation

A "continuing violation" exists where a plaintiff is injured repeatedly over time by a conspiracy that commenced more than four years before the plaintiff files a lawsuit. In a continuing conspiracy each time a member of the conspiracy commits an injurious act that harms the plaintiff, a new cause of action accrues to recover for that act, and, as to those damages, the statute of limitations runs from the time the act is committed. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997). With a continuing violation, a plaintiff is entitled to recover "not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial." *Zenith*, 401 U.S. at 339.

As to the continuing violation theory, the Sixth Circuit has held:

> The test for determining whether a continuing violation exists is summarized as follows: First, the defendant's wrongful conduct must continue after the precipitating event that began the pattern. . .Second, injury to the plaintiff must continue to accrue after that event. Finally, further injury to the plaintiff[] must have been avoidable if the defendants had at any time ceased their wrongful conduct. *Tolbert v. State of Ohio Dep't of Transp.*, 172 F.3d 934, 940 (6th Cir. 1999). *See also, Paschal v. Flagstar Bank*, 295 F.3d 565, 572 (6th Cir. 2002). "[A] continuing violation is occasioned by continual

> unlawful acts, not continual ill effects from an original violation." *Tolbert*, 172 F.3d at 940 (quoting *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991)). Passive inaction does not support a continuing violation theory. *Id.*; *Paschal*, 295 F.3d at 573.

Edison v. Tenn. Dep't of Children's Servs., 510 F.3d 631 (6th Cir. 2007).

Continuing violations arise most often in the context of conspiratorial conduct. "A conspiracy is presumed continuing where there is an agreement to eliminate competition with no affirmative showing of the termination of that agreement." *In re Se. Milk Antitrust Litig.*, 555 F. Supp. at 947. Amendments or extensions to anticompetitive agreement are new acts restarting the statute of limitations under the continuing violation doctrine. *See, e.g., Smith v. eBay Corp.*, C-10-03825, 2012 U.S. Dist. LEXIS 1211, at *3 (N.D. Cal. Jan. 5, 2012) (continued modification of the Accepted Payment Policy and enforcement of the illegal agreement constituted a new act).

The "continuing violation" exception, however, recognizes that "a cause of action accrues each time the plaintiff is injured by an act of the defendants." *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 467 (6th Cir. 1996) (*quoting Barnosky Oils, Inc. v. Union Oil Co. of Cal.*, 665 F.2d 74, 81 (6th Cir. 1981)). This exception requires "an overt act by the defendant. . . to restart the statute of limitations." *Id.* (*quoting Peck v. General Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990). Such an act "is characterized by two elements: (1) it must 'be a new and independent act that is not merely a

reaffirmation of a previous act'; and (2) it must 'inflict new and accumulating injury on the plaintiff.'" *Id.* (quoting *Pace Indus. Inc. v. Three Phoenix Co.*, 813 F.2d 234, 238 (9th Cir. 1987)). Based upon this principle, the Sixth Circuit has repeatedly rejected invocations of the continuing-violations defense that are mere reaffirmations of a previous act." *Z Techs v. The Lubrizol Corp.*, 753 F.3d 594, 600 (6th Cir. 2014).

MWE maintains that Defendants facilitated and enforced compliance by all payers of their respective Panel Limitations. Consequently, where the Defendants enforced or "fine-tuned" a payer's Panel Limitation after January 8, 2008, or induced a payer to extend its commitment through some new consideration after that date, that injurious act is imputed to the other conspirators. *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 536 (6th Cir. 2008) (concealing acts by one conspirator are chargeable to all members of the conspiracy). Defendants argue that MCEP cannot establish the two essential requirements for this exception: (1) a new and independent act; and (2) that the act caused it new injury.

a. UHC

UHC's Panel Limitation bars it from adding to its managed care network the only two independent hospitals operating in the 8-county Dayton area: MCEP and Dayton Heart. UHC wanted to contract with both.

By July 2007, UHC considered the Panel Limitation to be a barrier and wanted it removed. (Doc. 142-19). At a July 2007 meeting, UHC complained that both Anthem and MMO had contracted with DHH. To

appease UHC, Defendants said that they would terminate the MMO contract because that payer had signed DHH (and, in UHC's mind, broken the "line"). As a result, UHC dropped its complaint about the barrier and never added DHH to its managed care networks while DHH was an independent hospital. (Doc. 128-33 at 196). A jury could conclude that Defendants' commitment to terminate MMO was an additional action that renewed UHC's commitment to "holding the line."

UHC had no concerns about a rival contracting with MCEP in 2007 and 2008 because all were "holding the line." In its conversations with MCEP, however, UHC repeatedly told MCEP that if Anthem would contract with MCEP, then UHC would contract with MCEP. (Doc. 128-37 at 84-85; Doc. 128-25 at 138; Doc. 128-31 at 41-42). MCEP and UHC agreed to meet in the fall of 2007 "in concert with next steps with Anthem." (Doc. 145-13). This strategy caused two disputed issues of fact that preclude summary judgment on statute of limitations grounds: (1) whether UHC's refusal was not an "irrevocable, immutable, permanent or final" act so that subsequent efforts to get a contract from UHC during the limitations period cannot be considered "reaffirmations" of a prior independent act; and (2) to what extent a reasonable jury might impute Anthem's pretext to UHC to support a conclusion of horizontal concerted inaction at the payer level. *In re Lower Lake Erie*, 998 F.2d 1144, 1172 (3rd Cir. 1993) (finding that certain conspiracies, such as boycotts, operate through inaction).

MCEP also argues that the 2008 amendment to UHC and Defendants' contract changed certain provisions, including the facility location and service listings, and renewed Section 9.15 (the Panel Limitation). (Doc. 141-7; Doc. 148-5 at 170968). A reasonable jury may determine that this "fine-tuning" of the agreement constitutes an injurious act during the limitations period.

b. MMO and HealthSpan

MMO signed a managed care contract with MCEP on August 11, 2008 (two months after MCEP signed it). (Doc. 141-20 at 693). HealthSpan listed MCEP in-network on KHN's PHA plan in December 2009. (Doc. 145-23). As a result, MCEP's damage theory with respect to MMO and HealthSpan is that "but for" the conspiracy, other payers would have contracted with MCEP earlier, prompting MMO and HealthSpan to contract with MCEP earlier than they did.

The statute of limitations inquiry as to these two payers has two components: (1) whether the refusal by these other payers to give MCEP a managed care contract before the 2009 Kettering investment was the result of a group boycott in which Defendants participated; and (2) whether evidence raises a genuine dispute that MMO and/or HealthSpan would have granted MCEP access to their managed care networks if their rivals had and there were no Panel Limitations encumbering MMO and HealthSpan's contracts.

MCEP claims that MMO's escape clause permitted it, without automatic financial penalty in the form of a significant rate increase, to add a hospital if

Defendants had a contract with a "significant" rival of MMO and that rival could add a hospital to its managed care network. (Doc. 141-19 at 38; Doc. 128-14 at 179-180). MMO considered Anthem, UHC, and possibly Aetna and Humana "significant" rivals. (Doc. 128-14 at 180). MMO sought this provision and agreed that the provision was intended to assure that MMO's "competitors with HMO products would not have an advantage on having a hospital in its network that MMO could not sign without incurring a rate increase." (*Id.* at 181). Therefore, MMO monitored to see when a rival added a hospital, knowing it could do the same, without triggering the automatic rate increase. (*Id.* at 211-212). For example, after Anthem resigned its managed care contract with Defendants in 2005, its managed care network consisted of Defendants, KHN, and DDH. (*Id.* at 197-198; Doc. 142-26). This allowed MMO to add DDH to its network without breaching Defendants' contract. (*Id.* at 198; Doc. 142-26).

MCEP first contacted MMO in August 2007. (Doc. 128-14 at 73-74; 77). However, MCEP claims the evidence supports a finding that MMO was not going to contract with MCEP until it made progress with Anthem and other large insurers. (Doc. 142-28) (MMO telling MCEP "there is a lot of concern that nobody else is contracted with you at present. Is it possible to get a better indication regarding Anthem's willingness to contract with you?"). MMO acknowledged a risk associated with contracting with MCEP when no one else would contract with MCEP. (Doc. 128-14 at 235). If the conspiracy had not prevented UHC, Anthem, Aetna, and Humana from contracting with MCEP, a jury could reasonably infer that MMO would have

contracted with MCEP sooner in order to be sure those companies did not gain an advantage over MMO in the marketplace. (*Id.* at 78-79).

Healthspan had a Panel Limitation in its managed care contract with Defendants throughout the relevant time period. Under that Limitation, the addition of a hospital would breach the agreement, confronting HealthSpan with the consequence of higher rates or termination. (Doc. 141-9 at 9). Defendants and HealthSpan had renewed their agreement each year since 2001. (*Id.* at 20, 22-23, 25, 27, 32, 35, 37, 42-43, 45). MCEP argues that these amendments furthered their conspiracy. In fact, Defendants shared an email from EHN, a PPO network operating in Dayton alongside HealthSpan, in which EHN confirms that it would not contract with MCEP. (*Id.*) This evidence is sufficient to create a genuine dispute about whether HealthSpan would have contracted with MCEP sooner, if unrestrained by Panel Limitations.

c. Private Healthcare Systems

MCEP argues that the earliest possible claim accrual date for Private Healthcare Systems is January 31, 2008, which is within the limitations period.

Since January 2006, PHCS's managed care contract with Defendants contained a Panel Limitation which operated to prevent PHCS from adding hospitals to its Dayton managed care panel. The only affected hospitals in Montgomery Country were DHH and MCEP. Rather than deny MCEP's request, PHCS asked for time to research. On January 31, 2008, PHCS reported that Defendants would not change the Panel

Limitation, but advised that PHCS and Defendants were to reconvene soon. As of February 18, 2008, negotiations between PHCS and Defendants were ongoing. (Doc. 142-3 at 4). After that date, PHCS told MCEP that it could not contract with MCEP. (Doc. 145-3 at 60; Doc. 149-10 at ¶ 15). PHCS was "otherwise open to contracting with MCEP, [but] the opportunity to do so was not worth the risk of reopening the PHCS agreement with Premier." (Doc. 149-10 at ¶ 17).

The negotiations about removing the Panel Limitation from the PHCS contract occurred during the limitations period. Unsuccessful efforts to remove the Panel Limitation resulted in continued inaction by PHCS, notwithstanding its desire to contract with MCEP.

d. HealthSmart/EHN

The first record evidence of a denial with EHN is 2009, within the limitations period.

EHN's managed care contract with Defendant Hospitals MVH and GSH contained a Panel Limitation, breach of which confronted EHN with significant rate increases or termination. EHN committed to this Panel Limitation in the January 1, 2009 contract renewal, which Defendants executed on October 30, 2008. (Doc. 147-16 at 108873). MCEP argues that this new contract amendment was in essence a "check-in" to ensure the parties were all still on-board to "hold the line" against MCEP. The new contract amendment "fine-tuned" the contractual and conspiratorial relationship between the parties.

In fall 2009, when Defendants noticed that EHN listed KHN as an in-network provider, Defendants told EHN that it had breached the Panel Limitation and threatened termination. In response, EHN explained that the KHN hospitals were contracted as of January 1, 2001, through the PHA, and took the position than the Panel Limitation did not apply to KHN. (Doc. 148-4 at 168725, 168728).

Despite telling Defendants that the Panel Limitation did not apply to KHN, EHN told MCEP that it could not participate through PHA because EHN's contract with Defendants precluded EHN from exceeding a certain number of beds in a network and informed MCEP that it could not be in EHN's network. (Doc. 128-1 at 178-179). MCEP still does not have access to EHN's managed care networks.

A jury could find that Defendants' agreement with EHN, effective January 1, 2009, coupled with Defendants' demand for a retroactive increase in rates, constitute new injurious acts within the limitations period. There is also a disputed issue of fact about whether EHN's inaction (not contracting with MCEP) during the limitations period was a result of the Panel Limitation in its agreement with Defendants and constitutes an injurious act. (Doc. 143-33 at 142441; Doc. 128-1 at 178-179).

MCEP claims that Defendants' acts caused it new injury. Specifically, MCEP claims that its lack of access to managed care contracts resulted in patient's out-of-pocket costs being higher and physicians risked not receiving professional fees for procedures performed at out-of-network hospitals like MCEP. (Doc. 144-14).

Therefore, MCEP's physicians were less inclined to use MCEP's facility and utilization decreased. For example, Dr. Weprin testified that doctors were deterred from investing in MCEP, which led to a general fatigue among the investors. (Doc. 128-41 at 216-217). The delay in obtaining managed care contracts led to scheduling difficulties and decreased utilization because a physician cannot perform a procedure covered by a particular insurer at MCEP if MCEP does not have a contract. (Doc. 128-41 at 123; Doc. 140 at 154-155; Doc. 128-6 at 76-77). Even after the managed care contracts were in place, MCEP claims that it was difficult to build enthusiasm because there were no distributions and MCEP was not making a profit since the contracts were weak. (Doc. 128-41 at 216-217).

e. Lost patients

MCEP maintains that as part of the conspiracy, Defendants threatened to have their primary care physicians stop referring patients to doctors affiliated with MCEP, acted on that threat, and MCEP's investors saw a drop in their patient referrals. The following MCEP physician investors were told by Defendants that their referrals could be cut off because of their affiliation with MCEP: Dr. Todd Sobol, Dr. Alvin Stein, Dr. Thomas Yunger, Dr. Rajesh Patel,[34]

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[34] Defendants do not dispute that the loss of the Dayton Respiratory Group procedures caused MCEP injury—however, Defendants contend that Dr. Patel and other physicians resigned for reasons "that had nothing to do with" Defendants. The Court finds that the circumstances surrounding DRG's departure is disputed, because there is evidence that Dr. Patel divested from

Dr. Anug Goyal, Dr. Alan Jacobs, Dr. Lawrence Goldstick, Dr. Larry Weprin, Dr. Don Lutter, Dr. Piush Gupta, Dr. Joel Vandersluis, Dr. Hugh Moncrief, Dr. R.L. Chunduri (Doc. 128-30 at 350-351; Doc. 141-5); Dr. Tom Cook (Doc. 128-11 at 60-61) (Jim Pancoast, at the time President of GSH "basically told me that quote, unquote, I'm going to tell my doctors not to send you patients."); Dr. Stuart Weprin (Doc. 128-41 at 49-50) (all referrals from GSH primary care physician "disappeared" after he invested in MCEP); Dr. Caroline Peterson (physicians were told by Defendants that if they continued to refer patients to MCEP and/or MCEP physicians, they would lose their referral base) (Doc. 140 at 63); Dr. John Fleishman (Doc. 128-15 at 110-112); and Dr. Lazlo Toth (Doc. 128-15 at 82, 83). MCEP claims that these threats are ongoing because Defendants continue to discourage referring patients to MCEP. (Doc. 128-32 at 54).

Dr. Toth is just one example of an MCEP physician forced to divest from MCEP in February 2009. (Doc. 143-13). Dr. Toth was a founding investor in MCEP, however his income was effectively cut in half as a result of Defendants' conduct, forcing Dr. Toth to explore alternative options to sustain his livelihood. (Doc. 141-25, Doc. 128-30 at 659-660). Prior to losing his referral base from Defendants, Dr. Toth had a stable, large surgical volume, much of which he performed at MCEP. (Doc. 128-30 at 661-662). However, Dr. Toth's surgical volume diminished as a result of Defendants' pressuring Dr. Toth's referral

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MCEP as a result of threats to his referrals by Defendants. (Doc. 128-6 at 94-95, 99-100).

sources to not refer to MCEP. Specifically, Dr. Toth's referrals were cut by physicians employed by Defendants, including Dr. Larry Weprin and his associates in GILD. (*Id.*)[35] GILD re-started the referrals to Dr. Toth once Toth left MCEP to work for Defendants. (Doc. 128-15 at 106). After being forced to explore alternative employment, Defendants offered Dr. Toth significant compensation in exchange for a non-compete, which required him to divest all ownership in any competing facilities, specifically MCEP, and prevented him from performing procedures at MCEP. (Doc. 128-30 at 245, 256, 718-719; Doc. 141-25).

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[35] Larry Weprin and GILD members were losing referrals (Doc. 140 at 107-108), so GILD joined Digestive Care and mutually terminated its investment in MCEP in October 2012. (Doc. 128-30 at 245-246; Doc. 146-1 at 7373-77). Dr. Weprin had been a part of MCEP since its inception and was excited about the hospital; in fact, he specifically requested a pathology lab to support his practice. However, when Dr. Weprin discovered Defendants' hostile sentiments for MCEP, GILD decided to join Digestive Care. (Doc. 128-6 at 110-111). GILD physicians admitted that they were told by Defendants that they would "suffer" if they sent patients to MCEP. As a result, "[t]he bulk of their group [GILD] was terrified to use anyone that even came close to MCEP from the start because of fear of retribution on their referrals." (Doc. 148-21 at 63; Doc. 128-30 at 223). MCEP argues that GILD's departure from MCEP in October 2012 injured MCEP during the limitations period. MCEP's gastroenterology department's volume of cases decreased, which resulted in a domino effect on other departments. (Doc. 128-32 at 94-95; Doc. 140 at 59). For example, after GILD's departure, Dr. Rosset saw a decrease in her pathologist practice at MCEP by one-half to two-thirds. (Doc. 128-32 at 63-64). The volume of cases seen by MCEP general surgeons decreased as well. (Doc. 140 at 59; Doc. 128-32 at 95). This overall decrease in volume lead to a decrease in revenue for MECP. (Doc. 128-32 at 94-95).

Dr. Wilcher, a general surgeon, also felt the impact of Defendants' refusal to refer patients to MCEP or MCEP physicians and was forced to leave MCEP in Spring 2011, because he could not maintain his practice without referrals. (Doc. 128-30 at 224-225; Doc. 128-1 at 139). Dr. Witcher felt the effects of Dr. Toth's departure, because he no longer had the support of Dr. Toth in general surgery. (Doc. 148-21 at 57-58). Frustrated with his loss of referrals, Dr. Wilcher was terminated from MCEP for his refusal to participate in a cash call. (Doc. 128-30 at 224-225).

MCEP claims that each lost patient referral is analogous to a separate purchase of a price-fixed good in that each lost referral is a new injurious act.[36] A jury could find that Defendants' acts were new and independent acts that caused MCEP new injury. (Doc. 128-32 at 94; Doc. 128-30 at 354-55). The fact that Premier's policy on referrals was implemented in 2006 does not, as a matter of law, preclude damages arising from lost referrals prior to January 30, 2008. Whether Defendants' actions are mere reaffirmations of its 2006 policy on referrals is a disputed issue of fact.

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[36] "Antitrust law provides that, in the case of a 'continuing violation," say a price fixing conspiracy that brings about a series of unlawfully high proceed sales over a period of years, 'each overt act that is part of the violation and that injures the plaintiff,' e.g., each sale to the plaintiff, 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.'" *Klehr*, 521 U.S. at 189.

f. Dayton Heart Hospital Non-Compete

Defendants admit that the implementation of the non-compete agreement with respect to Dayton Heart was an overt act. (Doc. 130 at 19-20). However, Defendants conclude that MCEP was not injured because the non-compete agreement permitted DHH doctors to keep shares in MCEP so long as MCEP did not expand its scope of cardiac services beyond what MCEP was offering at that time. (Doc. 128-29 at 250). However, because MCEP never previously offered cardiac surgical services, this non-compete agreement effectively prevented expansion of those services, because if MCEP offered any cardiac services prior to 2013, those investors would have to sell their shares in MCEP or be in breach of the covenant and risk forfeiting their share of the proceeds from the sale of DHH to GSH. (Doc. 128-29 at 252; Doc. 149-12 at ¶ 12). Accordingly, a reasonable jury could find that because the non-compete allegedly prevented MCEP from offering cardiac services, MCEP suffered a new injury in the limitations period.

In sum, the Court finds that the date(s) of the cognizable injury(ies) in this case are disputed issues of material fact. However, a reasonable jury could find that many, if not all, injurious acts giving rise to MCEP's claim occurred within the limitations period. Therefore, Defendants' motion for summary judgment on statute of limitations grounds is **DENIED**.

D. Damages

In the alternative, Defendants request an order granting partial summary judgment in the form of an

order barring MCEP from recovering damages for acts and injuries which occurred prior to January 30, 2008. Specifically, Defendants cite specific testimony from MCEP's damages expert which they contend demonstrates he intends to testify about a damages calculation based on conduct that occurred prior to January 30, 2008. This issue is best addressed in the context of a Daubert motion or a motion *in limine*.

Denying summary judgment on Defendants' statute of limitations defense, this Court found that genuine issues of material fact exist as to whether injurious acts were committed in the four years prior to MCEP's filing of the Complaint. In the context of an ongoing conspiracy, courts have held that damages caused by injurious activity are recoverable. *See In re Lower Lake Erie*, 998 F.2d at 1173.[37] MCEP claims that it can establish that it is entitled to damages flowing from Defendants' conduct in the following categories: (1) managed care contracts; (2) forced sale to KHN; and (3) PHA Benchmark damages.

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[37] *See also Poster Exch. v. Nat'l Screen Serv. Corp.*, 517 F.2d 117, 128 (5th Cir. 1975) (finding that a plaintiff is not required to tie its damages to a specific act, but rather that a continuing conspiracy may give rise to "continually accruing rights of action," and merely requires a plaintiff to support its allegations that the defendant had committed "some act" during the limitations period).

E. CHI's Motion[38]

CHI is the owner of Samaritan Health Partners, which owns the assets of GSH. MCEP asserts that CHI is a participant in the alleged conspiracy because it "controls" and "makes material independent decisions concerning. . .the operations of [SHP] and Good Samaritan [Hospital]." (Doc. 7 at ¶¶ 4, 6, 29, 42). CHI argues that the JOA vests Premier (not CHI) with complete strategic, financial, and operational control of GSH. Specifically, CHI maintains that: (1) it did not "control" the JOC or any Defendant Hospital; and (2) CHI is merely a "passive member" in the JOC and merely a "passive investor" in a Defendant Hospital.

A conspiracy under Section 1 requires proof of: (1) an agreement in violation of Section 1 of the Sherman Act; and (2) the defendant knowingly entering that agreement, either tacitly or explicitly. *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1270 (6th Cir. 1995) (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 n.59 (1940)).[39] MCEP must prove that CHI "engaged in a contract,

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[38] The Sixth Circuit found a genuine dispute exists as to whether CHI is an entity separate from one or more of the other defendants for purposes of Plaintiff's antitrust claim, but the Sixth Circuit did not evaluate the evidence Plaintiff submitted regarding CHI's participation in the group boycott. (Doc. 176 at 2).

[39] *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004) ("In order to establish their claim under Section 1 of the Sherman Act, the Promoters must prove that the [defendant] '(1) participated in an agreement that (2) unreasonably restrained trade in the relevant market.'"), *cert. denied*, 546 U.S. 813 (2005).

combination. . .or conspiracy, in restraint of trade or commerce." *Midwest Media Prop., LLC v. Symmes Twp.*, 503 F.3d 456, 472 (6th Cir. 2007). *See also Beukema's Petroleum Co. v. Admiral Petroleum Co.*, 746 F.2d 1475, 1475 (6th Cir. 1984) (affirming summary judgment for defendants because plaintiff "failed to produce any probative evidence tending to support its conspiracy allegations").[40]

Here, MCEP attempts to hold CHI liable for the purported antitrust violations of its affiliates simply by virtue of their corporate relationship. Such cases often turn on the issue of control. *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 622 F. Supp. 2d 890, 897, 899-900 (N.D. Cal. 2009) (evaluating in Sherman Act case "day to day control" of parent corporation where plaintiff argues "that an agency theory allow[ed] the actions of NTC USA [subsidiary] to be imputed to NTC [parent]"; observing that a "majority of [court] decisions require more than mere ownership of stock, and more than the supervision of finance and capital budget

[40] MCEP argues that "[b]ecause [Premier] is a joint venture, [CHI] must overcome the 'strong presumption'" that it was an active participant. *Nunez v. Robin*, 415 F. App'x 586, 589 (5th Cir. 2011). However, MCEP misquotes *Nunez* (a non-antitrust case), which actually states that: "[b]ecause SSA is a joint venture, Nunez must overcome the 'strong presumption' that 'a general partnership or joint venture interest is not a security.'" *Id.* (considering whether plaintiff's joint venture could hold defendants liable under the Securities Exchange Act of 1934, which depended on whether plaintiff's ownership interest was a security). *Nunez* does not support the proposition that a joint venture is strongly presumed to be a participant in a conspiracy (antitrust or otherwise).

decisions, or shared directorships" for liability to attach).[41]

To evidence that CHI intentionally entered into or ratified an illegal conspiracy, MCEP points to: (1) meeting minutes from 2006; (2) the appearance of the CHI logo on letters sent to doctors; and (3) non-compete agreements from 2008 between GSH and certain physicians.

1. Meeting Minutes

MCEP argues that at the April 25, 2006, June 27, 2006, and September 2006 meetings, there were discussions about how MCEP's entry into the Dayton market could result in "significant reduction in surgical volume." MCEP maintains that this topic concerned not only Defendants as a group, but CHI individually as the owner of GSH's assets. (Doc. 143-14 at 4627;

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[41] *See also Caribbean Broad. Sys., v. Cable & Wireless PLC*, 148 F.3d 1080, 1088-89 (D.C. Cir. 1998) ("To be a competitor at the level of the subsidiary, the parent must have substantial control over the affairs and policies of the subsidiary."); *In re Auto. Parts Antitrist Litig.*, No. 2:12cv100, 2013 U.S. Dist. LEXIS 80334, at *40 (E.D. Mich. June 6, 2013) (declining to "'presume that a parent company participates in every decision or action of its subsidiary,'" reasoning that there must be "some specific evidence of coordinated activity" for the parent to be liable for antitrust violation); *In re Pa. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663, 688 (E.D. Pa. 2009) (dismissing Sherman Act claim, reasoning that "plaintiffs must set forth facts establishing the parent corporations' direct and independent participation in the alleged conspiracy"; further reasoning that "'[a]pproval and assent' and 'ownership and control' constitute the entirety of plaintiffs' allegations of [the] parents' participation. Plaintiffs offer nothing else").

Doc. 146-4 at 4745). CHI had previously made it clear that its objective was to preserve GSH's market share and position in the Dayton market. (Doc. 143-19 at 6149). MCEP argues that these events demonstrate that the CHI representatives not only approved of the Defendants' plan of conduct against MCEP and the financial resources necessary to implement the plan, but also monitored and received reports on the efficacy of specific activities taken in furtherance of that objective.

The mere presence of "representatives" at board and committee meetings is not itself sufficient proof of a connection to or ratification of a purported conspiracy. *Vandervelde v. Put & Call Brokers & Dealers Ass'n*, 344 F. Supp. 118, 155 (S.D.N.Y. 1972) ("[M]ere membership on a committee is not in itself sufficient proof of connection [to] or ratification [of a conspiracy]."). [42] CHI claims that the minutes from the three 2006 meetings fail to establish CHI's connection to or ratification of any purported conspiracy.

First, although MCEP asserts that "CHI representatives" were in attendance at the April 25, 2006 meeting, the minutes reflect that CHI's only appointed trustee—Michael Rowan—was not in attendance. ("TRUSTEES ABSENT. . .Michael Rowan, CHI") (Doc. 143-5 at 21544). While MCEP claims that

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[42] *See also Daniel v. Am. Bd. of Emergency Med.*, 988 F. Supp. 127, 236 (W.D.N.Y. 1996) ("[A]cting as a representative does not in itself establish that the representative is an agent for the entity represented with authority to bind the represented party or to serve as a conduit for attribution of tortious actions by the organization on which the representative serves.").

"CHI had the second most representatives of any member of the JOC Board at this time," CHI appoints only one trustee to "represent" it on the Board of Trustees; otherwise, CHI is empowered only to "elect" seven members nominated by the nominating committee. (Doc. 146-4 at 4724-5). Accordingly, the "CHI representatives" referenced by MCEP are actually just elected members of the Board of Trustees, not employees or agents authorized to act on behalf of CHI. The members are "recognized civil leaders from the Miami Valley Region," elected to "support the values and mission of the Catholic Church." (*Id.* at 4725). Moreover, at the meeting, Premier's CEO discussed its commitment to responding to new competition from MCEP "by any legal means possible." (Doc. 143-5 at 21548). The minutes reflect "support" by "consensus," but no formal action or specific vote on the part of members elected by CHI. Accordingly, attendance at the April 25 meeting does not evidence attachment to an illegal scheme.

Second, with respect to the June 27, 2006 meeting, CHI's appointed representative, Michael Rowan, was present.[43] However, the minutes do not reflect any activity relating to an illegal scheme, only presentations by the GSH and MVH presidents discussing physician attitudes toward association with "Regent Surgical Health Hospital" after Premier expressed concerns regarding the profit-driven values

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[43] Again, MCEP overstates the presence of CHI, stating that "[s]everal CHI representatives on the JOC Board attended that meeting." (Doc. 139 at 142). As explained *supra*, these "CHI representatives" did not have the authority to act on behalf of CHI.

of physician-owned hospitals. (Doc. 148-13 at 213515; Doc. 141-18 at 1207). No action was approved or disapproved (as no vote was taken) and the minutes reflect no statements or action by CHI. (Doc. 148-13 at 213515).

Third, with respect to the September 2006 finance committee meeting, Douglas Wickerham, a non-voting CHI member, was present. (Doc. 139-1 at 97). This meeting involved discussion of a plan to enter into non-compete agreements with physicians who chose to accept employment from GSH. (Doc. 143-23 at 234106).

Ultimately, a CHI representative attended only two of the three meetings cited by MCEP. Furthermore, the minutes reflect no action by CHI representatives. *Vandevelde*, 344 F. Supp. at 156 (no Sherman Act liability for defendant who "was a member of the Business Conduct Committee but did not participate in [the] recommendation" and another defendant who "played no direct or indirect role in the. . . controversy" and was not "shown to have any connection to the matters at issue except that of a 'mere member' of the association").[44]

2. CHI Logo

"Dear Doctor" letters were sent from the individual hospitals and affiliated physicians' groups. The GSH

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[44] *See also Black v. JP Morgan Chase & Co.*, No. 10-848, 2011 U.S. Dist. LEXIS 103727, at *104-05 (W.D. Pa. Aug. 10, 2011) (conduct that "amount[s] to nothing more than conduct 'typical of any parent and subsidiary[]'…are insufficient [to support] a § 1 claim against the parent corporations").

Dear Doctor letter appeared on GSH letterhead which displayed the "Catholic Health Initiatives" logo on the bottom of the letterhead. (Doc. 141-18). MCEP argues that the CHI-logoed letter made inflammatory statements against it and attempted to dissuade doctors from doing business with it. (*Id.*) For example, the GSH/CHI Dear Doctor letter explicitly threatened to deny privileges to investing physicians:

> Thus, we are considering developing a conflict of interest policy (similar to what the Columbus hospitals have done) to include all actions up to and including denying membership and privileges for any physician who creates such a conflict of interest by owning or investing in this (or any other) competing inpatient facility. This policy, if approved by the Board of Trustees, will permit the Board of Trustees to take any or all actions they may decide in regard to this issue.

(*Id.*) MCEP argues that the GSH/CHI letter attempted to intimidate physicians by asserting that any physician investment involved a serious risk of violating Stark or Anti-kickback laws. (*Id.*) The letters warned GSH physicians that they would face "fines of up to $25,000, imprisonment up to five years, exclusion from the Medicare and Medicaid programs, civil monetary penalties, and loss of reimbursement for any services provided in the facility which received an improper referral." (*Id.*)

However, despite the CHI logo, MCEP fails to evidence that CHI was involved in or acquiesced to the letter. *See, e.g., Allstate Motor Club, Inc. v. SHL Systemhouse*, No. 97 C 5354, 1998 U.S. Dist. LEXIS

14191, at *14 (N.D. Ill. Sept. 1, 1998) ("The appearance of the 'SHL' logo on the letterhead of Christ's correspondence is irrelevant. Members of a corporate family often share a corporate symbol and the associated goodwill."). Additionally, MCEP was not discussed at a meeting attended by an actual CHI representative until June 27, 2006, after the May 10, 2016 "Dear Doctor" letter was sent. (Doc. 148-13 at 213514). MCEP offers no evidence that CHI was even aware of MCEP's existence before June 27, 2006. Therefore, GSH's letter cannot connect CHI to a purported conspiracy. *Carpet Group Int'l v. Oriental Rug Imps. Ass'n*, 256 F. Supp. 2d 249, 275 (D.N.J. Feb. 28, 2003) (granting summary judgment on antitrust claim, reasoning in part that "Plaintiffs have failed to produce evidence tending to demonstrate that [defendant Bashian Bros] prepared, contributed to, or authorized any of the 'provocative' correspondence [allegedly supporting [a] conspiracy").

3. Non-Compete Agreements

In 2008, GSH created a proposal to acquire DHH which it presented to the JOC Board of Trustees for approval and later to CHI for funding. (Doc. 143-22). In the proposal, GSH referenced the necessity of "overcome[ing] the past nine years of strain" between GSH, Premier, and DHH. (*Id.* at 148822). The proposal linked DHH and MCEP, stating that the acquisition might increase "pressure to entertain others in the market (*i.e.*, MCEP, Dayton Rehab Hospital, etc.)." (*Id.*)

A draft of the JOC's "Communication Plan Summary" regarding the acquisition contained a "Master Q&A – For Internal Use Only" where the

Defendants anticipated and offered responses to potential questions regarding the acquisition. (Doc. 147-29 at 150110). The document included the following potential questions for the GSH President to consider:

- "Is this the only way PHP can compete? Like Microsoft—so rich you just buy your competitors and shut them down instead of earning their business?" (*Id.*)
- How can you explain to your medical staff who shunned investment in physician-owned hospitals that you ended up rewarding those physicians with millions of dollars and welcoming them back on equal footing with those who were loyal?" (*Id.*)
- "Do you believe the sale of DHH vindicates Premier's position against physician against physician-owned hospitals?" (*Id.*)
- "Since you couldn't get the legislature to outlaw physician-owned hospitals and your boss swore to destroy DHH, was buying it and shutting it down the only way to win?" (*Id.*)
- "Didn't you try to destroy DHH's business by working with insurers, like UHC, not to cover their patients." (*Id.*)
- "How do you expect the Ohio attorney general to react to the proposed acquisition?" (*Id.*)

MCEP argues that CHI participated in this anticompetitive conduct through its activities on the

JOC Board and through its involvement with GSH, including funding the acquisition of DHH. (Doc. 148-14 at 214551). Specifically, the JOC requested that CHI loan GSH $55 million for the acquisition. (*Id.*) CHI met with the JOC's senior vice president and chief financial officer to gain an understanding of the circumstances surrounding the DHH acquisition. (*Id.*) As a result, CHI loaned GSH the full purchase amount in exchange for consideration, including increased oversight of JOC financial performance. (Doc. 144-128 at 4020; Doc. 144-21 at 6015 at 6019). MCEP argues that as a condition for that funding, CHI required the DHH physician-owners to execute non-competes in order to receive their share of the proceeds; this non-compete directly implicated MCEP. (Doc. 139 at 37, 119).

None of the documents cited by MCEP in its cross-referenced pages supports the proposition that CHI required (or even expressed a preference regarding) non-competition agreements. MCEP simply cites to the non-competition provisions themselves, which do not mention CHI. (Doc. 143-12 at 143242-46; Doc. 147-28 at 148429). Even if CHI had insisted on non-competition provisions, such a request is not *per se* illegal.

Without evidence that CHI agreed to loan money for an anticompetitive purpose, CHI's funding the purchase of DHH is immaterial.

4. Financial Benefits

Finally, MCEP claims that CHI has a financial interest in the performance of GSH and SHP. CHI was permitted to "withdraw cash from [SHP's] share of

income . . . up to 15 percent per year with no effect on equity/income split." (Tab 17 – DX280 at 6105). Consequently, improved performance by GSH and the JOC resulted in increased payments to CHI, while reduced financial performance would result in lower payments to CHI. CHI is also entitled to an administrative fee equal to "1% of operating expense in any fiscal year." (*Id.* at 6106). CHI benefited as GSH expanded its operations and suffered a detriment if GSH reduced its operating.[45] Finally, CHI was a major creditor to GSH and depended on GSH's continuing ability to meet its debt obligations. (Doc. 144-22 at 856; Doc. 144-25 at 1626; Tab 127 CHI00002765).

However, the fact that CHI received any financial benefit from the success of GSH is immaterial unless MCEP can prove participation in an illegal conspiracy. MCEP offers no authority to suggest that simply receiving a return on investment from an affiliate—without independent participation in an illegal agreement—is enough to create liability.

In sum, construing all facts in the light most favorable to the nonmoving party, MCEP has failed to evidence that CHI engaged in conduct relevant to Plaintiff's allegations. Accordingly, CHI's motion for summary judgment (Doc. 129) is **GRANTED**.

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[45] The GSH President estimated "that [MCEP] would take approximately $7 million annually from Good Samaritan Hospital." (Doc. 128-29 at 115; Doc. 149-17 on SB120)).

IV. CONCLUSION

Accordingly, for these reasons:

(1) Defendant Catholic Health Initiatives motion for summary judgment (Doc. 129) is **GRANTED**, and Catholic Health Initiatives is **TERMINATED** as a party to this action;

(2) Defendants' motion for summary judgment on statute of limitations (Doc. 130) is **DENIED**;

(3) Defendants' motion for summary judgment on the *per se* rule (Doc. 132) is **DENIED**; and

(4) Defendants' motion for summary judgment based on Plaintiff's failure to present evidence of antitrust injury (Doc. 133) is **DENIED**.

IT IS SO ORDERED.

Date: 10/6/16

s/ Timothy S. Black
Timothy S. Black
United States District Judge

APPENDIX G

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 16a0068p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-4166

[Filed March 22, 2016]

THE MEDICAL CENTER AT ELIZABETH PLACE, LLC, *Plaintiff-Appellant*,	)
v.	)
ATRIUM HEALTH SYSTEM, et al., *Defendants-Appellees.*	)

Appeal from the United States District Court
for the Southern District of Ohio at Dayton.
No. 3:12-cv-00026—Walter H. Rice, District Judge.

Argued: October 8, 2015

Decided and Filed: March 22, 2016

Before: MERRITT, DAUGHTREY, and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Richard A. Ripley, HAYNES AND BOONE, LLP, Washington, D.C., for Appellant. Charles J. Faruki, FARUKI IRELAND & COX P.L.L., Dayton, Ohio, for Appellees. **ON BRIEF:** Richard A. Ripley, HAYNES AND BOONE, LLP, Washington, D.C., James Alan Dyer, SEBALY, SHILLITO & DYER, Dayton, Ohio, Anne M. Johnson, Ryan Paulsen, Sally Dahlstrom, HAYNES AND BOONE, LLP, Dallas, Texas, for Appellant. Charles J. Faruki, Laura A. Sanom, FARUKI IRELAND & COX P.L.L., Dayton, Ohio, Thomas Demitrack, JONES DAY, Cleveland, Ohio, for Appellees.

MERRITT, J., delivered the opinion of the court in which DAUGHTREY, J., joined. GRIFFIN, J. (pp. 16–26),delivered a separate dissenting opinion.

OPINION

MERRITT, Circuit Judge. Section 1 of the Sherman Act broadly prohibits "combinations in restraint of trade."[1] Plaintiff claims that defendants conspired to deny it access to managed care contracts that plaintiff needed to compete in the hospital market in Dayton, Ohio. The question in this case is whether defendants, four previously independent hospitals now operating as

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[1] Section 1 of the Sherman Act prohibits any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1.

a hospital "network" under the name "Premier Health Partners," is a "combination" subject to liability under § 1 of the Sherman Act, or whether it should be characterized as a single entity competing in the marketplace for hospital services in the Dayton area. The four hospitals entered into a joint operating agreement that merged[2] some of their healthcare functions, but retained control of others, and they continued to compete with each other. The district court held that the Premier group was a single entity and dismissed this antitrust case on summary judgment without adjudicating the question of whether the behavior of the Premier group of hospitals constitutes impermissible anticompetitive conduct. We disagree and reverse and remand for further proceedings under the Sherman Act.

I. Background

Plaintiff, The Medical Center at Elizabeth Place, opened in 2006 and operates a 26-bed, for-profit, physician-owned hospital in Dayton, Ohio.[3] Plaintiff specializes in acute-care surgical services. Its competitors for surgical patients in the Dayton market

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[2] A merger was not possible because one of the hospitals, Catholic Health Initiatives, Inc., was prohibited from joining a non-Catholic entity.

[3] In 2009, after struggling financially for three years, which plaintiff claims resulted from defendants' illegal boycott, plaintiff sold a 49% ownership interest to Kettering Health Network, a major competitor of defendant Premier Health Partners in the Dayton market. The sale allowed plaintiff to gain access to Kettering's managed-care contracts with local insurance companies and thereby increase its patient volume.

include the defendant hospitals. Defendant Premier Health Partners was formed in 1995 when two Dayton-area hospitals entered into a joint operating agreement. Over the next 13 years, several additional hospital corporations in the area entered into Premier's joint operating agreement.[4] Premier Health Partners, through the joint operating agreement, operates four hospitals: Good Samaritan Hospital, Miami Valley Hospital, Atrium Medical Center, and Upper Valley Medical Center. See Second Amended and Restated Joint Operating Agreement of Premier Health Partners (executed Feb. 2008). Premier is not a hospital, does not provide any health care itself, and has no assets of its own. Instead, Premier handles much of the financial business of the hospitals through the joint operating agreement, including negotiating managed-care contracts with insurance carriers. The defendant hospitals share revenues and losses through an agreed-upon formula set forth in the joint operating agreement, but each defendant maintains separate ownership of its assets. Defendant hospitals file separate tax returns and other corporate forms and documents filed with the government.

Plaintiff claims that the hospital defendants are not a single entity, but instead a group of hospitals capable of concerted action to keep plaintiff from competing in the market. Plaintiff offers proof that the group engaged in concerted action in three principal ways:

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[4] The corporate defendants, in addition to Premier Health Partners, are Atrium Health System, Catholic Health Initiatives, MedAmerica Health Systems Corporation, Samaritan Health Partners, and UVMC.

(1) to coerce commercial health insurers that collectively represent at least 70% of the insured consumers in Dayton to refuse to negotiate contracts for managed care with plaintiff and to otherwise deny it access to their networks, thereby depriving plaintiff of the ability to serve a large segment of the Dayton consumer market; (2) by threatening punitive financial consequences to physicians who affiliated with plaintiff, including terminating leases that physicians had with defendant hospitals for office space or terminating or evicting physicians already leasing from defendant facilities, and threatening to withhold referrals; and (3) by compelling physicians, either through threats of punitive measures or through financial incentives, to refuse to admit their patients to plaintiff hospital.

The question cannot be answered in the abstract as to whether a joint venture like the one here constitutes a single entity incapable of conspiring with itself in an anticompetitive manner, or whether, instead, it becomes a vehicle to facilitate separate entities to conspire illegally to restrain trade. In *American Needle, Inc. v. National Football League*, 560 U.S. 183, 203 n.10 (2010), the Supreme Court relied on Justice Brandeis's multi-factored test in *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918), to determine whether a joint venture constitutes a "combination" under Section 1:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy

> competition. *To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable.* The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; *but because knowledge of intent may help the court to interpret facts and to predict consequences.*

(Emphasis added.)[5] The summary judgment record

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[5] Our dissenting colleague does not agree that this statement from Justice Brandeis in *American Needle* is relevant because it discusses facts relating to defendants' intent, history and coercive behavior. The objection is strange because Justice Brandeis's admonition is quoted at length in a case where the issue was whether the defendant was a single entity. Surely if the Supreme Court had thought that Justice Brandeis's factors concerning conduct and intent were irrelevant, it would not have said they were relevant and directed lower courts to consider them. We understand that, at least on paper, the joint venture agreement, written by defendants themselves, aims to legitimate the cartel. But further factual determination is required to resolve whether the neutral words of the agreement belie the true aim of defendants' association. We are tasked with looking at the evidence before us, which includes evidence of defendants' unveiled threats to plaintiff and the words of defendants' employees and agents concerning their views on the nature of the relationship among defendants. *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1150 (9th Cir. 2003) ("Defendants sabotage their theory by their own admissions. . . . Rarely do antitrust defendants

leaves little doubt on the question of the intent of the network to prevent plaintiff hospital from entering the Dayton healthcare market. The deposition of the eventual head of plaintiff hospital contains the following testimony about a phone conversation he had with Thomas Arquilla, Executive Vice President of the Premier group of hospitals, one afternoon before the plaintiff hospital opened:

> The conversation started with him asking me the question, John, I understand that you are an investor in this new Regent Hospital [plaintiff hospital]. And I said yes, Tom, that's true. I also understand that you are the chairman of the board of the hospital. Is that true? I said yes, it's true. He said I want you to know that you are the enemy and that this is war, and you are not going to open this hospital. I replied to him are you going to kick me off of staff at Miami Valley Hospital? And he said John, I'm not going to tell you what we are going to do to you, but there are many things that we can do to you, and we are going to do them. I said Tom, are you going to blow the facility up? And he laughed, and he said I already told you, John, there's lots of things that we can do to you, and we are going to do them. You are not going to open this hospital. He then went on to say that our facility would

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serve up their own heads on so shiny a silver platter."). Our colleague's refusal to consider anything other than the joint venture agreement is tantamount to repealing Section 1 of the Sherman Act by allowing the cartel members themselves to write up the only facts to be considered.

> suck off good paying patients, that we were going to be cherry pickers, and that we would suck off good patients.

Fleishman Dep. at 118:12-119:10 (Oct. 22, 2013).

American Needle sets out the framework we are to follow in deciding the "single entity" versus "concerted activity" question at issue in this appeal. Based on defendants' stated intent to keep plaintiff out of the Dayton market, the evidence of coercive conduct threatening both physicians and insurance companies with financial loss if they did business with plaintiff, evidence of continued actual and self-proclaimed competition among the defendant hospitals, and evidence that the defendant hospitals' business operations are not entirely unitary, we conclude that there is a genuine issue of material fact as to whether the defendant hospitals' network constitutes a single entity or concerted action among competitors for purposes of Section 1 of the Sherman Act.

II. Analysis

The Sherman Antitrust Act is based on an often-difficult distinction between concerted and independent, unilateral action. Concerted activity is scrutinized more closely than unilateral behavior because "'[c]oncerted activity inherently is fraught with anticompetitive risk' insofar as it 'deprives the marketplace of independent centers of decisionmaking that competition assumes and demands.'" *Am. Needle*, 560 U.S. at 190 (quoting *Copperweld Corp. v. Indep. Tube Corp.,* 467 U.S. 752, 768-69 (1984)). Specifically, Section 1 regulates concerted activity between two or

more entities, outlawing "[e]very contract, combination . . . or conspiracy, in restraint of trade," 15 U.S.C. § 1, a provision that has subsequently been limited to target only "unreasonable" restraints of trade. To prevail on a claim under § 1, a plaintiff must prove: (1) a contract, combination, or conspiracy; (2) producing adverse, anticompetitive effects in the relevant market; and (3) resulting in injury. *See Expert Masonry, Inc. v. Boone Cty., Ky.,* 440 F.3d 336, 342 (6th Cir. 2006). This appeal looks only at the element addressed by the district court, which is the first element: whether defendants' conduct is the result of two or more entities acting in concert or whether defendants, based on their participation in the joint operating agreement, function as a single entity in the market place. Our analysis is guided by *American Needle*, which sets out the standard to apply in distinguishing concerted from unilateral action.

In *American Needle*, the Court looked at the conduct of members of an incorporated joint venture that organized the 32 NFL teams for purposes of marketing the NFL trademark for apparel. *American Needle* explained that "concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities." 560 U.S. at 191. Rather, "substance, not form, should determine whether a[n] . . . entity is capable of conspiring under § 1." *Id*. at 195 (quoting *Copperweld*, 467 U.S. at 773 n.21). It is not dispositive that defendants organize themselves "under a single umbrella or into a structured joint venture," *id*. at 196, as defendant hospitals did here. The "key," according to the Court, is whether the "contract, combination . . ., or conspiracy" joins together "independent centers of

decisionmaking . . . . If it does, the entities are capable of conspiring under § 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one." *Id*. (citation omitted). The Court went on to hold that the 32 teams "remain separately controlled, potential competitors with economic interests that are distinct from [National Football League Properties'] financial well-being." *Id*. at 201 (citing Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L.R. 1, 52-61 (1995)). Given this explanation, the Court in *American Needle* concluded that the joint venture formed by 32 NFL teams, "at least" with regard to their decision collectively to license the teams' independently owned intellectual property, was engaged in concerted rather than single-entity action and thus potentially violated Section 1. The Court reasoned that apart from the teams' agreement to cooperate in exploiting these assets, they would be competitors in the market to produce and sell team-logo apparel and headgear by licensing their intellectual property and dealing with suppliers.

Applying *American Needle* to examine the relationship among the defendant hospitals pursuant to the joint operating agreement, we come to the same conclusion. Like the joint venture in *American Needle,* the joint operating agreement brings together "independent centers of decisionmaking" that "remain separately controlled, potential competitors with economic interests that are distinct" and thus are capable of concerted action. *See* Nathaniel Grow, *American Needle and the Future of the Single Entity Defense under Section One of the Sherman Act*, 48 Am.

Bus. L.J. 449, 484 (Fall 2011) ("[W]henever the entity is controlled by, or itself controls, competing economic actors, it is engaged in concerted activity rendering single entity status improper."); *see also* Areeda & Hovenkamp, *Antitrust Law* ¶ 1478a (2010) (The "most significant competitive threats arise when joint venture participants are actual or potential competitors.").

The Supreme Court looks beyond labels to recognize underlying collusion among competitors as violations of the Sherman Act. *See Am. Needle*, 560 U.S. at 191 ("[W]e have repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity."); *accord Timken Roller Bearing Co. v. United States,* 341 U.S. 593, 594-95 (1951) (failing to "find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture'"), *overruled on other grounds by Copperweld,* 467 U.S. at 764–65; *United States v. Am. Tobacco Co.*, 221 U.S. 106, 187 (1911) (where the trust or holding company device brought together previously independent firms to lessen competition and achieve monopoly power, "the combination was in and of itself" is a restraint of trade); *see also* Federal Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors 9 (2000) ("[L]abeling an arrangement a 'joint venture' will not protect what is merely a device to raise price or restrict output . . . .").

American Needle directs us to look at a number of factors when determining whether multiple parties joined together in a joint venture are functioning as a single entity for purposes of Section 1 of the Sherman Act. We first look to the actual conduct of the parties to the joint venture: "We have long held that concerted activity does not turn simply on whether the parties involved are legally distinct entities. Instead, we have eschewed formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct *actually operate*." 560 U.S. at 191 (emphasis added). The Court went on to say that in looking at how the parties actually operate, "we have repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *Id.* (citing *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) (holding that Sealy was not a single entity, but instead an "instrumentality of the individual" parties)).

The stated intent on the part of the defendants to engage in coercive behavior, as well as conduct providing evidence of that intent, is demonstrated by the conversation recited above between the CEO of plaintiff and the Executive Vice President of Premier, in which the Premier official stated his intention to keep plaintiff from entering the Dayton healthcare market. The record also contains evidence, through letters and emails, that physicians who collaborated with plaintiff in any way lost their leases for office space in properties owned by defendants and were

threatened with loss of treating privileges at defendant hospitals.

Boycott by Health Insurance Companies

Another example of alleged conduct indicating possible anticompetitive intent on the part of defendants arises from evidence that insurance companies were refusing to deal with plaintiff at the behest of defendant hospitals. Defendant hospitals each executed separate managed-care contracts with each insurance company. Plaintiff offered evidence that defendant hospitals each individually executed managed-care contracts with the insurance companies that contained language prohibiting the insurer from also contracting with plaintiff by including an explicit restriction on the insurer's ability to add a new hospital to its network. *See, e.g.,* Email dated Aug. 10, 2009, from Mark Shaw of Premier to Renee Johnson of Premier with subject line referencing "Medical Center at Elizabeth Place" and requesting that Ms. Johnson investigate whether certain insurance companies were violating their contracts with Premier by adding new hospitals to their networks. Access to managed-care contracts offered by insurers is crucial to a hospital's financial success. The managed-care contracts with insurers provide the hospital with the volume (patients who are covered by the insurers) that is necessary to survive. If a hospital cannot contract with a number of insurers, or at least several insurers with large numbers of insureds, it is unlikely to admit enough patients, and it is only through patients that the hospital generates revenue. Hospitals generally seek to become "in-network" or "preferred" providers for a

number of insurers, often accepting lower rates from the insurance companies in exchange for a higher volume of patients. In this case, the forming of the joint venture, bringing the defendant hospitals under the umbrella of Premier Health Partners, facilitated negotiation with insurers for managed-care contracts. The Federal Trade Commission and the Antitrust Division of the Justice Department recognize that "collaboration that eliminates or reduces price competition or allows providers to gain increased bargaining leverage with [insurers] raises significant antitrust concerns." Deborah L. Feinstein, Director, Bureau of Competition, Federal Trade Commission, *Antitrust Enforcement in Health Care: Proscription, not Prescription*, at 2, Address at the Fifth National Accountable Care Organization Summit (June 19, 2014). In this address, Director Feinstein also noted that "management contracts whereby one hospital manages another hospital with which it also competes may raise concerns similar to horizontal acquisitions." *Id.* at 9.

Negotiating contracts that explicitly exclude the insurers' ability to contract with other parties is anticompetitive on its face and normally serves no proper business function, a fact recognized by the district court in its first order denying the motion to dismiss. *The Med. Ctr. at Elizabeth Place v. Premier Health Partners*, 2012 WL 3776444, at *5 (S.D. Ohio Aug. 30, 2012) ("Organizing a group boycott of [plaintiff] does not promote any legitimate objective of the [joint operating agreement] or achieve any procompetitive benefits."). Plaintiff has submitted evidence that each insurer knew that the other

insurers had included this limitation in their contracts, as demonstrated by the excerpt below from a Dayton industry publication:

> Premier has threatened to revoke privileges for physicians participating in [plaintiff hospital] and contracts with health plans such as Anthem and UnitedHealth are known to be contingent on excluding [plaintiff hospital] from the network.

HealthLeaders InterStudy, Dayton Market Overview at 7-8 (Apr. 2008). In addition to this published account, plaintiff also offered evidence from insurance company emails and defendant hospitals' Board of Directors meetings that, in addition to demonstrating knowledge among the insurers of the restriction on adding new hospitals to their networks in their managed-care contracts with defendant hospitals, the insurance companies regularly monitored each other to ensure that the other insurance companies were complying with the contract restriction on dealing with a new hospital.

The Joint Operating Agreement

American Needle also looked to other factors in addition to actual conduct, examining the nature of the business relationship among defendants, focusing on whether that relationship remains that of separate, competing entities or whether there is a single center of decisionmaking. As noted above, Premier owns no assets and it does not provide any healthcare services. Like the joint venture under scrutiny in *American Needle,* Premier is a separate corporate entity with its own management structure, including a CEO and a

Board of Directors, some of whom are employees of the individual defendant hospitals. The joint operating agreement provides for certain management functions to be carried out by Premier on behalf of the defendant hospitals. Premier's duties under the joint operating agreement are an attempt to achieve efficiencies in billing and collecting payments, managing physicians and physician groups, property management and other similar duties. *American Needle* emphasized that it is not dispositive that the parties to the joint venture have organized and created a legally separate entity that centralizes certain management functions. The Court stated that an "ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label. 'Perhaps every agreement and combination in restraint of trade could be so labeled.'" *Am. Needle,* 560 U.S. at 197 (quoting *Timken Roller Bearing*, 341 U.S. at 598). The joint operating agreement provides for some degree of unitary management, but questions remain as to whether "their general corporate actions are guided or determined by separate corporate consciousnesses." *Id.* at 196 (quotation marks and citations omitted).

The Premier joint operating agreement also provides for sharing revenue pursuant to an agreed upon formula. But, if the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from § 1, then any cartel "could evade the antitrust laws simply by creating a 'joint venture' to serve as the exclusive seller of their competing products." *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring in judgment). Indeed,

a joint venture with a single management structure is generally a better way to operate a cartel because it decreases the risk that a party to an illegal agreement will defect from that agreement. But, competitors "cannot simply get around" antitrust liability by acting "through a third-party intermediary or joint venture." *Am Needle*, 560 U.S. at 201 (internal quotations omitted).

Although joining together to carry out certain functions, defendant hospitals remain separate legal entities, each with their own assets, filing their own tax returns and maintaining a separate corporate identity with its own CEO and Board of Directors. The record also demonstrates that defendant hospitals compete with each other for physicians and patients, with each defendant hospital continuing to market certain hospital services to the public. Each of the defendant hospitals makes material independent decisions concerning their respective medical operations that are not managed by Premier, including staffing decisions and medical strategies concerning patient care.

Like the NFL teams in *American Needle*, each defendant hospital holds its own assets. Thus, the defendant hospitals only "partially" unite their economic interests, and they continue to have distinct, potentially competing interests. *See Am. Needle*, 560 U.S. at 198. Any joint venture involves multiple sources of economic power cooperating to produce a product or provide a service. The benefits of cooperation do not transform concerted action into unilateral action that puts the joint venture beyond the

reach of § 1. As the Court noted, "Apart from their agreement to cooperate in exploiting those assets, . . . there would be nothing to prevent each of those teams from making its own market decisions . . . ." *Id*. at 200. Here, the defendant hospitals clearly did not completely align their interests, economic or otherwise. The defendant hospitals continue to function more or less as independent and competing hospitals that entered into the joint operating agreement largely to derive the benefit of conforming certain business practices to a uniform standard. The evidence shows that the joint venture under Premier's management is composed of individual hospitals that are separately incorporated, hold their assets separately, and compete with each other for patients. Like the NFL teams, each defendant hospital "is a substantial, independently owned" business that is "guided [by a] 'separate corporate consciousness[ ].'" *Id*. at 196 (quoting *Copperweld*, 467 U.S. at 771).

Defendant Hospitals Continue to Compete

The record also provides evidence that defendant hospitals continue to view themselves not as a single entity, but as competitors in the market. Defendants made statements to the public, among themselves and to a consultant hired by Premier, that demonstrate that they view themselves as separate entities. In 2010, Premier retained H*Works Consulting to help it devise a strategic five-year plan (2010-2015). One aspect of the study was to analyze the role of Premier and its relationship to its constituent elements, the defendant hospitals. As part of the process, 44 of defendants' "executives and key stakeholders" were interviewed by

H*Works on a number of topics, including the integration of defendant hospitals. Pearce Fleming of H*Works conducted all of the interviews of defendants' executives, including Premier's Board of Trustees, the top level executives at Premier, and senior management from all the defendant hospitals. Fleming took contemporaneous notes of each interview, generating 11 sets of handwritten notes.

Based on these statements by defendants' top administrators, H*Works made a number of findings, including the following: "[Premier] partners do not collaborate or act as a system today, more often [Premier] partners find themselves competing with each other;" "[Premier] does not have an identity as a collaborative group, rather act as a confederacy that collaborates in a few areas (i.e., supplies, financing/access to capital, electronic medical records);" "[Premier] does not think of itself as integrated organization;" and "[Premier] Partners compete with each other for market share." H*Works Consulting, Key Interview Findings, at 8 (Apr. 2010). Specific statements from the interviews include: Premier is a "confederation of autonomous organizations" that cooperate in certain areas; "[t]he brand is the hospital, not [Premier];" defendant hospitals "do their own thing and act in their own self interest above that of [Premier];" and the joint venture structure was "designed to keep everyone separate." H*Works Consulting Interview Statements at 2-5 (Apr. 2010). The H*Works findings and interview statements set forth in its reports to Premier provide evidence that defendant hospitals uniformly agree that the they are

driven to pursue individual hospital goals even after entering into the joint venture.

The district court refused to consider most of this compelling evidence, labeling it inadmissible hearsay. In refusing to consider the findings from H*Works, the district court found the statements "incomplete, anonymous personal opinions . . . . lack[ing] any context," ruling them "inadmissible, anonymous hearsay and speculation . . . ." *The Med. Ctr. at Elizabeth Place v. Premier Health Partners,* 2014 WL 7739356, at *4 (S.D. Ohio Oct. 20, 2014). To the contrary, many of the statements were attributable to a particular person. But, whether a specific identity is given or not, it was error to exclude these statements as they are admissions of a party-opponent, admissible under the hearsay exception in Federal Rule of Evidence 801(d)(2).[6] An anonymous statement may be

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[6] The Rule states in relevant part:

> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
>
> . . .
>
> (2) An Opposing Party's Statement. The statement is offered against an opposing party and:
>
> > (A) was made by the party in an individual or representative capacity;
> > (B) is one the party manifested that it adopted or believed to be true;
> > (C) was made by a person whom the party authorized to make a statement on the subject;
> > (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

admissible under Rule 801(d)(2) in certain circumstances that demonstrate sufficient indicia of reliability as to the authenticity of the statement. *Davis v. Mobil Oil Expl. & Prod. Se., Inc.*, 864 F.2d 1171, 1174 (5th Cir. 1989) (holding that anonymous statement was admissible as a statement by a party's agent under Rule 801(d)(2)(D), and noting that "a district court should be presented with sufficient evidence to conclude that the person who is alleged to have made the damaging statement is in fact a party or an agent of that party . . . .").

The statements fall within the hearsay exception for admissions of party opponents under Rule 801(d)(2)(D) because the district court was presented with "sufficient evidence" to conclude that the person who made the statement is in fact "a party or an agent" of defendants. It is undisputed that the speakers, though some are unidentified by name or specific title, were all executives or "key" stakeholders of defendant hospitals. The statements were made in the scope of their employment relationship and during the existence of the joint venture. They acted within the scope of their employment in stating their views on the state of their operations and integration of those operations at the request of Premier's CEO. Thus, the sources of the statements are identified sufficiently to establish that they were made by agents of defendants acting within the scope of and during the existence of their employment relationship. *See Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 134 (3d Cir. 1997) (holding in

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> (E) was made by the party's coconspirator during and in furtherance of the conspiracy

a similar situation that statements from unidentified executives were admissible because evidence established that though their precise identity was unknown, they were all "Westinghouse executives who had authority to make personnel decisions [and thus were] act[ing] within the scope of their employment in stating their views on the state of their workforce . . . ."). The crucial question is whether there is evidence that the unidentified declarants were speaking on a matter within the scope of their employment, not their identity. *Back v. Nestle USA, Inc.*, 694 F.3d 571, 578 (6th Cir. 2012).

III. Conclusion

The gravamen of plaintiff's complaint is that in creating a joint venture, defendants colluded to keep plaintiff from competing in the Dayton hospital market through a number of avenues. The evidence of emails, letters, and the statements elicited by the consultant, together with the lack of shared assets by the defendants, raises a genuine issue of material fact as to whether defendant hospitals have "separate" corporate consciences or whether they should be considered a single entity for purposes of the antitrust laws. All of these facts suggest that defendant hospitals are actually competitors attempting to eliminate another competitor through concerted action. When viewing the record in the light most favorable to plaintiff, a reasonable juror might conclude that, aside from a business relationship pursuant to the joint operating agreement, defendant hospitals maintained separate identities and acted more like competitors than one unit. *Expert Masonry, Inc. v. Boone Cty., Ky.*, 440 F.3d

336, 341 (6th Cir. 2006) ("In this circuit, courts are generally reluctant to use summary judgment dispositions in antitrust actions due to the critical 'role that intent and motive have in antitrust claims and the difficulty of proving conspiracy by means other than factual inference.'")(quoting *Smith v. N. Mich. Hosp., Inc.*, 703 F.2d 942, 947 (6th Cir. 1983)).

Because plaintiff presented evidence of conduct and business operations that raise the possibility of concerted action among defendant hospitals, the question remains upon remand whether hospitals that had previously pursued their own interests separately, and that continue to seem to compete, combined unlawfully to restrain competition.

For the foregoing reasons, the judgment of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion.

DISSENT

GRIFFIN, Circuit Judge, dissenting. To succeed on a § 1 claim under the Sherman Antitrust Act, a plaintiff must establish that the defendants: "(1) participated in an agreement that (2) unreasonably restrained trade in the relevant market." *Worldwide Basketball and Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004). Because § 1 "does not reach conduct that is wholly unilateral," *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (internal quotation marks omitted), proving the first element involves a threshold showing that the defendants are separate entities capable of concerted action. That is the only question before us: "whether defendants . . . should be characterized as a single entity." (Majority opinion.)

The test we apply to determine single-entity status is from *American Needle* and *Copperweld*: whether the defendants are "separate economic actors pursuing separate economic interests," such that their agreement "'deprives the marketplace of independent centers of decisionmaking,' . . . and thus of actual or potential competition." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 195 (2010) (quoting *Copperweld*, 467 U.S. at 769).

My colleagues begin not with *American Needle* and *Copperweld*, but with the "rule of reason" as articulated in *Board of Trade of Chicago v. United States*, 246 U.S. 231 (1918)—a test that may come into play only for the

second part of the inquiry—i.e., in determining whether the agreement itself constitutes an "unreasonable restraint" on trade. *See Am. Needle*, 560 U.S. at 203 ("[T]he restraint must be judged according to the flexible Rule of Reason.") (footnote omitted); *see also Worldwide Basketball*, 388 F.3d at 959 ("Whether an agreement *unreasonably* restrains trade is determined under one of two approaches: the *per se* rule and the rule of reason.").[1] Reaching this issue is premature. Because of its ruling that defendants are a single entity for § 1 purposes, the district court never considered whether defendants "participated in [any] agreement," much less an agreement to restrain trade unreasonably.

The majority's misapplication of *American Needle* is problematic. Invoking the rule of reason steers focus to defendants' intent to avoid competition with plaintiff and away from the relevant question: whether, under the terms of their Joint Operating Agreement (JOA), defendant hospitals and their joint operating company, Premier Health Partners (Premier), share "a complete unity of interest," *Copperweld*, 467 U.S. at 771, and represent a single center of decisionmaking. I conclude they do. Thus, I would affirm summary judgment in favor of defendants and respectfully dissent.

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[1] Citing the rule of reason seems all the more misplaced here, where plaintiff alleges that defendants' conduct constitutes a *per se* violation of § 1, not a violation under the "flexible Rule of Reason." *Am. Needle*, 560 U.S. at 203.

I.

"The Sherman Act contains a 'basic distinction between concerted and independent action.'" *Id.* at 767 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)). Section 2 of the Act governs conduct by a single firm that "threatens actual monopolization," while § 1 reaches "unreasonable restraints of trade effected by a 'contract, combination or . . . conspiracy' between separate entities." *Id.* at 767–68 (quoting 15 U.S.C. § 1). Concerted activity between two parties is "inherently . . . fraught with anticompetitive risk." *Id.* at 768–69. "In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit." *Id.* at 769. As a result, the conspirators profit from increased economic power, while depriving the market "of the independent centers of decisionmaking that competition assumes and demands." *Id.*

That concern does not apply, however, when the actors share "a complete unity of interest," such as when the coordinated conduct occurs between officers and employees of the same company, or a corporation and one of its unincorporated divisions. *Id.* at 769–71. "[O]fficers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." *Id.* at 769. Following this reasoning in *Copperweld*, the Supreme Court held that the coordinated activity of a parent corporation and its wholly owned subsidiary "must be viewed as that of a

single enterprise for purposes of § 1 of the Sherman Act." *Id.* at 771.

Although *Copperweld* limited its inquiry to the context of parent and wholly owned subsidiary corporations, *see id.* at 767, the Court emphasized "the broader principle that substance, not form, should determine whether a separately incorporated entity is capable of conspiring under § 1." *Id.* at 773 n.21. Whether two legally separate entities constitute a single actor depends upon commonality of interest, not corporate formality. Thus, "although a parent corporation and its wholly owned subsidiary are 'separate' for the purposes of incorporation or formal title, they are controlled by a single center of decisionmaking and they control a single aggregation of economic power. Joint conduct by two such entities does not 'depriv[e] the marketplace of independent centers of decisionmaking.'" *Am. Needle*, 560 U.S. at 194 (quoting *Copperweld*, 467 U.S. at 769).

The Supreme Court reiterated the substance-over-form analysis in *American Needle*, which involved an antitrust claim against National Football League Properties (NFLP), an organization formed by the 32 teams in the National Football League (NFL), "to develop, license, and market [each team's] intellectual property." 560 U.S. at 187. Traditionally, NFLP granted nonexclusive licenses to vendors, including American Needle, to manufacture and sell clothing bearing NFL team insignias. *Id.* In 2000, however, NFLP granted Reebok an exclusive license to sell trademarked headwear for all 32 teams. *Id.* American Needle sued, claiming the NFL, its teams, the NFLP,

and Reebok violated §§ 1 and 2 of the Sherman Act. *Id.* at 187–88. Defendants NFL and NFLP asserted they were incapable of conspiring with each other "because they are a single economic enterprise, at least with respect to the conduct challenged." *Id.* at 188. The district court agreed and granted defendants' motion for summary judgment. The Seventh Circuit affirmed, noting the teams "can function only as one source of economic power when collectively producing NFL football." *Id.*

The Supreme Court reversed. Explaining the single-entity inquiry, the Court stated:

> [T]he question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination . . . or conspiracy" is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination . . . or conspiracy" amongst "separate economic actors pursuing separate economic interests" . . . such that the agreement "deprives the marketplace of independent centers of decisionmaking," and therefore of "diversity of entrepreneurial interests," and thus of actual or potential competition.

Id. at 195 (citations omitted).

Applying this test, the Court ruled the independently owned NFL teams were capable of conspiring with one another. Though "*partially* unite[d]" by the fact that they all benefit from the success of the NFL brand, each team "still ha[d] distinct, potentially competing interests." *Id.* at 198. Teams compete with one another on the field for fans, for contracts with managerial and player personnel, and "in the market for intellectual property." *Id.* at 196–97. A team licensing its intellectual property "is not pursuing the common interests of the whole league but is instead pursuing interests of [the] 'corporation itself,'. . . teams are acting as 'separate economic actors pursuing separate economic interests,' and each team therefore is a potential 'independent cente[r] of decisionmaking.'" *Id.* at 197 (quoting *Copperweld*, 467 U.S. at 770) (citation omitted). The fact that the teams had formed the NFLP to market their brands through a single outlet was not dispositive. "An ongoing § 1 violation cannot evade § 1 simply by giving the ongoing violation a name and a label." *Id.*

Whether the NFLP's decisions constituted concerted action was a closer question. "This is so both because NFLP is a separate corporation with its own management and because the record indicates that most of the revenues generated by NFLP are shared by the teams on an equal basis." *Id.* at 200. Nevertheless, because each team acted for its own separate interest in making NFLP decisions, the Court held that those decisions fell within the reach of § 1. *Id.* "Thirty-two teams operating independently through the vehicle of the NFLP are not like the components of a single firm that act to maximize the firm's profits." *Id.* at 201.

Instead, each team garnered economic benefits "separate and apart from NFLP profits as a result of the decisions they make for the NFLP." *Id.* Accordingly, because each team was acting for its own interest, and not simply the interest of the NFLP as a whole, "decisions by the NFLP regarding the teams' separately owned intellectual property constitute[d] concerted action." *Id.*

II.

As the majority states, *American Needle* "eschewed formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *Am. Needle*, 560 U.S. at 191. Guided by the rule of reason, my colleagues interpret this directive to mean that we should ask how defendants "actually operate" with regard to plaintiff—specifically, their intent to keep plaintiff out of the market as expressed through apparent threats by Premier's executives and the boycott defendants allegedly arranged among the insurance companies. This view is flawed. Defendants' intent to exclude others from the market is irrelevant to determining whether defendants themselves constitute a single entity. To resolve that question, we should consider how defendants "actually operate" amongst each other.

American Needle asks if "the [anticompetitive] agreement joins together independent centers of decisionmaking" between the defendant entities. 560 U.S. at 196 (internal quotation marks omitted). Defendant hospitals were independent centers of decisionmaking before forming Premier as their joint

operating company, but the question here is whether that independence survived the creation of the joint venture; whether, when acting through Premier, defendants are "pursuing the common interests of the whole," or whether each defendant has a remaining, independent economic interest, such that it could be "pursuing the interests of [the] corporation itself," even in the course of taking joint action. *Id.* at 197 (internal quotation marks omitted). What matters then is whether defendants remain in competition *with each other*, not whether they intend to ward off competition with a third party. The Supreme Court's reasoning makes this point plain:

> Agreements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself . . . .
>
> For that reason, decisions by the NFLP regarding the teams' separately owned intellectual property constitute concerted action. Thirty-two teams operating independently through the vehicle of the NFLP are not like components of a single firm that act to maximize the firm's profits. The teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being. Unlike typical decisions by corporate shareholders, NFLP licensing decisions effectively require the assent of more than a mere majority of shareholders. And each team's decision reflects not only an interest in NFLP's

> profits but also an interest in the team's individual profits.

Id. at 200–01 (citations and footnotes omitted). Defendants' wish to avoid competing with plaintiff tells us nothing about whether defendant hospitals are themselves "potential competitors with economic interests that are distinct from [Premier's] financial well-being" as a whole.

III.

The best evidence of how Premier and the defendant hospitals "actually operate" is the parties' JOA. The majority concedes that the JOA vests Premier with control over the hospitals' "management functions," but insists—without discussion of the agreement's terms—that "questions remain" as to whether defendants are guided by a single corporate consciousness. Review of the JOA should resolve those questions. From the outset, the JOA identifies corporate unification as an overarching goal: "The vision of the Parties is to create and operate the JOC [joint operating company] Network as a multi-entity, integrated health care delivery system for the Miami Valley Region that is positioned for the future and not simply a continuation of the large JOC Hospitals."

Executing on that vision, the agreement creates a "unity of interest" among defendant hospitals by establishing a system of shared income:

- The JOA provides that its financial arrangements are intended to promote the functioning of Premier and defendant hospitals as an "integrated health system."

- Defendants' net incomes are totaled each year into a single "network net income," to be allocated to the parties based on predetermined percentages in the JOA.
- Defendants also share losses according to the same predetermined percentages.

Most importantly, the allocation of network net income is not linked to any individual hospital's revenue or profitability. For example, defendant MedAmerica Health Systems is entitled to 55.35% of the network net income under the JOA. Because defendants' revenues are combined in totaling the network net income, MedAmerica receives 55.35% of the profit earned from a patient regardless of whether that patient is treated at Atrium Health System, Samaritan Health Partners, Catholic Health Initiatives, UVMC, or MedAmerica's own facility. Unlike the NFL teams in *American Needle*, who maintained "economic interests . . . distinct from NFLP's financial well-being," 560 U.S. at 201, no single hospital has any incentive to become more profitable by attracting more patients than the other.[2] The majority is therefore incorrect to say "defendant hospitals compete with each other for . . . patients." They do not.

To be sure, revenue sharing is not dispositive of single-entity status. Competitors cannot side-step antitrust liability merely by sharing revenue through

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[2] Additionally, defendants' counsel represented at oral argument that Premier sets prices for all hospital services performed by physician-employees, ensuring that each hospital charges the same price for the same service.

a joint venture. "If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from § 1, then any cartel 'could evade the antitrust law simply by creating a "joint venture" to serve as the exclusive seller of their competing products.'" *Am. Needle*, 560 U.S. at 201 (quoting *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring in judgment)).

But defendants' integration is not limited to profits and losses on a balance sheet. The JOA grants Premier significant operational authority over each defendant hospital. In particular:

- It designates Premier as the "operator" for all health system activities and requires Premier to coordinate and have authority over all of those activities. Premier has general authority to operate and manage the operations of the health system activities of all defendants.
- Defendant hospitals' CEOs report to Premier's COO.
- Each defendant's management reports to Premier's executives, and Premier's system vice presidents and senior vice presidents serve at the top of each department throughout the system.
- Premier has integrated a number of system management functions among defendant hospitals, such as managed care and legal

functions, into single departments for the entire system.

- The JOA grants Premier authority and control over defendants' strategic plans, budgets, and business plans.
- The JOA requires Premier to develop and oversee the implementation of a strategic plan for all system activities, and each defendant must comply with and implement the strategic plan.
- It also requires Premier to develop annual capital expenditure and operating budgets for the system, and each defendant must adopt and implement the budget approved for it by Premier.
- Premier's CEO has the power to remove each defendant hospital's CEO.
- Premier controls defendant hospitals' material debt incurrence and negotiates and manages their relationships with insurance companies.

Although each defendant hospital retains its separate corporate existence, along with the right to amend or repeal their corporate governing documents, the JOA requires them to "take all corporate action . . . as required to implement" Premier's authority. Defendants are also prohibited from modifying corporate documents in a manner inconsistent with the JOA without prior approval. To the extent defendant

hospitals' corporate documents conflict with the JOA, the JOA controls.

The majority's reply that "defendant hospitals remain separate legal entities . . . [each] filing their own tax returns and maintaining a separate corporate identity with its own CEO and Board of Directors" is beside the point. Finding an issue of fact on these grounds elevates form over substance. "[T]he question is not whether the defendant is a legally single entity or has a single name"; rather, the question is one of functional reality. *Am. Needle*, 560 U.S. at 195. And the functional reality is that the JOA unifies defendant hospitals under Premier's flagship.

That reality is not changed by the fact that the hospitals maintain individually-owned assets. Neither *American Needle*, nor *Copperweld*, discusses the role of asset ownership as part of the single-entity inquiry. Yet the majority makes a point of quoting the single mention of "assets" in *American Needle*: "NFLP's licensing decisions are made by the 32 potential competitors, and each of them actually owns its share of the jointly managed assets. Apart from their agreement to cooperate in exploiting those assets, including their decisions as the NFLP, there would be nothing to prevent each of the teams from making its own market decisions relating to purchases of apparel and headwear, to the sale of such items, and to the granting of licenses to use its trademarks." *Id.* at 200 (citation omitted).

This language does not establish that asset ownership is important to the single-entity inquiry. Viewed in context, the Court's mention of assets is

merely a reiteration of its primary holding; "there would be nothing to prevent each of the [NFL] teams from making its own market decisions" because they remained independent centers of decisionmaking capable of acting on separate economic interests—even while making joint decisions through the NFLP:

> The 32 teams capture individual economic benefits separate and apart from NFLP profits as a result of the decisions they make for the NFLP. NFLP's decisions thus affect each team's profits from licensing its own intellectual property. "Although the business interests of" the teams "will *often* coincide with those of the" NFLP "as an entity in itself, that commonality of interest exists in every cartel." In making the relevant licensing decisions, NFLP is therefore "an instrumentality" of the teams.

Am. Needle, 560 U.S. at 201 (citations omitted). Here, by contrast, defendant hospitals are not capable of acting on separate economic interests. All of their profits are shared as part of the network net income. They do not "capture individual economic benefits separate and apart from" that income. *Id.* Individual ownership of assets carries little weight when all the economic benefit of those assets is mutually shared. Defendant hospitals are also distinguishable from the teams in *American Needle* by virtue of their decision to cede substantial operational control over to Premier. Consequently, there is something to prevent them from making "[their] own market decisions" wholly "[a]part from their agreement to cooperate in exploiting [their individually-owned] assets." *Id.* at 200.

To the extent that asset ownership matters, it must be evaluated as part of *American Needle*'s "functional analysis," *id.* at 192, which in this case directs us back to the JOA. The JOA grants Premier substantial control over the defendant hospitals' individually-owned assets—a fact the majority does not address. Defendant hospitals are prohibited from "sell[ing], convey[ing], transfer[ring], or otherwise dispos[ing] of any material asset used in JOC Activities" to any entity other than a fellow defendant hospital without Premier's prior approval. Further:

- It gives Premier authority to use any of defendant hospitals' resources, facilities, or supplies for the system's activities.
- Plaintiff cited no evidence to dispute defendants' claim that Premier has, in fact, consolidated programs, moved equipment between facilities, and limited procedures occurring in certain facilities.
- The JOA also authorizes Premier to assess costs to the hospitals for implementation of new technologies and programs—including building, equipment acquisition, and training costs—and Premier exercises that authority.

Functionally, defendant hospitals own their assets in name only, without deriving any individual benefit from those assets. Defendants' inability to manage their own assets should therefore serve as another marker of Premier's centralized control—not a fact that brings their corporate unification into question.

IV.

In addition to defendants' anticompetitive intent, and individually-owned assets, the majority finds that the anonymous H*Works statements are evidence "that defendant hospitals continue to view themselves . . . as competitors in the market." I disagree.

Setting aside the question of admissibility, this evidence does not create a genuine issue of material fact. "When the moving party has carried its burden . . . , its opponent must do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (footnote and citation omitted). While we may reasonably infer that the issue of economic integration was within the scope of employment for some of the 44 "executives and key stakeholders" involved in the H*Works project, the circumstances surrounding the statements do not prove that the statements are related to that issue.

The purpose of the H*Works project was to help Premier "devise a strategic five-year plan," and "analyze the role of Premier and its relationship to . . . defendant hospitals." (Majority opinion.) According to plaintiff, defendants "hoped to . . . improve strategic integration, coordination, systems thinking and market leverage"—goals that involve more than just economic integration. The variety of topics addressed in the H*Works statements confirms as much; they include thoughts on creating a more "patient centered approach," Premier's need to "expand to other communities," and complaints from doctors that

Premier "must answer the 'what's in it for me' question for physicians and prove it to them."

The JOA establishes "control[] by a single center of decisionmaking [i.e., Premier]," as well as "a single aggregation of economic power." *Am. Needle*, 560 U.S. at 194. Defendants have therefore carried their burden to establish an overall unity of interest. Plaintiff has not rebutted the factual basis for defendants' motion. Considered in context, the H*Works statements cast no more than a "metaphysical doubt" upon that unity. Thus, "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," and "there is no genuine issue for trial." *Matsushita*, 475 U.S. at 587 (internal quotation marks omitted).

V.

Defendants' alleged conduct in this case, if proven at trial, is indeed anticompetitive. But the Sherman Act does not proscribe unreasonable restraints on trade by a single entity; "it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability." *Copperweld*, 467 U.S. at 775. "Congress left this 'gap'" purposefully, "for eminently sound reasons." *Id.* A prohibition against independent action "that merely restrains trade . . . could deter perfectly competitive conduct by firms that are fearful of litigation costs and judicial error." *Am. Needle*, 560 U.S. at 190 n.2. Regardless of their intent to keep plaintiff out of the market, defendants have demonstrated a complete unity of interest and a single center of decisionmaking. "Unless we second-guess the

judgment of Congress to limit § 1 to concerted conduct," *Copperweld*, 467 U.S. at 776, we are without authority to check them.

For these reasons, I respectfully dissent. I would affirm the judgment of the district court.

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:12-cv-26

Judge Timothy S. Black

[Filed October 20, 2014]

THE MEDICAL CENTER AT ELIZABETH PLACE, Plaintiff,	)
vs.	)
PREMIER HEALTH PARTNERS, *et al.*, Defendants.	)

SEALED ORDER[1]
GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS PLAINTIFF'S

[1] Pursuant to S.D. Ohio Civ. R. 79.3 and paragraph 14 of the Stipulated Protective Order (Doc. 43), this Order contains citations to exhibits, deposition testimony, and other documents produced in this case that have been designated "Confidential" or "Highly Confidential – Outside Counsels Eyes Only." Accordingly, this Order is docketed under seal.

CLAIM LACKS THE NECESSARY PLURALITY OF ACTORS (Doc. 131)

This civil action is before the Court on Defendants' motion for summary judgment that Plaintiff's claim lacks the necessary plurality of actors (Doc. 131) and the parties' responsive memoranda (Docs. 139, 155).[2]

I. BACKGROUND FACTS[3]

Plaintiff claims that Defendants designed and implemented an unlawful plan to deny Plaintiff access to supply (managed care contracts and physicians) and demand (physician referrals) that Plaintiff needed to compete as a 26-bed adult acute-care hospital in Dayton, Ohio.

This alleged plan secured the cooperation and agreement of members of the Defendants' Joint Operating Agreement ("JOA") and their subsidiary Hospitals, *i.e.*, nearly all of the health insurers operating in Dayton, as well as certain independent medical professionals, with the oversight of Defendant Premier Health Partners.

II. STANDARD OF REVIEW

A motion for summary judgment should be granted if the evidence submitted to the Court demonstrates

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[2] Defendants include Premier Health Partners, Atrium Health System, Catholic Health Initiatives, MedAmerica Health Systems Corporation, Samaritan Health Partners, and UVMC (collectively "Defendants").

[3] *See also* the parties' undisputed facts at Doc. 131, Ex. 1 and Doc. 139, Ex. 1.

that there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party has the burden of showing the absence of genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. *Celotex*, 477 U.S. at 323. All facts and inferences must be construed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

A party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248 (1986).

III. ANALYSIS

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Although the Sherman Act, by its terms, prohibits every agreement "in restraint of trade," the United States Supreme Court recognizes that Congress intended to outlaw only "unreasonable restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

> [T]o establish a claim under Section 1, the plaintiff must establish that the defendants contracted, combined or conspired among each other, that the combination or conspiracy

> produced adverse, anticompetitive effects within relevant product and geographic markets, that the objects of any conduct pursuant to that contract or conspiracy were illegal and that the plaintiff was injured as a proximate result of that conspiracy.

Crane & Shovel Sales Corp. v. Buckyrus-Erie Co., 854 F.2d 802, 805 (6th Cir. 1988).

A threshold requirement of the Sherman Act is that the challenged agreement be entered into by multiple parties. 15 U.S.C. § 1. Conduct by a single entity is not covered by Section 1 -- the statute applies only to joint conduct. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1983).

> [A]n internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that Section 1 was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.

Id. at 769.

Defendants argue that they are a single entity incapable of conspiracy. Plaintiff maintains that a genuine dispute exists as to whether Defendants are a single entity for purposes of the conduct challenged here.

A. Ownership

First, Plaintiff maintains that Defendants are not a single entity because they do not share ownership assets.

In *Copperweld,* the Supreme Court found that a parent and its subsidiary constituted a single entity for purposes of Section 1 liability. 467 U.S. at 771, 777. Plaintiff argues that the Sixth Circuit has constrained its application of *Copperweld* to control that comes from ownership. *See, e.g., Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435 (6th Cir. 2008). Although the Supreme Court in *Copperweld* explicitly limited its holding to the facts presented (a corporate parent and its wholly owned subsidiary), the Supreme Court stated that "substance, not form, should determine whether a separately incorporated entity is capable of conspiring under Section 1." 467 U.S. at 773 n.21.

Federal courts have used this mantra to extend *Copperweld* to situations other than that of parents and wholly owned subsidiaries, including corporations sharing no common corporate ownership. Indeed, the Supreme Court precedent eschews any bright-line rule regarding asset ownership, emphasizing function, not form, and how the parties actually operate. *Id*.[4]

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[4] *See also Am. Needle Inc. v. National Football League*, 560 U.S. 183, 191 (2010) ("We have long held that concerted action under Section 1 does not turn simply on whether the parties involved are legally distinct entities. Instead, we have eschewed such formalistic distinctions in favor of a functional consideration of

> This inquiry is sometimes described as asking whether the alleged conspirators are a single entity. That is perhaps a misdescription, however, because the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination. . ., or conspiracy" is concerted action – that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination . . ., or conspiracy" amongst "separate economic actors pursuing separate economic interests" such that the agreement "deprives the marketplace of independent centers of decisionmaking" and therefore of "diversity of entrepreneurial interests."

Am. Needle, Inc. v. National Football League, 560 U.S. 183, 195 (2010).

In *Copperweld*, the Supreme Court found that although a parent corporation and its wholly owned subsidiary are "separate" for the purposes of incorporation or formal title, they are controlled by a single center of decisionmaking and they control a single aggregation of economic power. Joint conduct by two such entities does not "depriv[e] the marketplace of independent centers of decisionmaking," and, as a

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how the parties involved in the alleged anticompetitive conduct actually operate.").

result, an agreement between them does not constitute a "contract, combination . . . or conspiracy" for the purposes of Section 1. 467 U.S. at 769.

> Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged Section 1 violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture. The question is whether the agreement joins together "independent centers of decisionmaking."

Id. If it does, the entities are capable of conspiring under Section 1, and the court must decide whether the restraint is an unreasonable and therefore illegal one." *Am Needle, Inc.*, 560 U.S. at 196.[5]

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[5] Plaintiff argues that *American Needle* rejected the two arguments Defendants advance: (1) that contractual control is sufficient to demonstrate that the Defendants are a single entity; and (2) the analysis involves a single binary choice as to the enterprise as a whole and in all circumstances. This Court finds, however, that Plaintiff misinterprets *American Needle*, which held that "it is not dispositive that the teams have organized and own a legally separate entity that centralizes the management of their intellectual property . . . . Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged § 1 violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structure joint venture. The question is whether the agreement [*i.e.*, the alleged conspiracy] joins together 'independent centers of decision making.'" *Id.* at 197 (emphasis added). *See, e.g., City of Mt. Pleasant, Iowa v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 275 (8th Cir. 1988) ("The thrust of the holding [in *Copperweld*] is that

For example, in *Healthamerica Pennsylvania, Inc. v. Susquehanna Health Sys.*, the defendant hospitals entered into the Alliance Agreement (akin to the JOA) forming the non-profit organization Alliance to manage the delivery of their healthcare services (akin to Premier). 278 F. Supp. 2d 423, 427-28 (M.D. Penn. July 2, 2003).[6] Due to the religious affiliation of one hospital (like Good Samaritan Hospital ("GSH") in the Premier health system), the hospitals did not merge, and "[e]ach party to the Alliance Agreement retain[ed] its respective separate legal identity and the ownership of all of its assets, real and personal, tangible and intangible, and . . . continue[d] to be governed by its respective Board of Directors subject to. . .the Alliance Agreement." *Id.* at 428, 435 n.8. After the "Alliance Agreement, [the hospitals] and their Affiliates ceased being competitors." *Id.* at 427. Plaintiff's argument that Defendants are not a single entity mirrors the losing argument from the plaintiff in *Susquehanna*: "[Plaintiff] HealthAmerica asserts that *Copperweld* is inapplicable because the Alliance is nothing more than a joint operating agreement created by separate and independent hospital systems." *Id.* at 433.[7]

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economic reality, not corporate form, should control the decision of whether related entities can conspire.").

[6] Despite the fact that *Susquehanna* is strikingly analogous to the instant case, Plaintiff fails to even mention it in its briefing.

[7] Another example is *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), where several agricultural cooperatives that were owned by the same farmers were sued for violations of Section 1 of the Sherman Act. *Id.* at 24-25. The Supreme Court held that the three cooperatives were "in practical

Like in *Susquehanna*, the JOA Participants retained title (ownership) of their assets, and the parties did not technically merge, in order to allow Samaritan Health Partners ("SHP") and GSH to retain their Catholic identity, but delegated operational, strategic, and financial control to Premier. 278 F. Supp. 2d at 435 n. 8. (*See also* Doc. Doc. 131, Ex. 7 (JOA) at §§ 3.1, 7.4). Accordingly, contractual control is sufficient to demonstrate that the Defendants are a single entity. The fact that Premier is "a corporate shell with no assets, income, expenses, or liability [and] [t]hus, there is no shared ownership of assets used in the Joint Venture" is immaterial and does not create a genuine dispute of material fact.

B. Actual and Potential Competitors

Next, Plaintiff argues that Defendants are "actual and potential competitors," so they cannot be a single entity. Finding parties to be "actual and potential competitors" for Section 1 purposes requires the alleged conspiracy to be "amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of . . . actual or potential competition." *Am. Needle*, 560 U.S at 195.

Specifically, Plaintiff argues that a project related to the creation of Defendants' 2010-2015 Strategic Plan

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effect" one "organization," even though the controlling farmers "have formally organized themselves into three separate legal entities." *Id.* at 29. "To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect" insofar as "use of separate corporations had [no] economic significance." *Id.*

("the H*Works Project"), exposed the fact that Defendants wanted to become more than an "'aggregation of parts' and to advance toward a structure characterized by more strategic integration, coordination, 'systems thinking,' and market leverage." (Doc. 143, Ex. 36 at 3). Pearce Fleming, the H*Works consultant handling the project, was a neutral facilitator in a number of live group interviews involving some of Defendants' senior management.[8] Mr. Fleming asked participants sets of open-ended questions in a group interview setting. (Doc. 128, Ex. 16 at 25-26, 53, 206). The individual responses during those group interviews were recorded in part in Mr. Fleming's handwritten notes. (*Id.* at 35-36, 53, 136, 203, 206). All of the statements upon which Plaintiff relies are from Mr. Fleming's handwritten notes. (*Id.*) Plaintiff maintains that the commentary given by senior management relates to the issue of separateness and the competitive dynamic among the hospitals. For example, the first statement in Fleming's notes is: "We do compete with each other. Collaboration is nice to have but not a mandate." (Doc. 143, Ex. 39 at 1). Based

[8] The group interviews involved a sample of people affiliated with Premier's Board of Trustees, Premier Corporate Services, and Defendant Hospitals UVMC, Atrium, GSH, and MVH. Mary Boosalis, Premier COO, testified that the interviewees included: the vice president of operations, the chief medical officer, the chief of staff for the physicians, a MVH board member, "an orthopod who was in active practice at Miami Valley," a neuro-interventionlist, the vice president of nursing, a person in finance," an obstetrician, a cardiologist, and an emergency room doctor from a third-party entity that contracted with MVH for emergency room services. (Doc. 128, Ex. 4 at 139-44).

on the group interviews, Fleming presented Key Findings, including:

- "PHP partners do not collaborate or act as a system today, more often PHP partners find themselves competing with each other"
- "PHP does not have an identity as a collaborative group, rather act as a confederacy that collaborates in a few area (i.e., supplies, financing/access to capital, electronic medical records)"
- "PHP does not think of itself as integrated organization"
- "Fear [of] the smaller hospitals that the larger Dayton based hospitals will 'steal' the patients if they are referred to services"
- "It is easier to compete with each other than with PHP competitors"
- "PHP Partners compete with each other for market share"

(Doc. 144, Ex. 8 at 8-9).

However, these excerpts reflect incomplete, anonymous personal opinions given orally and spontaneously in response to Mr. Fleming's questions. (Doc. 128, Ex. 16 at 14-15, 142, 206-08, 223). The statements do not provide any indication whether the anonymous speaker held an informed opinion on the topic, and they lack any context or qualifications that may have been part of the statements. (*Id.* at 207-09, 223). The incomplete statements are inadmissible,

anonymous hearsay and speculation that cannot defeat a well-supported motion for summary judgment. *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 927-28 (6th Cir. 1999).[9]

For example, in *Wesley Health Sys. v. Forrest County Bd. of Supervisors*, the plaintiff offered employee testimony to show that defendants were not a single entity. No. 2:12cv59, 2014 U.S. Dist. LEXIS 7764, at *30-31 (S.D. Miss. Jan. 22, 2014). However, the court found that the employees' statements regarding their understanding of the defendants' relationship were "not sufficient to create a genuine factual dispute over [defendant hospital's] control of [defendant ambulance company.] Most of it is inadmissible hearsay or speculation." *Id.* at 31. "At best, these witnesses were guessing as to [defendant hospital's] control of [defendant ambulance company]." *Id.* The evidence here is even more speculative than in *Wesley*, because the statements in *Wesley* were not anonymous; instead, they were from defendant's CEO and several of the defendant's employees. *Id.* at 30-31. Ultimately, the facts anonymously alleged here, even if true, are immaterial because it is the economic integration of Defendants, not the form, that is determinative for the antitrust analysis.

Although Premier's members previously competed with one another, they ceased competing upon joining

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[9] *See also Pearce v. Faurecia Exhaust Sys., Inc.*, 529 F. App'x 454, 458 (6th Cir. 2013) ("[c]onclusory allegations, speculation, and unsubstantiated assertions are not evidence, and are not enough to defeat a well-supported motion for summary judgment").

Premier and becoming subject to Premier's control. *Susquehanna*, 278 F. Supp. 2d at 427. Since Defendants are a single, unified economic unit, regardless of a perception of, or even actual, intra-corporate competition, Defendants are not and cannot be "actual or potential [economic] competitors." *Am. Needle*, 560 U.S. at 195, 197 (the key issue is whether the members of the firm are "pursuing separate economic interests" such that "agreements among them . . . suddenly bring together economic power that was previously pursuing divergent goals.").

Here, Defendants are not competitors because they are not separate economic actors – all of the money goes to one bottom line – the Network Net Income.[10] *See, e.g., Texaco Inc. v. Dagher*, 547 U.S. 1, 6 (2006) (although General Motors' separate divisions compete with one another in a colloquial sense (Buick v. Chevrolet), there is no actual or potential competition in an antitrust sense because there is only one economic actor – GM). The conduct here in the instant case is akin to the conduct that the Supreme Court stated in *American Needle* is not covered by Section 1: "internally coordinated conduct of a corporation and one of its unincorporated divisions, because a division within a corporate structure pursues the common interests of the whole, and therefore coordination between a corporation and its division does not

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[10] (*See also* Doc. 129, Ex. 1 at ¶¶ 11-12 (all income or loss from all activities is combined into a single net income, i.e., one bottom line – the Network Net Income); Doc. 131, Ex. 2 (JOA) at § 1.31 (defining "Network Net Income" as the combined net income from Premier and all Hospital participants for all system activities).

represent a sudden joining of two independent sources of economic power previously pursuing separate interests." 560 U.S. at 195-196. In *American Needle*, the 32 NFL teams each had distinct economic interests and corporate consciousnesses, while Defendants here have a unity of economic interests (Network Net Income) whose actions are guided or determined by one corporate consciousness.

C. Public Disclosures of Separateness

Next, Plaintiff argues that Defendants made statements in public disclosures that support a finding that Defendants are separate.

1. IRS Form 990s

Plaintiff argues that according to Defendants' Form 990s, Premier is a corporate shell with no assets, income, expenses, or liability. (Doc. 147, Ex. 1 at Premier 00100806-28 (2006); Ex. 2 at Premier00101268-88 (2007); Ex. 4 at Premier 00101640-68 (2008); Ex. 7 at Premier 00101987-2020 (2009); Ex. 11 at Premier 00102374-406 (2010); and Ex. 14 at Premier 00102813-52 (2011)). Specifically, Plaintiff points out that MedAmerica's subsidiary, Miami Valley Hospital ("MVH"), stated in its 2005 Form 990 that the current JOA members – CHI, MedAmerica, and AHS "have agreed to jointly operate separate healthcare systems pursuant to the terms of a joint operating agreement." (Doc. 146, Ex. 30 at Premier 00100511) (emphasis added). However, the Court finds that this brief summary description in tax documents, which refers and defers to the JOA, fails to show that Defendants do not function as a unified

economic actor. *See, e.g., Am. Needle*, 560 U.S. at 196 ("The NFL teams do not possess either the unitary decision making quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and independently managed business."). The JOA itself, and how the parties actually function under the JOA, are what controls. *Susquehanna*, 278 F. Supp. 2d at 435 ("Although the organizational form employed here is unique, the court finds that the Alliance functions as a single entity.").

Next, Plaintiff alleges that the Form 990s state that Defendants give an incentive bonus for executives that is based in part on "Individual Objectives or Outcomes." (Doc. 143, Ex. 10 at Premier 00101877). Each executive has a scorecard used to determine incentive bonuses and one component of the scorecard involves financial performance, which includes assessment of the individual hospital's financial performance. (Doc. 128, Ex. 29 at 21-23). Although the incentive may create internal competition, all of the money earned goes to the Network Net Income, so hospital performance does not affect the percentage of the Network Net Income allocated to the Defendants. (*Id.* at 22, 102-103).

Accordingly, the IRS Form 990s do not establish a disputed issue of fact regarding Defendants' status as a unified economic actor.

2. Statements in Bond Documents

Next, Plaintiff argues that Defendants are separate actors because in the 2011 offering for $100 million in

revenue bonds, MedAmerica disclosed that the bond proceeds were solely for the benefit of MVH and that only MedAmerica and MVH would be obligated under the bonds. (Doc. 148, Ex. 15 at Premier 217151). The bond memorandum also disclosed that "[b]oth the [Miami Valley] Hospital and the other parties to the JOA continue to own their respective assets and to remain liable for their respective liabilities including their long-term debt." (*Id*.) While these statements are undisputed, as the operator, Premier must authorize the debt. (Doc. 139, Ex. 1 at 17, ¶ 14) (admitted by Plaintiff) (the JOA makes Premier the operator for the system's activities and gives Premier the power and authority over all system activities). Specifically: (a) Premier has, and exercises, control over the Defendants' debt incurrence, including this specific MedAmerica bond; (b) Premier controls Defendants' financial plan; and (c) Premier may use any resources, facilities, or supplies of any of the Defendants for system activities. (*Id*.)

Since the bonds were issued for improvements at MVH, all of the Defendants will benefit from the improvements because there is only one bottom line -- the Network Net Income. The bond proceeds are part of "non operating income or loss" and therefore subject to the Allocation of Network Net Income for the system. (Doc. 131, Ex. 2). The bond memorandum explains that "the net income or loss derived from the operations managed by Premier (together with non-operating income or loss) is apportioned between [JOA members] in accordance with a formula set forth in the JOA." (Doc. 148, Ex. 15 at Premier217200). Additionally, the Defendants work together to ensure that each meets its

bond requirements. For example, MedAmerica guaranteed Atrium's bond obligations. (Doc. 139, Ex. 1 at 27-28, ¶ 33). *Susquehanana* involved a similar scenario: "While the hospitals technically have separate bond covenants, they work together to ensure that each meets the requirements of its own bond covenant." 278 F. Supp. 2d at 435.

The managed care function that is at the heart of Plaintiff's allegations is wholly controlled by Premier. Plaintiff admits that Premier: (1) negotiates and enters into payor contracts that bind all of the Hospital Participants (Doc. 155, Ex. A at ¶¶ 28-30); and (2) manages all relationships with payors, including all managed care companies (*Id*.) In fact: (1) Premier allocates the system's income and losses to the hospitals' four parent holding companies based upon the JOA's predetermined formula, with all of the income or loss from all of the Defendants' system activities being combined into a single net income (*i.e.*, one bottom line, the Network Net Income) (Doc. 155, Ex. A at ¶¶ 9-12); (2) the combined net income is allocated each year based upon the pre-determined percentage shares in the JOA, independent of the particular revenue or profitability of any single Hospital Participant (*Id.*, Ex. A at ¶¶ 9-13); (3) Premier develops and approves the strategic planning, business plans and budgets for all the Hospital Participants, and the Hospital Participants must comply with and implement those plans and budgets, and the strategic planning and budgeting for all of the Hospital Participants are combined (*Id.*, Ex. A at ¶¶ 19-23); and (4) Premier assesses costs to the hospitals for implementing new technologies and programs (and

those costs are shared by the hospitals) (*Id.* at ¶ 31). Accordingly, the JOA is structured and functions such that Premier and the Hospital Participants are one economic actor, with Premier in control of the health system's relevant decision making and activities.

For example, in *Wesley*, 2014 U.S. Dist. LEXIS 7764, the court found that the facts were sufficient to show that, under both their agreement and in practice, the defendant hospital and defendant ambulance company were a single economic unit and the hospital controlled the ambulance company. The court held that "the alleged conspirators must be 'separate economic actors pursuing separate economic interests'" in order to be capable of conspiring under Section 1. *Id.* at 27. The court found "there is no genuine issue of material fact as to whether [defendant hospital] and [defendant ambulance company] constitute 'separate economic actors pursuing separate economic interests.' The evidence demonstrates that [hospital] controls [the ambulance company]. They are, therefore, incapable of conspiring under Section 1 of the Sherman Act." *Id.* at 33 (quoting *Am. Needle*, 560 U.S. at 196). Similarly, Plaintiff fails to offer any material facts to prove that Defendants "constitute separate economic actors pursuing separate economic interests," or that Premier does not control the Defendants with respect to the alleged conspiracy. Plaintiff has admitted or failed to deny the facts that show Premier and the Hospital Participants are one economic actor controlled by Premier.

D. Conduct

Plaintiff also argues that the evidence documents conduct in the market that supports a finding of separateness among the Defendants.

Specifically, Plaintiff argues that when the contract with MVH and GSH expired, Premier kept Atrium's contract with Anthem, which was separate, in place. (Doc. 128, Ex. 33 at 41-42). Anthem contracts separately with MVH and GSH, UVMC, and Atrium. (Doc. 146, Ex. 17 at Premier 00049063-49065). In fact, Defendants 2011 negotiation strategy with Anthem included determining "which PHP entities are included in the negotiations. . .hospitals, subsidiaries, joint ventures, primary care physicians, specialists?" (Doc. 146, Ex. 21). However, simply because a contract is in the name of a Defendant does not mean that the Defendant is separate from the Premier system for purposes of a Section 1 analysis. For example, once Atrium joined the JOA, the income stemming from its Anthem contract – whether in the name of Premier, Atrium, or any other Defendant – becomes Network Net Income under the JOA and is annually distributed to all Defendants pursuant to the JOA's formula. (Doc. 155, Ex. A at ¶¶ 28-29) (Plaintiff admitted that Premier negotiates and manages all relationships with payers).

Next, Plaintiff argues that a September 22, 2010 internal GSH document acknowledges that "historically and through today, all system hospitals operated independently regarding orthopedic strategy." (Doc. 146, Ex. 5 at Premier 00005390). Furthermore, Plaintiff argues that the May 27, 2004 minutes from

the MRH (Atrium) Board of Directors meeting state that the medical staffs at each Defendant Hospital "remain separate, with individual credentialing processes taking place at each individual hospital." (Doc. 148, Ex. 9 at Premier 00176425-176426). However, these documents only show that the Hospitals' orthopedic plans were not the same and that the Hospitals' medical staffs are separate and have individual credentialing processes. This case involves managed care contracting, not orthopedic strategy, and the undisputed evidence supports a finding that Premier has the ultimate control over these activities, including developing and overseeing implementation of the strategic plans, budgets, and business plans of the system and the Defendants. Moreover, in accordance with the JOA, decisions on medical staff admission, privileges, and memberships are still subject to the credentialing criteria approved by Premier's board, and Premier has the authority to consolidate the medical staffs. (Doc. 131, Ex. 7 (JOA) at §§ 5.1(h), 6.4).[11]

Plaintiff also argues that a 2005 internal GSH report states: "Good Samaritan, a Catholic non-profit hospital, has multiple affiliations. On a national level, the Hospital is a member of Catholic Health Initiatives (CHI) . . . . On a local level, the hospital is part of SHP [which CHI wholly owns]. In addition, GSH is a member of Premier Health Partners, which is a joint operating company with Miami Valley Hospital." (Doc. 146, Ex. 19 at Premier 52178). Still, this report does

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[11] *Copperweld* emphasized that there does not need to be complete control of decision making by one party – instead, certain authority and tasks can be given to autonomous units. 467 U.S. at 771.

not refute any of the admitted facts that demonstrate that Defendants are controlled by a single center of decision making.

Finally, Plaintiff argues that courts have repeatedly found instances in which members of a legally single entity violated Section 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerned activity. For example, in *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), a group of mattress manufacturers operated and controlled Sealy, Inc., a company that licensed the Sealy trademark to the manufacturers, and dictated that each operate within a specific geographic area. *Id.* at 352-353. The Court explained that although Sealy "should be considered a single entity as to the functions provided by Sealy associated with the R&D and national promotion of the product" the Supreme Court considered the challenged conduct – the exclusive territory each manufacturer received – a function with relation to the shared assets and therefore not a single entity. *Id.* at 354. However, *Sealey* is distinguishable because, like in *American Needle*, the defendants had separate economic interests. The issue was whether Sealy (a licensor to sell products under the Sealy brand) conspired with its licensees to allocate exclusive territory among its licensees. *Sealey*, 388 U.S. at 351. The Supreme Court found that the territorial arrangements were among the licensees, not Sealy, because it was the licensees "who, through select members, guaranteed or withheld and had the power to terminate licenses for inadequate performance." *Id.* at 353-54. The Court referenced Sealy's lack of control over the individual licensees, noting how a licensee

"could make and sell his private label products anywhere he might choose" and it "appears, without resale price collaboration or enforcement." *Id.* at 352, 357 n.3. Therefore, Sealy did not have control over the operation so that individual licensees pursued separate economic interests.

Unlike the facts in *Sealy*, Premier controls the Defendants' operations, and GSH, for example, is not allowed to "make and sell" services outside of Premier whenever and wherever it chooses. In fact, it cannot "sell" any services outside of Premier, and all of its profits and losses must go to Premier and are allocated to the hospital divisions based upon the formula in the JOA, i.e., the Allocation of Network Net Income. (Doc. 155, Ex. A at ¶¶ 9-12 (admitted by MCEP); Doc. 131, Ex. 7 (JOA) at § 7.2 (Allocation of Network Net Income).

Accordingly, Defendants' conduct in the market does not support a finding of separateness.

E. Joint Venture

Finally, the evidence supports a finding that Premier is a joint venture. A joint venture between two competitors is a single entity for antitrust purposes. *Dagher*, 547 U.S. at 6. "When 'persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . such joint ventures [are] regarded as a single firm competing with other sellers in the market.'" *Id.* ("the pricing policy challenged here amounts to little more than the price setting by a single entity—albeit within the context of a joint venture—and not a pricing

agreement between competing entities with respect to their competing products"). *See also Stanislaus Food Products Co. v. USS-POSCO Indus.*, No. 09-0560, 2010 U.S. Dist. LEXIS 92236, at *56, 60-62, 96 (E.D. Cal. Sept. 3, 2010) (recognizing that *Dagher* "extended *Copperweld* to joint ventures," and granting defendants' motion to dismiss because "[a]n economically integrated joint venture is a 'single entity' under *Copperweld* which is incapable of 'conspiring' for purposes of the Sherman Act."). Like in *Dagher*, Defendants, through the JOA, "agreed to pool their resources and share the risks of and profits from [the system's] activities." 547 U.S. at 3, 6 ("Throughout [the joint venture's] existence, [defendants] shared in the profits of [the joint venture's] activities in their role as investors, not competitors.").

Not only is Premier a legitimate joint venture, but the challenged conduct in this case — managed care contracting and physician relations —is a core function of the Premier health system. *Id.* at 6 ("the pricing policy challenged here amount to little more than the price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products"). Since a "single entity" is incapable of conspiring for purposes of the Sherman Act, Plaintiff's claim fails as a matter of law.

IV. CONCLUSION

Accordingly, for these reasons, Defendants' motion for summary judgment that Plaintiff's claim lacks the necessary plurality of actors (Doc. 131) is **GRANTED**. Since Plaintiff has failed to meet the threshold

requirement—that the challenged agreement be entered into by multiple parties — Plaintiff's antitrust claim fails as a matter of law. There is no genuine dispute as to any material fact, and Defendants are entitled to entry of judgment as a matter of law. The Clerk shall enter judgment accordingly, whereupon this case shall be **CLOSED** in this Court.[12]

IT IS SO ORDERED.

Date: 10/20/14

s/ Timothy S. Black
Timothy S. Black
United States District Judge

[12] The outstanding motions for summary judgment (Docs. 129, 130, 132, 133) are terminated as moot, as is Defendants' motion to continue the trial date (Doc. 161).

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:12-cv-26

Judge Timothy S. Black

[Filed August 30, 2012]

MEDICAL CENTER AT ELIZABETH PLACE, LLC,	)
Plaintiff,	)
vs.	)
PREMIER HEALTH PARTNERS, *et al.*,	)
Defendants.	)

ORDER THAT DEFENDANTS' MOTION TO DISMISS (Doc. 22) IS DENIED

This civil action is currently before the Court on Defendants'[1] motion to dismiss (Doc. 22) and the

[1] Defendants include Premier Health Partners and its hospital affiliates: Atrium Health Systems, Catholic Health Initiatives ("CHI"), MedAmerica Health Systems, Samaritan Health Partners,

parties' responsive memoranda (Docs. 29, 30).[2] Defendants allege that Plaintiff's[3] Amended Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim.

Specifically, Plaintiff alleges that the Hospital Defendants conspired through their shared managing agent, Premier, to orchestrate a per se illegal group boycott against it. Defendants' motion to dismiss relies on three arguments: (1) as a matter of law, Plaintiff's group boycott claim does not qualify for per se treatment; (2) Plaintiff has failed to allege an antitrust injury; and (3) Defendants are a single entity, and thus incapable of conspiring.

I. FACTS ALLEGED BY THE PLAINTIFF

For purposes of this motion to dismiss, the Court must: (1) view the complaint in the light most favorable to the Plaintiff; and (2) take all well-pleaded factual

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and Upper Valley Medical Center ("UVMC") (collectively, "Hospital Defendants").

[2] Defendants request oral argument on this motion. (Doc. 30). The Court finds, however, that the pleadings are clear on their face and that oral argument is not necessary. *See* Local Rule 7.1(b)(2): "oral argument [will be granted] where deemed to be essential to the fair resolution of the case because of its public importance or the complexity of the factual or legal issues presented." *See also Whitescarver v. Sabin Robbins Paper Co.*, Case No. C-1-03-911, 2006 U.S. Dist. LEXIS 51524, at *7 (S.D. Ohio July 27, 2006) (C.J. Dlott) ("Local Rule 7.1(b)(2) leaves the Court with discretion whether to grant a request for oral argument.").

[3] Plaintiff is The Medical Center at Elizabeth Place ("MCEP").

allegations as true. *Tackett v. M&G Polymers*, 561 F.3d 478, 488 (6th Cir. 2009). Plaintiff alleges as follows:

MCEP opened in 2006 and operates a 26-bed physician-owned hospital in Dayton, Ohio. (Doc. 7 at ¶ 2). MCEP recently sold an ownership interest to Kettering Health Network ("Kettering"), a major competing hospital system in the area, in order to obtain access to Kettering's managed care contracts. (*Id.* at ¶¶ 63, 78). MCEP accounts for less than 4 percent of the general inpatient medical and surgical services market in the Dayton area. (*Id.* at ¶¶ 2, 62, 63).

MCEP's competitors for the provision of general surgical services included the hospitals owned by the Hospital Defendants. (Doc. 7 at ¶ 29). The Hospital Defendants view hospitals like MCEP as competitive threats because they "attract away an important segment" of surgical specialists, which results in revenue declines for the Hospital Defendants. (*Id.* at ¶ 68).

At the time MCEP began operating in the greater Dayton area, the Hospital Defendants had a collective market share of general inpatient surgical services that approached 55 percent. (Doc. 7 at ¶ 43, 46). In May 2006, CHI sent a letter to doctors who were considering an investment in MCEP, and in that letter CHI claimed incorrectly that MCEP violated federal and state law. (*Id.* at ¶ 67).

MCEP claims that Premier prohibited managed care plan providers, representing in excess of 70 percent of insured individuals in Dayton, from

contracting with MCEP to service those subscribers. (Doc. 7 at ¶¶ 74, 75). Additionally, MCEP previously orchestrated a boycott by plan providers of Dayton Heart Hospital that forced Dayton Heart Hospital to sell out to CHI. (*Id.* at ¶¶ 72, 73). Even then, CHI, as part of the conspiracy against MCEP, conditioned the receipt of the sales proceeds by Dayton Heart's owners on a commitment by those doctors not to associate with MCEP if it began to offer competitive cardiac services. (*Id.* at ¶ 72).

In furtherance of this conspiracy, MCEP alleges that the Hospital Defendants, through Premier, committed at least the following overt acts directed at MCEP:

(a) coercing, compelling, co-opting or financially inducing commercial health insurers or managed care plan providers, including Anthem, UnitedHealthcare, Private Healthcare Systems, HealthSpan, Humana, Aetna, Cigna, and Medical Mutual of Ohio to refuse to permit MCEP full access to their respective networks;

(b) threatening punitive financial consequences to physicians who affiliated with MCEP and following through on punitive measures against physicians who did affiliate with MCEP, including terminating leases that the physicians had with the Defendants for office space;

(c) offering payments to physicians who agreed not to work with or at MCEP, and who agreed to divest ownership in MCEP;

(d) coercing, compelling, co-opting or financially inducing physicians affiliated with or employed by the Hospital Defendants from becoming members of MCEP, admitting patients to MCEP, or referring patients to physicians who treated patients at MCEP;

(e) hiring as employees key physicians affiliated with MCEP who accounted for a disproportionately high number of admissions and then prohibiting them from admitting patients to MCEP; and

(f) coercing, compelling, co-opting or financially inducing commercial health insurers or managed care plans to provide reimbursement rates that were below market and below the rates and on different terms from what the Hospital Defendants demanded for the exact same services.

(Doc. 7 at ¶ 74).

MedAmerica Health Systems and Sisters of Charity Health Care, Inc. formed Premier by entering into the JOA in 1995. (Doc. 7 at ¶ 39). MedAmerica is the parent of Miami Valley Hospital; in 1995, Sisters of Charity was the parent of Samaritan Health Partners (Good Samaritan Hospital's parent). (*Id.* at ¶¶ 4, 7). The two hospital systems had planned to merge, but they abandoned the merger in favor of the JOA because Good Samaritan Hospital could not merge its assets

with a non-Catholic institution as a matter of Church principles. (*Id.* at ¶¶ 38-40). Sisters of Charity later assigned its JOA rights to Catholic Health Initiatives, which is now the parent of Samaritan Health Partners. (*Id.* at ¶¶ 4, 42). Atrium Health System (the parent of Atrium Medical Center) joined the JOA in 2005; UVMC (the parent of Upper Valley Medical Center) did so in 2008. (*Id.* at ¶¶ 44, 46). The Hospital Defendants are the sole corporate members of Premier. (*Id.* at ¶ 3).[4]

Premier, through the Hospital Defendants, operates the four hospitals. (*Id.* at ¶¶ 4-5, 7, 9-12, 14). Specifically, the Hospital Defendants collaboratively operate "certain aspects of" their hospitals through the JOA. (*Id.* at ¶¶ 47, 48, 51). The Hospital Defendants "share some functions" and "jointly operate separate health care systems." (*Id.* at ¶¶ 48, 51). Premier, in turn, supports the hospitals in their health care operations. (*Id.* at ¶ 3). For example, Premier manages the hospitals' relationships with managed care providers. (*Id.* at ¶ 60). The Hospital Defendants have also consolidated revenues through the JOA. (*Id.* at ¶¶ 3, 49).

MCEP alleges that the Hospital Defendants, acting through Premier, conspired to eliminate MCEP from the market. (*Id.* at ¶¶ 61,69, 73, 76). According to MCEP, Premier coerced managed care plan providers to refuse to permit MCEP access to those plans'

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[4] A "member" of a not-for-profit entity is the equivalent of a shareholder of a for-profit company. Ohio Rev. Code §§ 1702.01(G), l702.04(B)(5), 1702.11, 1702.13. Therefore, if Premier were a for-profit company, the Hospital Defendants would be its only shareholders.

networks or to reimburse MCEP at below market rates; Premier also allegedly induced physicians not to affiliate with MCEP. (*Id.* at ¶ 74). MCEP has been "prevented and/or delayed . . . access to managed care contracts" (*id.* at ¶ 90), and "has been largely foreclosed from the relevant market" (*id.* at ¶ 80).

II. STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6) operates to test the sufficiency of the complaint.[5] Rule 12(b)(6) permits dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P 12(b)(6). The complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The plaintiff's ground for relief must entail more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

The first step in testing the sufficiency of the complaint is to identify any conclusory allegations. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. at 1949 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). That is, "a plaintiff's obligation to provide the grounds of [his] entitlement to relief requires more than labels and

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[5] Traditionally, courts have held that a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim is viewed with disfavor and is rarely granted. *Nuchols v. Berrong,* 141 Fed. Appx. 451, 453 (6th Cir. 2005).

conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555. Although the court must accept well-pleaded factual allegations of the complaint as true for purposes of a motion to dismiss, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.*

After assuming the veracity of all well-pleaded factual allegations, the second step is for the court to determine whether the complaint pleads "a claim to relief that is plausible on its face." *Iqbal*, 129 S. Ct. at 1949, 1950 (citing *Twombly*, 550 U.S. at 556, 570). A claim is facially plausible when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 1949 (citing *Twombly*, 550 U.S. at 556).

III. ANALYSIS

The Amended Complaint asserts a single per se violation of Section 1 of the Sherman Act. Section 1 outlaws "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. To survive the motion to dismiss, Plaintiff must allege that: "(1) two or more entities engaged in a conspiracy, combination, or contract, (2) to effect a restraint or combination prohibited per se (wherein the anticompetitive effects within a relevant geographic and product market are implied), (3) that was the proximate cause of [MCEP's] antitrust injury." *Expert Masonry, Inc. v. Boone Cnty.*, 440 F.3d 336, 342-43 (6th Cir. 2006).

Defendants claim three separate and independent reasons require dismissal of the Amended Complaint: (1) Plaintiff's group boycott claim does not qualify for per se treatment; (2) Plaintiff failed to allege antitrust injury; and (3) Defendants are a single entity and thus incapable of conspiring. The Court will address each argument in turn.

A. Per Se Theory v. Rule of Reason

There are two modes of analysis for determining whether a challenged restraint unreasonably restrains trade under Section 1 – the rule of reason and the per se rule.[6] The rule of reason is the prevailing standard of analysis and the per se rule is the exception, limited only to certain kinds of horizontal agreements[7] that are "plainly anticompetitive" and likely to have no "redeeming virtue." *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 8, (1979).

The per se standard recognizes that there are some methods of restraint that are so inherently and facially anti-competitive that an elaborate and burdensome

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[6] In evaluating whether Defendants unreasonably restrained trade, the Supreme Court has explained that "a restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be 'per se' unreasonable, or because it violates what has come to be known as the 'Rule of Reason.'" *Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 457-58 (1986).

[7] Price fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are per se unlawful. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980)

inquiry into a demonstrable economic impact on competition in a relevant market is not required. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978). Under the per se analysis, "certain agreements or practices are so 'plainly anticompetitive,'. . . and so often 'lack . . . any redeeming virtue,'. . . that they are conclusively presumed illegal without further examination." *Broad. Must, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979). The decision to apply the per se rule turns on "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Id.* at 19-20.

Plaintiff claims that this is a per se antitrust claim because Defendants effectuated a "group boycott."[8]

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[8] "[There] is more confusion about the scope and operation of the per se rule against group boycotts than in reference to any other aspect of the per se doctrine." L. Sullivan, Law of Antitrust 229-230 (1977). Cases to which the Supreme Court has applied the per se approach have generally involved joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." *Id.* at 261-62. In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete. *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963). Additionally, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances, the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote. *Nw. Wholesale Stationers Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 294

(Doc. 7 at ¶ 74). Defendants argue that the Amended Complaint contains no allegations, specific or general, about any individual act by the hospitals' alleged co-conspirators. The Court disagrees. The Amended Complaint alleges multiple overt acts by the co-conspirators: (1) CHI sent a letter to doctors who were considering an investment in MCEP stating that it was a violation of federal and state laws (Doc. 7 at ¶ 67); (2) CHI, MedAmerican, and UVMC expanded their network of employed physicians and specialists who are prohibited from admitting patients to specialty hospitals (*Id*. at ¶ 70); (3) Dayton Heart sold out to CHI in March 2008 and exited the market – the physician owners of Dayton Heart were eligible for their share of the proceeds if they agreed not to invest in MCEP (*Id.* at ¶ 72); (4) the Hospital Defendants coerced commercial health insurers or managed care plan providers, including Anthem, United Healthcare, Private Healthcare Systems, HealthSpan, Humana, Aetna, Cigna, and Medical Mutual of Ohio, to refuse MCEP full access to their respective networks (*Id*. at ¶ 74); (5) the Hospital Defendants threatened punitive financial consequences to physicians who affiliated with MCEP and followed through on punitive measures against physicians who did affiliate with MCEP,

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(1985). A plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects. However, under the auspices of a motion to dismiss, neither the Court nor the parties have the benefit of discovery and the Court must consider the alleged facts as true. The Court can imagine a scenario wherein a court determines that the per se rule applies, but discovery may later support a finding that rule of reason is in fact the appropriate standard of analysis.

including terminating leases that the physicians had with the Defendants for office space (*Id.* at ¶ 74); (6) the Hospital Defendants offered payments to physicians who agreed not to work with or at MCEP (*Id.* at ¶ 74); (7) the Hospital Defendants coerced physicians affiliated with or employed by them from becoming members of MCEP, admitting patients to MCEP or referring patients to physicians who treated patients at MCEP (*Id.* at ¶ 74); (8) the Hospital Defendants hired physicians affiliated with MCEP who accounted for a disproportionately high number of admissions and then prohibited them from admitting patients to MCEP (*Id.* at ¶ 74); and (9) the Hospital Defendants coerced commercial health insurers or managed care plans to provide reimbursement rates that were below market and below the rates and on different terms from what they demanded for the exact same services (*Id.* at ¶ 74). Additionally, in 2008, during the midst of the alleged conspiracy, Premier approached MCEP about the Hospital Defendants acquiring or otherwise absorbing it. (*Id.* at ¶ 77).[9]

The Amended Complaint does not challenge the legality of the JOA, but rather the joint efforts by the

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[9] Although the alleged overt acts in furtherance of the conspiracy include vertical conduct (involving the alleged manipulation and coercion of managed care plan providers and physician), the multiplicity of actors as well as the effect of the agreement was predominately horizontal, and therefore per se illegal. *Com-Tel, Inc. v. Dukane Corp.*, 669 F.2d 404, 409 (6th Cir. 1982) ("[A]lthough the coercive pressure in this situation was applied vertically, we conclude that the stifling of competition in this instance was predominantly horizontal, warranting application of the per se rule of illegality as a group boycott.").

Hospital Defendants to disadvantage a direct rival by coercing managed care plan providers to boycott MCEP. The fact that this joint conduct may have occurred within the guise of the JOA does not save it as a matter of law. Considering the facts in the light most favorable to the nonmoving party, the Amended Complaint alleges a naked restraint[10] consisting of conduct falling squarely within the category of boycotts and subject to per se treatment. (Doc. 7 at ¶ 91).

Courts have held that the per se rule applies to conduct taken under the mantle of a joint venture[11] when the challenged restraint is not reasonably related to any of the efficiency-enhancing benefits of a joint

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[10] A particular horizontal agreement is defined as a naked restraint "if it is formed with the objectively intended purpose or likely effect of increasing price or decreasing market wide output in the short run, with output measured by quantity or quality." *See* Hovenkamp Treatise P 1906a. If the Agreement is one that presents a "naked restraint of trade with no purpose except stifling competition," it qualifies for per se treatment. *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). *See also* Hovenkamp Treatise P 1906a ("Once a restraint is classified as 'naked,' condemnation follows almost as a matter of course, most often without elaborate inquiry into power or actual effects and with only a several limited recognition of defenses.").

[11] The existence of shared functions and joint management, along with the pooling of capital and the consolidation of revenues is the very definition of a joint venture. *Texaco Inc. v. Dagher,* 547 U.S. 1, 3-4 (2006) (noting the competitors created an "economically integrated joint venture" by agreeing to consolidate their operations and "pool their resources and share the risks of and profits from [the venture's] activities"). Generally, the rule of reason and not the per se rule applies to the conduct of joint ventures and similar arrangements.

venture, and serves instead only as a naked restraint against competition. *See, e.g., Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 229 (D.C. Dir. 1986). Organizing a group boycott of MCEP does not promote any legitimate objective of the JOA or achieve any procompetitive benefits. When an alleged restraint bears no relationship to some procompetitive justification or legitimate function of the joint venture, the challenged restraint must be evaluated on its own and can be per se illegal even if the remainder of the joint venture is lawful. *Blackburn v. Sweeney*, 53 F.3d 825, 828-29 (7th Cir. 1995) (applying per se rule to a provision in a law partnership dissolution agreement that restrained the territories where former partners could advertise after finding the provision to be non-ancillary to the rest of the agreement).

Accordingly, based upon the facts before this Court, the per se theory applies. Plaintiff has sufficiently alleged the first two factors of the *Expert Masonry* test, and the Court will address the third factor *infra* at Section C.

B. Single Entity

Conduct by a single entity is not covered by Section 1; rather, the statute applies only to joint conduct. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1983). Section 1 does not apply to unilateral conduct; it prohibits only certain agreements in restraint of trade. Here, Defendants argue that the Hospital Defendants, through Premier, are so integrated that they operate as a single entity whose conduct is beyond the scope of Section 1 of the Sherman Act.

While Plaintiff concedes some facts which indicate integration between Defendant Hospitals,[12] it also alleges facts that the Hospital Defendants are separate and distinct entities (Doc. 7 at ¶¶ 48, 87), and that they remain "actual and potential competitors in the relevant markets" (*id.* at ¶ 58). Specifically, Plaintiff alleges that: (1) the Hospital Defendants are "owned, controlled and operated independently" (Doc. 7 at ¶ 47); (2) one of the Hospital Defendants described the JOA as "separate healthcare systems" operating under the guidance of Premier (*Id.*); (3) it characterized the JOA as a "consolidation of revenue streams" (*Id.* at ¶ 49); (4) since its formation, Premier has reported no assets, no liabilities, no revenue, no income, and no expenses (*Id.* at ¶ 50); (5) each of the Hospital Defendants has maintained independent ownership of, and responsibilities for, their respective assets, liabilities, equity, revenues, and expenses (*Id.* at ¶¶ 52, 53, 55, 56); (6) each of the Hospital Defendants maintains separate governing boards under Ohio law that exercise authority for all business operations and decisions (*Id.* at ¶¶ 57); (7) each of the Hospital Defendants makes material independent decisions concerning their respective operations that are not managed by Premier (*Id.* at ¶¶ 6, 9, 11, 14); and (8) the

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[12] MCEP acknowledges that the Hospital Defendants "jointly operate separate health care systems" (Doc. 7 at ¶ 51) and that they "have agreed to operate certain aspects of their respective hospitals collaboratively" (*id.* at ¶ 47). MCEP further alleges that Premier acts for the hospitals (*id.* at ¶ 6) and that the Hospital Defendants have consolidated revenues through Premier (*id.* at ¶¶ 3, 49).

Hospital Defendants remain actual and potential competitors in the relevant markets (*Id.* at ¶ 58).

Accordingly, Plaintiff has alleged sufficient facts to maintain that the Hosptial Defendants are not a single entity. While the JOA might "refute" some of these allegations, that simply creates a facutal dispute. This Court cannot assume the JOA is being enforced as written.

Plaintiff cites *Healthamerica Penn. v. Susquehanna Health Sys.*, 278 F. Supp. 2d 423 (M.D. Pa. 2003), in support of its argument. In *Healthamerica*, which had a JOA similar to the one challenged here, two health care systems formed Susquehanna Regional Healthcare Alliance for the purpose of managing the delivery of healthcare services in central Pennsylvania. *Id.* at 426. The Court held that it was "readily apparent that defendants' actions [were] guided 'not by two separate corporate consciousness, but one.'" *Id.* at 435. However, *Healthamerica* was decided on a summary judgment motion and then only after extensive discovery had been conducted with respect to whether the hospitals and the alliance actually functioned as a single entity. Additionally, the health alliance in *Healthamerica* was subjected to considerable antitrust scrutiny at its formation. In fact, the Pennsylvania Attorney General's Office negotiated a consent decree with the parties which "authorized the formation of the Susquehanna Alliance in exchange for various conditions and restrictions on the new entity's operations and pricing." *Id.* at 427.

Defendants fail to point to any case where a court has decided this factually driven issue on a motion to dismiss.

C. Antitrust Injury

Finally, in order to state a claim, Plaintiff must plead an antitrust injury. An antitrust injury is an: (1) "injury of the type the antitrust laws were intended to prevent" and (2) injury "that flows from that which makes defendants' acts unlawful." "[B]ecause the purpose of the antitrust laws is to protect competition rather than competitors, a plaintiff must allege injury, not only to himself, but to a relevant market. Thus, failure to allege an anti-competitive impact on a relevant market amounts to a failure to allege an antitrust injury." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). "[A] plaintiff must put forth factual allegations plausibly suggesting that there has been an adverse effect on prices, output, or quality of goods in the relevant market as a result of the challenged actions." *Guinn v. Mount Carmel Health*, No. 2:09cv226, 2012 U.S. Dist. LEXIS 24353, at *4 (S.D. Ohio Feb. 27, 2012). Injury to the plaintiff alone does not satisfy the antitrust injury requirement: "the key inquiry is whether competition - not necessarily a competitor – suffered as a result of the challenged business practice." *CBC Companies v. Equifax, Inc.*, 561 F.3d 569, 571-72 (6th Cir. 2009).[13]

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[13] "[A]n antitrust plaintiff must show that (1) the alleged violation tended to reduce competition overall and (2) the plaintiff's injury was a consequence of the resulting diminished competition." *J.B.D.L. Corp. v. Wyeth-Ayerst Labs. Inc.*, 485 F.3d 880, 887 (6th Cir. 2007). This requires a demonstration, "as a threshold matter,

Plaintiff argues that "the adverse effect of competition is presumed" in per se cases. (Doc. 29 at 11-12). To the contrary, the caselaw notes that "[t]he 'mere presence' of a per se violation under Sherman Act § 1 . . . does not by itself bestow on any plaintiff a private right of action for damages." *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1443-44 (9th Cir. 1995). "[T]he per se rule is a method of determining whether § 1 of the Sherman Act has been violated," *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341-42 (1989), but "it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under § 4 of the Clayton Act." *Id.* "[T]he need for this showing [of antitrust injury] is at least as great under the per se rule as under the rule of reason. Indeed, insofar as the per se rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored." *Id.* at 343.

Plaintiff claims that the Amended Complaint "explicitly alleges that Dayton-area consumers have been forced to pay higher prices as a result of Defendants' conduct." (Doc. 29 at 13). Although, the words "higher prices" do not appear in the Amended Complaint, it does state that

> Defendants' conduct caused injury to competition in the relevant markets. For example, it denied consumers of general

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'that the challenged action has had an actual adverse effect on competition as a whole in the relevant market.'" *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 139 (2nd Cir. 1998).

> inpatient surgical services the ability to use the [MCEP] under their health plans, thereby eliminating the Hospital Defendants' only competitor other than Kettering. This materially constrained the [MCEP] from exerting competitive pressure on the Hospital Defendants' pricing and quality.

(*Id.* at ¶ 84). Additionally, the Amended Complaint maintains that Defendants' conduct actually "denied" Plaintiff "access to managed care plans," which alleges an injury to both Plaintiff and competition in general:

> In furtherance of this conspiracy, the Hospital Defendants, through Premier, committed at least the following overt acts directed at the Medical Center: . . coercing, compelling, co-opting or financially inducing commercial health insurers or managed care plans to provide reimbursement rates that were below market and below the rates and on different terms from what the Hospital Defendants demanded for the exact same services. The managed care plan providers involved in the overt acts identified above represent in excess of 70 percent of insured individuals in the Dayton are. As an example, in early 2008, Private Healthcare Systems advised the Medical Center that it attempted to get Defendant Premier to remove the exclusivity provision in the contract that Private Healthcare Systems had with the Hospital Defendants, but Premier refused. In 2009, Premier told HealthSpan that it would terminate the contract that Health Span had

> with the Hosptial Defendants if HealthSpan added the Medical Center to its Preferred Plan list of participating hospitals.

(Doc. 7 at ¶¶ 74, 75).

Plaintiff has set forth facts which allege that Defendants' violation reduced competition overall and injured Plaintiff. Thus, Plaintiff has alleged sufficient facts to state a claim for violation of Section 1 of the Sherman Act.

IV. CONCLUSION

Accordingly, based on the foregoing, Defendants' motion to dismiss (Doc. 22) is **DENIED.**

IT IS SO ORDERED.

Date: 8/30/12

s/ Timothy S. Black
Timothy S. Black
United States District Judge

APPENDIX J

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 17-3863

[Filed June 7, 2019]

MEDICAL CENTER AT ELIZABETH PLACE, LLC,	)
Plaintiff-Appellant,	)
v.	)
ATRIUM HEALTH SYSTEM, et al.,	)
Defendants-Appellees.	)

O R D E R

BEFORE: BATCHELDER, SUTTON, and WHITE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Sutton adheres to his separate concurrence. Judge White adheres to her dissent and would grant rehearing.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX K

Regent
Surgical Health

Discussions with Tom Arqilla and Adam Middleton

- Wednesday, April 19, 2006 I received a call from Tom Arquilla after he called Scott Becker to get my number. Tom was emphatic that Premier would not allow our hospital to open. I asked him what he planned to do as we have already syndicated to 60 physicians and collected full funds. He indicated that they would do whatever they needed to do in order to stop us from opening. He said that Premier lived through the opening of the Heart Hospital and they would not do this again. I suggested that, in fact, they "lived" and they would live through our project too. He insisted that our project will bankrupt Good Sam. I suggested that while many of our doctors are on staff at Good Sam, the main volume will come from Kettering. He asked that I review our staff list and we would talk later that week.

- Wednesday, April 26, 2006 After talking by phone on Tuesday, we agreed to meet for lunch on Wednesday. I met Tom and Adam at 12 PM at the Miami Valley cafeteria. Adam said very little. Tom reiterated his belief and the belief of the board that our facility would bankrupt Good Sam. He indicated his sole purpose for working everyday was to provide healthcare for the poor and uninsured of

Dayton and our facility would prevent the cost shifting from insured patients that we would treat to the uninsured that they will treat. When I shared that ½ of our doctors were from Good Sam, the high volume surgeons are from Grandview. He indicated that any negative affect on Grandview would hurt Good Sam because Kettering would forsake the city and close it, leaving Good Sam as the sole provider of charity care for the downtown area. We discussed what they planned on doing and he indicated they will do everything they can to stop us from opening. However, Tom admitted that Premier hospitals have improved since the Heart Hospital opened. As we parted, Tom asked if the members of MCEP would consider partnering with Premier? He did not know if the board of Good Sam and Premier would agree, but he felt he needed to ask. I told him I would ask the board who was meeting that evening and call him the next day.

- Tuesday, May 2, 2006 I called and left a message for Tom to call me. Adam returned the call on Thursday May 4. I shared the board's skepticism, due to negotiations around Dayton Rehab, but they would listen to any ideas Premier might propose to partner. I asked Adam about Tom's idea on the I-475 site and he confessed he had no idea what Tom was thinking. Tom was under the weather and would call me back when he returned to work.

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APPENDIX L

2011 OVERVIEW

MARKET OVERVIEW

Dayton
2011 Issue
Updated: November 2011

HealthLeaders
InterStudy
A Decision Resources Group Company

Dayton Market Overview

www.hl.isy.com

Contents

Dayton

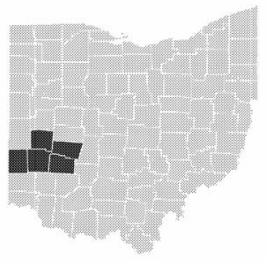
Counties Covered:
Clark, Greene, Miami, Montgomery and Preble

Key Cities Covered:
Dayton and Springfield

Market Stage:
This Market Is Consolidated

Population

979,835



Analysis For Dayton Healthcare Market

 **Opportunities: Pharma**	 **Threats: Pharma**
» A low uninsured rate combined with high rates of obesity, cancer and cardiovascular disease create a formula for boosting prescription drug sales. And data from Kaiser Family Foundation and the Agency for Healthcare Research and Quality indicate a large amount of drug use per capita in Ohio. » The market's two leading health systems are competing to deliver the most lucrative medical services lines. Watch tor the result to be duplication of services but also robust access to treatment and prescription drugs for patients.	» Consumer-driven health plan options will become even more prevalent in the area, and will likely expand in the public sector because Ohio lawmakers are attempting to cut costs on healthcare benefits for state employees. If less rich healthcare benefits are provided to them, public employees will likely spend less lavishly on pharma products. » As of Oct. 1, 2011, Medicaid prescription drug benefits are again under the control of managed care plans, which could put tighter restrictions on prescription drug use.

 **Opportunities: Managed Care**	 **Threats: Managed Care**
» A UnitedHealth Group pilot program is attempting to lower costs by using a bundled payment model to reduce unnecessary drug administration by oncologists. Regardless of the drugs used to treat patients, the oncologists will be paid the same. Breast colon and lung cancer are being targeted for this pilot. » MCOs regained control of pharmacy benefits in October 2011, giving them more tools to manage care and reduce drug spending.	» The public sector in the Dayton area was already shedding employees (and hence insured members); a greater shift in costs to those who remain employed may cause a further deterioration in a once-reliable membership base.

Sources: HealthLeaders-InterStudy, 2011

* * *

[p.30]

WellPoint (Anthem Blue Cross and Blue Shield in Ohio)

Table 6-1		
Income and Revenue*	**Local Enrollment****	**Statewide Enrollment****
2008 Net Income: $528.5M	**Commercial HMO:** 10,595	**Commercial HMO:** 97,542
2008 Revenue: $4.17B	**Fully Insured Commercial PPO:** 64,502	**Fully Insured Commercial PPO:** 594,323
2009 Net Income: $2.52B	**Self-Insured PPO:** 71,551	**Self-Insured PPO:** 664,513
2009 Revenue: $4.07B	**Fully-Insured POS:** 1,797	**Fully-Insured POS:** 16,605
	Self-Insured POS: 1,927	**Self-Insured POS:** 17,819
	Managed Medicaid: 0	**Managed Medicaid:** 0
	Medicare HMO: 10,739	**Medicare HMO:** 86,167
	Medicare PPO: 9,508	**Medicare PPO:** 70,488

*Reports in Ohio as Community insurance Co.; includes all lines of business.

** As of Jan. 1, 2011, Commercial enrollments are projected and include members of WellPoint plans based in other states. Does not include COHP lives.

Sources: HealthLeaders-InterStudy; managed Medicaid

is from state Medicaid department; Medicare HMO and PPO are from the Centers for Medicare & Medicaid Services.

For-profit, Indianapolis-based WellPoint is the parent of Anthem Blue Cross and Blue Shield in Ohio, the largest health plan in the Dayton market, with the majority of PPO enrollment.

Anthem is also the largest carrier statewide, and WellPoint is the nations largest health benefits company by enrollment.

Anthem and Premier Health Partners renewed their contract in July 2010 through the end of 2013, although Atrium Medical Center and Upper Valley Medical Center are on a separate contract than runs through 2012. Kettering also has a contract with Anthem, which was extended in July 2010 through Feb. 14, 2012. Anthem signed a new contract with physician-owned Ohio Valley Medical Center in Springfield in August 2010.

Anthem piloted its individual health record in Dayton as a partnership with Kettering Health Network, building on Kettering's EMR system and integrating it with Anthem's claims systems. The DaytonHealthKonnect IHR puts claims and clinical data through complex algorithms to arrive at a functional health summary, which the company says differentiates its IHR from the typical EMR system. Anthem sees it as one of the most promising efforts to control costs among members with chronic conditions. The IHR is made available

to the patient in the form of a personal health record, and to the physician in the form of an EMR with e-prescribing capability. The health record incorporates Anthem's pay-for-performance rules, paying physicians more if they practice medicine consistent with evidence-based guidelines, and will incorporate its utilization management rules so that physicians will have to call the company less frequently. Early results showed a 7.4 percent reduction in overall healthcare trend costs by participants, who were also more likely to receive key disease screening tests.

In April 2010, DaytonHealthKonnect began a major strategic expansion phase with Kettering Health, agreeing to exchange data from its clinical systems with the IHR, allowing anyone using Kettering facilities or physicians to access their own personal IHR. The program had been restricted to employees of Kettering and their dependents, but is being rolled out to more than 500,000 people.

The success of the IHR Diabetes program has allowed Kettering to halve their copays for diabetic, cholesterol and hypertension drugs for participating patients.

Another initiative that was piloted in Dayton is Anthem Care Comparison, an online tool that provides detailed cost information on nearly 40 medical procedures performed at specific area hospitals, outpatient surgery centers and freestanding radiology facilities. Started in September 2006 with General Motors in Dayton,

the program has been rolling out through Anthem markets since.

* * *

[p.32]

UnitedHealth Group (UnitedHealthcare)

Table 6-2		
Income and Revenue*	**Local Enrollment****	**Statewide Enrollment****
2008 HMO Net Income: $27.7M	**Commercial HMO:** 171	**Commercial HMO:** 4,275
2008 HMO Revenue: $702.5M	**Fully Insured Commercial PPO:** 9,018	**Fully Insured Commercial PPO:** 84,875
2009 Net HMO Income: $8.8M	**Self-Insured PPO:** 3,318	**Self-Insured PPO:** 30,335
2009 HMO Revenue: $749.3M	**Fully-Insured POS:** 41,435	**Fully-Insured POS:** 268,024
	Self-Insured POS: 81,999	**Self-Insured POS:** 615,892
	Managed Medicaid: 0	**Managed Medicaid:** 118,781
	Medicare HMO: 22,465	**Medicare HMO:** 78,511
	Medicare PPO: 497	**Medicare PPO:** 5,441

* Multistate reporting.
**As of Jan. 1, 2011.

Sources: HealthLeaders-InterStudy; managed Medicaid is from state Medicaid department; Medicare HMO and PPO are from the Centers for Medicare & Medicaid Services.

Minnetonka, Minn.-based UnitedHealth Group operates as United Healthcare of Ohio in the Dayton market, where it is the second-largest health plan, based mainly on its sizable stand-alone point-of-service enrollment. UnitedHealth Group also has the largest local managed Medicare enrollment.

UnitedHealth Group is the third-largest managed care plan in Ohio and the second largest nationally.

In September 2010, UnitedHealth Group began offering diabetic members paid consultations with Walgreens pharmacists in six pilot markets, including Dayton; other markets include Cincinnati and Columbus in Ohio. Through the Diabetes Prevention and Control Alliance, participants receive personalized coaching and counseling services. The program will roll out to the remainder of the nation through 2012. UnitedHealth rewards diabetic and pre-diabetic members who routinely follow independent, medically-proven steps to help manage their conditions and use wellness coaching.

Premier Health Partners and UnitedHealth Group renewed their contract in April 2010.

UnitedHealth Group is a leader in disease management, electronic health records and pharmacy benefit management. It has rolled out

several initiatives promoting value-based benefits in pharmacy design, and it expects continued growth in consumer-driven plans as well as with plans focused on a smaller network of providers and on wellness components.

UnitedHealthcare is also a leader in the small-group market and is looking to increase that business through a new strategy called MultiChoice, which offers the carrier's traditional plan lineup with a defined-contribution from the employer while allowing members to pay more for richer benefits. The new strategy is being tested in Cincinnati, Columbus, Dayton and other markets where brokers report a large proportion of small-group employers dropping coverage. Plan designs range from low-deductible copay plans to high-deductible plans paired with health savings accounts or heath reimbursement arrangements, and many points in between. Common plan features include coinsurance in the 20 percent to 30 percent range after the deductible has been met. The employer chooses a few options that will be offered to employees, with the employer obligated only to a pre-set percentage of the premium.

The UnitedHealth Premium Designation program is a physician performance assessment initiative that uses evidence- and consensus-based medicine and national standards to evaluate physicians in 20 specialties for quality and cost efficiency of clinical care. There are some UnitedHealth Group medical plan designs, such as EDGESM and Tiered Benefits, that allow members to pay lower copays

and/or coinsurance percentages when they use a two-star quality and cost-efficiency designated specialist.

* * *

APPENDIX M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
(Western Division)

Case No. 3:12-cv-00026-TSB

Judge Timothy S. Black

[Filed August 27, 2014]

THE MEDICAL CENTER AT ELIZABETH PLACE, LLC,	)
Plaintiff,	)
v.	)
PREMIER HEALTH PARTNERS, et al.,	)
Defendants.	)

DECLARATION OF ALEX RINTOUL

1. My name is Alex Rintoul. I am over eighteen years of age and competent to give testimony.

2. I am the CEO of The Medical Center at Elizabeth Place. I have held that position since January 2007.

3. I have been involved in the administration and management of healthcare facilities for 23 years.

4. Healthcare insurers (payers) may offer several types healthcare insurance products. Two of these are Health Maintenance Organizations ("HMOs") and Preferred Provider Organizations ("PPOs"). In both, providers, including hospitals, contract with a payer to perform healthcare services to a group of the payer's customers ("insureds" or "covered lives"). PPO and HMO products are referred to as managed care plans, and the written agreement by which a payer authorizes a provider to offer healthcare service to insureds is called a managed care agreement. Providers with a contract are referred to as "participating," "par," or "in network'; providers without a contract are considered "out of network" with that particular payer.

5. In a PPO, insureds are not required to use the providers participating in the PPO, but if they do, their out-of-pocket responsibility is lower. An HMO can be more restrictive than a PPO because some HMOs require insureds to use only in-network providers and offer no out-of-network benefits to insureds. An insured in those HMOs would bear full responsibility for the cost of the out of network service.

6. Some payers also market a Traditional/ Indemnity product, under which they agree to cover a certain percentage of an insured's healthcare expense after the insured meets an annual deductible. Traditional products give insureds flexibility because they choose any provider and receive the same benefit.

7. Non-hospital providers include: ambulatory surgery centers performing outpatient procedures not requiring overnight hospital stays; freestanding imaging or laboratory facilities; and specialty hospitals providing a limited range of specialty procedures, often organized around a singular issue, such as surgery, cardiac care, or women's care. These facilities may be wholly owned by physicians, wholly owned by hospitals, or owned in part by each.

8. Insureds can obtain their healthcare from any of these providers or the hospitals; however, they are more likely to choose a healthcare provider covered by their payer's networks so as to avoid penalties for using an out-of-network provider. Being out of network with a payer raised the patient's out-of-pocket costs if they had a procedure performed at MCEP.

9. Because of these payer networks, and the agreements between the payer and the insureds, a healthcare provider must be an in-network provider in order to receive an appreciable volume of patients.

10. MCEP received its Joint Commission certification on November 13, 2006.

11. From the day it opened for business until it was forced to sell an interest to KHN because of the Defendants, MCEP was the only non-specialty acute-care hospital operating in Dayton independent of Defendants and KHN. MCEP competes with the Defendants and KHN.

12. MCEP has never offered cardiac surgical services.

13. The sole reason MCEP sold part of its business to KHN in 2009 was to get access to the payers' managed care networks through the KHN contracts with those payers. From September 2006 until its forced partial sale to Kettering Health Network on January 1, 2009, MCEP was unable to get any managed care contracts from Anthem, UHC, Aetna, Cigna, Emerald, or PHCS, among others.

14. CIGNA did not pursue a contract with MCEP after October 2008. In fact, CIGNA has never offered MCEP a managed care contract.

15. Lack of access to managed care plans severely impeded MCEP's ability to compete with KHN and Defendants. Being out of network with a payer raised the patient's out-of-pocket costs if they have a procedure performed at MCEP. Also, some payers advise physicians operating under their own professional managed care agreement with the payer that the professional risked not receiving his/her professional fees for procedures performed at out-of-network facilities like MCEP. These factors, among others, deterred physicians from utilizing MCEP and affected our ability to compete for cases.

16. In addition, some payers advised MCEP that it might not receive any payments on services provided out of network if the procedure did not meet certain specific criteria. Payers deny out-of-network claims at a far greater rate than they deny in-network claims. Additional Anthem, when it covered an out-of-network claim, would pay the patient instead of MCEP, forcing MCEP to pursue the patient to collect the balance due

from Anthem for the services. Many of these collection efforts were unsuccessful.

17. The manner in which payers handle out-of-network claims, created uncertainty with respect to anticipated revenue and raised MCEP's costs.

18. This changed once MCEP was able to participate in managed care networks in 2009 after it sold an ownership interest to KHN. The number of cases increased substantially with respect to each payer with which MCEP had in-network status.

19. In August 2008, we received from Bryan Weber at Anthem Blue Cross Blue Shield for the first time a rate proposal for Anthem's Traditional program. When we sent a rate counterproposal, Bryan Weber, then at Anthem, cut off the negotiations in September 2008. When KHN negotiated on MCEP's behalf with Anthem in 2009, Bryan Weber was then working for KHN and so was negotiating against his old employer Anthem. When we finally secured managed care contracts from Anthem after selling part of our business to KHN, the rates in those contracts were higher than the rates that Anthem proposed back in August 2008.

20. In late 2008, MCEP was forced to selling half its business to KHN solely because of the Defendants' success in preventing MCEP from getting managed care contracts.

21. Anthem did not offer MCEP a managed care contract until the 2009 KHN investment.

22. UHC did not offer MCEP a managed care contract until the 2009 KHN investment.

23. Humana did not offer MCEP a managed care contract until the 2009 KHN investment.

24. Aetna did not offer MCEP a managed care contract until the 2009 KHN investment.

25. PHCS has never offered MCEP a managed care contract.

26. Emerald Health Network has never offered MCEP a managed care contract.

27. HealthSpan did not offer a managed care contract to MCEP until the 2009 KHN investment.

28. GILD (Gastro Intestinal Liver Disease) is a GI practice in Dayton. GILD (through Gastro Ventures LLC) was one of MCEP's founding investors. GILD's practice involved significant use of our pathology lab; in fact, GILD was one of the driving forces behind the decision to invest in the lab. While investors, GILD sent specimens to MCEP's pathology lab. When the physicians from GILD who owned MCEP shares sold them back to MCEP because of pressure from Defendants, GILD stopped sending specimens to MCEP's pathology lab.

29. Drs. Lawrence Goldstick, Thomas Cook and Alan Jacobs have been investors in MCEP since its inception.

30. Dr. Toth sold back his shares in 2011. A primary reason stated by Dr. Toth for this decision was pressure he was feeling from Defendants on his

practice in the form of lost referrals from physicians associated with Defendants. Dr. Wilcher forfeited his shares 2011. A primary reason stated by Dr. Wilcher for this decision was pressure he was feeling from Defendants on his practice in the form of lost referrals.. After Drs. Toth and Wilcher sold back their shares in MCEP, they stopped using MCEP for procedures.

I declare under penalties of perjury that the foregoing is true and correct to the best of my knowledge.

/s/Alex Rintoul
Alex Rintoul

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