No. 22-

IN THE

Supreme Court of the United States

BRFHH SHREVEPORT, L.L.C., DOING BUSINESS AS UNIVERSITY HEALTH SHREVEPORT,

Petitioner,

v.

WILLIS-KNIGHTON MEDICAL CENTER, DOING BUSINESS AS WILLIS-KNIGHTON HEALTH SYSTEM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

First, Section 1 of the Sherman Act prohibits any contract, combination, or conspiracy in restraint of trade. This Court has held that to make out a Section 1 claim and survive a motion to dismiss under Rule 12(b)(6), a plaintiff must plead "only enough facts to state a claim for relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 556, 570 (2007). The First Question Presented, upon which the circuits are divided, is:

May a Section 1 claim be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), consistent with *Twombly*, based on evidence suggesting an alternative, non-conspiratorial reason for the challenged conduct, where the complaint also contains substantial factual allegations disputing that alternative inference?

Second, Section 2 of the Sherman Act prohibits the monopolization (or attempted monopolization) of any trade or commerce through anticompetitive conduct. Such anticompetitive conduct is "conduct which unnecessarily excludes or handicaps competitors," thereby "impairing competition." *Aspen Skiing v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 597 (1985). The Second Question Presented is:

To adequately allege anticompetitive conduct for purposes of a Section 2 claim involving a threatened refusal to deal, must plaintiffs allege a "substantial foreclosure" of competition?

PARTIES TO THE PROCEEDING

Petitioner is BRFHH Shreveport, L.L.C., who was plaintiff in the cases below. Respondent is Willis-Knighton Medical Center, who was defendant in the cases below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, BRFHH Shreveport, L.L.C. hereby states that it is a wholly-owned subsidiary of Biomedical Research Foundation of Northwest Louisiana, a Louisiana non-profit corporation. No publicly held corporation owns 10% or more of the stock of either entity.

STATEMENT OF RELATED CASES

BRFHH Shreveport L.L.C. v. Willis-Knighton Medical Center, No. 5:20-cv-00142, U.S. District Court or the Western District of Louisiana. Judgment entered Sept. 27, 2021.

BRFHH Shreveport L.L.C. v. Willis-Knighton Medical Center, No. 21-30622, U.S. Court of Appeals for the Fifth Circuit. Judgment entered Sept. 19, 2022.

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JURISDICTION

The judgment of the Fifth Circuit was entered September 19, 2022. (Pet. Appx. 1a.) The Court has jurisdiction under 28 U.S.C. 1254(1).

PROVISIONS INVOLVED

Sherman Act Section 1 (15 U.S.C. § 1) is reproduced at Pet. Appx. 63a. Sherman Act Section 2 (15 U.S.C. § 2) is reproduced at Pet. Appx. 64a. Federal Rule of Civil Procedure 12(b)(6) is reproduced at Pet. Appx. 65a.

INTRODUCTION

The published decision by the Fifth Circuit Court of Appeals affirming the dismissal of the Complaint by BRFHH Shreveport, L.L.C. ("University Health Shreveport" or "UHS") against Willis-Knighton Medical Center was based on two legal principles that involve a "sea change" in antitrust law, and is directly at odds with decisions in many other circuits and the legal principles enunciated by this Court:

1. The Court held that UHS' conspiracy claim under Section 1 of the Sherman Act must be dismissed because

of the existence of a possible independent explanation for the behavior claimed to be conspiratorial. The Court declared that the existence of this alternative explanation compelled "the end of [UHS'] Section 1 claim," despite four different categories of factual allegations that directly disputed this explanation. The Fifth Circuit expressly weighed substantial conflicting evidence in deciding which conclusion is most probable (not merely plausible), and thereby imposed a standard for the viability of antitrust complaints that completely usurps the role of the jury. By its actions, the Fifth Circuit disregarded all the guardrails that this Court and other circuits have imposed to limit a court's discretion at the motion to dismiss or summary judgment stages including the requirement that an alternative explanation is sufficient for dismissal only when it is "obvious," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 (2007), that the complaint's allegations need only "tend[] to" exclude alternative explanations, *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984), and that a complaint need only "suggest" a conspiracy. *Twombly*, 550 US. at 556.

The Fifth Circuit's decision is the most extreme example of the trend in some circuits to conflate the plaintiff's burden at the motion to dismiss stage, at summary judgment and at trial. It thus fails to consider the balance between dismissal of "groundless" claims and the need to be "cautious before dismissing an antitrust complaint in advance of discovery. . . ." *Twombly*, 550 U.S. at 558. This is an issue of exceptional importance, since it affects a large number of antitrust claims, and implicates issues this Court has addressed multiple times in *Twombly*, *Monsanto*, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Matsushita Elec. Indus. Co., Ltd. v. Zenith*

Radio Corp., 475 U.S. 574 (1986). The Fifth Circuit's decision is an unprecedented intrusion into the role of the trier of fact.

While this Court has denied many petitions for certiorari in cases applying the "plausibility" standard in *Twombly*, the Fifth Circuit's decision here represents a dramatic departure from the standard applied in all those cases. The decision essentially tells defendants – and possible plaintiffs considering an action – if there is any possible alternative explanation that can be hypothesized for a claim of conspiracy, then that claim will be dismissed if the judges in question regard that hypothesis as more likely than what can be inferred from specific, well-pleaded factual allegations. This will significantly deter the pursuit of antitrust cases that are very far from "groundless," *Twombly*, 550 U.S. at 559, and seriously undermine the role of private antitrust plaintiffs as "private attorneys general." *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329 (1955). The standard in the Fifth Circuit's decision essentially allows courts to decide significant disputes as to fact even at the motion to dismiss phase without any opportunity to develop a record in support of those well pleaded facts.

Because the decision so dramatically changes the relevant standard, it is an appropriate case for this Court to explain how far its decision in *Twombly* does, and does not, reach.

2. The Fifth Circuit concluded that conduct involving a refusal to deal cannot violate Section 2 of the Sherman Act unless it results in substantial foreclosure. This ruling also contradicts prior decisions of this Court and numerous

other circuits. As such, the Fifth Circuit's decision eliminates the protections under Section 2 against a wide variety of anticompetitive acts and consequences that harm competition even where no channels of distribution or purchase are completely foreclosed to competitors.

Together, these two rulings by the Fifth Circuit create a new and significant bar to antitrust claims under either Section 1 or Section 2 of the Sherman Act. It is critical that certiorari be granted in order to resolve these issues and clarify that antitrust claims of conspiracy and monopolization cannot be as severely circumscribed as the Fifth Circuit has indicated.

STATEMENT OF THE CASE

I. Factual Allegations in the Complaint

A. The Parties

UHS filed its Complaint on January 30, 2020 alleging antitrust violations under Sections 1 and 2 of the Sherman Act. Section 1 provides in part 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." Section 2 states in part that "[e]very person who shall monopolize, or attempt to monopolize, . . . any part of the trade or commerce . . . shall be deemed guilty of a felony."

The Complaint alleges that Willis-Knighton, the dominant hospital system in Shreveport-Bossier City, Louisiana, undertook an anticompetitive scheme to

suppress competition from its largest rival, UHS, after facing substantially increased competition by UHS, in order to preserve its monopoly power and ability to impose high prices on health plans, employers and consumers. Willis-Knighton has a market share of 75% or more among commercially insured patients, which is alleged to be the relevant market. (D. Ct. Dkt. 1, Complaint at ¶¶ 27, 159-170.) Willis-Knighton has only two local competitors—CHRISTUS Health Northern Louisiana ("Christus") and UHS. (*Id.* at ¶¶ 12, 176.) As a result of this dominance, according to its CEO, Willis-Knighton was able to obtain "commercial insurance reimbursements" that "are significantly above the norms." (*Id.* at ¶¶ 35-36.) Compared with Willis-Knighton, UHS' rates were substantially lower. (*Id.* at ¶ 92.)

For years, Willis-Knighton had not viewed the Shreveport hospital that UHS later operated as a competitor, because Willis-Knighton did not consider it a rival for the more lucrative commercially insured patients. (*See id.* at ¶¶ 21, 64.) But when UHS took over management of the Shreveport hospital, it dramatically improved operations, including the following:

a. Reduced clinic patient referral queues;

b. Achieved record surgical volumes;

c. Developed an ICU step down unit and new stroke center;

d. Enhanced Bone Marrow Transplant program;

> e. Restored Level 1 Trauma Center certification;
>
> f. Established a new Baby Friendly Program;
>
> g. Established a Minority and Women's Owned Business Program;
>
> h. Reduced labor and benefit costs despite increasing volume;
>
> i. Experienced a substantial reduction in patient complaints;
>
> j. Reduced wait times for MRI and CT Scans; and
>
> k. Reduced average length of stay by 7%.

(*Id.* at ¶ 24.) As a result, UHS became a much greater competitive threat to Willis-Knighton:

> In 2014 (as compared to 2012, before UHS's acquisition of the Shreveport hospital), UHS accomplished the following:
>
> a. Increased admissions by 15%;
>
> b. Increased clinic visits by 6%;
>
> c. Increased emergency department visits by 15%;

d. Improved EBITDA (earnings before interest, taxes, depreciation and amortization) since transition of approximately $80,000,000; and

e. Reduced expenses to the State of Louisiana by $49,000,000 as reported by the State of Louisiana's Department of Health & Hospitals.

(*Id.* at ¶25.)

Willis-Knighton stated in a 2014 draft letter that "with the privatization of LSU, the new University Health hospital will be seeking to draw private [commercially insured] patients from Willis-Knighton and Christus Highland. So the LSU hospital that once was an ally is now a competitor." (*Id.* at ¶ 64.)

B. Willis-Knighton's Coercion

Willis-Knighton's response included coercing LSU Health, the medical school whose faculty represents the sole medical staff at UHS, from engaging in the normal cooperation with the hospital that is common to any medical staff. (*Id.* at ¶¶ 39, 43-48, 62-63.) The coercion resulted from Willis-Knighton's willingness to provide LSU Health (which was in its own words "IN CRISIS") critically needed funds, but only if it ceased cooperation with UHS, the hospital at which LSU Health's doctors primarily practiced. (*Id.* at ¶¶ 70-75.)

The Complaint explains that before 2016, UHS and LSU Health had successfully worked together on a number

of initiatives. UHS and LSU Health administration held weekly meetings to improve hospital and physician operations. (*Id.* at ¶ 40.) And UHS executives also enjoyed free and open communication with the chairs of various LSU Health departments. (*Id.*) Before 2016, UHS and LSU Health had also worked cooperatively to recruit many physicians to Shreveport, including several pediatric and oncological subspecialists. (*Id.* at ¶ 111.)

For these reasons, relations between Willis-Knighton and LSU Health leadership had been strained. (*Id.* at ¶ 59.) Willis Knighton had an "issue of trust" with Dr. Robert Barish, LSU Health's chancellor, and questioned whether he and his team "actually desire—and will support—a partnership with" Willis-Knighton. (*Id.*)

LSU Health's behavior changed after a January 2016 Willis-Knighton PowerPoint presentation to LSU Health which conditioned Willis-Knighton's provision of funds on LSU Health's "cooperation" with Willis-Knighton. (*Id.* ¶ 71.) The Complaint alleges that LSU Health knew that such cooperation with Willis-Knighton entailed a refusal to work with UHS, since LSU Health had been earlier informed that Willis-Knighton desired to "accelerate the demise" of UHS. Moreover, previous cooperation between LSU Health and UHS in exploring a (then unconsummated) venture with Ochsner Health had resulted in a Willis-Knighton threat to withhold funds from LSU Health. (*Id.* ¶¶ 65, 69, 77.)

Cooperation between LSU Heath and UHS ceased after Dr. G.E. Ghali was appointed interim chancellor at LSU Health in early 2016, replacing Dr. Barish. (*Id.* at ¶¶ 39-41, 56-59.) At the time of his appointment, Dr.

Ghali was a senior partner in Willis-Knighton's Oral and Maxillofacial Surgery Institute and a member of the Willis-Knighton Physician's Network. (*Id.* at ¶ 56.) Willis-Knighton provided Dr. Ghali's department at LSU Health significant seven-figure funding annually, and Dr. Ghali also routinely used Willis-Knighton's private plane. (*Id.*) After his appointment as chancellor, Dr. Ghali habitually forwarded internal UHS documents to Willis-Knighton and engaged in political advocacy, on behalf of Willis-Knighton. (*Id.* at ¶ 60.)

A series of emails from Willis-Knighton representatives to LSU in the summer of 2016 stated that Willis-Knighton would only consider "the advance of funding" to LSU when it had "confidence in knowing the future permanent Chancellor and the key leadership of LSUHSC-S [LSU Health]." (*Id.* at ¶ 58.) Shortly after those emails, Dr. Ghali's interim appointment as Chancellor of LSU Health became permanent. (*Id.*)

After Dr. Ghali was appointed, his subordinate Bruce Solomon directed that all communications from UHS must go through him, and that LSU Health department chairs were no longer permitted to directly communicate with UHS. (*Id.* at ¶ 41.) He also cancelled the regular weekly meetings between UHS and LSU Health. (*Id.*) Mr. Solomon often stated that he was "too busy" to communicate with UHS executives. (*Id.* at ¶ 43.)

After LSU Health began to resist any cooperation with UHS, an LSU Health executive reported in an internal document that Willis-Knighton had "conceptually agreed" to supply the promised funds. (*Id.* at ¶ 73.) In a later communication to the president of Louisiana State

University, the same executive said that LSU Health needed to cease cooperation with UHS in order to take advantage of Willis-Knighton's "mother lode" of funds. (*Id.* at ¶ 79.) The executive referred to a "partnership" with Willis-Knighton. (*Id.* at ¶ 80.)

The Complaint alleges:

> In the very same email, Mr. Yick [of LSU Health] said that "we need to calibrate our strategy that we have to refocus our energy to rebuild *rather than to collaborate with BRF*." (Emphasis added.) Instead, the conclusion was that LSU Health Shreveport should "form a sustainable long term partnership with WKMC . . ." Thus, LSU Health Shreveport agreed to meet Willis-Knighton's demand to not collaborate with BRF or UHS in order to gain the additional funding promised by Willis-Knighton and to avoid losing the funding already provided by Willis-Knighton.

(*Id.* at ¶ 86.)

LSU Health admitted in an email that it had entered into agreements with hospitals other than Willis-Knighton "for cover," *i.e.*, as a cover-up of its arrangement with Willis-Knighton. (*Id.* at ¶ 81.)

While not referenced in the Complaint, the Fifth Circuit relied upon extrinsic evidence regarding a lawsuit LSU filed against UHS and its affiliates in July 2015, seeking to terminate the operation of the Shreveport hospital and its affiliated Monroe hospital (Conway) by

UHS and its affiliates. (Pet. Appx. 3a, 13a; *see also id.* at 66a-68a.) However, as described above, LSU Health's cooperation with UHS in Shreveport did not cease at the time of the lawsuit, but ended only in 2016. Moreover, LSU Health continued to fully cooperate with UHS' sister hospital, Conway in Monroe, where Willis-Knighton does not compete. (D. Ct. Dkt. 1, Complaint at ¶ 45.) Willis-Knighton's coercive activities described in the Complaint only occurred with regard to the hospital in Shreveport.

C. LSU Health's Actions Against Its Interest

The Complaint also alleges in great detail how LSU Health's refusals to cooperate with UHS in Shreveport in at least ten different areas were contrary to its individual self-interest:

Cost Sharing. In 2016 UHS approached LSU Health about combining many overhead functions. (*Id.* at ¶ 96.) Despite the millions of dollars in savings that cooperation with UHS would have provided LSU, LSU Health rejected each proposal. (*Id.*)

Productivity Improvements. LSU Health also refused to cooperate with UHS to improve the productivity of several of its departments, many of which ranked at the lower quartile nationally. (*Id.* at ¶¶ 107-108.) Because of this inadequate productivity, physicians were not seeing as many patients as would have been possible, resulting in significant backlogs. (*Id.* at ¶ 109.) Accepting UHS' assistance in improving physician productivity would have earned LSU Health millions of dollars in incremental revenue and provided UHS with significant increases in market share, because more patients would be able to be

seen and treated by physicians. (*Id.* at ¶ 110.) Despite the demonstrated need to improve physician productivity, LSU Health refused to even provide productivity data for its physicians to UHS. (*Id.* at ¶ 108.)

Similar efforts by UHS at its Conway hospital that were accepted by LSU Health led to significant improvements in productivity. (*Id.* at ¶ 110.) At Conway, unlike UHS, the LSU administration worked closely with UHS in improving productivity, on recruitment, and in other areas. (*Id.* at ¶ 45.) Willis-Knighton was not active in Monroe, where Conway was located. (*Id.*)

Hospitalists. UHS proposed the creation of a hospitalists program. (*Id.* at ¶¶ 118-120.) Many hospitals in the United States employ such physicians, who do not have independent practices and instead specialize in taking care of patients while they are in the hospital. (*Id.* at ¶ 118.) A hospitalist program also frees up physicians to spend more time in the office seeing patients. (*Id.* at ¶ 119.) Yet LSU Health effectively rejected adopting such a program, and so forewent the substantial revenue it could have realized by virtue of being able to treat more patients. (*Id.* at ¶ 120.)

Refusal to Cooperate in Staffing Clinics. The failure by LSU Health to fully staff the Provenance clinic, UHS' first facility that mainly served commercially insured patients, led to a substantial loss of revenues to LSU Health. (*Id.* at ¶ 121.)

Adoption of a Common Formulary. UHS tried to persuade LSU Health to adopt a common formulary for the purchase of drugs and medical supplies, rather

than leave such decisions to the discretion of individual physicians. (*Id.* at ¶ 131.) Hospitals frequently work with their physicians to adopt such formularies, as they allow hospitals to purchase in larger quantities and obtain greater discounts, as well as reduce inefficiencies and potential errors. (*Id.*) LSU Health's refusal to cooperate with UHS resulted in LSU Health missing out on substantial shared savings. (*Id.*)

Physician Training in Documentation. UHS approached LSU Health about training physicians in clinical documentation. (*Id.* at ¶ 132.) Proper documentation is important because it not only improves patient care, but without proper documentation managed care payors will not pay for the care provided. (*Id.*) Thus, better and more accurate documentation improves results for patients and increases revenues. (*Id.*) By foregoing participation in such training, LSU Health forewent substantial additional revenue. (*Id.*)

Scheduling. When UHS approached LSU Health about improvements to scheduling, LSU Health was unwilling to change its system. (*Id.* at ¶ 134.) LSU Health's existing system impeded the efficiency of the physicians and prevented them from seeing more patients. (*Id.*) LSU Health's refusal to cooperate in improving this scheduling system led to lost revenue and fewer patients seen. (*Id.*)

Outpatient Imaging Center. UHS also proposed that LSU Health and the hospital establish a joint venture outpatient imaging center at a location apart from the hospital campus. (*Id.* at ¶ 133.) LSU Health ignored the request. (*Id.*)

Recruiting. Beginning in May 2016, LSU Health refused to work with UHS to recruit additional physicians in areas like neurology and cardiology despite LSU executives' expressed concern over their inability to recruit physicians, and despite the substantial shortfalls in medical school and hospital revenues created by the departure of existing physicians. (*Id.* at ¶¶ 47, 111-114.)

In some cases, LSU Health executives specifically admitted that they refused cooperation with UHS at Willis-Knighton's behest. For example, Blue Cross Blue Shield of Louisiana approached UHS and LSU Health about offering a network to patients that would exclude Willis-Knighton hospitals and physicians, and thus be available at a far lower cost to subscribers. (*Id.* at ¶ 44.) Such an effort would have garnered millions of dollars in new funds to LSU Health. (*Id.*) But LSU Health refused to even participate in meetings on the subject, because, according to Dr. Ghali, such a strategy would upset Willis-Knighton's CEO James Elrod. (*Id.* at ¶ 89.)

D. Anticompetitive Effects

The Complaint contains numerous specific allegations that indicate that this conduct was anticompetitive and exclusionary. Willis-Knighton's actions prevented UHS from reducing its costs or increasing its revenue and stymied UHS' efforts to further challenge Willis-Knighton. (*Id.* at ¶¶ 6, 43, 101, 105, 147.) These actions thus allowed Willis-Knighton to maintain its high market share and high prices without fear of increased competition.

Willis-Knighton thereby maintained its monopoly-level market share, by suppressing UHS' ability to

compete for greater volumes of patients. The narrow network opportunity with Blue Cross that UHS had to forego because of Wills-Knighton's coercive pressure on LSU would have increased UHS' volumes and revenues significantly by attracting more subscribers. (*Id.* at ¶ 90.) LSU Health's actions specifically stymied an effort by Blue Cross to create greater managed care competition for Willis-Knighton, which would have undercut Willis-Knighton's position as a "must-have" hospital which could effectively set its own rates. (*Id.* at ¶¶ 85-93.)

If Willis-Knighton had not interfered in UHS' recruiting efforts, UHS would have been able to attract more doctors to the hospital, compete more effectively in certain specialty areas, and increase its revenues by increasing the volume of patients UHS treated. (*Id.* at ¶ 47.) Likewise, LSU Health's refusal to cooperate with UHS on adopting productivity standards for physicians and adopting a more efficient scheduling system also prevented UHS from seeing as many patients as it otherwise would have been able to. (*Id.* at ¶¶ 107-110, 134.) UHS would have also been able to increase its volume of commercially insured patients seen, and therefore its revenues, had LSU cooperated in staffing UHS' Provenance clinic. (*Id.* at ¶ 121.) The UHS-proposed outpatient imaging center would also have created a new revenue stream that it wasn't able to realize because of Willis-Knighton's coercion. (*Id.* at ¶ 133.)

If UHS had gained additional funds through the rejected cooperative ventures, it would have engaged in substantial additional competitive activities, including additional marketing, facility improvements, and expansion of programs and services, thereby potentially reducing

Willis-Knighton's dominant position. (*Id.* at ¶ 178.) Given Willis-Knighton's dominant position in the market, and the fact that UHS was one of only two competitors to Willis-Knighton, even a small change in market shares would have impacted competition. (*Id.* at ¶ 179.) Indeed, economic research shows that high market concentration substantially increases hospital prices. (*Id.* at ¶ 181.) Willis-Knighton's coercion maintained that high level of concentration. (*Id.* at ¶ 179.) The Complaint alleges that improvements at UHS would be desirable to consumers, since UHS had been increasing its market share through its increased competitive efforts. (*Id.* at ¶¶ 24, 52, 105, 178.) The Complaint also states that managed care payors, and in particular Blue Cross of Louisiana, specifically expressed interest in a joint contractual relationship with UHS and LSU Health. (*Id.* at ¶ 86.) Since managed care plans are considered the "customers" in health antitrust cases, *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 342 (3d Cir. 2016), this establishes evidence of harm to consumers.

II. The District Court's Decision

Willis-Knighton moved to dismiss the Complaint for failure to state a claim on May 22, 2020. (D. Ct. Dkt. 20.) UHS moved for oral argument on June 18, 2020. (D. Ct. Dkt. 28.) The Court denied the motion for oral argument on March 30, 2021. (D. Ct. Dkt. 35.) After briefing and without oral argument, the district court granted Willis-Knighton's motion and dismissed UHS' complaint on September 27, 2021 on the basis that UHS "failed to sufficiently allege antitrust violations in more than a nonspeculative manner." (Pet. Appx. 24a.)

III. The Fifth Circuit's Decision

A. Section 1 Claim

The Fifth Circuit affirmed the district court's dismissal of UHS' Section 1 claim, holding—as a matter of first impression—that Willis-Knighton's threats and LSU Health's numerous actions acceding to those threats were insufficient to plausibly suggest a "threat-and-accession" conspiracy because "LSU had a completely independent reason for refusing to cooperate with [UHS] . . . ." (Pet. Appx. 13a.) The Court inferred this "independent reason" from a 2015 lawsuit between LSU Health and UHS, in which LSU Health alleged, among other things, that UHS was failing to adequately collaborate in achieving LSU Health's mission. (*Id.*) Accordingly, the Court reasoned, LSU Health had a reason to "sever its ties" with UHS that "predated any alleged coercion by Willis-Knighton." (*Id.*) Choosing to believe the inference that LSU Health ceased cooperating with UHS for the reasons stated in a prior lawsuit rather than in response to Willis-Knighton's coercion, the Court declared it "the end of [UHS]'s Section 1 claim." (*Id.* at 14a.)

The Fifth Circuit reached this conclusion notwithstanding the fact that the Complaint contained specific allegations explaining that LSU Health continued to cooperate with UHS in Shreveport until after Willis-Knighton's January 2016 proposal and the appointment of Willis-Knighton's agent Dr. Ghali as LSU Health's interim chancellor:

> Prior to the appointment of Dr. Ghali and Mr. Solomon, LSU Health Shreveport's

> administration had worked closely with UHS, through weekly meetings, to cooperate with the hospital to improve both hospital and physician operations. Additionally, UHS executives enjoyed free and open communication with the chairs of the various LSU Health Shreveport departments, and worked with them on common goals.
>
> Commencing in the spring of 2016, this cooperation ceased. In fact, Mr. Solomon [appointed by Dr. Ghali] directed that all communications from UHS go through him, and that LSU Health Shreveport department chairs not directly communicate with UHS. The regular weekly meetings between UHS and LSU Health Shreveport executives were cancelled. When UHS proposed a number of cooperative initiatives, LSU Health Shreveport consistently refused to participate, even though it would have been in its individual self-interest to do so.

(D. Ct. Dkt. 1, Complaint at ¶¶ 40-41. *See also id.* at ¶ 39.) On nearly a dozen occasions, the Complaint explains that LSU Health's refusal of cooperation was directed by Dr. Ghali and his subordinate Mr. Solomon, who did not assume their positions until 2016. (*Id.* at ¶¶ 42-44, 47-49.)

The Fifth Circuit rejected these well-pleaded specific facts as a "made-to-order account" and "wishful thinking", and therefore not plausible. (Pet. Appx. 15a.) As such, the Fifth Circuit expressly weighed specific, conflicting evidence in deciding whether the claim was plausible.

Because of this express evaluation of well pleaded specific factual allegations, the Fifth Circuit's decision presents a strong vehicle for determination of the appropriate standard for plausibility under *Twombly* and *Iqbal*.

The Fifth Circuit ignored the fact that LSU Health continued to cooperate with UHS' sister hospital, Conway in Monroe, Louisiana (also part of the same lawsuit) where Willis-Knighton was not a competitor. (D. Ct. Dkt. 1, Complaint at ¶¶ 45, 47, 108, 114.) The existence of the prior lawsuit could not possibly explain these facts.

The Fifth Circuit also effectively treated as irrelevant the direct evidence of agreement here, including LSU Health's reference to its "partnership" with Willis-Knighton, the fact that LSU Health and Willis-Knighton had "conceptually agreed" on the payment of funds which Willis-Knighton had conditioned on cooperation and LSU Health's cover-up of that relationship. (*Id.* at ¶¶ 59, 73, 80-81.) The mere fact of an alternative explanation for an alleged conspirator's behavior cannot explain away direct evidence of agreement of this sort.

The Fifth Circuit also failed to address the extremely detailed allegations in the Complaint that LSU Health's actions were clearly against its own interest in 10 separate areas. (*Id.* at ¶¶ 90, 96-100, 103-105, 110, 113, 115, 119, 132.) The Fifth Circuit did not explain why LSU Health would seek to cause itself such substantial harm once it lost the lawsuit and it became clear that its doctors would need to continue to serve as UHS' medical staff. Again, the Fifth Circuit ignored this evidence and effectively found implausible the notion that a firm's actions against its unilateral interests could suggest a conspiracy.

The Fifth Circuit thus ignored or belittled four different categories of evidence inconsistent with the alternative explanation that it considered dispositive. The Fifth Circuit weighed the evidence and rejected evidence that it concluded was (for unknown reasons) insufficient, without any opportunity for UHS to present actual testimony regarding the inconsistency between its allegations and the Fifth Circuit's theory. As such, the Fifth Circuit acted as the finder of fact.

B. Section 2 Claims

The Fifth Circuit also affirmed the district court's dismissal of UHS' Section 2 claims. The Court reasoned that, although UHS had offered numerous theories of harm upon which to find anticompetitive conduct, the "likeliest candidate[]" is a "conditional refusal to deal", which, the Court concluded, is "functionally equivalent" to an exclusive-dealing arrangement. (Pet. Appx. 17a.) The Court therefore held that "[s]ubstantial foreclosure is a prerequisite for every exclusive-dealing Section 2 claim." (*Id.* at 18a (citing *Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403, 410 (5th Cir. 1962).) Concluding that UHS failed to allege substantial foreclosure of the "medical services market" resulting from the exclusive-dealing arrangement between Willis-Knighton and LSU Health, the Court held that UHS failed to state a claim under Section 2 of the Sherman Act. (*Id.* at 19a-22a.)

IV. Federal Jurisdiction

UHS' Complaint alleges violations of Sections 1 and 2 of the Sherman Act. By statute, "any person who shall be injured in his business or property by reason of anything

forbidden in the antitrust laws may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent . . . ." 15 U.S.C. § 15(a).

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit Dramatically Departed from the Decisions of this Court and Numerous Other Circuits, in Weighing Competing Inferences on a Rule 12(b)(6) Motion

The Fifth Circuit's willingness to dismiss UHS' Complaint as long as there was a possible (though controverted) non-conspiratorial explanation for LSU Health's behavior directly conflicts with the decisions of this Court and at least the First, Second, Fourth and Sixth circuits. *Bell Atlantic Corp. v. Twombly* requires only that "a complaint [present] enough factual matter (taken as true) to suggest that" a violation of the Sherman Act occurred. 550 U.S. 544, 556 n.5, 559 (2007). The presence of such factual allegations are sufficient to permit a complaint to "proceed even if it strikes a savvy judge that actual proof of those facts is improbable" or recovery "very remote and unlikely." *Id*. at 556 (quotation omitted). It is sufficient that a complaint offer "only enough facts to state a claim for relief that is plausible *on its face*." *Id.* at 570 (emphasis added). "Rule 12(b)(6) does not countenance … dismissals based on a judge's disbelief of a complaint's factual allegations." *Id.* at 556. Even in the summary judgment context, a plaintiff's evidence "is to be believed, and all justifiable inferences are to be drawn in their favor." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992) (brackets omitted).

The Fifth Circuit's decision set requirements far beyond this Court's standard in *Twombly*. The Fifth Circuit demanded, not merely "factually suggestive" allegations, but also (in a highly selective way) weighed the factual allegations and decided which it believed were more likely. It chose to disbelieve specific factual allegations as "wishful thinking" and "made-to-order." It labeled UHS' allegations as implausible based on its own assessment of certain factual allegations, and failed to even address others. This went far beyond what is appropriate at the complaint stage.

The allegations here certainly meet the standard set forth in *Twombly* for "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." 550 U.S. at 556. For example, here, it is certainly foreseeable that discovery will show in even more detail than is set forth in the Complaint, that LSU Health decided to abandon its effort to terminate UHS, and therefore decided to do what was necessary to make the relationship work, until the conspiracy began. Discovery could also reveal that LSU Health cannot explain why it rejected a series of opportunities to profitably cooperate with UHS. Similarly, discovery could reveal that LSU Health's decision to cooperate with UHS' affiliate at its Conway Hospital in Monroe was significant and therefore contrasts dramatically with LSU Health's behavior in Shreveport, where Willis-Knighton was dominant and had a significant stake in the outcome.

By weighing these factual allegations, and simply disregarding many of them, the Fifth Circuit ignored the prospect that these allegations could be supported in discovery and precluded UHS' opportunity to do so. It was

not "cautious before dismissing an antitrust complaint in advance of discovery," 550 U.S. at 558, but eager to do so.

The Fifth Circuit also transformed the "alternative explanation" language in *Twombly* into a formulation far beyond what this Court and numerous circuits intended. *Twombly* justifies dismissal where there is an "obvious alternative explanation" for the behavior. 550 U.S. at 567. Several circuits have agreed. *See, e.g.*, *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 322-23 (3d Cir. 2010); *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1130 (9th Cir. 2015). But an alternative explanation is "obvious" only if there are no significant facts that suggest that the explanation could be inadequate. Here, there clearly were such facts alleged. If allowed to stand, the Fifth Circuit's decision to make its own assessment of those very substantial factual allegations would allow dismissal when an alternative explanation is far from "obvious."

While this Court relied on an alternate explanation to conspiracy in *Twombly*, that is because there were no facts alleged to suggest a contrary inference. The Court held that "nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance." 550 U.S. at 566. It added that "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway[.]" *Id.* In contrast, in the instant Complaint, there were four categories of factual allegations supporting an inference of agreement and rebutting the proposed alternative explanation.

Indeed, the approach taken by the Fifth Circuit was far more stringent than this Court has held applies even at the summary judgment stage. In *Monsanto Co. v. Spray-Rite Service Company*, 465 U.S. 752, 761 (1984), this Court recognized that it is enough that the evidence "tends to exclude the possibility that [the defendants] were acting independently." This Court recognized in *Monsanto* that even ambiguous evidence is sufficient to meet the "tends to exclude" standard. Referring to a distributor newsletter, the Court found that it was "reasonable to interpret this newsletter as referring to an agreement or understanding . . ." 465 U.S. at 766. While the Supreme Court acknowledged that this document could be interpreted as reflecting either agreement or a "reaction to unilateral Monsanto pronouncements," it concluded that that issue "properly was left to the jury." *Id.* at 766, n.11. In contrast, the Fifth Circuit took the relevant issue from the jury at the motion to dismiss phase before discovery, even where there were specific and unambiguous allegations controverting evidence of an independent decision.

In *Matsushita*, the Court said that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." 475 U.S. at 588 (citing *Monsanto*, 465 U.S. at 764). But here there was substantial evidence pleaded that was not "as consistent" with independent action. The standard applied by the Fifth Circuit goes far beyond even the "tends to exclude" standard set forth in the summary judgment cases and the most pro-defendant cases deciding motions to dismiss. Of course, the words "tends to" in this standard are not accidental. A requirement that evidence completely exclude the

possibility of independent action would impose far more than a "preponderance of the evidence" standard on plaintiffs. The "tends to exclude" formulation simply indicates that there is evidence upon which a reasonable fact finder could conclude that there was a conspiracy. By ignoring or finding unpersuasive the extensive factual allegations that were inconsistent with its hypothesis, the Fifth Circuit rejected a host of evidence that certainly, at the very least, "tended to" exclude the possibility of independent action.

The Fifth's Circuit's decision thus directly conflicts with the careful balance set forth in *Twombly*, *Iqbal*, *Monsanto* and *Matsushita* between the need to preserve legitimate factual disputes for trial and the need to end cases based on groundless allegations. The Fifth Circuit chose to decide several very specific factual disputes, taking them from the jury.

Many circuits have rejected the Fifth Circuit's formulation. The First Circuit held in *Evergreen Partnering Group, Inc. v. Pactiv Corp.*, 720 F.3d 33 (1st Cir. 2013), that the district court "improperly occupied a factfinder role when it both chose among plausible alternative theories interpreting defendants' conduct and adopted as true allegations made by defendants in weighing the plausibility of theories put forward by the parties." *Id.* at 50. As the First Circuit explained:

> [A]lthough an innocuous interpretation of the defendants' conduct may be plausible, that does not mean that the plaintiff's allegation that that conduct was culpable is not also plausible . . . .

Id. at 45-46 (citation and quotations omitted).

The Second Circuit in *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162 (2d Cir. 2012), *cert. denied*, 568, U.S. 1087 (2013), enunciated the same principle:

> [O]n a Rule 12(b)(6) motion it is not the province of the court to dismiss the complaint on the basis of the court's choice among plausible alternatives. Assuming that [plaintiff] can adduce sufficient evidence to support its factual allegations, the choice between or among plausible interpretations of the evidence will be a task for the factfinder.

Id. at 190; *see also Starr v. Sony BMG Music Ent.*, 592 F.3d 314, 325 (2d Cir. 2010).

The Fifth Circuit thus contributed further to what the *Evergreen* court recognized as a "slow influx of unreasonably high pleading requirements at the earliest stages of antitrust litigation. . . ." *Evergreen*, 720 F.3d at 44.

The Fifth Circuit's ruling was also contrary to the analysis of the Sixth Circuit in *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452 (6th Cir. 2011). As the *Watson* court explained, though a defendant's refusal to deal may admit of several plausible explanations, "[f]erreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage." *Id.* at 458. The plausibility of alternative explanations "does not render all other reasons implausible." *Id.*

The Fourth Circuit's analysis is also inconsistent with the Fifth Circuit's opinion. *See generally SD3, LLC v.*

Black & Decker (U.S.) Inc., 801 F.3d 412 (4th Cir. 2015), *cert. denied*, 579 U.S. 917 (2016). The Fourth Circuit explained that "[w]hen a court confuses probability and plausibility, it inevitably begins weighing the competing inferences that can be drawn from the complaint. But it is not our task at the motion-to-dismiss stage to determine 'whether a lawful alternative explanation appear[s] more likely' from the facts of the complaint. Post-*Twombly* appellate courts have often been called upon to correct district courts that mistakenly engaged in this sort of premature weighing exercise in antitrust cases." *Id.* at 425.

The Fifth Circuit's approach is also at odds with the decisions by many circuits holding that evidence of actions against self-interest is compelling evidence of conspiracy, more than sufficient to make a conspiracy plausible. As such it rejected the "plus factor" analysis frequently employed at the motion to dismiss or summary judgment stage. Evidence of actions against interest "is perhaps the strongest plus factor indicative of conspiracy." *Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, 201 F.3d 436, 1999 WL 691840, at *10 (4th Cir. 1999); *see also In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 399 (3d Cir. 2015) ("[E]vidence of actions against self-interest means there is evidence of behavior inconsistent with a competitive market."); *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1195 (9th Cir. 2015); William E. Kovacic, et al., *Plus Factors & Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 405 (2011) ("Actions contrary to each defendant's self-interest" is one of the "chief plus factors."). The Fifth Circuit's failure to even consider "plus factors" was at odds with decisions in these circuits.

The Fifth Circuit's decision to ignore even *direct* evidence is also contrary to decisions in many circuits. Other cases have inferred conspiracy from "coverups" or pretextual explanations of the sort revealed here. *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1012 (3d Cir. 1994); *see also Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1374-80 (1992), *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 779 (7th Cir. 1999).

Even those circuits affirming dismissals of antitrust claims did so only where the alternative explanation was "obvious," i.e. unrefuted. As the Ninth Circuit explained in *Name.Space, Inc. v. Internet Corp. for Assigned Names and Numbers*, 795 F.3d 1124 (9th Cir. 2015): "We cannot, however, infer an anticompetitive agreement when factual allegations '*just as easily* suggest rational, legal business behavior.'" *Id.* at 1130 (citations omitted) (emphasis added). Here, the four different specific categories of factual allegations, discussed *supra* at 17-20, cannot possibly "just as easily" suggest "rational, legal business behavior." Indeed no explanation for this behavior (other than the conclusory "made to order" phrase) was even addressed by the Fifth Circuit. Similarly, the Eleventh Circuit dismissed an antitrust claim where independent self-interest completely explained the behavior of the parties. *See Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1342 (11th Cir. 2010).

No circuit, other than the Fifth Circuit, has conflated the existence of an "obvious" alternative explanation for conspiracy with a "probable" or even "possible" alternative explanations. No circuit, other than the Fifth Circuit, has "ferret[ed] out" what it believed to be "the most likely

reason" for the actions alleged at the motion to dismiss phase. As such, the Fifth Circuit's decision provides the most extreme example of what the First Circuit has described as a "slow influx" of summary judgment standards at the motion to dismiss phase. The Fifth Circuit's decision is unique among many other cases where certiorari was denied because it represents far more than such a "slow influx." It exceeds even the summary judgment cases in treating the burden at the motion to dismiss phase identically to what would be assessed at trial if the allegations in question were supported by evidence. This dramatic departure from the careful standard set forth by this Court and many circuits creates a significant and unjustified deterrent to future antitrust cases.

This conflict between the circuits should be resolved by this Court.

II. In Holding that Foreclosure is a Prerequisite to a Conditional Refusal to Deal Claim, the Fifth Circuit Established an Unprecedented Rule Completely at Variance with the Decisions of this Court and the Circuit Courts

The Fifth Circuit held that UHS had failed to state a Section 2 claim because it did not plausibly allege "substantial foreclosure" in the relevant market, "a prerequisite for every exclusive-dealing Section 2 claim," which the Court held is the "functional equivalent" of a conditional refusal to deal. (Pet. Appx. 17a-18a.) The Fifth Circuit's decision clearly conflicts with the precedents of the Supreme Court and at least five circuits.

This Court has frequently made clear that complete foreclosure of any business opportunities, i.e. the complete

unavailability of any inputs or customers, is not necessary for a Section 2 violation. *See Eastman Kodak*, 504 U.S. at 482–83 (holding that it is unlawful to "foreclose competition, to gain a competitive advantage *or* to deny a competitor" (emphasis added)). Similarly, in *Aspen Skiing v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) this Court made clear that it was "concerned with conduct which unnecessarily excludes or *handicaps* competitors," because this can have "the effect of impairing competition." *Id.* at 597 (emphasis added). Unlawful monopolization can result from "practices which *tend to* exclude or *restrict* competition. . . ." *Id.* at 604 (emphasis added).

In *Aspen Skiing*, there was no finding that the plaintiff was foreclosed from competing in the relevant market. One method of distribution – joint lift tickets – was eliminated. In response, the plaintiff "attempt[ed] to develop a substitute product," and that "proved to be prohibitively expensive. As a result, Highlands' share of the relevant market steadily declined after the four-area ticket was terminated." *Id.* at 607-608. As this Court noted, quoting from Professor Bork's "The Antitrust Paradox", "[b]y disturbing optimal distribution patterns one rival can impose costs upon another, that is, force the other to accept higher costs." *Id.* at 604 n.31. Similarly, here, Willis-Knighton's actions disturbed the optimal methods by which a hospital and its medical staff cooperate. That kept UHS from increasing its revenues and cutting its costs. That is more than sufficient for anticompetitive effects, whether or not foreclosure was involved.

The First, Sixth and Tenth circuits have held that anticompetitive conduct is "conduct, other than competition on the merits or restraints reasonably

necessary to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power." *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1182 (1st Cir. 1994), *abrogated on other grounds, Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, (2010); *Realcomp II, Ltd. v. F.T.C.*, 635 F.3d 815, 830 (6th Cir. 2011), *cert. denied*, 565 U.S. 942 (2011); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995), *cert. denied*, 516 U.S. 1044 (1996). *See also* Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 651g (4th ed. 2020). None of these cases even mentions—let alone imposes—a "substantial foreclosure" requirement.

Numerous courts have held, echoing this Court, that foreclosure of competition is one—but hardly the only—source of competitive harm. As the Sixth Circuit held in *Byars v. Bluff City News Co.*, 609 F.2d 843 (6th Cir. 1979), "the use of monopoly power, however lawfully acquired, to foreclose competition, *to gain a competitive advantage*, or to destroy a competitor, is unlawful." *Id.* at 857 n.38 (emphasis added); *see also In re Beltone Elec. Corp.*, 100 F.T.C. 68, 92 (1982) (holding that substantial foreclosure is "only one of several variables to be weighed in the rule-of-reason analysis now applied to all nonprice vertical restraints"). The conduct at issue in *Byars* included, among other things, covering up newspaper racks and disparagement, conduct that does not involve foreclosure. 609 F.2d at 854; *see also Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 784-796 (6th Cir. 2002), *cert. denied*, 537 U.S. 1148 (2003) (conduct included hiding and damaging product racks, and removing racks, some of which were later replaced).

Actions short of foreclosure often have the potential to cause substantial anticompetitive effects. In *Multistate Legal Studies*, the Tenth Circuit held that alleged attempts by a legal studies service to create scheduling conflicts in order to discourage attendance at the plaintiff's workshops gave rise a monopolization claim under Section 2 of the Sherman Act. 63 F.3d at 1553. The Tenth Circuit rejected the argument that "to be actionable, the schedule conflicts had to make it impossible, rather than merely inconvenient, for BAR/BRI students to take PMBR's workshop." *Id.*

A number of other circuit court decisions have found that competitive harm can occur without foreclosure. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1478 (9th Cir. 1997), *aff'd on non-antitrust grounds*, 525 U.S. 299 (1999) (healthcare provider's policy of shifting indigent patients to rivals could have effect of raising their costs); *Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 368 (7th Cir. 1987) (alleged agreement between union and contractors' association under which union would obtain fee from all employers without whom it had collective bargaining agreements, whether or not they were association members, to be paid to the association, probably intended to raise the costs of nonmember contractors).

Most favored nations clauses, which raise prices to rivals, but do not totally foreclose competition, are widely viewed as potentially anticompetitive. *See, e.g.*, Jonathan B. Baker and Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, 27 ANTITRUST, Spring 2013, at 24-25; Jonathan M. Jacobson and Daniel P. Weick, Contracts That Reference Rivals as an Antitrust Category, 11 ANTITRUST SOURCE, April 2012, at 6-7.

Conduct that raises a rival's costs is a well-established antitrust violation. *See Multistate Legal Stud., Inc.*, 63 F.3d at 1553 n.12 (practice could raise competitor's costs, and therefore, "would qualify as anticompetitive conduct"); *Premier Elec. Constr. Co.*, 814 F.2d at 368 (observing that, when defendant "raised its rivals' costs," it "raised the market price to its own advantage"); *Coalition for ICANN Transparency v. VeriSign, Inc.*, 611 F.3d 495, 500-507 (9th Cir. 2010) (actions to harass ICANN in order to cause it to raise its prices could constitute monopolization). As these cases illustrate, costs can be increased, and competition harmed, without completely foreclosing any purchases or sales by the plaintiff-competitor. *See also* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price.*, 96 YALE L.J. 209, 261 (1986) (rivals' costs can be increased by a refusal to deal on advantageous terms).

That analysis applies foursquare in this case. Here, the threatened refusal to deal by Willis-Knighton was directed at LSU Health, not UHS. The threat was not intended to cause LSU Health to cut off all contacts with University Health; LSU Health physicians certainly could not readily completely cease practicing at the hospital at which they were based. The threatened harm was of another sort: that LSU Health would not work with University Health to cut costs, improve productivity, and attract additional physicians, the kinds of cooperative functions in which hospitals and medical staffs typically engage. The harm from such a refusal to cooperate was not foreclosure, but higher costs, fewer physicians on staff, less efficient operations and fewer opportunities to attract business through managed care plans. By dismissing those claims, the Fifth Circuit held – without

any analysis or support – that such actions could not as a matter of law harm competition, no matter what discovery revealed. As such, the Fifth Circuit rejected this Court's requirement of fact-based rulings in antitrust cases in favor of a formalistic rule that made no sense in this (and many other) contexts. "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." *Eastman Kodak*, 504 U.S. at 466–67.

The Fifth Circuit confused a refusal to deal with the plaintiff – a so-called horizontal refusal to deal – with a refusal to deal with a supplier to the plaintiff – a "vertical" refusal to deal, which was at issue in this case. *See* Susan A. Creighton & Jonathan M. Jacobson, *Twenty-Five Years of Access Denials*, ANTITRUST MAG., Fall 2012, at 50-51.

The Fifth Circuit's decision effectively established a rule that any refusal to deal at any stage of the market, whether horizontal or vertical, cannot harm competition unless there is substantial foreclosure. But that makes no sense. A vertical refusal to deal with a supplier of a competitor can, as in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), result in an absolute refusal to deal by the supplier with the competitor. But it can also (as here) pressure the supplier to engage in other disadvantageous behavior which can harm the competitor and thereby, under the right circumstances, harm competition. For example, in addition to the facts presented here, a threat of a refusal to deal could be used to compel a supplier's imposition of a most favored nations clause or discriminatory higher prices on competitors of the monopolist. The Fifth Circuit's ruling would preclude any remedy in these situations.

Effectively, the Fifth Circuit's rule means that no matter how much LSU Health's refusal to cooperate with UHS harmed UHS, and no matter how much that harm impaired overall competition in a market in which Willis-Knighton was the dominant, high-priced hospital, that could not create an antitrust violation as long as UHS was not entirely foreclosed from some portion of a market. If allowed to stand, that decision allows monopolists to unlawfully harm their rivals in any way they choose, whatever the impact, unless there is complete foreclosure of some portion of the market from the rival. There is nothing in the antitrust laws to support that conclusion. The Fifth Circuit's decision drastically truncates the remedies available to victims of monopolization.

III. These Issues Are of Major National Importance

Both these issues will have a major impact on the course of antitrust jurisprudence and antitrust litigation.

The application of *Twombly* to antitrust complaints arises in virtually every claim under Section 1 of the Sherman Act. If courts are permitted to disregard well-pleaded factual allegations in assessing plausibility, many antitrust cases will be ended in their infancy, without any opportunity for plaintiffs to prove their claims. Many district and circuit courts will likely conclude that they are justified in dismissing antitrust cases if they do not find the plaintiffs' factual allegations, though specific and relevant, to be persuasive.

The Fifth Circuit's resolution of the Section 2 issue is equally important. The significance of refusals to deal by a monopolist as a lever to force anticompetitive behavior by

suppliers and customers of the monopolist's competitors has been recognized in antitrust jurisprudence since at least *Lorain Journal*. Under the Fifth Circuit's standard, such coercion would be permissible, as long as the competitor could still purchase inputs and sell to customers. Other anticompetitive uses of refusals to deal, which may severely impede the opportunities of competitors, would become per se legal, notwithstanding their competitive consequences. That would severely circumscribe the scope of the antitrust laws.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 19, 2022

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-30622

BRFHH SHREVEPORT, LLC, DOING BUSINESS AS UNIVERSITY HEALTH SHREVEPORT,

Plaintiff-Appellant,

versus

WILLIS-KNIGHTON MEDICAL CENTER, DOING BUSINESS AS WILLIS-KNIGHTON HEALTH SYSTEM,

Defendant-Appellee.

September 19, 2022, Filed

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 5:20-cv-142

Before SMITH, DUNCAN, and OLDHAM, *Circuit Judges.*

ANDREW S. OLDHAM, *Circuit Judge*:

Appendix A

BRFHH Shreveport sued Willis-Knighton Medical Center for antitrust violations. The district court dismissed the complaint for failure to state a claim. We affirm.

I.

A.

We "accept all well-pleaded facts as true and view them in the light most favorable to the non-movant." *Turner v. Lieutenant Driver*, 848 F.3d 678, 684 (5th Cir. 2017). Here, that's BRFHH Shreveport ("BRF").

We begin by describing the three main players. First is Louisiana State University's medical school in Shreveport, known as "LSU Health Shreveport" or "LSU" for short. LSU long owned and, until 2013, operated a clinical teaching hospital in Shreveport. That hospital was one of six in the city.

Second is BRF. In 2013, LSU hired BRF to operate its Shreveport hospital (along with a separate hospital in Monroe). The hospital then became known as University Health Shreveport ("UHS").[1] BRF ran UHS until 2018, at which point another medical company, Ochsner, took

1. BRF often refers to itself as UHS, which can be confusing. Throughout most of this opinion, the distinction between UHS and BRF isn't important. So we generally use the term "BRF" to refer to both BRF itself and to UHS while under BRF's management. We use the term "UHS" only when the distinction between the hospital and its (former) managing company makes a difference.

its place. Since 2018, an entity jointly owned by LSU and Ochsner has managed the hospital.

Third is Willis-Knighton Medical Center. Willis-Knighton was the largest provider of medical care in the Shreveport area, and it controlled four of the city's six hospitals. It enjoyed a concomitantly large portion of the market share for commercially insured patients. Willis-Knighton regularly made charitable donations to LSU, and LSU depended heavily on those donations.

Less than two years into the BRF/LSU collaboration, the relationship soured. That gave rise to a spate of litigation separate from, but relevant to, the current lawsuit. First, LSU issued a notice of breach to BRF in 2015. *See* Petition for Declaratory Judgment and Injunction at 96, *BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr.*, No. 5:15-cv-2057 (W.D. La. Sept. 28, 2015), ECF No. 77-1 (copy of the July 10, 2015 breach notice, attached as part of a docket entry in the first antitrust suit); *Lake Eugenie Land & Dev., Inc. v. Halliburton Energy Servs. (In re Deepwater Horizon)*, 934 F.3d 434, 440 (5th Cir. 2019) ("We may take judicial notice of prior court proceedings as matters of public record."). Second, BRF sued Willis-Knighton (but not LSU) in July 2015 for antitrust violations. *See* Complaint, *BRFHH Shreveport*, No. 5:15-cv-2057 (W.D. La. July 16, 2015), ECF No. 1. It alleged that Willis-Knighton and LSU made an illegal agreement, wherein LSU would direct its physicians to steer commercially insured patients to Willis-Knighton. Third, LSU filed a state-court lawsuit against BRF. *See* Petition for Declaratory Judgment and Injunction, *supra*

(LSU's initial state-court pleading, attached as a docket entry in the first antitrust suit). LSU alleged that BRF had breached its obligations in various ways and sought to end BRF's management of UHS.

The way BRF tells the story, its 2013 takeover of UHS was massively successful. The hospital had been poorly run and inefficient, but BRF turned things around completely. BRF cut expenses, decreased wait times, increased the quality of care, and so on. Willis-Knighton looked on with envy.

Willis-Knighton began to worry that BRF would threaten its power in the Shreveport healthcare market. Willis-Knighton enjoyed a market share of 75% of commercially insured patients and controlled 80% of primary care physicians during the relevant times. Willis-Knighton's internal documents said that the insurer "Blue Cross [Blue Shield] told another hospital system there is only one health care system they must have in Louisiana: Willis-Knighton." Willis-Knighton's then-CEO even boasted about the company's market power in a 2013 book. On his telling, a significant portion of Willis-Knighton's profits came from its dominant position in the Shreveport healthcare market.

In the spring of 2016, LSU found itself in a budget crisis. It had been running at a deficit of $40 million to $50 million each year since BRF's 2013 takeover of UHS. In 2016, that deficit combined with Louisiana's broader budgetary problems to create at least the perception (and presumably the reality) that LSU desperately needed

more money. LSU asked BRF for a $100 million donation to help close the gap, but BRF couldn't muster the funds.

LSU's crisis and BRF's inability to help gave Willis-Knighton an opportunity. Willis-Knighton decided to take advantage of LSU's situation by conditioning cash donations on LSU's behavior. The alleged approach was carrot-and-stick. The carrot: Willis-Knighton tentatively agreed to give LSU a $50 million donation if LSU backed off on its cooperation with BRF. The stick: Willis-Knighton hinted on several occasions that, if LSU didn't comply, Willis-Knighton would cut off donations.

BRF suggests Willis-Knighton experienced competitive pressure in the Shreveport market as early as 2014. But the complaint plainly alleges that it was not until 2016 that Willis-Knighton made the relevant anticompetitive threats. That's because, even though Willis-Knighton presumably wanted to destroy BRF before then, Willis-Knighton wasn't able to effectively pressure LSU with money until the 2016 budget crisis hit.

LSU subsequently did what Willis-Knighton wanted. The complaint isn't clear as to whether LSU *decreased* its existing cooperative activities with BRF or merely refused BRF's offers to *increase* cooperation. In any event, the complaint does allege specific refusals to cooperate.

BRF then alleges that LSU's non-cooperation harmed it in various ways. The basic idea is that cooperation from LSU would have allowed BRF to decrease costs, provide better care to patients, charge patients and insurers

less, gain market share, and generally outcompete Willis-Knighton. *See infra*, Part II.B.2 (discussing these allegations in more depth).

BRF and LSU parted ways in 2018 when Ochsner took over management of LSU's Shreveport hospital (and the Monroe hospital, for that matter). The Ochsner relationship improved LSU's financial position, and BRF notes that LSU now cooperates with Ochsner in ways it refused to do with BRF. BRF says this shows that, once LSU was no longer strapped for cash, Willis-Knighton's coercive influence faded away.

B.

BRF brought this antitrust suit in federal court. As in its first suit, BRF named Willis-Knighton but not LSU as a defendant. The complaint alleges that Willis-Knighton entered a conspiracy in restraint of trade, in violation of Section 1 of the Sherman Antitrust Act. *See* 15 U.S.C. § 1. It also alleges that Willis-Knighton committed both actual and attempted monopolization, in violation of Section 2 of the Act. *See* 15 U.S.C. § 2.

Willis-Knighton raised four arguments in a motion to dismiss. First, BRF hadn't alleged antitrust injury, which is a component of antitrust standing. *See Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990). Second, BRF failed to state a plausible Section 1 claim. Third, likewise for Section 2. And fourth, the *Noerr-Pennington* doctrine barred BRF's claims. *See E. R.R. Presidents Conf. v. Noerr Motor*

Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965).

The district court dismissed BRF's claims. The court held BRF plausibly alleged an antitrust injury. But for the Section 1 claim, BRF failed to allege an agreement—a fatal defect. As for the Section 2 claim, BRF failed to allege anticompetitive conduct. Thus, even though Willis-Knighton didn't contest its status as a monopolist, the Section 2 claim failed as well. With both claims gone, the court saw no need to rule on the *Noerr-Pennington* issue and declined to do so. BRF timely appealed.

II.

We review a district court's grant of a 12(b)(6) motion *de novo*. *Heinze v. Tesco Corp.*, 971 F.3d 475, 479 (5th Cir. 2020). A complaint cannot survive a motion to dismiss by stating facts "merely consistent with" liability. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The complaint must instead state "a plausible claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). We accept all well-pleaded facts as true and construe the facts in the light most favorable to the non-movant. *Turner*, 848 F.3d at 684. But we don't accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." *In re Great Lakes Dredge & Dock Co.*, 624 F.3d 201, 210 (5th Cir. 2010) (quotation omitted).

We hold (A) BRF's Section 1 claim fails because BRF hasn't plausibly alleged an agreement between Willis-Knighton and LSU. Then we hold (B) BRF's Section 2 claim fails because BRF hasn't plausibly alleged market foreclosure. That's enough for affirmance, so we don't reach antitrust injury or *Noerr-Pennington*. *See McCormack v. NCAA*, 845 F.2d 1338, 1343 (5th Cir. 1988) ("Whether a plaintiff has antitrust standing does not raise a question of jurisdiction on which we are required without exception to satisfy ourselves."); *Pulse Network, LLC v. Visa, Inc.*, 30 F.4th 480, 488 (5th Cir. 2022) (differentiating antitrust standing from Article III standing).

A.

Section 1 of the Sherman Antitrust Act makes unlawful "[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; *see also id.* § 15(a) (Clayton Act provision creating a private cause of action for "any person who shall be injured in his business or property" by antitrust violations, including violations of Section 1). To establish a Section 1 violation, "a plaintiff must show that the defendant[] (1) engaged in a conspiracy (2) that restrained trade (3) in a particular market." *MM Steel, LP v. JSW Steel (USA) Inc.*, 806 F.3d 835, 843 (5th Cir. 2015) (quotation omitted); *see also Golden Bridge Tech., Inc. v. Motorola, Inc.* 547 F.3d 266, 271 (5th Cir. 2008) (providing the same rule statement and elaborating).

Only the first element is relevant here. It's beyond doubt that a conspiracy (or simply an "agreement"—we use the two interchangeably unless otherwise noted) is a necessary condition for Section 1 liability. That's because Section 1 "does not prohibit all unreasonable restraints of trade[,] but only restraints effected by a contract, combination, or conspiracy." *Twombly*, 550 U.S. at 553 (quotation omitted); *see also ibid.* (explaining that "independent decision[s]" aren't actionable under Section 1 (quotation omitted)); *Marucci Sports, LLC v. NCAA*, 751 F.3d 368, 373-74 (5th Cir. 2014) (similar). Notably, though, tacit agreements are still agreements. *See Twombly*, 550 U.S. at 553 ("[T]he crucial question is whether the challenged anticompetitive conduct stems from independent decision *or from an agreement, tacit or express*." (emphasis added) (quotation omitted)).

Threat and accession is one way to form a tacit agreement. In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984), the Supreme Court held that evidence of *A*'s threat to *B*, coupled with *B*'s subsequent buckling to the pressure, could constitute "substantial direct evidence" of an agreement for Section 1 purposes. *Id.* at 765 (emphasis omitted); *see also ibid.* ("Evidence of this kind plainly is relevant and persuasive as to a meeting of minds."). Our court has since elaborated on this threat-and-accession theory. *E.g.*, *Spectators' Commc'n Network Inc. v. Colonial Country Club*, 253 F.3d 215, 220-22 (5th Cir. 2001); *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, 776 F.3d 321, 331-33 (5th Cir. 2015); *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 763-64 (5th Cir. 2002);

MM Steel, 806 F.3d at 844-45. We have always been clear, however, that a threat itself is not enough: *A*'s threat can give rise to an agreement with *B* only if *B* actually gives in and does what *A* wants—and only if *B* gives in *because of A*'s threat. *See, e.g.*, *Viazis*, 314 F.3d at 764.

To our knowledge, this is the first time our circuit has confronted a threat-and-accession case at the 12(b)(6) stage. So we'll pause here to fit the pieces together. A plaintiff proceeding on a threat-and-accession theory must plausibly allege three things: first, that *A* made a threat; second, that *B* subsequently did what *A* wanted; and third, that *B* did so because of *A*'s threat. That third requirement is often the hardest to satisfy. It's not enough to allege that *B*'s behavior was "merely consistent with" caving to the threat. *See Twombly*, 550 U.S. at 557. The plaintiff must do more, providing "allegations plausibly suggesting" that *B* acted in response to the threat rather than out of its own self-interest. *See ibid.*; *Viazis*, 314 F.3d at 764 (affirming a district court's grant of judgment as a matter of law on the ground that the plaintiff hadn't shown the defendant acted "in response to [the relevant] threats" rather than "based on an independent evaluation of its best interests" after "ignor[ing] the threats"); *Abraham & Veneklasen*, 776 F.3d at 333 (similar).

BRF first alleges that Willis-Knighton threatened LSU. The complaint says Willis-Knighton viewed BRF as a dangerous competitor in the Shreveport healthcare market. Willis-Knighton responded by implementing a scheme in 2016 to push BRF out of that market. Willis-Knighton knew about LSU's budget crisis and BRF's

inability to give LSU the needed donations, so it stepped into the breach and offered $50 million in donations. But that money came at a price: Willis-Knighton made clear, in various ways, that it would donate the $50 million *only if* LSU refused to cooperate with BRF and instead increased its cooperation with Willis-Knighton.

BRF next alleges that LSU subsequently did what Willis-Knighton wanted it to do: It cut back on its preexisting cooperation with BRF, refused to undertake new cooperative projects with it, and pivoted towards Willis-Knighton instead. For example, LSU rejected a Blue Cross Blue Shield proposal to include BRF in a care network that would've competed with Willis-Knighton. LSU refused to combine fixed costs like housekeeping with BRF. LSU refused to collaborate with BRF to improve physician productivity. LSU fired a neurosurgeon for working with BRF and failing to send enough patients to Willis-Knighton facilities. And LSU refused to let BRF hire its physicians unless BRF paid an above-market rate. That mattered because LSU's by-laws stipulated that only LSU physicians could practice at UHS. The complaint includes other allegations to this effect, but we needn't recount them all here.

Even if we assume that BRF plausibly alleged those first two parts of a threat-and-accession agreement, BRF still loses on the third.[2] Per BRF's own complaint,

2. BRF's complaint also contains allegations about Dr. Ghali Ghali, who was appointed as LSU's chancellor in 2016. BRF says Ghali was unqualified for the job and functioned as Willis-Knighton's "agent," undermining BRF and responding to Willis-Knighton's whims.

Willis-Knighton's coercion would have been impossible without LSU's recognition that it was in a budget crisis. No crisis, no desperation for cash, no need to give in to threats, no problem. In the complaint's words, Willis-Knighton's campaign "arose in particular as a result of [LSU's] perception of a 'crisis' reflecting a heightened need for additional funds." Further, the complaint says Ochsner's 2018 joint venture and the associated $40 million funding increase to LSU annually "eliminated the source of Willis-Knighton's coercion over LSU." Yet the complaint *also* makes clear that the budget crisis (or at least LSU's awareness of it) didn't happen until 2016—and hence the coercion could not have started before then.[3]

Because we assume for the sake of argument that BRF plausibly alleged noncooperation from LSU, and because Ghali's alleged actions were merely means to the end of non-cooperation, we need not evaluate the plausibility of these allegations. To the extent BRF suggests that Ghali's appointment somehow *independently* establishes an agreement between Willis-Knighton and LSU, we reject the suggestion as an "unwarranted factual inference[]." *Great Lakes Dredge & Dock*, 624 F.3d at 210 (quotation omitted). BRF tries to avoid this result by rewriting its complaint on appeal. Its brief says Willis-Knighton "assert[ed] that it was willing to donate funds to [LSU] only if a person it approved was appointed as LSU's chancellor." But that's not what the complaint says. The complaint merely says Willis-Knighton refused to donate until (a) it knew who the next chancellor would be, and (b) it knew LSU was going to cooperate more than it had in the past.

3. For this reason, it doesn't matter that the complaint contains scattered mentions of Willis-Knighton's pre-2016 behavior. That includes, for example, an allegation that Willis-Knighton's funding strategy was a "longstanding position" and that, in 2012 and 2013,

The problem is that LSU had a completely independent reason for refusing to cooperate with BRF, which *predated* any alleged coercion by Willis-Knighton. Specifically, LSU issued a notice of breach to BRF *in 2015*—the year before LSU's cash crunch and Willis-Knighton's alleged coercion. *See* Petition for Declaratory Judgment and Injunction, *supra*, at 96 (copy of the breach notice, attached as a docket entry in the first antitrust suit). And LSU filed suit against BRF shortly thereafter in Louisiana state court. *See id.* at 1-45 (LSU's initial state-court pleading, attached in the same docket entry). In its initial state-court pleading, LSU accused BRF of "failure to support LSU's teaching mission," "bad-faith negotiation," "failure to complete . . . contemplated transactions," *id.* at 9, "failure to work collaboratively with LSU," *id.* at 18, and failure to "develop[] a financially sustainable business model," *id.* at 33—among many, many other things. LSU sought declaratory and injunctive relief of various kinds, with the dominant theme being a desire to sever its ties with BRF. *Id.* at 41-44. The truth or falsity of these allegations is irrelevant for present purposes; all that matters is that LSU made them and that LSU attempted to cut ties with BRF in 2015.

Willis-Knighton's CEO "stated to the Willis-Knighton Board that Willis-Knighton would only continue its current level of funding to LSU 'provided that [Willis-Knighton] and LSU Health remain partners, not competitors.'" It also includes an allegation that Willis-Knighton told LSU's then-dean in 2015 that, if he attended a meeting with BRF, Willis-Knighton would stop funding LSU.

The complaint is clear that any such moves wouldn't have a meaningfully coercive effect on LSU in the absence of a budget crisis. We take the complaint at its word.

And that's the end of BRF's Section 1 claim. To plead an agreement, BRF needed to plausibly allege that LSU's refusal to cooperate with BRF was a response to Willis-Knighton's threat—as opposed to an ordinary, self-interested decision that BRF wasn't a good business partner. *See Twombly*, 550 U.S. at 557 (allegations "merely consistent with" an agreement aren't good enough); *Viazis*, 314 F.3d at 762. But if LSU tried to cut off BRF before Willis-Knighton's alleged coercion *even began*, then how can LSU's refusals to collaborate with BRF have been a response to the coercion? At the very most, BRF's allegations are consistent with an agreement. But that's not enough. *See Twombly*, 550 U.S. at 557 (laying out "[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement").

Pressed with this point at oral argument, BRF offered two responses. First, even though LSU had already been cooling on its relationship with BRF before Willis-Knighton's alleged threats, the relationship really deteriorated after the threats began. Perhaps that explanation is conceivable. But given LSU's unambiguous efforts to cut ties through state-court litigation, it's not plausible. *See Twombly*, 550 U.S. at 570 ("Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."). Second, BRF asserts that, in the months *after* LSU filed its 2015 state-court lawsuit and *before* Willis-Knighton's coercion began, LSU had decided to continue partnering with BRF after all. And it was only Willis-Knighton's threats that caused LSU to renew its efforts to cut off BRF. But BRF can't muster any reason

(besides, perhaps, wishful thinking) to find that made-to-order account plausible. *See ibid.*

B.

BRF also says Willis-Knighton violated Section 2 of the Sherman Antitrust Act by committing actual and/or attempted monopolization. We (1) lay out the rules governing Section 2 claims and explain that BRF is relying on an exclusive-dealing theory. Then we (2) explain that BRF's failure to plausibly allege market foreclosure is fatal to this theory.

1.

In relevant part, Section 2 bans attempts to monopolize or monopolization of "any part of the trade or commerce among the several States." 15 U.S.C. § 2; *see also id.* § 15 (private cause of action). Unlike Section 1, Section 2 "covers both concerted and independent action." *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 190, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010). But monopolization is harder to establish than the mere restraint of trade that suffices in the Section 1 context. *See ibid.* That's because "[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place." *Verizon Commc'ns Inc. v. Law Off. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004).

The first element of a Section 2 actual-monopolization claim is "possession of monopoly power." *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992); *see also Trinko*, 540 U.S. at 407 (similar). Willis-Knighton didn't contest its monopoly power in the district court, and it doesn't do so now.

Thus, the Section 2 claim in this case turns on the second element: anticompetitive (or "exclusionary") conduct. Anticompetitive conduct is "the use of monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak*, 504 U.S. at 482-83 (quotation omitted); *see also United States v. Griffith*, 334 U.S. 100, 108, 68 S. Ct. 941, 92 L. Ed. 1236 (1948) (similar). Attempted monopolization, of course, is similar but allows for liability even if the monopoly never came to fruition. *See Spectrum Sports v. McQuillan*, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993) (A defendant commits attempted monopolization if it "(1) . . . has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."); *accord Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003).

2.

Within that general framework, plaintiffs avail themselves of various theories in their efforts to establish anticompetitive conduct. *See, e.g.*, *OJ Com. LLC v. KidKraft Inc.*, 34 F.4th 1232, 1244 (11th Cir. 2022) (Pryor, C.J.) (explaining that the plaintiffs "advance[d] two theories of harm in support of" the anticompetitive-conduct element and going on to address each theory separately); *Apani*

Sw., Inc. v. Coca-Cola Enters., 300 F.3d 620, 625-26 (5th Cir. 2002) (similar).

BRF hasn't been entirely clear on its theory here. Based on the complaint and the briefing, the two likeliest candidates are conditional refusal to deal and flat refusal to deal. But at oral argument, BRF expressly waived reliance on the latter. So we limit our analysis to the former.

Despite the long name, conditional refusals to deal are functionally equivalent to exclusive-dealing arrangements. As the Eleventh Circuit has explained, a conditional refusal to deal amounts to "one firm unilaterally refusing to deal with another firm unless some condition is met." *OJ Com.*, 34 F.4th at 1247 (quotation omitted). An exclusive-dealing arrangement is a conditional refusal to deal where the condition is exclusivity. Because of that similarity, the Eleventh Circuit "treats conditional refusals to deal . . . and exclusive dealing as synonymous" for doctrinal purposes. *Ibid.* (quotation omitted). We will do the same here.

BRF says Willis-Knighton refused to deal with (*i.e.*, donate to) LSU unless LSU refused to cooperate with BRF. And on BRF's view, that exclusivity condition was anticompetitive because it aimed to decrease BRF's supply of LSU-trained physicians (and to harm BRF in other ways) thereby excluding it from the Shreveport healthcare market.[4]

4. BRF also suggests that Willis-Knighton attempted to raise BRF's costs. *See* Thomas Krattenmaker & Steven Salop,

Substantial foreclosure is a prerequisite for every exclusive-dealing Section 2 claim. *Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403, 410 (5th Cir. 1962) (citing *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 329, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)); *see also OJ Com.*, 34 F.4th at 1249-50 (applying the substantial-foreclosure requirement to a Section 2 claim and rejecting the argument that substantial foreclosure sometimes is not required). The substantial-foreclosure analysis has three steps. First, identify the relevant product market. Second, identify the relevant geographic market. And third, "show that the competition foreclosed by the arrangement constitutes a substantial share of the relevant market." *Apani*, 300 F.3d at 625 (quotation omitted) (citing *Tampa Elec.*, 365 U.S. at 327-28); *accord*

Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price, 96 Yale L.J. 209 (1986) (arguing that taking actions to raise a rival's costs can sometimes amount to a Section 2 violation). We don't doubt that raised costs can be a form of antitrust injury in cases where the defendant has *already* violated antitrust law in some other way. *See Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 368 (7th Cir. 1987) (Easterbrook, J.) (discussing raised costs along these lines). But we are skeptical of raised costs as a standalone theory. *See* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application § 651 (2022) (describing raising rivals costs as a "sometimes useful but also incomplete definition of exclusionary practices."). Regardless, in *this* case, it's clear that the only way Willis-Knighton might have raised BRF's costs is through its exclusive-dealing arrangement with LSU. BRF's raised-costs argument therefore stands or falls with its exclusive-dealing theory. We need not decide whether raised costs can ever function as a standalone Section 2 theory.

Gurrola v. Walgreen Co., 791 F. App'x 503, 504 n.5 (5th Cir. 2020) (per curiam).

BRF's complaint alleges the first two steps. First, it identifies two relevant product markets: "the market for general acute care inpatient hospital services for commercially insured patients," and the market for "general acute care outpatient services" to commercially insured patients. Second, it identifies "the Shreveport-Bossier City area" as the relevant geographic market. The district court adopted those market definitions for the sake of argument, and Willis-Knighton does not contest them in its briefing.

But BRF hasn't plausibly alleged the third element. An actual-monopolization plaintiff must allege that the defendant's exclusive-dealing arrangement has caused substantial market foreclosure, and an attempted-monopolization plaintiff must allege a "dangerous probability" that it will do so. *Spectrum Sports*, 506 U.S. at 455-56; *see also Tampa Elec.*, 365 U.S. at 327; *Apani*, 300 F.3d at 625. BRF has done neither.

One set of BRF's allegations—that Willis-Knighton's exclusive-dealing arrangement ended up hurting BRF's bottom line—is irrelevant. BRF gives a laundry list of efficiency-enhancing, cooperative BRF/LSU projects that LSU refused to undertake. And it says it would've been significantly better off in a world where those projects came to fruition rather than dying on the vine. But of course, those allegations have nothing to do with BRF's getting shut out of any market at all. So they're irrelevant for foreclosure purposes.

Other allegations do touch on the topic of foreclosure, but they are conclusory. *See Twombly*, 550 U.S. at 557 (conclusory allegations are insufficient). The following paragraph from the complaint is typical:

> But for [Willis-Knighton's] anticompetitive activities, University Health-Shreveport would have been a significantly more successful competitor to Willis-Knighton, and would have reduced Willis-Knighton's dominant market share, permitting more patients to receive care at lower prices. As a result of Willis-Knighton's actions, its market dominance was maintained and enhanced, and competition and the public have been seriously harmed.

Another example: "LSU Health Shreveport's refusal to cooperate in [the area of physician recruitment] directly eliminated competition for Willis-Knighton and stymied [BRF's] ability to directly challenge an important source of Willis-Knighton's dominance." Another: "A portion of the damages to [BRF] resulted from decreased volumes, which also resulted in decreased market share, maintaining and enhancing Willis-Knighton's monopoly power. The remainder of the damages resulted from higher costs, which constrained [BRF] from making more vigorous competitive efforts against Willis-Knighton." BRF also asserts that "[t]he actions described herein reduced [BRF's] share, or prevented [BRF] from increasing its share, in each of the relevant markets by at least" two percentage points—though it doesn't offer any explanation for that conclusion.

Those allegations are little more than high-level assertions about how wonderful things would be if Willis-Knighton hadn't formed an exclusive-dealing arrangement with LSU. They don't tell a coherent story about how the arrangement prevented BRF from providing healthcare services to any portion of the market. In short, they are miles away from plausibly alleging that Willis-Knighton came close to substantially foreclosing the Shreveport healthcare market.

Even if those allegations weren't conclusory, BRF's complaint would still fail. The complaint alleges that Willis-Knighton's exclusive dealing arrangement affected the upstream market for physician services. Then the complaint alleges foreclosure in the downstream medical services market. But BRF doesn't adequately connect the two. After all, it's not as though Willis-Knighton had an exclusive deal with insurers or patients. One could imagine how that sort of arrangement might affect the downstream medical-services market. But as it is, BRF offers no explanation for how Willis-Knighton's exclusive-dealing arrangement with LSU—whose main relevant function seems to be supplying physicians to both Willis-Knighton and BRF—could foreclose the medical-services market.

Perhaps BRF could have avoided this problem by alleging a market for physicians and arguing Willis-Knighton substantially foreclosed *that* market. But BRF can't take that route now for two reasons. First, the complaint already chose which market to allege. And it chose to focus on downstream markets for healthcare services—*not* the upstream market for physicians. BRF

can't change horses midstream. *See Rollins v. Home Depot USA, Inc.*, 8 F.4th 393, 397 (5th Cir. 2021) ("A party forfeits an argument by failing to raise it in the first instance in the district court."). Second, though the complaint asserts that BRF had no choice but to get physicians from LSU, it admits this was a pre-existing "provision in the hospital by-laws." All LSU did was "refuse[] to waive" that provision and refuse to "freely provide courtesy faculty appointments to independent physicians who wished to practice at" BRF. But if the restriction admittedly pre-existed anything Willis-Knighton did, there's no way Willis-Knighton's behavior could have caused it. So even if the restriction threatened substantial foreclosure—which BRF hasn't alleged—BRF still would've failed to plead causation. *See Bell Atl.*, 339 F.3d at 302 (explaining that private antitrust plaintiffs must "establish that it was the defendant's conduct that actually caused" plaintiff's injury).

* * *

BRF failed to state a claim. We therefore need not reach antitrust injury or the *Noerr-Pennington* doctrine.

AFFIRMED.

APPENDIX B — MEMORANDUM RULING OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, SHREVEPORT DIVISION, FILED SEPTEMBER 27, 2021

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF LOUISIANA,
SHREVEPORT DIVISION

CIVIL ACTION NO. 20-142

BRFHH SHREVEPORT, LLC,

VERSUS

WILLIS-KNIGHTON MEDICAL CENTER.

September 27, 2021, Decided;
September 27, 2021, Filed

ELIZABETH E. FOOTE,
UNITED STATES DISTRICT JUDGE.
MAG. JUDGE KAYLA D. MCCLUSKY.

MEMORANDUM RULING

Before the Court is a motion to dismiss filed by the Defendant, Willis-Knighton Medical Center ("Willis-Knighton"). Record Document 20. Willis-Knighton seeks to dismiss the complaint filed by the Plaintiff, BRFHH Shreveport, LLC, which alleges, in broad terms, that Willis-Knighton committed antitrust violations by coercing LSU Health Shreveport to refuse to cooperate

with BRFHH in the operations of its Shreveport hospital. As the Court concludes that the Plaintiff has failed to sufficiently allege antitrust violations in more than a nonspeculative manner, Willis-Knighton's motion to dismiss [Record Document 20] is **GRANTED**.

Background

The Court begins by noting that this is the second antitrust civil action filed by the Plaintiff against this Defendant, the alleged violations stemming from the same acrimonious relationship that has heretofore existed between these two parties. *See BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr.*, 05:15-cv-2057 (W.D. La.) (the "2015 case"). The allegations in the instant case concern a more recent time period than those in the 2015 case and set forth contentions regarding different antitrust activity; nonetheless, the cases generally involve the same players competing in the same relevant market.

I. The Relevant Entities

LSU is a State university with a medical school component which employs physician faculty members throughout the State. Record Document 1 at 5. The faculty physicians treat patients, teach students, and train residents and fellows in their respective fields. *Id.* LSU Health Shreveport is the medical school in Shreveport, Louisiana. *Id.*

Plaintiff BRFHH, doing business as University Health Shreveport ("UHS"), operated University Health Hospital

in Shreveport. Once a state-owned and -operated charity facility, the hospital was operated by BRFHH starting in September of 2013, when LSU, whose neighboring medical school traditionally supplied physicians for UHS, and the parent entities of BRFHH signed a Cooperative Endeavor Agreement transferring hospital management authority from the State of Louisiana to BRFHH's parent entity. *See generally BRFHH Shreveport v. Willis-Knighton*, 15-cv-2057, Record Document 121. To be discussed in more detail below, the hospital run by UHS is now run by Ochsner (named Ochsner LSU), the result of UHS's sale of its hospital business to Ochsner. Thus, the Plaintiff in this suit is no longer involved in the operations of the current hospital. But, the alleged antitrust conduct in this case preceded that sale and ceased when Ochsner acquired the hospital.

As a result of the 2013 privatization of the hospital, UHS treated a substantial portion of the Shreveport area's indigent population and was dependent upon hospital admissions from LSU physicians. *See id.* One of the underlying issues in the 2015 case stems from the notion that in order for UHS to remain financially viable, a critical, if minority, mass of the patients treated at UHS needed to have private, commercial insurance; the higher reimbursement rates associated with commercial insurance would help offset the relatively low profitability of treating the indigent. *See id.*

Defendant Willis-Knighton is a competing healthcare provider that operates four hospitals and several free-standing clinics in Shreveport and Bossier City. *See*

id. Besides Willis-Knighton and UHS, a third entity, CHRISTUS Health Northern Louisiana ("Christus") also operates hospitals in the Shreveport and Bossier City area. *See id.* The allegations in the prior suit regard Willis-Knighton's predominate share of the commercially-insured healthcare market, as opposed to the much smaller shares held by UHS and Christus. *See id.* Suffice it to say that UHS and Willis-Knighton were competing healthcare providers, each trying to reduce costs while increasing efficiency and profitability.

II. Post-Privatization

From the commencement of the privatization agreement in 2013 until October of 2018, UHS was LSU Health Shreveport's clinical partner and its teaching hospital. Record Document 1 at 6. The UHS medical staff was limited to LSU Health Shreveport-approved physicians. *Id.* UHS depended upon admissions from those faculty physicians. *Id.*

When UHS took over the hospital from LSU, it took on the lease of the hospital facilities from the State, which owned the buildings on campus and the assets of the hospital. *Id.* at 8. UHS alleges that when it assumed those operations, the hospital was inefficient, experiencing "extraordinarily high overtime use, an absence of productivity standards and management dashboards, and lengthy wait times at clinics." *Id.* UHS submits that once it took over the hospital, it created a much more "effective, efficient and patient-friendly hospital." *Id.* UHS articulates several successful measures it experienced, which can be

summarized as an increase in admissions, an increase in clinic and emergency room visits, improved earnings, and decreased expenses to the State of Louisiana. *Id.* at 9. According to UHS, these improvements attracted more patients to the hospital, which resulted in UHS becoming a significant competitor to Willis-Knighton. *Id.* at 9-10. During this period, UHS and LSU Health Shreveport worked closely together, engaging in weekly meetings, cooperating to improve operations, and enjoying open communications between the department chairs and UHS executives. *Id.* at 15. Taking UHS's allegations as true, in response to UHS's success,

> Willis-Knighton attempted to prevent UHS' competition by implementing a plan to divert LSU Health Shreveport's commercial patients from UHS to Willis-Knighton. Accordingly, UHS filed the 2015 Case. Because of the 2015 Case, Willis-Knighton put its efforts to fully implement this plan on hold. However, . . . in spring of 2016, it commenced a new scheme intended to cause harm to UHS and to keep it from improving its operations and competitiveness, by coercing LSU Health Shreveport into refusing to cooperate with UHS' new initiatives to further improve the hospital and its competitiveness. Willis-Knighton also coerced LSU into an effort to terminate the contract whereby UHS owned and operated the hospital.

Id. at 10. That contention—that Willis-Knighton unlawfully and in violation of antitrust law, coerced LSU

Health Shreveport into refusing to cooperate with UHS in the improved operations of the hospital—is the crux of the instant suit.

A. The Financial Crisis

Historically, Willis-Knighton was a major donor to LSU Health Shreveport; these donations predated the alleged antitrust conduct at the heart of this suit. The parties agree that during the relevant timeframe, LSU Health Shreveport perceived it was facing a significant financial crisis, with a "heightened need for additional funds." *Id.* at 14. Quite simply, LSU Health Shreveport needed an influx of a large amount of money, and it required support from outside sources, lest its school accreditation, amongst other things, be placed at risk. *Id.* at 22 & 26. Willis-Knighton was aware of LSU Health Shreveport's ongoing need for money, shortfalls historically caused by State budget deficits and then more recently related to the privatization of the hospital. The budget crisis allegedly made LSU Health Shreveport susceptible to the whims and demands of Willis-Knighton, the deep-pocket power player in the local healthcare market.

By 2015 and 2016, LSU Health Shreveport desperately needed millions of dollars. It was LSU Health Shreveport's need for continued funding that fueled the alleged antitrust conduct here. The medical school's Vice-Chancellor Victor Yick ("Yick") authored a document conceding that LSU Health Shreveport was in a financial crisis, that it experienced an "operating loss of $40-$50M per year since privatization of the hospital," and that

the "cash reserve can run out in [fiscal year] 2016-17." *Id.* at 27. Consequently, LSU Health Shreveport first approached UHS and requested $100 million in "mission support." *Id.* UHS declined. *Id.* LSU Health Shreveport then turned to Willis-Knighton, asking for a $50 million "mission support" grant. *Id.* Yick later reported that Willis-Knighton "conceptually agreed to provide working capital" to the medical school. *Id.* UHS asserts this statement is evidence that "LSU Health Shreveport believed that it was acting in Willis-Knighton's interest by refusing to cooperate with . . . UHS." *Id.* The alleged lack of cooperation, as well as the inferences UHS draws from LSU Health Shreveport's actions, are discussed in greater detail below.

B. Dr. Ghali

In early 2016, Dr. Ghali Ghali ("Dr. Ghali") was named as interim Chancellor of LSU Health Shreveport and subsequently named the permanent Chancellor. *Id.* at 14 & 21. UHS insists that Willis-Knighton was instrumental in Dr. Ghali's promotion, as Dr. Ghali was otherwise unqualified for such a prominent administrative position. *Id.* at 21. Dr. Ghali was a senior partner in the Willis-Knighton Oral and Maxillofacial Surgery Institute, a member of the Willis-Knighton Physician Network, his primary clinic practice for many years was at Willis-Knighton and his income was determined in significant part by his collections, and Willis-Knighton provided Dr. Ghali's department at LSU Health Shreveport—presumably the Department of Oral and Maxillofacial Surgery—with $1 million or more annually. *Id.* at 20. Dr.

Ghali also allegedly used Willis-Knighton's private plane on occasion. *Id.* Thus, UHS asserts that Dr. Ghali "received substantial benefit from working for Willis-Knighton, and at its direction." *Id.* "Dr. Ghali's appointment as permanent Chancellor cemented Willis-Knighton's control over LSU Health's direction." *Id.* at 22.

According to UHS, after Dr. Ghali assumed his new role, he acted essentially as Willis-Knighton's agent. With Dr. Ghali at the helm, LSU Health Shreveport's administration ceased its cooperation with UHS. *Id.* at 15. Bruce Solomon of LSU Health Shreveport required all UHS communications to go through him and also restricted LSU Health Shreveport department chairs from directly communicating with UHS. *Id.* The weekly meetings were cancelled. *Id.* And, when UHS proposed cooperative initiatives, LSU Health Shreveport refused to participate. *Id.* Its refusal, it is alleged, was entirely against its own self-interest and must, therefore, have resulted from Willis-Knighton's coercion. *Id.*

C. Means of Coercion

1. Allegedly Contingent Funding

UHS contends that Willis-Knighton linked its funding to LSU Health Shreveport's agreement not to cooperate with UHS. That is, Willis-Knighton "would continue to fund LSU Health Shreveport only if LSU Health Shreveport did not support its competitors." *Id.* at 23. According to UHS, Willis-Knighton wanted to eliminate UHS as the hospital operator, or at the very least, ensure UHS could not be competitive. *Id.*

As evidence, UHS cites to a time in 2012 when James Elrod ("Elrod"), the President and CEO of Willis-Knighton, told the Willis-Knighton Board that it would only continue its current level of funding to LSU Health Shreveport if the two entities "remain[ed] partners, not competitors." *Id.* at 23. Also in 2012, there was some indication that Willis-Knighton was aware that if another hospital corporation managed LSU Health Shreveport, Willis-Knighton may encounter an adversarial relationship with LSU Health Shreveport with respect to its market share. *Id.* In 2013, at a Willis-Knighton Board meeting, Elrod said that Willis-Knighton's continued support of the medical school would continue only so long as LSU Health Shreveport did not directly compete with Willis-Knighton and if Willis-Knighton could have some level of oversight. *Id.* In 2014, Willis-Knighton drafted a letter to its employees that said that UHS would begin "seeking to draw private patients from Willis-Knighton and Christus Highland. So the LSU hospital that once was an ally is now a competitor." *Id.* at 24. All of the comments above were made prior to the antitrust activity alleged in this case.

Aside from Elrod's and Willis-Knighton's direct statements about UHS and/or the medical school, UHS also contends that Willis-Knighton had a pattern of stymying LSU Health Shreveport's efforts to work with Willis-Knighton's competitors. *Id.* at 25. In 2015, LSU Health Shreveport's department chairs were invited to meet with UHS and Ochsner on a possible joint venture. *Id.* In testimony in the 2015 case, the LSU Health Shreveport Dean, Dr. Marymont, stated that Willis-Knighton told him that if he went forward with the meeting, Willis-

Knighton would cease funding the medical school. *Id.* Dr. Marymont testified that "on other occasions," Willis-Knighton threatened to pull its funding from LSU Health Shreveport "if it was unhappy with LSU actions." *Id.* The 2015 meeting predates the antitrust activity in this case, as well; and, UHS provides no temporal context for the "other occasions" mentioned by Dr. Marymont.

In 2016, Willis-Knighton gave a PowerPoint presentation to Yick that represented it was aware of the critical funding issues faced by LSU Health Shreveport and that it was willing to increase its funding of programs and services to LSU Health Shreveport if there was "increased cooperation from leadership and the faculty." *Id.* at 26. Willis-Knighton also proposed a consolidation of programs and services with LSU Health Shreveport, though this never occurred. *Id.*

In July of 2016, Yick authored an email to the LSU President and CFO stating that LSU Health Shreveport still needed to raise $50 million in mission support. *Id.* at 29. He stated that Willis-Knighton "is our mother lode" and that the medical school "still [has] work to do with WK." *Id.* Yick's email further opined that LSU Health Shreveport's energy needed to be spent on rebuilding rather than collaborating with UHS and that the medical school needed to "form a sustainable long term partnership" with Willis-Knighton. *Id.* Yick also stated that letters of intent LSU had entered into with other hospitals, aside from Willis-Knighton, were "initially just for cover." *Id.* That Yick felt the need for cover is, according to UHS, proof of LSU Health Shreveport's complicity

in an unlawful scheme. *Id.* Nonetheless, because of the 2015 case, Willis-Knighton never provided the anticipated funding to LSU Health Shreveport. *Id.* at 28.

Lastly, in a 2017 deposition, Elrod agreed that without Willis-Knighton, LSU Health Shreveport would have a difficult time surviving. *Id.* at 22.

2. Noncompliant Physicians

UHS contends that Willis-Knighton engaged in a pattern of threatening non cooperative physicians. *Id.* at 24. In essence, the allegation seems to be that Willis-Knighton would punish physicians who made referrals to non-Willis-Knighton facilities by hiring new Willis-Knighton physicians to compete with those physicians. The new physicians would receive all of the Willis-Knighton referrals, thus creating a "starvation of referrals" to the non-compliant physicians. *Id.* UHS claims that Elrod communicated this threat through the publication of his book, and as such, the entire Shreveport-Bossier healthcare community was made aware of the consequences of competing against Willis-Knighton. *Id.* at 25.

UHS also asserts that Dr. Ghali fired Dr. Anil Nanda ("Dr. Nanda"), the "most renowned physician at LSU Health Shreveport" because Dr. Nanda "did not admit sufficient numbers of patients at Willis-Knighton to satisfy James Elrod, and because he had always cooperated with UHS." *Id.* at 43-44. Elrod allegedly told Dr. Ghali that "the best thing Dr. Ghali ever did was to fire Dr. Nanda

as head of the Neurosurgery Department." *Id.* at 45. The firing of Dr. Nanda is allegedly evidence of one form of retaliation Willis-Knighton had in its arsenal to use against non-compliant physicians.

D. Lack of Cooperation

There are myriad ways in which LSU Health Shreveport allegedly refused to cooperate with or acted to undermine UHS, including: (1) its refusal to combine fixed overhead activities to reduce costs; (2) its refusal to participate in a narrow network product with Blue Cross; (3) its refusal to improve productivity, efficiency, and quality of care in various departments; (4) its refusal to cooperate in recruitment of new physicians; (5) Dr. Ghali's dismissal of Dr. Jay Marion as Chair of the Department of Medicine and Dr. Nanda as the Chair of the Neurosurgery Department of LSU Health Shreveport; (6) Dr. Ghali's miscellaneous defamatory statements; and (7) LSU Health Shreveport's attempts in 2016 and 2017 to terminate UHS as the owner and operator of the hospital, which caused damage to UHS's reputation. *Id.* at 16-19.[1] UHS contends that LSU Health Shreveport's "conduct was inconsistent with unilateral, self-interested behavior, and can only be explained by [its] acquiescence in and agreement to Willis-Knighton's demands" because "no rational medical school would have undertaken" the actions LSU Health Shreveport did absent "coercion by Willis-Knighton." *Id.* at 19.

1. Not all of these issues are given equal attention in UHS's complaint. Some are mentioned in passing and never discussed again. As such, the Court's analysis will follow suit and focus on the issues to which UHS has given its attention.

In 2018, Ochsner bought an interest in both the Shreveport and Monroe[2] hospitals and created Ochsner LSU. *Id.* at 48. As a result, LSU Health Shreveport received an additional $40 million annually, plus a fifty percent stake in the hospital. *Id.* Allegedly, LSU Health Shreveport now cooperates in initiatives with Ochsner in ways it refused to cooperate with UHS. *Id.* at 49. This is so, UHS asserts, because LSU Health Shreveport is no longer susceptible to Willis-Knighton's coercion. *Id.*

III. The Instant Suit

In 2020, UHS brought this suit, alleging that between 2016 and 2018, Willis-Knighton violated both Section 1 of the Sherman Act, which prohibits concerted activity relating to unreasonable restraints of trade, 15 U.S.C. § 1; and Section 2 of the Sherman Act, which prohibits monopolization and attempted monopolization, 15 U.S.C. § 2. UHS did not name LSU Health Shreveport as a defendant in this matter.

Willis-Knighton has filed the instant motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). It argues that there are five principal reasons to dismiss UHS's claims. First, UHS has not established antitrust injury, a threshold requirement for a plaintiff in any antitrust claim. Record Document 20-1 at 11. Second, UHS has not sufficiently alleged an agreement or conspiracy between LSU Health Shreveport and Willis-Knighton,

2. University Hospital Conway was located in Monroe, Louisiana.

for purposes of Section 1 of the Sherman Act. *Id.* at 14. Third, UHS has not alleged the requisite anticompetitive conduct, that is exclusionary conduct, to sustain its claim under Section 2 of the Sherman Act. *Id.* at 17. Fourth, the First Amendment shields Willis-Knighton's actions from antitrust liability under the *Noerr-Pennington* Doctrine.[3] *Id.* at 21. And fifth, Willis-Knighton is shielded from liability by the State Action Doctrine. *Id.* at 28. Following extensive briefing by the parties, the matter is now ripe for review.

Law and Analysis

I. Federal Rule of Civil Procedure 12(b)(6) Standard

Federal Rule of Civil Procedure 8 requires a short and plain statement of the claim showing the pleader is entitled to relief. A complaint is not required to contain detailed factual allegations, however, "a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal marks and citations omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2008) (internal marks omitted). "A claim has facial plausibility

3. *E. R.R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965).

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.* Plausibility does not equate to possibility or probability; it lies somewhere in between. *See id.* This plausibility requirement "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* However, the complaint cannot be simply "unadorned, the-defendant-unlawfully-harmed-me accusation[s]." *Id.* Plausibility simply calls for enough factual allegations to raise a reasonable expectation that discovery will reveal evidence to support the elements of the claim. *See Twombly*, 550 U.S. at 555-56.

As the Fifth Circuit has explained, in order to survive a 12(b)(6) motion, "the complaint must contain either direct allegations on every material point necessary to sustain a recovery or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 420-21 (5th Cir. 2006) (internal marks and citation omitted). Moreover,

> a statement of facts that merely creates a suspicion that the pleader might have a right of action is insufficient. Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief. The court is not required to conjure up unpled allegations or construe elaborately arcane scripts to save a complaint. Further, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.

Id. at 421 (internal marks and citations omitted).

Although courts generally are not permitted to review materials outside of the pleadings when determining whether a plaintiff has stated a claim for which relief may be granted, there are limited exceptions to this rule. Specifically, a court may consider documents attached to a Rule 12(b)(6) motion to be part of the pleadings if the plaintiff refers to those documents and they are central to the claim. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000); *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004). Additionally, pleadings filed in state or other federal district courts are matters of public record and the Court may take judicial notice of those documents in connection with a Rule 12(b)(6) motion to dismiss. *See Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir. 1994).

II. Antitrust Injury

Willis-Knighton argues that UHS has not sufficiently alleged antitrust injury. Antitrust injury is necessary for a plaintiff to pursue either a Section 1 or Section 2 claim under the Sherman Act. *Jebaco, Inc. v. Harrah's Operating Co.*, 587 F.3d 314, 319 (5th Cir. 2009). Antitrust injury is a component of antitrust standing. Antitrust standing, in turn, is a judicially-created set of threshold requirements that a private plaintiff must show before a court can entertain its antitrust claims. *See Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters* ("AGC"), 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 & n.31 (1983). The three antitrust standing

requirements are "1) injury-in-fact, [i.e.,] an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit." *Sanger Ins. Agency v. HUB Int'l, Ltd.*, 802 F.3d 732, 737 (5th Cir. 2015) (citing *Jebaco*, 587 F.3d at 318). These requirements, which supplement Article III standing requirements, ensure that successful antitrust claims only redress the types of harm that antitrust law was designed to prevent, rather than create a fortuitous windfall for all parties proximate to the defendant, regardless of whether they were injured by anticompetitive conduct. *See AGC*, 459 U.S. at 535.

The second component of antitrust standing, antitrust injury, requires that a plaintiff's injury is "of the type the antitrust laws were intended to prevent and . . . flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977). This means that in an antitrust suit, but-for causation is insufficient. Instead, a plaintiff must be able to trace its injury to the anticompetitive effects of the defendant's antitrust violation. *See id.* Thus, an inquiry into antitrust injury always asks whether there is a causal connection between the alleged injury of the plaintiff and the anticipated anticompetitive effect of the specific practice that allegedly violates antitrust law. *See Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 122 (2d Cir. 2007) ("We can ascertain antitrust injury only by identifying the anticipated anticompetitive effect of the specific practice at issue and comparing it to the actual injury the plaintiff alleges.").

UHS contends that Willis-Knighton's unlawful conspiracy targeted UHS's business in order to stymie competition and increase its monopoly power in the relevant market. Taking UHS's allegations as true, as a result of Willis-Knighton's anticompetitive scheme, UHS was not prevented from working with LSU Health Shreveport on pre-established initiatives and programs, but rather it was restrained from improving and becoming more competitive in other areas and on other healthcare measures. Stated another way, Willis-Knighton's anticompetitive intention was to restrict UHS's ability to compete with it, which could have resulted in diminishing Willis-Knighton's predominance in the local healthcare market. Consequently, UHS alleges, Willis-Knighton restrained competition by hindering UHS's ability to work with its physicians on measures which ultimately would have decreased costs, improved quality of care, or ensured and/or increased access to care.[4] So viewed, UHS's

4. Many of the areas in which UHS claims LSU Health Shreveport refused to cooperate are insufficient for purposes of establishing antitrust injury. For example, the litany of ways in which the two entities could have shared costs, coordinated on a drug formulary, or established an outpatient imaging center, allegedly would have decreased costs or increased profitability. For these, there is no suggestion that they would have harmed, or in the converse, helped patients or the consumer market. The Court will not consider those allegations for purposes of assessing whether UHS has alleged an antitrust injury, as the antitrust laws protect competition, not the competitor. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993). The Court is concerned with harm to UHS only insofar as that harm resulted in a concomitant effect upon consumer costs, the quality of care, access to care, and patient choice. With that in mind, the Court

competitive disadvantage "fall[s] within the conceptual bounds of antitrust injury, whatever the ultimate merits of its case." *Doctor's Hosp. v. Southeast Medical Alliance*, 123 F.3d 301, 305 (5th Cir. 1997) (finding antitrust injury, for purposes of standing, was aptly demonstrated by plaintiff, a direct competitor of the alleged monopolist who colluded with a third party to remove plaintiff from the relevant market and weaken its competitive state). Therefore, the Court finds that UHS has sufficiently alleged antitrust injury for standing purposes.

III. Section 1 of the Sherman Act

Title 15, United States Code, Section 1 prohibits any contract, combination, or conspiracy that unreasonably restrains trade. Over a century of Supreme Court interpretation of Section 1 has distilled its expansive definition into a number of well-recognized causes of action, such as vertical and horizontal price fixing, tying agreements, and exclusive dealing agreements. Holmes and Mangiaracina, Antitrust Law Handbook § 2.2. Here, UHS's complaint does not coherently describe one of the more familiar antitrust allegations, however, its opposition to the motion to dismiss clarifies that it has alleged an unlawful vertical integration.

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deems sufficient the allegations regarding the narrow insurance network, co-management of certain departments, improvements upon physician productivity, recruitment of or privileges to new physicians, staffing of clinics, Dr. Nanda's termination, and improved clinical documentation.

Appendix B

There are three elements of a Section 1 claim: (1) a conspiracy; (2) that restrained trade; (3) in the relevant market. *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 271 (5th Cir. 2008). "Antitrust claims do not necessitate a higher pleading standard and a plaintiff need only plead enough facts to state a claim to relief that is plausible on its face." *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 373 (5th Cir. 2014) (internal marks omitted). Only the sufficiency of the first element—conspiracy—was challenged by Willis-Knighton's motion to dismiss.[5]

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5. Although they are not at issue in this opinion, the Fifth Circuit has set forth the analysis for the other elements:

> Once a plaintiff establishes that a conspiracy occurred, whether it violates § 1 is determined by the application of either the *per se* rule or the rule of reason. The *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason. Moreover, the *per se* rule should only be applied when conduct is so pernicious and devoid of redeeming virtue that it is condemned without inquiry into the effect on the market in the particular case at hand.
>
> Under a rule of reason analysis, the factfinder considers all of the circumstances to determine whether a restrictive practice imposes an unreasonable restraint on competition. The court's considerations should include the restrictive practice's history, nature, and effect and whether the businesses involved have market power. Market power has been defined as the ability to raise prices above those that would be

Appendix B

A. Conspiracy

Willis-Knighton submits that UHS has failed to sufficiently plead a conspiracy between it and LSU Health Shreveport under Section 1 of the Sherman Act. In response, UHS argues that it has adequately alleged that Willis-Knighton threatened LSU Health Shreveport into unlawfully restraining UHS's ability to compete by making Willis-Knighton's monetary contributions contingent upon LSU Health Shreveport's accession to its demands. The Court disagrees.

"Section 1 of the Sherman Act does not proscribe independent conduct." *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 761 (5th Cir. 2002) (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)). Thus, a Section 1 violation requires concerted action. To be sure, "[t]he crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express." *Twombly*, 550 U.S. at 553 (internal marks omitted).

> charged in a competitive market. The rule of reason analysis also requires that the plaintiff show that the defendants' activities injured competition. The rule of reason is designed to help courts differentiate between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest. Regardless of which rule applies, the court's inquiry should ultimately focus upon forming a judgment about the competitive significance of the restraint.

Marucci Sports, 751 F.3d at 374 (cleaned up).

To satisfy this inquiry in the present case, UHS must show that Willis-Knighton "engaged in concerted action, defined as having a 'conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Golden Bridge Tech.*, 547 F.3d at 271 (quoting *Monsanto*, 465 U.S. at 764). Under *Twombly*, to successfully plead a Section 1 claim, the complaint must assert sufficient facts to suggest an agreement was made; that is, enough factual matter "to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly*, 550 U.S. at 556. Parallel business behavior, *i.e.*, parallelism, does not constitute a conspiracy, nor does a "conclusory allegation of agreement at some unidentified point . . . supply facts adequate to show illegality." *Id.* at 556-57. A plaintiff's allegations must plausibly suggest the unlawful agreement, not simply be consistent with an agreement. *Id.* at 557. Without context showing "a meeting of the minds," the defendant's conduct remains "in neutral territory." *Id.*

As a preliminary matter, per the instructions of *Iqbal* and *Twombly*, this Court must disregard the complaint's conclusory and formulaic assertions, as those are not entitled to a presumption of truth. The remaining allegations must then be examined to determine whether they plausibly suggest entitlement to relief. As the district court explained in *Dowdy & Dowdy Partnership v. Arbitron, Inc.*,:

> A "bare allegation of conspiracy" and "a conclusory allegation of agreement at some unidentified point" are insufficient to plead

> illegal antitrust activity. Not only does the naked allegation of a conspiracy, without additional facts, not state a plausible antitrust claim, such conclusory allegations are not entitled to be accepted as true for the purposes of this motion.

Dowdy & Dowdy P'ship v. Arbitron Inc., No. 2:09CV253 KS-MTP, 2010 U.S. Dist. LEXIS 108798, 2010 WL 3942755, at *3 (S.D. Miss. Oct. 6, 2010) (internal citations omitted).

Here, although the complaint repeatedly uses the term "threat," what actually constitutes a threat seems to be a more complicated question than UHS has recognized. Within the context of the case and in light of the way in which the complaint was drafted, the Court finds the use of the term "threat" is a legal conclusion masquerading as a fact. Other problematic areas within the complaint include UHS's allegation that Willis-Knighton threatened to pull its existing financial support if LSU Health Shreveport refused to participate in Willis-Knighton's "scheme" to harm UHS. Record Document 1 at 14. Disregarding the use of the term threat, the allegation is still in peril, as it relies broadly on the existence of a scheme, when one is never sufficiently alleged. UHS also generally alleges that Willis-Knighton made "promises to provide [and] threats to withhold funds based on LSU's acquiescence in its demands . . . ." *Id.* at 22. Again, however, the so-called "demands" are never described in terms that are nonconclusory or nonspeculative. These allegations will not be given the presumption of truth.

Appendix B

The Court has examined UHS's actual factual allegations to determine whether they plausibly state a claim under Section 1 of the Sherman Act. Despite spanning seventy-six pages, the complaint is lacking in detail. "A complaint can be long-winded, even prolix, without pleading with particularity. Indeed, such a garrulous style is not an uncommon mask for an absence of detail." *Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 362 (5th Cir. 2004) (quoting *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 178 (5th Cir. 1997)). UHS's claims of antitrust conspiracy rest on four bases:

> (1) Elrod's involvement: (a) his 2012 statement to the Willis-Knighton Board that it would continue to fund LSU Health Shreveport so long as the two entities remained partners, not competitors; (b) his 2013 comment at a Willis-Knighton Board meeting that Willis-Knighton would continue to support the medical school so long as LSU Health Shreveport's business model was not in direct competition with Willis-Knighton and Willis-Knighton could have some oversight; and (c) his 2017 deposition testimony in which he agreed that the medical school would have a difficult time surviving without Willis-Knighton;
>
> (2) Yick's involvement: (a) Willis-Knighton's 2016 PowerPoint presentation to Yick that represented it was willing to increase its funding of programs and services to LSU Health Shreveport if there was "increased

> cooperation from leadership and the faculty"; (b) Yick's 2016 email stating that LSU Health Shreveport still needed to raise $50 million in mission support, that Willis-Knighton "is our mother lode," and his opinion that LSU Health Shreveport's energy needed to be spent on rebuilding rather than collaborating with UHS; (c) his report that Willis-Knighton had "conceptually agreed to provide working capital" to the medical school; and (d) his statement that letters of intent into which LSU had entered with other hospitals, aside from Willis-Knighton, were "initially just for cover";
>
> (3) Willis-Knighton's referral shortage; and
>
> (4) LSU Health Shreveport's refusals to cooperate with UHS, including Dr. Ghali's statement that he did not enter into a narrow insurance network with Blue Cross because it would have angered Elrod.

As these bases are interdependent, the Court's analysis must view them jointly to determine whether UHS has alleged a plausible Section 1 claim.[6] The Court finds

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6. While the Court has not tightly compartmentalized each set of allegations, analyzed them independently, and wiped the slate clean after each examination, it does note that the Fifth Circuit has expressed doubt as to whether instances of alleged conduct, which individually are not anticompetitive, can be aggregated to be considered cumulatively anticompetitive. *Retractable Techs., Inc. v. Becton Dickinson & Co.*, 842 F.3d 883, 892 (5th Cir. 2016) (citing

that all of UHS's factual allegations suffer from the same deficit: UHS has not pleaded sufficient facts to suggest a prior agreement existed between Willis-Knighton and LSU Health Shreveport to unreasonably restrain trade of medical services. "[R]esisting competition is routine market conduct." *Twombly*, 550 U.S. at 566. As the Supreme Court has explained, when examining a Section 1 claim, "[c]ircumstances must reveal 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" *Monsanto*, 465 U.S. at 764 (quoting *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)). Thus, the Court must determine whether there is concerted action, and if so, whether that concerted action was the result of a meeting of the minds to agree to restrain competition. *See Marucci Sports*, 751 F.3d at 375 (instructing that the "pivotal question is whether the concerted action was a result of an agreement . . . to unreasonably restrain trade.").

Here, the complaint does not allege facts demonstrating an intention on the part of LSU Health Shreveport to engage in a conspiracy. *See id.* at 378-79 (complaint

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with approval *City of Groton v. Conn. Light & Power*, 662 F.2d 921, 928 (2d Cir. 1981) (holding alleged instances of misconduct, none of which is anticompetitive, cannot be cumulatively anticompetitive.)). The *Retractable Technologies* opinion explained that there has been no case since its 1980 decision in *Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1356 (5th Cir. 1980), in which "a congeries of business torts was found so egregious as to constitute actionable predatory or exclusionary conduct." *Id.* Nonetheless, in the instant case, the Court's antitrust analysis has been as coterminous as UHS's complaint and the law allow.

dismissed because plaintiff failed to set forth facts showing a meeting of the minds or any actual agreement among the conspirators). As to the statements made by Elrod to the Willis-Knighton Board in 2012 and 2013, these two statements were made three and four years prior to the alleged antitrust activity in this case. Further, Elrod's comments were made to his own Board, not to LSU Health Shreveport. UHS has not alleged that the statements were ever communicated to LSU Health Shreveport or that LSU Health Shreveport ever learned of them. There is no suggestion that these statements were repeated at a time more contemporaneous with the alleged conspiracy. These statements do not plausibly suggest a conspiracy.

Nonetheless, using the 2016 PowerPoint presentation to Yick, UHS makes inferential leaps to connect Elrod's historical statements to Yick's more contemporaneous comments, thereby deducing a conspiratorial link exists. However, Yick's statements, even when viewed against the backdrop colorfully painted by UHS, still do not plausibly suggest a conspiracy to restrain competition.

UHS argues LSU Health Shreveport was desperate for money and that, in exchange for the money it so badly needed, Willis-Knighton required LSU Health Shreveport to accede to its unlawful, anticompetitive whims by halting UHS's competitive momentum. UHS, however, cannot survive Rule 12(b)(6) scrutiny simply by supplanting its subjective beliefs for facts. There is a paucity of facts to entitle UHS to the inferences upon which its claims are premised. The complaint is silent as to (1) when, where, or how the conspiracy was formed; (2) whether Willis-

Knighton communicated with LSU Health Shreveport about the conspiracy; (3) whether LSU Health Shreveport communicated with Willis-Knighton about the conspiracy; and (4) whether they shared a common intent or meeting of the minds to restrain trade.

UHS points out that it is not required to set forth a "specific time, place, or person" for its conspiracy allegations. *See In re Pool Prod. Distrib. Mkt. Antitrust Litig.*, 988 F. Supp. 2d 696, 715 (E.D. La. 2013). It is, however, required to "allege the general contours of when an agreement was made, supporting those allegations with a context that tends to make said agreement plausible." *Id.* Like the district court in *Pool Products*, the Court here is unable to infer the "general contours of when the alleged agreement was made or even what, precisely, the agreement was." *Id.* at 719. That is, the Court cannot discern what the agreement was or when it was confected; there is no description of how or under what terms the agreement was reached, nor is there a mention of the extent of the agreement. *See id.* at 721 (noting that "[s]uch vague conspiracy claims rarely pass muster under Rule 8 and *Twombly*") (collecting cases). UHS also argues that it does not need to establish that LSU Health Shreveport communicated with Willis-Knighton on each of its decisions, as LSU Health Shreveport was aware of the overall threat. While it is true that an express agreement on every detail is not required, it is equally true that the law demands more than what is alleged here. There still must be an agreement to a scheme and an agreement to work together to further a common goal. UHS's complaint has failed to satisfy that standard.

As to the alleged starvation of referrals used by Willis-Knighton to threaten non compliant physicians, UHS claims this "threat" was contained within Elrod's book, which was generally available to those in the relevant healthcare market who wanted to read it.[7] The allegation itself lacks context and contour. Even if the book was generally available in the marketplace, UHS alleges no fact from which to infer that LSU Health Shreveport, as an entity, knew of Elrod's statements, knew of the practice generally, felt threatened by it, and felt threatened enough to engage in a conspiracy. Without additional factual context, this allegation is too specious to withstand scrutiny.

As to Elrod's 2017 deposition testimony, his statement does not demonstrate any conspiracy or agreement between Willis-Knighton and LSU Health Shreveport. It is a factual statement, not wholly untrue, provided in a vacuum without any surrounding context. Even when viewed in light of UHS's other allegations, it fails to demonstrate any meeting of the minds or agreement to coerce LSU Health Shreveport into refusing cooperation with UHS.

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7. The Court notes that in the 2015 case, it concluded that Willis-Knighton's control of physician referrals was not anticompetitive under Section 2 of the Sherman Act because it did not lack competition on the merits. *BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr.*, 176 F. Supp. 3d 606, 625-26 (W.D. La. 2016). That is, the practice had a rational business purpose (treatment of more patients) and Willis-Knighton could not have accomplished the acts without the consent and participation of consumers. *Id.* at 625.

Finally, UHS argues that LSU Health Shreveport's refusals to cooperate are each discrete overt acts taken in furtherance of the conspiracy. UHS contends that Dr. Ghali's statement—that entering into a narrow insurance network with Blue Cross would have angered Elrod—is evidence of an overt act taken in furtherance of the conspiracy. An overt act is an act taken in furtherance of a conspiracy only so long as there is, in fact, a conspiracy in existence; otherwise, the act is just an act. Again, UHS has used a broad brush to paint all unfavorable decisions as ones caused by a conspiracy against it. To the contrary, broad brushes and generalized theories of long-standing coercion cannot withstand Rule 12(b)(6) scrutiny.

UHS insists the only reason LSU Health Shreveport would decline its opportunities is if it was coerced by Willis-Knighton because, according to UHS, the decisions were against LSU Health Shreveport's best interests. UHS's case can be summed up thusly there must have been an unlawful agreement to conspire against and harm UHS because UHS cannot otherwise understand why LSU Health Shreveport would not have jumped at the chance to implement all of UHS's good ideas. Yet, LSU Health Shreveport was entitled to decline business endeavors that would jeopardize its relationship with a donor without running afoul of antitrust laws. Indeed, "one might refrain from taking an otherwise profitable step because someone else has the power to make it unacceptably costly . . . such inaction serves the decisionmaker's long-run interest, taking the third party's power into account." *In re Pool Prod. Distrib. Mkt. Antitrust Litig.*, 988 F. Supp. 2d at 718 (quoting 6 Phillip Areeda & Herbert Hovencamp,

Antitrust Law ¶ 1415c (3d ed. 2010)). These allegations, without more, fall short of establishing a conspiracy between Willis-Knighton and LSU Health Shreveport, in which both entities agreed to work together to restrain UHS's ability to compete in the marketplace.

The gravamen of UHS's case is that Willis-Knighton threatened LSU Health Shreveport, LSU Health Shreveport felt threatened and thus agreed to Willis-Knighton's demands, and LSU Health Shreveport refused to cooperate with UHS. Unfortunately, UHS has committed a logical fallacy by (1) observing past behavior by Willis-Knighton, (2) observing a current unfavorable situation with LSU Health Shreveport, and (3) deducing that LSU Health Shreveport's behavior must have been caused by Willis-Knighton. Put in the familiar A + B = C equation, with "A" being Willis-Knighton's "ruthless" competition and "C" being LSU Health Shreveport's rejection of additional joint endeavors, UHS's complaint is missing "B"—that is, the other element that plausibly supports the inference that Willis-Knighton *caused* LSU Health Shreveport's behavior. Under *Monsanto*, there must be a meeting of the minds. The Supreme Court has defined that as something more than mere acquiescence. "A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto*, 465 U.S. at 761. The manufacturer can announce its decision in advance and "refuse to deal with those who fail to comply." *Id.* The downstream entity "is free to acquiesce" in the demand "in order to avoid termination." *Id.* A conspiracy requires "more than a showing that the distributor conformed . . . .

It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Monsanto*, 465 U.S. at 764 n.9.

UHS is required to sufficiently plead an agreement, a meeting of the minds. "Absent any agreement, there is no Section 1 claim, because an anticompetitive agreement is the *sine qua non* of a Section 1 violation." *In re Pool Prod. Distrib. Mkt. Antitrust Litig.*, 988 F. Supp. 2d at 708. Here, what led to LSU Health Shreveport's decision not to engage in additional joint endeavors is sheer speculation. There are insufficient allegations to plausibly suggest that Willis-Knighton actually threatened LSU Health Shreveport and, there is even less to suggest that LSU Health Shreveport entered into an unlawful conspiracy with Willis-Knighton to comply with its demands.

In sum, notably absent from UHS's complaint is the critical linkage between Willis-Knighton and LSU Health Shreveport, in terms of communications, timing, intent, and conduct. Like *Twombly*, UHS's complaint is rife with "legal conclusions resting on the prior allegations." *Twombly*, 550 U.S. at 564. UHS argues that it is entitled to reasonable inferences, which ostensibly should result in a plausible showing of a conspiracy to restrain competition. However, a plaintiff must first allege a fact from which the inferential leap can be made. An inference cannot exist without the underlying premise. In the law, these premises must take the form of nonspeculative allegations of fact. Without those, no reasonable inferences may be drawn at all. *See Marucci Sports*, 751 F.3d at 375

(explaining that when the complaint "presents various conclusory allegations that support one of many inferential possibilities," it falls short of *Twombly's* pleading standards.). The Court finds that UHS has failed to sufficiently plead a claim under Section 1 of the Sherman Act, and therefore this claim shall be dismissed with prejudice.

IV. Section 2 of the Sherman Act

Section 2 of the Sherman Act prohibits the monopolization or attempted monopolization of any trade or commerce.[8] 15 U.S.C. § 2. In contrast to Section 1, Section 2 of the Sherman Act "covers both concerted and independent action, but only if that action monopolizes or threatens actual monopolization, a category that is narrower than restraint of trade." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010) (internal citations and quotations omitted). A defendant is liable for monopolization under Section 2 when it (1) possesses monopoly power[9] and

8. UHS has alleged both monopolization and attempted monopolization in violation of Section 2. These claims are indistinguishable for the purposes of evaluating Willis-Knighton's dismissal arguments. Because anticompetitive conduct is an element of both, *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993), the viability of either claim is dependent upon UHS's ability to sufficiently plead anticompetitive conduct.

9. To establish Section 2 violations asserting monopolization, a plaintiff must define the relevant market. *Doctor's Hosp.*, 123 F.3d at 311. The Court assumes for present purposes that the healthcare

(2) achieves or maintains its monopoly power through anticompetitive conduct. *See* 15 U.S.C. § 2; *Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko*, 540 U.S. 398, 407-08, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004); *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 522 (5th Cir. 1999) (the monopolist must have "acquired or maintained that power wilfully, as distinguished from the power having arisen and continued by growth produced by the development of a superior product, business acumen, or historic accident.") (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)).

A. Anticompetitive Conduct

As to the first element, Willis-Knighton's pleadings do not address, and thus do not challenge, whether it possesses monopoly power. As such, this Court will assume arguendo that UHS has successfully alleged facts demonstrating that Willis-Knighton possesses monopoly power.

Willis-Knighton instead focuses on the second element, arguing that UHS's complaint has failed to sufficiently plead anticompetitive conduct. The necessity of proving anticompetitive conduct, in addition to monopoly power, reflects federal courts' judgment that in the short term, the monopolist's ability to charge above-market prices invites more, rather than less, competition. *Trinko*, 540 U.S. at

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market in the Shreveport-Bossier City area is a relevant antitrust market.

407 ("The opportunity to charge monopoly prices . . . induces risk taking that produces innovation and economic growth."). Thus, while the definition of anticompetitive conduct[10] has many accepted permutations, the essence of the conduct that it makes actionable is the achievement or maintenance of monopoly power by means other than competition on the merits. *See Stearns Airport Equip.*, 170 F.3d at 522 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985) ("If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as [anticompetitive].")); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 58-59, 346 U.S. App. D.C. 330 (D.C. Cir. 2001) (to be condemned as anticompetitive under Section 2, the conduct "must harm the competitive process and thereby harm consumers."). In the Fifth Circuit, proving anticompetitive conduct also "[g]enerally" requires "some sign that the monopolist engaged in behavior that—examined without reference to its effects on competitors—is economically irrational." *Stearns Airport Equip. Co.*, 170 F.3d at 523. Hence, UHS must allege exclusionary conduct to survive the instant motion. Under *Twombly*, UHS's complaint must plead facts that, when viewed together, make anticompetitive conduct plausible. *See Twombly*, 550 U.S. at 555; *Assoc. Radio Serv. Co.*, 624 F.2d at 1356.

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10. Courts also label anticompetitive conduct exclusionary conduct, predatory conduct, and improper conduct. *See Taylor Pub. Co. v. Jostens, Inc.*, 216 F.3d 465, 475 n.2 (5th Cir. 2000) ("We use the terms 'predatory' and 'exclusionary' interchangeably . . . .").

The key factor in the inquiry is "the proffered business justification for the act. If the conduct has no rational business purpose other than its adverse effects on competitors, an inference that it is exclusionary is supported." *Clean Water Opportunities, Inc. v. Willamette Valley Co.*, 759 F. App'x 244, 248 (5th Cir. 2019) (quoting *Stearns Airport Equip. Co.*, 170 F.3d at 522). Nonetheless, as the Fifth Circuit has cautioned, "not all unfair conduct—even by a monopolist and a fortiori by one who is not—fits within the prohibition of § 2. Conduct must not only be inconsistent with competition on the merits, it must also have the potential for making a significant contribution to monopoly power." *Taylor Pub. Co.*, 216 F.3d at 475-76 (quoting 3A Areeda & Hovencamp ¶806d, at 331). The rationality of the defendant's business decision is a significant, yet not dispositive, factor in ascertaining whether conduct is exclusionary. *Clean Water Opportunities*, 759 F. App'x 248. Under *Stearns*, courts are also to consider whether the exclusionary conduct required the active approval of the consumer or whether there was the potential existence of bribery or threats that tainted an otherwise independent business decision. *See Stearns Airport Equip.*, 170 F.3d at 524-27.

In the instant case, UHS's efforts to allege anticompetitive conduct under Section 2 fall short for the same reason its Section 1 claim failed. In short, its claim hinges on speculation and subjective beliefs, not facts and the reasonable inferences to be drawn therefrom. Setting aside UHS's bare allegations, legal conclusions, and speculation, the lack of actual facts in the complaint makes it nearly impossible to define what Willis-Knighton even

did that is deemed exclusionary. Several years before the antitrust violations allegedly occurred, Willis-Knighton told its Board members that it would not fund a competitor. Three to four years later, Yick stated that Willis-Knighton conceptually agreed to provide the hospital with funding. Prior to and during this time was the pervasive, long-term threat of a referral starvation. Despite these allegations, the complaint fails to enunciate or describe any acts taken by Willis-Knighton that this Court could use to dissect whether Willis-Knighton acted anticompetitively, or rather, whether this was just business—unfair, tortious, or otherwise. There is, in fact, a great distinction between antitrust activity and victorious, if unrelenting, business practices.[11] Indeed, "[c]ompetition, even the maintenance of monopoly, through superior business acumen is allowed under section 2." *Stearns Airport Equip.*, 170 F.3d at 527.

UHS argues that Willis-Knighton's insistence or demand that LSU Health Shreveport's "medical staff not cooperate with the hospital with which it primarily works" cannot be deemed competition on the merits for antitrust purposes. In doing so, it repeats its familiar refrain that Willis-Knighton's actions were designed to limit UHS's

11. As the Fifth Circuit instructed, the "distinction between unfair conduct and anticompetitive conduct is critical to maintain because the antitrust laws 'do not create a federal law of unfair competition or purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'" *Retractable Techs.*, 842 F.3d at 892-93 (quoting *Brooke Grp. Ltd.*, 509 U.S. at 225) (internal marks omitted). The Supreme Court has stressed that "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." *Brooke Grp.*, 509 U.S. at 225.

competitive abilities. Nonetheless, reurging a conclusory allegation, without more, does not make the allegation plausible. The pleading woes that plagued UHS's Section 1 claim similarly doom its Section 2 claim. UHS's theories are dependent upon a sufficient showing of a threat, or coercion, or even an insistence, all of which lack a plausible showing in the complaint.

Even assuming UHS had sufficiently pleaded a threat or demand regarding Willis-Knighton's donations, Willis-Knighton contends that its business decisions are not anticompetitive. That is, any business would refrain from donating to another if the donee intended to help a competitor harm the donor. UHS counters that "when that 'harm' is simple competition, an action taken to preclude it is classic exclusionary conduct." Record Document 27 at 26. The distinction UHS fails to account for is that an action *taken* to *prevent* competition is different than an action *not taken* because it would *assist* or subsidize the competition. Despite many statements implying the contrary, UHS eventually concedes that the antitrust laws do not require Willis-Knighton to subsidize its own competition. *Id.* at 29. Nonetheless, UHS avers that an "antitrust violation arose when Willis-Knighton indicated that it would only provide funds *contingent* on *anticompetitive* actions." *Id.* (emphasis in original). But here again, the complaint lacks sufficient allegations to plausibly suggest both the contingent nature of the funding, as well as the anticompetitive actions Willis-Knighton allegedly took. The complaint fails to contain the requisite material to nudge UHS's claim over the line from conceivable to plausible as demanded by *Twombly*. For

these reasons, the Court concludes that UHS's complaint has failed to sufficiently allege anticompetitive conduct, and thus its claim under Section 2 of the Sherman Act must fail. This claim shall be dismissed with prejudice.

V. Immunity Arguments

Willis-Knighton has also challenged UHS's complaint on immunity grounds, arguing the shield of both the *Noerr-Pennington* Doctrine as well as the State Action Doctrine. Because the Court finds both Section 1 and Section 2 claims were insufficiently pleaded and cannot survive the motion to dismiss, it need not address Willis-Knighton's remaining contentions.

Conclusion

The Court does not render its decision today based on a disbelief or skepticism of UHS's allegations. Indeed, Rule 12(b)(6) does not countenance such a dismissal on those grounds. Rather, taking the factual allegations as true and making all reasonable inferences in favor of UHS, the Court is nonetheless constrained to find that the complaint has failed to plausibly state a claim for relief. For these reasons, Willis-Knighton's motion to dismiss [Record Document 20] is hereby **GRANTED**. UHS's antitrust violations against Willis-Knighton are **dismissed with prejudice**.

A judgment consistent with the terms of this Memorandum Ruling shall issue herewith.

THUS DONE AND SIGNED this 27th day of September, 2021.

/s/ Elizabeth Erny Foote
ELIZABETH ERNY FOOTE
UNITED STATES
DISTRICT JUDGE

APPENDIX C — STATUTES AND REGULATIONS

Sherman Act Section 1 (15 U.S.C. § 1)

Every 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Appendix C

Sherman Act Section 2 (15 U.S.C. § 2)

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Appendix C

Federal Rule of Civil Procedure 12(b)(6)

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

APPENDIX D — RULING ON EXCEPTIONS OF THE 19TH JUDICIAL DISTRICT COURT PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, DATED NOVEMBER 19, 2015

19TH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA

NO. 642,575 SECTION 27

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE

Versus

BIOMEDICAL RESEARCH FOUNDATION OF NORTHWEST LOUISIANA, INC. BRF HOSPITAL HOLDINGS, LLC, ET AL

RULING ON DEFENDANTS EXCEPTION OF NO CAUSE OF ACTION AND PREMATURITY

This matter came before the court for hearing on November 4, 2015 on the defendants' Exceptions of No Cause of Action and Prematurity. After the hearing, the matter was taken under advisement.

On September 25, 2015 the plaintiff filed a Petition for Declaratory Judgement and Injunction seeking a mandatory injunction ruling of this court mandating that the defendants withdraw from the Cooperative Endeavor Agreement (CEA) entered between the parties on September 30, 2013. The plaintiff has alleged in its

lawsuit that the defendant has breached the public purpose provision of their agreement.

The defendants have filed these exceptions arguing that the plaintiff's petition fails to state a cause of action and that their lawsuit is premature because they have failed to comply with Section 13.4 of the CEA.

The court, after considering the law and evidence denies the defendant's Exception of No Cause of Action and grants the defendant's Exception of Prematurity.

The court after considering the evidence finds that the plaintiff failed to comply with Sections 13.4(b) and 13.4(c) of the Cooperative Endeavor Agreement. The evidence presented proves by a preponderance that the defendants made every attempt possible in light of the circumstances presented by plaintiff's failure to collaborate in order to respond to the breach notice or prepare its corrective action plan. After plaintiffs issued the breach notice, the evidence indicates that they failed to engage in the consultative and executive level negotiation phases of the CEA unless and until the defendants stipulated to and/or agreed to their breach of the "Public Purpose" provision in the CEA. There is no provision in the CEA that requires a stipulation to a breach before entering the required phases of the 13.4 process and failure to engage in the phases mandated by Section 13.4(b) and 13.4(c) in good faith makes the plaintiff's lawsuit premature.

The CEA is replete with provisions that require the parties to exhaust all possible remedies to a breach in

advance of termination and/or withdrawal by a party. In fact, the CEA at issue contains three separate provisions that give the parties time to address and/or cure any alleged breach. These provisions obligate each party to collaborate towards curing any alleged or perceived breach, including a breach of the public purpose as alleged in plaintiff's petition. The Court, in consideration of the totality of evidence presented at the hearing, finds that the plaintiff failed in its obligation under the contract to work collaboratively with the defendant to remedy the alleged public purpose breach. The defendant could not have provided the Corrective Action Plan with an implementation schedule that plaintiff claims they never received as required by the CEA within the time allowed, because the plaintiff failed to engage in any collaborative effort to cure the alleged public purpose breach. This collaborative effort is required by the CEA and plaintiff breached that requirement based upon the evidence presented.

Judgment shall be submitted to the court consistent with this ruling for signature pursuant to Uniform District Court Rule 9.5.

Signed in Chambers on this 19th day of November, 2015.

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TODD W. HERNANDEZ, JUDGE
19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana