No. 23-

IN THE

Supreme Court of the United States

DRU CHOKER, D.V.M. AND
MATTHEW DEMARCO, D.V.M.,

Petitioners,

v.

NATIONAL VETERINARY ASSOCIATES, INC. (NVA)
AND PET EMERGENCY CLINIC, P.S. (PEC),

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW.

Whether a party injured by antitrust behavior leading to a monopolistic end has standing for damage relief under the Sherman Act's 15 U.S.C. §§ 1, 2, and 15.

Whether the court or a jury determines when conspirators' violation of the antitrust act is sufficiently "impending" to inflict injury allowing for damages under the Sherman Act's 15 U.S.C. §§ 1, 2, and 15.

II. PARTIES TO THE PROCEEDING.

Petitioners are Plaintiffs Dru Choker, D.V.M. and Matthew DeMarco, D.V.M. Respondents are Defendants National Veterinary Associates, Inc. (NVA) and Pet Emergency Clinic, P.S. (PEC).

III. LIST OF RELATED PROCEEDINGS.

Related cases are:

Choker v. Pet Emergency Clinic, P.S. by & through Bd. of Directors, No. 2:20-cv-00417-SAB, U.S. District Court for the Eastern District of Washington. Judgment entered Aug. 4, 2022.

Choker v. Pet Emergency Clinic, P.S., Nos. 22-35650, 22-35698, 22-35711, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Dec.26, 2023. Rehearing denied, Feb. 1, 2024.

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IV. PETITION FOR A WRIT OF CERTIORARI.

Petitioners Dru Choker, D.V.M. and Matthew DeMarco, D.V.M. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, included at Appendix 1a-7a.

V. OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Washington *is Choker v. Pet Emergency Clinic, P.S. by & through Bd. of Directors,* No. 2:20-CV-00417-SAB, 2022 WL 3129569 (E.D. Wash. Aug. 4, 2022). Appendix 8a-20a.

The opinion of the Ninth Circuit Court of Appeals is *Choker v. Pet Emergency Clinic, P.S.,* No. 22-35650, 2023 WL 8888632 (CA9 Dec. 26, 2023). Appendix 1a-7a, with rehearing denied February 1, 2024, at Appendix 21a-23a.

VI. BASIS FOR JURISDICTION.

The judgment of the court of appeals was entered on December 26, 2023. The decision denying en banc or rehearing review is dated February 1, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

VII. STATUTES INVOLVED.

The primary statutes at issue are these:

15 U.S.C. § 1. "Trusts, etc., in restraint of trade illegal; penalty."

"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;" and,

15 U.S.C. § 2. "Monopolizing trade a felony; penalty."

"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."
>
> 15 U.S.C. § 15, "Suits by persons injured."

This statute is set forth at Appendix 24a-26a.

VIII. STATEMENT.

Petitioners Dru Choker, D.V.M. and Matthew DeMarco, D.V.M., are animal emergency services veterinarians who were employed by the Respondent Pet Emergency Clinic (PEC), and practicing animal emergency medicine, in Spokane, Washington. On November 15, 2017, Drs. Choker and DeMarco were terminated by PEC from their employment as emergency veterinarians, effective December 31, 2017. 8-ER-2030-31. They had refused to sign a non-compete agreement with PEC, which PEC's Board of Directors was requiring them to sign at the directive of Respondent National Veterinary Associates, Inc. (NVA) as a continuation of discussions between Respondents intended to lead to NVA acquiring PEC. 7-ER-1572, 7-ER-1577, 7-ER-1579. Respondents' discussions for this acquisition had started far earlier, and included on site meetings by April, 2017. 5-ER-1154-1160. Respondents had progressed to the non-compete stage. 8-ER-2030. Upon their termination, Drs. Choker and DeMarco would be competitors to the intended NVA/PEC clinic in Eastern Washington's emergency animal services market. 8-ER-2031, ¶7, ¶10; 12-ER-3089, ¶4.73. At that time, Respondent PEC was the only emergency animal services clinic in Eastern Washington, and it had no competitors in that market. 6-ER-1320. PEC drew its customers and referrals from the fifty-three referring

veterinarian clinics in the relevant market. PEC was owned by fifty-five (55) veterinarian shareholders, among 53 surrounding community clinics. 9-ER-2145; 6-ER-1292. Petitioners were two of the 55 PEC veterinarian shareholders. 9-ER-2145. Respondents began to implement a monopolistic design. By November 29, 2017, NVA confirmed that all fifty-five PEC shareholders' *stock*, including Drs. Choker and DeMarco's stock, would be acquired in the intended acquisition and made subject to geographic and other non-compete restrictions preventing competition with the new PEC/NVA entity. 6-ER-1274, p. 278. A company's acquisition of another company's stock for purposes of lessening competition, or "to tend to create a monopoly" is defined as antitrust behavior. See e.g. 15 U.S.C. § 18 ("Acquisition by one corporation of stock of another" and prohibiting the acquisition of stock "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.").

On November 29, 2017, PEC thereby placed a moratorium on its 55 PEC veterinarian shareholders, including Petitioners Drs. Choker and DeMarco, which would prevent PEC shareholders from returning their stock to PEC to escape the acquisition restrictions, "[I]n light of the current discussions with NVA.'" 2-ER-292 (PEC email to shareholders); 2-ER-293 (Board minutes of December 19, 2017); 8-ER-2032, ¶11. Petitioners understood that the intended restrictions were targeting them through their stock, and intending to prevent their ability to compete with the intended NVA/PEC emergency clinic upon their release from PEC. 8-ER-2030, ¶9; 8-ER-1867-1868. Even if Petitioners could somehow individually

escape stock restrictions by means which Respondents did not offer, NVA would still control the stock of the other 53 veterinarians in the Eastern Washington market. NVA and PEC's control of stock would prevent any of those veterinarians from assisting Petitioners' intended competitor clinic. 8-ER-2037-38, and 11-ER 2780-81 (Merger Agreement, Article 7). NVA acquires entities through a shroud of secrecy of its ownership and management, making it impossible for consumers or other veterinarians to know what veterinary clinics have been acquired by, or are subject to, NVA restraints. 8-ER-2038-39. NVA's monopoly design is complex—it involves the use of multiple subsidiary companies to effect an acquisition. 8-ER-2038; 6-ER-1392; 6-ER-1256, 1257. By December 2017, PEC formed an official committee for the intended NVA sale. 10-ER-2303:8-21. Respondent NVA then began a process of acquiring specialty clinics to restrict specialty services to any competitor, and those specialty clinics happened to be the two tenants of the PEC clinic, PEC shareholders, and, in one case, the President of PEC's Board of Directors. By January 24, 2018, NVA acquired PEC's tenant surgical practice, whose owner was also a PEC shareholder, and a member of PEC's sale committee. NVA employed that surgeon and committee member. 13-ER-3176, 13-ER-3197. That surgical specialist was now prohibited from providing surgical assistance to any NVA/PEC competitor. 13-ER-3183, ¶¶6.2-6.4. By February, 2018, PEC's Board of Directors told Petitioners that the NVA acquisition would impose geographical non-compete restraints on all PEC stockholders, including Petitioners, that "would take us . . . out of Spokane." 8-ER-1876. By March 2018, PEC's Board clarified that the intended non-compete range would be 25 miles from the PEC facility, which would extend across the Washington state line

into the state of Idaho. 8-ER 2032 ¶13. While looking for a building in the Spokane market, on March 2, 2018, Petitioners placed a down payment on a building outside this announced 25-mile zone, which was across the state line in Idaho, to ensure they did not lose a building that could be refashioned into an emergency clinic, as the merger threat evolved. 11-ER-2646; 8-ER-2032, ¶12. Respondents' monopoly design continued in progress. By April 6, 2018, NVA acquired the second PEC tenant—a radiology specialist, also a PEC shareholder, and the President of PEC's Board of Directors. NVA employed that radiologist as well, making radiology services also unavailable to Petitioners as competitors. 13-ER-3225 (contract); 13-ER-3240, ¶6.2.

On May 14, 2018, PEC's president and NVA committed all 55 of PEC's shareholders, including Petitioners, to a formal "Purchase of Stock" Agreement. 7-ER-1743. PEC shareholders were now committed to implement the intended sale which would include a 25-mile anti-competitive restriction on all acquired shareholders' stock, along with referral mandates. 7-ER-1744 ("Non-compete Provisions"). All 55 PEC shareholders, including Petitioners, committed to a closing date of "no later than August 31, 2018." 7-ER-1745 ("Closing"). "By signing this Letter of Intent, Buyer and the Shareholders are agreeing to the urgency to complete the transaction, and that each party will manage their respective lawyers and advisors to do the same." *Id.*

On July 19, 2018, Petitioners' injury manifested. They were unable to obtain radiology and surgical services, which were now owned by NVA, and under continuing threat of the intended market-wide restrictions, including restrictions upon them individually, which were now

being formalized. Petitioners left the market, and signed a $1.4 million loan to begin construction on their new clinic in Idaho. 11-ER-2657; 8-ER-2037-2038, ¶¶32-37. NVA already owned the market's radiology and surgical assistance. The May 8 purchase agreement was being formalized into a merger agreement, and between August through October 2018, the documents constructed reveal an extent and array of anti-competitive restrictions intended to be imposed on the stock of nearly all veterinarians in the market, including Petitioners. 7-ER-1765 (August 17, 2018 Merger Agreement); 11-ER-2760 (October 22, 2018 PEC edits to Merger Agreement). The document contains geographical restrictions preventing assistance to any competitor emergency clinic. 7-ER-1774 (Article 6 Covenants Not to Compete). All 55 veterinarian shareholders were to be prohibited from participating "in any manner" or "rendering services for" any competitor. 7-ER-1775, ¶6.2. The agreement restricts access to PEC/NVA trained employees, to PEC/NVA customers, and to PEC/NVA suppliers. *Id*., ¶6.3, 6.4. The merger was a foregone conclusion. PEC shareholders who controlled 90% of the PEC shares had approved this formal merger agreement. 8-ER-1949 ("sale supported (by the) majority of shareholders controlling 90% of the shares."). NVA would refer to this merger on these terms as a "business expectancy." 7-ER-1759-1760, ¶¶6-8.

On August 13, 2018, Petitioners filed Washington state anti-monopoly damage claims against Respondents in the state superior court. 2-SER-063. Those claims would later evolve to the federal Sherman Act claims before this Court under 15 U.S.C. §§ 1 and 2. Once Petitioners filed their state court lawsuit, however, PEC and NVA suspended the execution of their formal merger agreement. 7-ER-1760, ¶7; 12-ER-2907, ¶7; 11-ER-2878, ¶4.107. Petitioners alleged

that they were already excluded from the market by the antitrust behavior of NVA and PEC in combination. NVA acknowledged that it was using its intended control of PEC stock to exclude Petitioners from competing in the market. NVA countersued Petitioners, alleging that Petitioners were using the anti-monopoly law "so that plaintiffs could develop their own competitive pet emergency business." 7-ER-1759 at ¶5, and 1760 at ¶8. NVA accused Petitioners of "interfering with" NVA's "business expectancy" of the merger. 7-ER-1760, ¶¶7-8.

As of November 9, 2020, Petitioners' claims moved forward in the district court for the Eastern District of Washington. Respondents' merger continues to remain "currently suspended" pending the outcome of this lawsuit. 7-ER-1760, ¶7; 12-ER-2907, ¶4.107; 11-ER-2878, ¶4.107. Petitioners' injury is continuing. They remain excluded from the market. Petitioners cannot return to the Eastern Washington market even to franchise, because the NVA/PEC restrictions are disclosed, and the formal merger agreement is poised for execution. Upon execution at any time, Petitioners would have no referral sources for, or assistance from, 53 community veterinarians and specialists. ER 8-2037-2038, ¶¶32-37.

The district court dismissed Petitioners' Sherman Act claims at summary judgment, holding that Petitioners failed to evidence antitrust injury sufficient for antitrust standing because they were and are not subject to executed agreements made by or between the Respondents. Appendix 18a.

> Plaintiffs can compete in the relevant market because they are not bound by any restrictive

> covenants in the unexecuted employment agreements or merger agreement. Plaintiffs are also no longer shareholders of PEC and therefore could not be bound by restrictions in a future merger agreement between PEC and NVA.

Appendix 18a.

The court of appeals upheld the dismissal. It recognizes that Petitioners are competitors to Respondents:

> Indeed, as Plaintiffs acknowledge in their opening brief, after their termination of employment "Drs. DeMarco and Choker were now fully able to directly compete in the Spokane market."

Appendix 5a.

It concludes, however, that in the absence of executed agreements, Petitioners' exclusion injury was self-inflicted, because they acted prematurely:

> Plaintiffs' allegations are too speculative to confer antitrust standing. . . . It is undisputed that Plaintiffs were never subject to any of the agreements they contend would have excluded them from the Spokane market. Plaintiffs never signed and were never subject to PEC's proposed employment agreement, and NVA's and PEC's proposed shareholder restrictions never took effect because NVA never merged with PEC.

Appendix 5a.

It found that Petitioners' fear of a formalized merger, which caused their injury, is not anti-trust injury, because it was injury from "hypothetical future harm that is not certainly impending:"

> Plaintiffs' assertion of market exclusion damages . . . thus stems from Plaintiffs' fear that PEC and NVA would eventually merge and impose competitive restrictions. However, Plaintiffs 'cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.' *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013).

Appendix 5a.

The court of appeals made fact findings upon disputed evidence, including "finding" that Respondents' merger was not "certainly impending":

> Plaintiffs failed to show that at the time they incurred market exclusion damages, the alleged anti-competitive restrictions from an NVA/PEC merger were certainly impending.

Appendix 6a.

The court of appeals denied rehearing.

Petitioners seek review.

IX. REASONS FOR GRANTING THE PETITION.

A question of exceptional national importance is presented in this case, that being, whether a party injured by antitrust behavior *leading to* a monopolistic end has standing for damage relief under the Sherman Act's 15 U.S.C. §§ 1, 2 and 15. Another question emerges of the same import. Who decides when conspirators' violation of the antitrust act is sufficiently "impending" to inflict the injury allowing for damages under the Sherman Act's 15 U.S.C. §§ 1, 2 and 15? On the first question, this court of appeals' decision conflicts with the *preventive* Congressional goal of the Sherman Act, as interpreted by this Supreme Court. The Sherman Act, 15 U.S.C. §§ 1 and 2, were passed with the goal of the "*prevention* of restraints to free competition in business," which is considered "a special form of public injury." *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 493 (1940) (emphasis added). There is no dispute that injunctive relief is available against threatened loss or damage by others' violation of the antitrust laws, even where there has not yet been injury. 15 U.S.C. § 26 ("Injunctive Relief for private parties; exception; costs"). Injunctive relief is "characteristically available even though the plaintiff has not yet suffered actual injury." *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 130–31 (1969). When seeking injunctive relief, a plaintiff "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Id.* This case asks whether a party injured by antitrust behavior leading to a monopolistic end has standing for damage relief under the Sherman Act's 15 U.S.C. §§ 1, 2, and 15. The plain text of these Sherman Act statutes allows standing for damage relief

to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. §15. Nowhere does that text require an executed merger agreement to inflict injury sufficient for standing. Threats cause economic damage by exclusion, and those threats constitute antitrust behavior, as Petitioners evidenced here, and as discussed *infra*. The court of appeals' holding that threats made as part of a monopoly design in progress cannot cause antitrust injury for purposes of a damage action unless and until final merger documents are signed conflicts with this court's clear precedent on the express preventative purpose of the Sherman Act's antitrust statutes, and the plain text of the antimonopoly statutes. Injury was caused to Petitioners by the Respondents' antitrust behavior in progress, with the monopolistic design announced (Respondents' acquisition of stock to control the market), the details known, and the progression explicitly underway toward the end formalization.

Second, the court of appeals is not a fact finder. At summary judgment stage, the petitioner non-moving parties' 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), ref. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255 (1986); *also ref. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The summary judgment standard of Federal Civil Rule 56 does not change just because the matter under consideration is an antitrust case. The court of appeals finds facts—that in the absence of executed agreements, Petitioners' exclusion injury was self-inflicted, because they acted prematurely: "Plaintiffs' allegations are too speculative

to confer antitrust standing." Appendix 5a. This Supreme Court has indeed refused to "endorse standing theories that rest on speculation about the decisions of independent actors." *Dep't of Com. v. New York,* 139 S. Ct. 2551, 2566 (2019), ref. *Clapper v. Amnesty Int'l USA*, 568 U.S. at 414. This is particularly so with speculation about future unlawful conduct. *Id.*, ref. *Los Angeles v. Lyons,* 461 U.S. 95, 105 (1983). Whether antitrust behavior demonstrably in progress toward an announced goal is speculation, however, is left to a fact-finder to determine upon the evidence at trial. As noted in *Dep't of Com. v. New York*, which involved a bench trial, Respondents may meet a "burden of showing that third parties will likely react in predictable ways" to the questions at hand. Evidence at trial may establish patterns or history, leading to a predictable result. 139 S. Ct. at 2566. This determination is thus a fact-finding. The court of appeals in this instance found that Petitioners' fear of a formalized merger, which caused their injury, is not anti-trust injury, because "Plaintiffs' assertion of market exclusion damages . . . thus stems from Plaintiffs' fear that PEC and NVA would eventually merge and impose competitive restrictions. However, Plaintiffs 'cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.'" Appendix 5a. The court of appeals found that Respondents' merger was not "certainly impending." These are fact-findings. Petitioners met their burden at summary judgment of showing the existence of the monopolistic design, the intended restrictions, the accomplished acquisition of specialty clinics, the design continuing in progress via Respondents' progressive execution of steps leading to the intended final result, and even a 90% shareholder approval of that merger, all causing their

injury. Threats of restrictions were not hypothetical future harm, because the restrictions intended were announced, well-defined, and "impending" as restrictions upon the stock of fifty-five veterinarians in a market. Whether alternatives existed to Petitioners leaving the market is also an issue of fact depending on Petitioners' finances, the nature of the industry, the availability of property, and the true underlying course of the monopolistic design as presented by witnesses to the events. The court of appeals holding conflicts with this Supreme Court's longstanding summary judgment standards, and those standards do not change when considering anti-trust standing. Where and when threats become "significant" and violations "impending" must be determined by a jury, not by a court upon disputed evidence at summary judgment. The decisions made by the court of appeals also conflict with decisions made by other circuits, which uniformly adhere to this Supreme Court's precedent, and apply the plain statutory text. Petitioners ask that this Supreme Court accept review.

A. The court of appeals' decision conflicts with this Supreme Court's precedent on the preventative goal of the Sherman Act.

The text of the Sherman Act is plain. "[E]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Nowhere does that text require that an executed agreement exist between those parties acting in combination and conspiracy to consider those conspirators as engaging in a violation. "[E]very 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." 15 U.S.C. § 2. Nowhere does that text require that an executed agreement be achieved between those acting in combination and conspiracy to show an attempt to monopolize. "[A]ny 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 the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." Nowhere does that text require an executed agreement between those acting in a manner forbidden by the antitrust law before a person may be injured by that behavior. Supreme Court precedent is equally plain. The Sherman Act is preventative. It allows action to "arrest the creation of monopolies in their incipiency and before consummation, meaning any time when the acquisition threatened to ripen into a prohibited effect under the Act." *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. at 597 (acquisition of stock to control a market). Antitrust injury may be shown before competitors are actually driven from the market. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 490 n.14 (holding that competitors "may be able to prove injury before they actually are driven from the market and competition is thereby lessened"). All that is necessary for anti-trust standing is injury that "stems from a competition-reducing aspect or effect of the defendant's behavior." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990). The court of appeals holding that executed agreements are required before anti-trust

injury can exist conflicts with Supreme Court precedent. Even the case cited by the court of appeals as justification for its ruling directs the opposite result. Threatened injury-in-fact results from anticompetitive aspects of proposed conduct where the defendants are capable of inflicting the injury. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986). The Sherman Act's "attempted" monopoly component confirms that conspiratorial behavior leading to a monopoly (that is, a monopolistic design) can inflict injury and is prohibited. 15 U.S.C. §2. What is determinative is whether the anticompetitive behavior that causes injury has the goal of restraints upon or lessening of competition.

In *Apex Hosiery Co. v. Leader*, 310 U.S. at 501, this Court addressed whether the "*effect* of the combination or conspiracy among respondents was a restraint of trade within the meaning of the Sherman Act." (emphasis added). The *Apex* petitioner alleged that respondents conducting a strike at petitioner's factory was a conspiracy in violation of the Sherman Anti-Trust Act under 15 U.S.C. § 1. *Id.*, at 480–81. The *Apex* petitioner prevailed at trial, but this Supreme Court ultimately held that "the combination or conspiracy did not have as its purpose restraint upon competition in the market for petitioner's product." *Id.*, at 501. At trial, the evidence "failed to show an intent on the part of respondents to restrain interstate commerce." *Id.* at 481. The court of appeals in this instance fails to recognize evidence of Respondents' intent as antitrust behavior. See, e.g., 15 U.S.C. § 18. Petitioners' evidence shows that Respondents' agreements made along the way were made "for purposes of lessening competition," or

"to tend to create a monopoly." *Id.*[1] Petitioners evidenced injury (exclusion) inflicted by a monopolistic design in progress. The Sherman Act provides relief where restraints (here, announced restraints in progress) are "intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition." *Apex Hosiery Co.*, at 501. The "effect of the combination or conspiracy among respondents" may be the restraint of trade within the meaning of the Sherman Act. *Id.*, at 501. *Apex Hosiery Co.*, gives the example of a labor organization "being used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices." *Id.* That is precisely akin to Petitioners' evidence here—a combination or conspiracy among Respondents to control stock by acquisition to lessen competition. Petitioners are allowed standing to invoke 15 U.S.C. § 15(a) for damage when they are injured "*by reason of anything forbidden in the antitrust laws.*" 15 U.S.C. § 15(a). Petitioners were injured by announced, definitive, and progressing antitrust behavior.

Moreover, this Supreme Court holds that injury may occur by intended restrictions. In *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 702 (2007), this Court accords antitrust standing to parents whose children "may" be subject to a known intended

1. While unnecessary here, it is recognized that a complaint that alleges 15 U.S.C. §§ 1 and 2 violations based upon asset acquisitions implicates Section 7 of the Clayton Act.1, which "prohibits corporations from asset acquisitions that will lessen competition or tend to create a monopoly." *Gulf States Reorganization Grp., Inc. v. Nucor Corp.*, 466 F.3d 961, 966-967 (2006), ref. 15 U.S.C. §18.

"design." The *Parents Involved* plaintiffs had children who "may be" denied admission to their chosen high schools "when they apply for those schools in the future.'" *Id*., at 718. The respondent Seattle School District argued that the parents lacked standing to challenge the student assignment plan in question "because its current members' claimed injuries are not imminent and are too speculative" because the parents would only be affected "if their children seek to enroll in a high school that is oversubscribed and integration positive." This Supreme Court found that injury existed even where no child had yet been actively subjected to the discriminatory process. "The fact that those children may not be denied such admission based on their race because of undersubscription or oversubscription that benefits them does not eliminate the injury claimed." *Id*., at 702. Injury is caused before litigants are forced into the process itself—"one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff." *Id.*, at 719 (citations omitted). Moreover, Respondents suspending their violative conduct does not alleviate the injury already caused. "Voluntary cessation does not moot a case or controversy unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" 551 U.S. at 719, ref. *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 189 (2000) (quote source omitted). Petitioners showed that Respondents suspended their finalization of their written merger agreement (voluntary cessation) because of Petitioners' lawsuit. Yet the court of appeals holds that Petitioners did not show injury because "NVA's and PEC's proposed shareholder

restrictions never took effect because NVA never merged with PEC." Decision, Appendix 5a. This decision conflicts with this Supreme Court's precedent in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1.* 551 U.S. 701. Initial standing requires "present or threatened injury." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 109 (1998). With future injury, then "clear precedent require(s) that the allegations of future injury be particular and concrete. " *Id.,* at 109. Petitioners evidenced both.

The court of appeals decision conflicts with this Supreme Court's decision in *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, which it cites, but which defines speculative and hypothetical future harm as harm that is not shown to be individualized, or present, or evidenced by *anything.* The *Clapper* plaintiffs presented no evidence of *any* impending or threatened harm to them individually. Conversely, Petitioners Choker and DeMarco evidenced injury from Respondents' antitrust behavior directed at their individual stock and the stock of fifty-three other veterinarian shareholders in a market of only fifty-two veterinary clinics.

The court of appeals' decision conflicts with this Supreme Court's precedent, and with the plain terms of the Sherman Act 15 U.S.C. §§ 1, 2, and 15. Petitioners ask that this Court accept review and reverse the court of appeals.

B. The panel's decision conflicts with Supreme Court precedent prohibiting judicial fact finding at summary judgment, which prohibitions apply to antitrust actions.

The court of appeals ruling presents a question of exceptional importance in conflicting with Supreme Court precedent on the court's role at summary judgment in an antitrust case. Without exception, a court may grant summary judgment only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Issues of, e.g., proximate causation and superseding cause involve application of law to fact, which is left to the factfinder, subject to limited review. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 840–41 (1996). At the summary judgment stage, the non-moving party'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. at 456, ref. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255; also ref. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. at 587. The summary judgment standard of Federal Civil Rule 56 does not change just because the matter under consideration is an antitrust case. The court of appeals finds that in the absence of executed agreements, Petitioners' exclusion injury was self-inflicted, because they acted prematurely: "Plaintiffs' allegations are too speculative to confer antitrust standing." Appendix 5a. This Supreme Court has indeed refused to "endorse standing theories that rest on speculation about the decisions of independent actors." *Dep't of Com. v. New York*, 139 S. Ct. at 2566, ref. *Clapper v. Amnesty Int'l USA,* 568 U.S. at 414. This is particularly so with speculation about future unlawful conduct. *Id.*, ref.

Los Angeles v. Lyons, 461 U.S. 95, 105 (1983). Whether antitrust behavior demonstrably in progress toward an announced goal is speculation, however, is left to a fact-finder to determine upon the evidence at trial. As noted in *Dep't of Com. v. New York*, which involved a bench trial, Respondents may meet a "burden of showing that third parties will likely react in predictable ways" to the questions at hand. Evidence at trial may establish patterns or history, leading to that predictable result. 139 S. Ct. at 2566. This determination of whether action is premature is a fact-finding based upon, e.g., financial strength, the speed and certainty of implementation of the design, and the circumstances of all parties as each step progresses. The court of appeals found that Petitioners' fear of a formalized merger, which caused their injury, is not anti-trust injury, because "Plaintiffs' assertion of market exclusion damages . . . thus stems from Plaintiffs' fear that PEC and NVA would eventually merge and impose competitive restrictions," and that this is Petitioners inflicting harm on themselves "based on their fears of hypothetical future harm that is not certainly impending.'" Appendix 5a. The court of appeals found that Respondents' merger was "not certainly impending." These are fact-findings. The threats of restrictions were not hypothetical future harm, because the threats existed, because the intended restrictions were announced, well-defined, evidenced, and "impending" as restrictions upon the stock of fifty-five veterinarians in a market. The monopolistic design was in progress toward an announced end. Whether alternatives existed to Petitioners' leaving the market in July 2018 is an issue of fact depending on Petitioners' finances, the nature of the industry, the availability of property, and the true underlying course of the monopolistic design as presented by witnesses to the progressing events. The court of

appeals holding conflicts with this Supreme Court's longstanding summary judgment standards. Summary judgment standards do not change when considering anti-trust standing. Where and when threats become "significant" and violations "impending" sufficient to allow for damages under the Sherman Act's 15 USC §§ 1, 2 and 15 must be determined by a jury where genuine issues of material fact exist. Petitioners ask that this Supreme Court accept review.

C. The panel decision conflicts with the plain language of the Sherman Act prohibiting attempts to monopolize. 15 U.S.C. §2. The statute must be enforced as written.

The proceeding involves a question of exceptional importance, because the court of appeals ruling conflicts with the plain language of 15 U.S.C. §2, and thereby 15 U.S.C. §15, which allow damages to private parties injured by attempted but incomplete mergers. "Every person who shall . . . *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, . . . shall be deemed guilty of a felony, . . . " 15 U.S.C. §2 (emphasis added). Attempts "to" monopolize, or combinations "to" monopolize are forbidden in the antitrust laws. Damages are allowed to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. §15. Petitioners were injured by an attempt to monopolize, *and* by behavior intended "to" monopolize, and they have standing under 15 U.S.C. §15. "The statute's plain language authorizes such suits." *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 2 (1989), *overruled on other grounds by Seminole Tribe of Fla. v.*

Fla., 517 U.S. 44 (1996) ("We hold that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power."). A statute's plain language controls as to Congress's intent. *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz,* 601 U.S. 42, 50 (2024).

The court of appeals ruling conflicts with the plain language of the 15 U.S.C. §§2 and 15, and in that regard, it conflicts with this Supreme Court's directive to apply statutes as written. Petitioners ask that this Supreme Court accept review and enforce the plain language of the Sherman Act's 15 USC §§2 and 15.

D. The decision conflicts with other Courts of Appeals who recognize injury from competition-reducing behavior, and apply the proper summary judgment standard.

For the same reasons detailed above, the court of appeals' holding that injury cannot be shown until a completed document exists conflicts with other courts of appeal, which align with the foregoing Supreme Court precedent. The court of appeals' holding conflicts with the Third Circuit's ruling in *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 289 (CA3 2012), ref. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. at 344, *which holds* that a plaintiff suffers antitrust injury if injury "stems from a competition-*reducing* aspect or effect of the defendant's *behavior*." The court of appeals' holding conflicts with the Fourth Circuit's ruling in *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690 710 (CA4 2021), which holds that "[w]hether antitrust injury occurred is a question for the jury to decide." The court of appeals' holding conflicts with

the Fifth Circuit's decision in *Doctor's Hosp. of Jefferson, Inc. v. S.E. Med. All., Inc.,* 123 F.3d 301, 305 (CA5 1997), which recognizes exclusion from a market as injury, and holds that "antitrust injury for standing purposes should be viewed from the perspective of the plaintiff's position in the marketplace," and that "[alleged losses and competitive disadvantage because of its exclusion" from a market "fall easily within the conceptual bounds of antitrust injury, whatever the ultimate merits of its case." The panel's decision conflicts with the Fifth Circuit's decision in *Sanger Ins. Agency v. HUB Int'l, Ltd.*, 802 F.3d 732, 741 (CA5 2015), which holds that, upon the type of evidence presented here, the showing goes "beyond 'the most basic preparatory steps' that we require of nascent competitors," at the summary judgment stage. The panel's decision conflicts with the Seventh Circuit's ruling in *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 467 (CA7 2020), which recognizes that a competitor suffers antitrust injury when that competitor is forced from the market by exclusionary conduct, and that evidence must be viewed in the light most favorable to the non-moving party at summary judgment, without making credibility determinations, or weighing the parties' competing evidence. *Id.,* at 482. The panel's decision conflicts with the Tenth Circuit's holding in *Chase Manufacturing, Inc. v. Johns Manville Corporation,* 84 F.4th 1157, 1168, 1171 (CA10 2023) which confirms that whether threats rise to the level of exclusionary conduct (injury) are genuine issues of material fact to be resolved in favor of the non-moving party at summary judgment. The panel's decision conflicts with the Eleventh Circuit's ruling in *Gulf States Reorganization Grp., Inc. v. Nucor Corp.,* 466 F.3d at 966-967, which notes that exclusion from the relevant market is antitrust injury that satisfies "the requirement

of demonstrating antitrust injury, i.e. injury of the type against which the antitrust laws are designed to protect." The latter holds that exclusion "is inseparable from the alleged harm to competition, and that that it is "this same exclusion from the market that denies consumers the benefit of the pressure to lower prices that would likely accompany the Group's becoming a viable competitor." *Id.*, at 967–68. In these respects, the court of appeals' ruling conflicts with the law of other circuits, and Petitioners ask this Court to accept review.

X. CONCLUSION.

Petitioners ask that their petition for a writ of certiorari be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals with instructions to remand to the district court for further proceedings under the Sherman Act's 15 U.S.C. §§ 1, 2 and 15.

Respectfully submitted this 30th day of April, 2024.

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APPENDIX

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APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 26, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-35650

D.C. No. 2:20-cv-00417-SAB

DRU CHOKER, D.V.M.;
MATTHEW DEMARCO, D.V.M.,

Plaintiffs-Appellants,

v.

PET EMERGENCY CLINIC, P.S.;
NATIONAL VETERINARY ASSOCIATES, INC.,
ACTING ON ITS OWN BEHALF AND THAT OF
NVA PARENT, INC.,

Defendants-Appellees.

No. 22-35698

D.C. No. 2:20-cv-00417-SAB

DRU CHOKER, D.V.M.;
MATTHEW DEMARCO, D.V.M.,

Plaintiffs-Appellees,

Appendix A

v.

PET EMERGENCY CLINIC, P.S.;
NATIONAL VETERINARY ASSOCIATES, INC.,
ACTING ON ITS OWN BEHALF AND THAT OF
NVA PARENT, INC.,

Defendants-Appellants.

No. 22-35711

D.C. No. 2:20-cv-00417-SAB

DRU CHOKER, D.V.M.;
MATTHEW DEMARCO, D.V.M.,

Plaintiffs-Appellees,

v.

NATIONAL VETERINARY ASSOCIATES, INC.,
ACTING ON ITS OWN BEHALF AND THAT OF
NVA PARENT, INC., DEFENDANT-APPELLANT,
AND PET EMERGENCY CLINIC, P.S.,

Defendant.

December 8, 2023, Argued and Submitted,
Seattle, Washington
December 26, 2023, Filed

Appendix A

Appeal from the United States District Court
for the Eastern District of Washington. D.C.
No. 2:20-cv-00417-SAB. Stanley A. Bastian,
Chief District Judge, Presiding.

Before: McKEOWN, N.R. SMITH, and SANCHEZ, Circuit Judges.

MEMORANDUM*

Plaintiffs-Appellants Dru Choker and Matthew DeMarco ("Plaintiffs") are licensed veterinarians who are former employees and shareholders of Defendant-Appellee Pet Emergency Clinic, P.S. ("PEC"). They allege that PEC and Defendant-Appellee National Veterinary Associates, Inc. ("NVA") tried to "create a closed network" for emergency veterinary services in the Spokane area by merging and imposing non-solicitation, mandatory referral, and non-competition agreements on PEC employees and shareholders. Plaintiffs sued PEC and NVA and brought claims under Section 1 and Section 2 of the Sherman Act (15 U.S.C. §1 and §2) and their Washington state analogues (RCW 19.86.030 and RCW 19.86.040).

Plaintiffs appeal the district court's grant of summary judgment over their federal claims. PEC and NVA cross-appeal the district court's refusal to exercise supplemental jurisdiction over Plaintiffs' state antitrust claims. PEC

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

and NVA also conditionally cross-appeal a separate order denying their motions to exclude testimony from Plaintiffs' antitrust expert. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's grant of summary judgment and whether a plaintiff has antitrust standing. *See Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1054 (9th Cir. 1999). We affirm.

1. Plaintiffs contend they suffered antitrust injury when their employment was terminated after they refused to sign PEC's allegedly anticompetitive employment agreements. We have held, however, that "[t]he loss of a job is not the type of injury that the antitrust laws were designed to prevent" because "[a] plaintiff who is neither a competitor nor a consumer in the relevant market does not suffer antitrust injury." *Vinci v. Waste Mgmt., Inc.*, 80 F.3d 1372, 1376 (9th Cir. 1996) (internal citations and quotation marks omitted).[1]

2. Plaintiffs also argue that they suffered an antitrust injury when they were excluded from the Spokane market and compelled to open their emergency veterinarian

1. In its amicus brief, the United States takes no position on the merits of Plaintiffs' claims but notes that *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739 (9th Cir. 1984), allows for the recognition of antitrust standing for dismissed employees under certain circumstances. Plaintiffs now seek to rely on *Ostrofe* to establish antitrust injury. But Plaintiffs did not cite *Ostrofe* either below or in their opening brief before this Court and cannot "raise new issues on appeal to secure a reversal of the lower court's summary judgment determination." *BankAmerica Pension Plan v. McMath*, 206 F.3d 821, 825 (9th Cir. 2000).

clinic in Coeur d'Alene, Idaho. Plaintiffs' allegations are too speculative to confer antitrust standing. An antitrust injury must be the "direct result" of the defendant's conduct. *City of Oakland v. Oakland Raiders*, 20 F.4th 441, 458 (9th Cir. 2021) (citation omitted). Antitrust injury "may not be derivative and indirect" or "secondary, consequential, or remote." *Id.* (quotation marks and citation omitted). Plaintiffs' market exclusion theory does not meet this standard.

It is undisputed that Plaintiffs were never subject to any of the agreements they contend would have excluded them from the Spokane market. Plaintiffs never signed and were never subject to PEC's proposed employment agreement, and NVA's and PEC's proposed shareholder restrictions never took effect because NVA never merged with PEC. Indeed, as Plaintiffs acknowledge in their opening brief, after their termination of employment "Drs. DeMarco and Choker were now fully able to directly compete in the Spokane market." Plaintiffs' assertion of market exclusion damages—"debt, start-up costs, substantial time recreating an emergency hospital, and loss of ongoing income, stress, and hardship"—thus stems from Plaintiffs' fear that PEC and NVA would eventually merge and impose competitive restrictions.

However, Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S.

398, 416, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013).[2] Plaintiffs failed to show that at the time they incurred market exclusion damages, the alleged anti-competitive restrictions from an NVA/PEC merger were certainly impending. Plaintiffs put a down payment on their veterinary clinic in Coeur d'Alene months before a non-binding Letter of Intent between PEC and NVA was signed. Moreover, PEC and NVA could not have forced Plaintiffs (or any unwilling shareholder) to accept restrictions associated with any merger in light of statutory dissenters' rights available under Washington law. *See* RCW 23B.13.020(1)(a). Plaintiffs' market exclusion theory based on the possibility of a merger is simply too attenuated to confer antitrust standing.[3]

3. The district court did not abuse its discretion in declining to exercise supplemental jurisdiction over Plaintiffs' state law antitrust claims. The court was

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2. While *Clapper* analyzed injury in the context of Article III standing, similar principles apply to antitrust standing, which also assesses the directness of the alleged injury. *See Oakland Raiders*, 20 F.4th at 458 (explaining that the second factor in the antitrust standing inquiry "focuses on the chain of causation between the plaintiff's injury and the alleged restraint of trade") (cleaned up).

3. The Government's amicus brief also discusses Plaintiffs' potential status as "nascent" competitors. But as the Government's counsel acknowledged at argument, whether a plaintiff is a nascent competitor does not obviate the separate inquiry whether a plaintiff has suffered antitrust injury sufficient to confer antitrust standing. Because Plaintiffs did not raise any nascent competitor theory before the District Court, we deem the issue waived. *See BankAmerica*, 206 F.3d at 825.

not required to provide an explanation for declining to exercise supplemental jurisdiction when, as here, it cited 28 U.S.C. § 1367(c)(3). *See San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 478 (9th Cir. 1998); *Ove v. Gwinn*, 264 F.3d 817, 826 (9th Cir. 2001).

4. Having affirmed the district court's dismissal of Plaintiffs' claims, we do not reach NVA's and PEC's conditional cross-appeals challenging the district court's orders denying their motions to exclude testimony from Plaintiffs' antitrust expert.

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WASHINGTON, FILED AUGUST 4, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DRU CHOKER, D.V.M.; AND MATTHEW DEMARCO, D.V.M.,

Plaintiffs,

v.

PET EMERGENCY CLINIC, P.S., BY AND THROUGH ITS BOARD OF DIRECTORS; AND NATIONAL VETERINARY ASSOCIATES, INC., ACTING ON ITS OWN BEHALF AND THAT OF NVA PARENT, INC.,

Defendants.

No. 2:20-CV-00417-SAB

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant Pet Emergency Clinic, P.S.' Motion for Summary Judgment as to Antitrust Claims, ECF No. 134, and Plaintiffs Dru Choker and Matthew DeMarco's Counter-Motion for Summary Judgment on Sherman Act Claims, ECF No. 142. The Court heard oral argument on the motions on July 7, 2022

by Video Conference. Plaintiffs Dru Choker and Matthew DeMarco are represented by Mary Schultz. Defendant Pet Emergency Clinic, P.S. ("PEC") is represented by Jeffrey A. Beaver, Brian William Esler, David C. Lundsgaard, and Geoffrey D. Swindler. Defendant National Veterinary Associates, Inc. ("NVA") is represented by James McPhee.

The Court concludes that Plaintiffs lack an antitrust injury and antitrust standing, and therefore, PEC and NVA are entitled to judgment as a matter of law on Plaintiffs' federal antitrust claims. With all federal claims being disposed, the Court declines to retain jurisdiction over the remaining state-law claims. Plaintiffs' causes of action under state law are dismissed without prejudice.

I. Facts[1]

Plaintiffs are former employees and shareholders of PEC, which provides emergency veterinary services in Spokane, Washington. Plaintiffs are also the owners and operators of an emergency veterinary hospital in Coeur d'Alene, Idaho. Plaintiffs allege that PEC violated antitrust laws by entering an illegal conspiracy with NVA. The alleged conspiracy proceeded in two stages.

First, Plaintiffs claim that PEC entered a conspiracy with NVA in violation of the antitrust laws to insert non-compete provisions in Plaintiffs' employment agreements

1. The following facts derive from the parties' respective statements of fact, submitted pursuant to Federal Rule of Civil Procedure 56(c) and Local Civil Rule 56(c)(1).

with PEC, and then terminate Plaintiffs when they refused to sign those agreements.

PEC initially presented the proposed employment agreements to Plaintiffs in June 2017. Between then and November, PEC negotiated with Plaintiffs and other emergency veterinarians over the proposed contracts. A deadline in November was set for the veterinarians to sign the agreements. The agreement included a "moonlighting clause" that provided PEC veterinarians could not, without prior written consent and during the period of their employment with PEC, render veterinary services to any person or firm that was competitive with PEC, or engage in any emergency activity competitive with or adverse to PEC's business. Plaintiffs declined to sign the agreements, and their employment terminated as of December 31, 2017. However, Plaintiffs remained shareholders in PEC until approximately December 2019.

Second, Plaintiffs claim PEC entered into a conspiracy with NVA in violation of the antitrust laws in connection with a proposed merger, and in particular by signing a "Non-Binding Letter of Intent" ("Non-Binding LOI") that included proposed terms that would require selling shareholders to agree "not to compete within a radius of 25 miles of [PEC] or refer such business to any hospital other than [PEC] for a period of five years." Def. SMF, ¶ 7. Plaintiffs claim that they and other emergency veterinarians believed the proposed employment agreements were being required for purposes of the NVA sale.

Appendix B

Beginning in April 2017, PEC discussed a potential purchase of NVA. Despite Plaintiffs' vigorous objections, on February 21, 2018, NVA disclosed an offer to purchase PEC. The offer was rejected, but PEC sent a revised offer on April 3, 2018. On April 16, 2018, NVA also sent the proposed Non-Binding LOI to PEC, which included non-competition, non-solicitation, and referral provisions in connection with the potential sale to NVA. The Non-Binding LOI was signed on May 14, 2018. It provided that a purchase agreement between PEC and NVA would include noncompetition clauses within a 25-mile radius for PEC shareholders as well as prevent shareholders from routinely referring emergency cases to any other hospital for five years.

By August 18, 2018, PEC received a draft of NVA's proposed merger agreement, which contained non-compete and referral obligations like those disclosed in the Non-Binding LOI. PEC returned the proposed merger agreement to NVA with changes on October 22, 2018, which (1) reduced the non-compete obligation to businesses providing overnight emergency veterinary services to small animals within a 15-mile radius, (2) excluded veterinary services consistent with any shareholder's past practice, including operations during evening and weekend hours, and (3) excluded any "exclusive referrals" clause. By October 31, 2018, PEC and NVA ended discussions regarding a potential merger. No final agreement was reached and NVA did not purchase PEC. Plaintiffs claim that these negotiations are merely suspended, and PEC and NVA do not contend that a future merger is precluded.

When NVA disclosed its first offer to PEC, Plaintiffs purchased property in Coeur d'Alene, Idaho to establish their own veterinary hospital, which does business as Emergency Veterinary Hospital ("EVH"). They claim they originally looked for a location in Spokane but declined to go further given the restrictions PEC and NVA were discussing.

II. Summary Judgment Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). There is no genuine issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The moving party has the initial burden of showing the absence of a genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party meets its initial burden, the non-moving party must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248.

In addition to showing there are no questions of material fact, the moving party must also show it is entitled to judgment as a matter of law. *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled to judgment as a matter of law when the non-moving party fails to make a sufficient showing on an essential element of a claim on which the non-moving

party has the burden of proof. *Celotex*, 477 U.S. at 323. The non-moving party cannot rely on conclusory allegations alone to create an issue of material fact. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993). When considering a motion for summary judgment, a court may neither weigh the evidence nor assess credibility; instead, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255.

Where, as here, parties submit cross-motions for summary judgment, '[e]ach motion must be considered on its own merits.'" *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). Accordingly, it is the district court's duty to "review each cross-motion separately . . . and review the evidence submitted in support of each cross-motion." *Id.*

III. Discussion

PEC moves for partial summary judgment on all of Plaintiffs' antitrust claims; that is, their causes of action under Sections 1 and 2 of the federal Sherman Antitrust Act (15 U.S.C. §§ 1, 2) and their Washington state analogues (RCW §§ 19.86.030, 19.86.040). The motion presents two core legal arguments. First, PEC contends that Plaintiffs have failed to assert a cognizable antitrust injury. Second, and relatedly, it argues that Plaintiffs lack antitrust standing.

Plaintiffs also move for summary judgment on their antitrust claims. Plaintiffs contend that they

have proffered sufficient evidence to demonstrate that Defendants engaged in a *per se* unlawful restraint of trade, and their actions are also unlawful pursuant to the rule of reason, in violation of Section 1. Plaintiffs further argue that PEC and NVA's proposed merger, in conjunction with the restrictive terms of the employment agreements, amounts to an attempted monopoly in violation of Section 2.

A. Federal Causes of Action

Section 1 of the Sherman Antitrust Act declares illegal all conspiracies in restraint of trade. 15 U.S.C. § 1. Relatedly, Section 2 of the Sherman Act makes it unlawful for any person to attempt to monopolize. *Id.* § 2. Actions for damages under the Sherman Act, like this one, are authorized by Section 4 the Clayton Antitrust Act. 15 U.S.C. § 15(a); *City of Oakland v. Oakland Raiders*, 20 F.4th 441, 455 (9th Cir. 2021). Section 4 provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained[.]" Despite its apparent breadth, courts have since read limitations into the language of Section 4 on the premise that "Congress did not intend [it] to have such an expansive scope." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1054 (9th Cir. 1999). Now, a plaintiff must demonstrate "antitrust standing." *Oakland Raiders*, 20 F.4th at 455; *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 987 (9th Cir. 2000).

Appendix B

The Supreme Court has identified certain factors for determining whether antitrust standing exists:

> (1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall;
>
> (2) the directness of the injury;
>
> (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and
>
> (5) the complexity in apportioning damages.

Oakland Raiders, 20 F.4th at 455 (quoting *Am. Ad Mgmt.*, 190 F.3d at 1054). A court "need not find in favor of the plaintiff on each factor." *Id.* (quoting *Am. Ad Mgmt.*, 190 F.3d at 1055). Rather, antitrust standing requires a "case-by-case analysis," *Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1996), and a court may "find standing if the balance of factors so instructs." *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356, 1363 (9th Cir. 1986). Nevertheless, the first factor, antitrust injury, is mandatory. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 109, 110 n.5 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *Oakland Raiders*, 20 F.4th at 455; *Am. Ad Mgmt.*, 190 F.3d at 1055.

An antitrust injury is "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990). The Ninth

Circuit has identified four requirements for an antitrust injury: (1) unlawful conduct; (2) causing an injury to the plaintiff; (3) that flows from that which makes the conduct unlawful; and (4) that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt.*, 190 F.3d at 1055. The second and fourth elements are dispositive to this case.

Plaintiffs assert three distinct injuries from PEC and NVA's allegedly anticompetitive conduct. First, Plaintiffs claim they were injured when their employment was terminated after they refused to sign the purportedly unlawful employment agreements.[2] Second, Plaintiffs claim harm because they were compelled to base their business out of Coeur d'Alene, Idaho, as opposed to Spokane, Washington. Third, Plaintiffs claim they are injured because they "remain unable to return to the market," due to risk of an anti-competitive merger. ECF No. 173 at 16. None of these alleged injuries are cognizable antitrust injuries.

Plaintiffs' loss of their jobs does not constitute an antitrust injury. *Vinci v. Waste Management*, 80 F.3d 1372 (9th Cir. 1994). In *Vinci*, the plaintiff owned and operated a waste recycling business that received recyclable materials from Waste Management. *Id.* at 1373. Vinci alleged that Waste Management breached their recycling agreement with the purpose of driving his company out of business. *Id.* at 1373–74. Waste Management subsequently acquired

2. PEC disputes that it "terminated" Plaintiffs, arguing instead that Plaintiffs "quit rather than sign[ ] the proposed employment agreements." ECF No. 162 at 98. The matter need not be resolved here because it is irrelevant to the Court's analysis.

his recycling plant, and hired Vinci as its employee; however, Vinci asserted that the Waste Management fired him when he refused to cooperate in anti-competitive schemes. *Id.* at 1374. Vinci's purported injuries were (1) economic damage to his recycling business, and (2) his employment termination. *Id.* at 1375.

The district court dismissed Vinci's antitrust claims for lack of antitrust standing. *Id.* at 1374. The Ninth Circuit affirmed and held that "[t]he loss of a job is not the type of injury that the antitrust laws were designed to prevent." *Id.* at 1376. Rather, the court reasoned those antitrust laws were intended to "preserve competition for the benefit of consumers in the market in which competition occurs." *Id.* (quotation omitted). Vinci was neither a competitor nor a consumer in his role as an employee, and therefore, his termination did not constitute an antitrust injury. *See id.* As in *Vinci*, Plaintiffs' job termination in this case is not an antitrust injury.

For the same reason, the location selected by Plaintiffs for their business does not constitute an antitrust injury, much more one Plaintiffs can assert in their individual capacities. Plaintiffs claim they were forced to open EVH in a different city due to fears regarding an impending merger. Plfs. SMJ, ¶¶ 333–34. Plaintiffs concede EVH is not a competitor to PEC and NVA, but a competitor in "an entirely new market in Coeur D'Alene, Idaho." Plfs. SMJ, ¶¶ 288.I, 324, 333. EVH is not a competitor to PEC or NVA, and thus, it similarly cannot suffer an antitrust injury. *See Vinci*, 80 F.3d at 1376; *Somers v. Apple*, 729 F.3d 953, 963 (9th Cir. 2013).

Plaintiffs also cannot assert the injury on behalf of EVH. The Ninth Circuit in *Vinci* held that an injury to Vinci's recycling business—even if he was the sole shareholder of the business—was not an injury to himself and did not provide him with antitrust standing. *See id.* In so holding, the court reasoned that "'[i]f shareholders were permitted to recover their losses directly, there would be the possibility of a double recovery, once by the shareholder and again by the corporation.'" *Id.* (quoting *Stein v. United Artists Corp.*, 691 F.2d 885, 896–97 (9th Cir. 1982)).

Relatedly, Plaintiffs' claim that they are unable to enter the Spokane market is not supported by the record and cannot provide Plaintiffs with antitrust standing. Plaintiffs can compete in the relevant market because they are not bound by any restrictive covenants in the unexecuted employment agreements or merger agreement. Plaintiffs are also no longer shareholders of PEC and therefore could not be bound by restrictions in a future merger agreement between PEC and NVA. To the extent Plaintiffs are concerned about how restrictions in a future merger could affect referrals to EVH if it became a competitor in the market, the harm is too speculative and indirect to amount to an antitrust injury to EVH or Plaintiffs as individuals. *See Oakland Raiders*, 20 F.4th at 455. The factors weigh against a finding that Plaintiffs have antitrust standing. *See id.*

Without an antitrust injury, Plaintiffs lack antitrust standing to sue. *Oakland Raiders*, 20 F.4th at 455. Defendants are entitled to summary judgment on the Sherman Act claims.

Appendix B

B. State Causes of Action

The Court declines to retain supplemental jurisdiction over the remaining state-law claims. *See* 28 U.S.C. § 1367(c)(3). Therefore, Plaintiffs' state antitrust, wrongful termination, and breach of contract claims are dismissed without prejudice.

Accordingly, **IT IS HEREBY ORDERED**:

1. Defendant Pet Emergency Clinic, P.S.' Motion for Summary Judgment as to Antitrust Claims, ECF No. 134, is **GRANTED**.

2. Plaintiffs' Counter-Motion for Summary Judgment, ECF No. 142, is **DENIED**.

3. Plaintiffs' Motion to Amend/Correct Complaint, ECF No. 181, is **DISMISSED as moot**.

4. Plaintiffs' Motion to Exclude Defense Expert Keith B. Leffler, ECF No. 60, is **DISMISSED as moot**.

5. The District Court Clerk is directed to **ENTER JUDGMENT** in favor of Defendants, and against Plaintiffs, as to their claims under Section 1 and 2 of the Sherman Antitrust Act.

IT IS SO ORDERED. The District Court Clerk is hereby directed to enter this Order, provide copies to counsel, and **close** the file.

DATED this 4th day of August 2022.

/s/
Stanley A. Bastian
Chief United States District
Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED FEBRUARY 1, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-35650

D.C. No. 2:20-cv-00417-SAB

Eastern District of Washington, Spokane

ORDER

DRU CHOKER, D.V.M.;
MATTHEW DEMARCO, D.V.M.,

Plaintiffs-Appellants,

v.

PET EMERGENCY CLINIC, P.S.; NATIONAL VETERINARY ASSOCIATES, INC., ACTING ON ITS OWN BEHALF AND THAT OF NVA PARENT, INC.,

Defendants-Appellees.

No. 22-35698

D.C. No. 2:20-cv-00417-SAB

Appendix C

DRU CHOKER, D.V.M.;
MATTHEW DEMARCO, D.V.M.,

Plaintiffs-Appellees,

v.

PET EMERGENCY CLINIC, P.S.; NATIONAL VETERINARY ASSOCIATES, INC., ACTING ON ITS OWN BEHALF AND THAT OF NVA PARENT, INC.,

Defendants-Appellants.

No. 22-35711

D.C. No. 2:20-cv-00417-SAB

DRU CHOKER, D.V.M.;
MATTHEW DEMARCO, D.V.M.,

Plaintiffs-Appellees,

v.

NATIONAL VETERINARY ASSOCIATES, INC., ACTING ON ITS OWN BEHALF AND THAT OF NVA PARENT, INC.,

Defendant-Appellant,

Appendix C

and

PET EMERGENCY CLINIC, P.S.,

Defendant.

Before: McKEOWN, N.R. SMITH, and SANCHEZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Fed. R. App. P. 40. Judge Sanchez voted to deny the petition for rehearing en banc, and Judges McKeown and Smith recommended denying the same. The full court has been advised of the petition, and no judge has requested to vote on whether to rehear the matter en banc. Fed. R. App. 35. Accordingly, the petitions for panel rehearing and rehearing en banc, filed January 9, 2024 (Dkt. No. 90) are **DENIED.** No further petitions will be entertained.

APPENDIX D — RELEVANT STATUTORY PROVISIONS

15 U.S.C.A. § 15

§ 15. Suits by persons injured [Statutory Text & Notes of Decisions subdivisions I to V] Currentness

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b), 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 the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

> **(1)** whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section--

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.