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APPENDIX A

United States Court of Appeals for the Ninth Circuit
Opinion, Filed Apr. 5, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN IRELAND, M.D., an individual, Plaintiff-Appellant, v BEND NEUROLOGICAL ASSOCIATES, LLC, an Oregon limited liability company; et al., Defendants-Appellees.	No. 21-35337 D.C. No. 6:16-cv-02054-MK MEMORANDUM[1]

Appeal from the United States District Court
for the District of Oregon
Mustafa T. Kasubhai, Magistrate Judge,
Presiding[2]**
Submitted April 5, 2023[3]***

[1] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.
[2] The parties consented to proceed before a magistrate judge. *See* 28 U.S.C. § 636(c).
[3] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: WALLACE, D. NELSON, and FERNANDEZ, Circuit Judges.

Stephen Ireland appeals pro se from the district court's summary judgment in his action alleging federal and state law claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's decision on cross-motions for summary judgment. *Guatay Christian Fellowship v. Cnty. San Diego*, 670 F.3d 957, 970 (9th Cir. 2011). We affirm.

The district court properly granted summary judgment for defendants on Ireland's "rule of reason" Sherman Act claim because Ireland failed to raise a genuine dispute of material fact as to whether defendants either intended to harm or unreasonably restrain competition or as to whether defendants actually caused an injury to competition. *See Austin v. McNamara*, 979 F.2d 728, 738–39 (9th Cir. 1992) (setting forth elements of a "rule of reason" Sherman Act § 1 claim).

The district court also properly granted summary judgment for defendants on Ireland's intentional interference with economic relations claim because Ireland failed to raise a genuine dispute of material fact as to whether defendants intentionally interfered with a professional or business relationship through improper means or for an improper purpose. *See Kraemer v. Harding*, 976 P.2d 1160, 1170 (Or. App. 1999) (establishing elements of an intentional interference with economic relations claim).

AFFIRMED.

APPENDIX B

United States District Court for the District of Oregon, Order, Filed Mar. 31, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

STEPHEN IRELAND, M.D.,
an individual,
Plaintiff,

v.

BEND NEUROLOGICAL ASSOCIATES LLC, an Oregon limited liability company; BEND MEMORIAL CLINIC, P.C., an Oregon professional corporation; MICHAEL BELL, M.D., P.C., an Oregon professional Corporation; MICHAEL BELL, M.D., an individual; DAVID T. SCHLOESSER, M.D., P.C., a professional corporation; DAVID SCHLOESSER, M.D., an individual; LAURA J. SCHABEN, M.D., P.C., a professional Corporation; LAURA SCHABEN, M.D., an individual; FRANCENA ABENDROTH, M.D., an individual; CRAIGAN GRIFFIN, M.D., an individual; GARY BUCHHOLZ, M.D., an individual, and GARY D. BUCHOLZ, M.D., P.C., an Oregon professional corporation,
Defendants.
Case No. 6:16-cv-02054-MK

OPINION AND ORDER

KASUBHAI, United States Magistrate Judge:

Pro se Plaintiff Stephen Ireland filed this lawsuit against Defendants, asserting claims for unlawful conspiracy in restraint of trade in violation of 15 U.S.C. § 1, and tortious intentional interference with economic and business relationships in violation of Oregon common law. Currently before the Court are Plaintiff's Amended Motion for Partial Summary Judgment and (ECF Nos. 153); Defendants Buchholz's Motion for Summary Judgment (ECF No. 147); Defendants BMC's, Griffin's, and Abendroth's Motion for Summary Judgment (ECF Nos. 149); and Defendants BNA's, Bell's, Schaben's, and Schloesser's Motion for Summary Judgment (ECF No. 151). For the reasons set forth below, Defendants' Motions for Summary Judgment (ECF Nos. 147, 149, 151) are GRANTED; Plaintiff's Amended Motion for Summary Judgment (ECF No. 153) is DENIED.

BACKGROUND

Plaintiff and Defendants Schloesser, Bell, Buchholz, Schaben, Abendroth, and Griffin (the "individual Defendants") work as neurologists. Ireland Decl. ¶ 5, ECF No. 154. Prior to September 2015, Plaintiff and the individual Defendants practiced in Bend, Oregon, with hospital privileges at St. Charles Medical Center-Bend ("SCMC"). *Id.* ¶ 5. Insurance providers "in the Bend service area require that physicians provide hospital coverage for their patients[.]" *Id.* ¶ 49. Similarly, SCMC's regulations require physicians to supply emergency call-coverage for their patients. *Id.* ¶ 7. Emergency call-coverage in

turn requires a physician to be within 40 minutes of travel distance to the hospital in the event their patients require immediate and in-person evaluation. *Id.* ¶¶ 42, 44. Failure to comply with SCMC's call-coverage requirements "can result in disciplinary action, including the loss of medical staff privileges." *Id.* ¶ 46.

Plaintiff opened his own clinic, Neurology of Bend ("NOB"). *Id.* ¶ 4. At all relevant times, Schloesser, Bell, and Schaben practiced for Bend Neurological Associates ("BNA") while Abendroth and Griffin were employed by Bend Memorial Clinic ("BMC"); Buchholz joined BMC in April 2014, where he continued to practice until March 2016. *Id.* ¶¶ 35, 37, 40.

Beginning in Spring 2013, Plaintiff, BNA, and BMC were recruiting neurologists for their respective practices. *Id.* ¶ 13. Bell, Schaben, Schloesser, Griffin, and Abendroth sent Plaintiff a letter in June 2013, informing him that, beginning July 1, 2013, they would no longer call share with Plaintiff and his practice.[4] *Id.* ¶ 51. Bell, Schaben, Schloesser, Griffin, and Abendroth sent Plaintiff a second letter on June 12, 2013, reiterating their intent to end call sharing and instructing Plaintiff to make alternative arrangements for call-coverage. *Id.* at ¶ 52. In response to Plaintiff's request for further clarification,

[4] "Call schedules are created in six-month intervals, beginning on the first of the year [such that] July 1, 2013 marked the first day of the new six-month call schedule." *Ireland v. Bend Neurological Assocs. LLC*, No. 6:16-cv-02054-JR, 2017 WL 3404970, at *2 n.1 (D. Or. May 23, 2017) (bracketing in original), *adopted*, 2017 WL 3401268 (D. Or. Aug. 8, 2017) ("*Ireland I*").

Abendroth sent an email several days later stating, in relevant part:

> [T]he neurology call group comprised of Drs. Abendroth, Bell, Griffin, Schaben and Schloesser will not be providing any call coverage for your patients. You are responsible for covering your patients 24/7 or arranging appropriate coverage in your absence, which includes coverage for your patients if they present to the ER or are admitted to the hospital and require, in person, neurological care. If you, or an appropriate covering provider, are not available to respond in a timely manner, the medical staff president will be notified by the ER or admitting provider to request coverage of the patient as an unassigned patient, and an EMS report filed.

Id. ¶ 53. Buchholz was not listed in this letter but joined the other individual Defendants in terminating their call coverage arrangement with Plaintiff on July 1, 2013. *Id.* ¶ 56.

Plaintiff later accepted a job in Meridian, Idaho, where he could obtain call coverage. *Id.* ¶¶ 17, 112. However, Plaintiff could not afford to relocate without first "leasing or selling [his] medical office building [and equipment]." *Id.* And due to "the real estate downturn in 2007[,]" Plaintiff sold his medical building as "soon as possible and, ultimately, sold it at a significant discount to its likely future value." *Id.* Plaintiff closed NOB, "resigned [his] hospital privileges" at SCMC, "terminated [his] contractual

relationships with health insurance providers," and relocated to Idaho in August 2015. *Id.* ¶¶ 17, 19. Plaintiff's family, however, elected to stay in Bend, resulting in "emotional pain, suffering and humiliation" for Plaintiff. *Id.* ¶ 118.

PROCEDURAL HISTORY

Plaintiff filed this action in October 2016. Compl., ECF No. 1. In November 2016, Defendants Buchholz, BNA, and BMC filed Motions to Dismiss for Failure to State a Claim, which this Court ultimately granted. *See* ECF Nos. 7, 31, 32, 62, 72. Plaintiff filed a Motion for Leave to File an Amended Complaint and a Motion for Disqualification, both of which were denied in December 2017. ECF Nos. 79, 81, 89, 91. Plaintiff filed a second Motion for Leave to File an Amended Complaint which the Court dismissed with prejudice. ECF Nos. 92, 108.

Plaintiff subsequently appealed the Court's dismissal to the Ninth Circuit in April 2018. ECF No. 111. The Ninth Circuit affirmed the dismissal of a *per se* violation of the Sherman Act; however, the court vacated and remanded Plaintiff's "rule of reason" Sherman Act claim as well as the IIER claim under Oregon law. ECF No. 112; *Ireland v. Bend Neurological Assocs., LLC*, 748 F. App'x 166, 167 (9th Cir. 2019) ("Liberally construed, the proposed second amended complaint contains sufficient allegations that defendants' decision to terminate call coverage for Ireland's patients was intended to restrain competition unreasonably and actually caused injury to competition that harmed consumer welfare."); *id.* ("Because we conclude that the district court erred by

dismissing the "rule of reason" Sherman Act claim, we conclude that the district court erred by dismissing Ireland's IIER claim."). However, the Ninth Circuit limited the scope of Plaintiff's antitrust claim on remand to the "rule of reason" framework and considered relevant whether the putative wrongdoing unreasonably restrains competition and thereby harms consumer welfare. *Id.* As noted, the parties have cross-moved for summary judgment.

STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file, if any, show "that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Substantive law on an issue determines the materiality of a fact. *T.W. Elec. Servs., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party determines the authenticity of the dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324.

Special rules of construction apply when evaluating a summary judgment motion: (1) all

reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *T.W. Elec.*, 809 F.2d at 630.

Generally, summary judgment in antitrust cases is inappropriate because of their factual complexity. *See Rickards v. Canine Eye Registration Found.*, 783 F.2d 1329, 1332 (9th Cir. 1986). However, a district court may award summary judgment when appropriate. The Supreme Court's decision in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* clarified the standards for resolving summary judgment cases in antitrust cases. 475 U.S. 574, (1986); *see also Bhan v. NME Hosps., Inc.*, 929 F.2d 1404 (9th Cir. 1991) (affirming district court's grant of summary judgment in antitrust case).

DISCUSSION

I. Sherman Act "Rule of Reason" Claim

Defendants assert that summary judgment is appropriate on Plaintiff's § 1 Sherman Act Claim. The Ninth Circuit has explained regarding Rule of Reason Claims:

> Our traditional framework for analyzing a rule of reason claim under section one of the Sherman Act is well settled and easily summarized. A section one claimant must initially prove three elements: (1) an agreement or conspiracy among two or more persons or distinct

> business entities; (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually injures competition.
>
> After the claimant has proven that the conspiracy harmed competition, the fact finder must balance the restraint and any justifications or pro-competitive effects of the restraint in order to determine whether the restraint is unreasonable. This balancing process requires a thorough examination into all the surrounding circumstances.

Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1445 (9th Cir. 1988) (citations omitted); *Austin v. McNamara*, 979 F.2d 728, 738–740 (9th Cir. 1992) (listing the elements required for Rule of Reason claim and concluding that failure to establish anyone of the three elements is dispositive) (citation omitted); *see also Austin v. McNamara,* 979 F.2d 728, 738 (9th Cir. 1992) ("refusals to 'cover' [even if] somehow intended to lead to a denial of staff privileges" must be analyzed pursuant to the Rule of Reason). Here, as explained below, Plaintiff's inability to establish the second element is fatal to his Rule of Reason claim. However, even if he were able to establish a *prima facie* case, his claim fails under the mandatory balancing inquiry.

Summary judgment for a defendant is appropriate on a Sherman antitrust claim where a Plaintiff fails to present "evidence that the agreement. . .was motivated by a desire to curtail competition." *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir. 1987). Significantly,

beyond his purely speculative conclusions, Plaintiff has not presented any admissible evidence that Defendants' decision to no longer call share with Plaintiff was motivated by a desire to curtail competition within the meaning of a Sherman antitrust claim. This alone makes summary judgment appropriate.[5]

Even assuming *arguendo* that Plaintiff could establish Defendants engaged in "an agreement, conspiracy, or combination among two or more persons or distinct business entities, which was intended to harm or unreasonably restrain competition,

[5] As to the third element, Plaintiff has additionally failed to establish an actual injury to competition. Although Plaintiff argues that Defendants' coordinated exclusion from the call group forced him to relocate his practice out of state the evidence in the record fails to support the assertion. As Defendants correctly note, even after the new call group was formed, "[Plaintiff] continued to practice in Bend and at St. Charles Medical Center-Bend for several years after the split." BNA Mot. Summ. J. at 17, ECF No. 151. Plaintiff's own deposition testimony demonstrates that he continued to treat patients even after the ending of call coverage with Defendants, signifying lesser harm than what Plaintiff testifies. Ireland Dec. Ex 18 (11:1519). Critically, the Ninth Circuit "has held that the *elimination* of a single competitor, standing alone, does not prove anticompetitive effect." *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1158–59 (9th Cir. 2001) ("*Tuolumne*") (emphasis in original) (citing *Austin v. McNamara,* 979 F.2d 728, 739 (9th Cir.1992); *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979) ("Even if sufficient proof of intent and causation are introduced, the elimination of a single competitor, standing alone, does not prove anticompetitive effect."). Moreover, Plaintiff testified that he was not aware of evidence that prices for neurological services were impacted by Defendants' conduct. Ireland Decl., Ex. 18 (188:15–18).

and actually caused injury to competition," and after "a thorough examination into all the surrounding circumstances," pursuant to a Rule of Reason analysis compels the Court to conclude that Plaintiff's claim fails. *Oltz*, 861 F.2d at 1445. Under the Rule of Reason burden shifting scheme, after Plaintiff establishes harm to market competition, "the burden then shifts to defendants to offer evidence that a legitimate objective is served by the challenged behavior." Tuolumne, 236 F.3d 1159.

Assuming without deciding that Defendants decision to terminate their call coverage relationship with Plaintiff harmed the market, Defendants' decision to do so to optimize patient health was legitimate. Defendants testified that "[Plaintiff's] relationship with each of the

Neurologists became strained to varying degrees." Ireland Dec. Ex. 18. (146:9–24, 148:13, 152:1–153:13). Defendants testified that on several occasions "[they] expressed concerns that poor communication with [Plaintiff] was disruptive and harmful to patients." Schaben Dec. Ex. 23 (106:06–08); *see also* Schloesser Dec. Ex. 24 (149:04–22); Bell Dec. Ex. 20 (132:23– 133:14); Abendroth Dec. Ex. 19 (91:25–92:07); Griffin Dec. Ex. 22 (70:09–14). BNA Defendants expressed that "[p]atients complained to defendants about [Plaintiff's] abrasive bedside manner, describing it as 'callous' and 'dismissive' of their concerns." Bell Dec. Ex. 20 (84:17–25). BNA Defendants further recalled how "[p]atients and physicians reported multiple instances where [Plaintiff] disparaged [Defendants'] clinical acumen, suggesting they were

inferior physicians with poor medical judgment. Ireland Dec. Ex. 18 (98:15–99:05); Bell Dec. Ex. 20 (84:17–25).

Furthermore, "they were not willing to share assigned call coverage 'because the relationship had become non-collegial enough that it would be a problem . . . for patient care." BNA Mot. Summ. J. at 9 (citing Schaben Dec. Ex. 23 (106:06–08, 125:02–07); ECF No. 151. Defendant Schloesser testified "he was no longer 'comfortable' sharing a call with [Plaintiff]," while Defendant Bell expressed "that it was 'potentially dangerous' for his patients to share call with [Plaintiff] because of [Plaintiff's] hostility and aggression towards hospital staff and neurologist peers." Schloesser Dec. Ex. 24 (149:04-22); Bell Dec. Ex. 20 (132:23–133:14). In correspondence with a fellow neurologist, Plaintiff decried:

> To be fair, I find [Defendant Griffin] and [Defendant Schaben] to lack basic competence. So do [Defendants Bell and Schloesser]. [Defendant Bell] is dim-witted and arrogant; [Defendant Schloesser] is dim-witted and unable to focus due to serious psychodynamic conflicts. [Defendant Buchholz] combines a weird inability to see the forrest [sic] for the trees with declining mental acuity and dishonesty. Like [Defendant Bell], [Defendant Buchholz] likes to prey on referring physicians by advancing interesting, but preposterous, diagnoses. Have you read [Defendant Buchholz's] notes? You can tell [Defendant Buchholz is] not all there.

Id. at 23 (citing Ex. 7), ECF No. 151. The evidence in the record reflects that each Defendant suffered from a combative relationship with Plaintiff that harmed the quality of care that patients received. The Ninth Circuit has held concerns for "optimizing patients' health . . . certainly are legitimate" and the Court finds no reasons to depart from that principle here. *Tuolumne*, 236 F.3d at 1159. In other words, in "balanc[ing] the harms and benefits" of Defendants' decision to terminate their call coverage relationship with Plaintiff "to determine whether they are reasonable, . . . any anticompetitive harm [was] offset by the procompetitive effects of [Defendants'] effort to maintain the quality of patient care that it provides. *Id.*; *see also Weiss v. York Hosp.*, 745 F.2d 786, 820 (3rd Cir. 1984) ("One factor in the effective and efficient running of a hospital is a medical staff that can work together and be courteous to patients and staff. Doctors who have a history of trouble in interpersonal relations can legitimately be excluded because, if admitted, they will reduce the effectiveness of the medical staff, thereby reducing the ability of the hospital to provide top-flight service. In sum, doctors who have trouble getting along with other people will reduce efficiency, thereby reducing the hospital's competitive position, and, therefore, exclusion of such doctors is pro-competitive and permissible under the rule of reason.").

As such, Plaintiff's § 1 Sherman Act claim fails as a matter of law. Defendants motions for summary judgment are GRANTED. Plaintiff's motion is DENIED.

II. Plaintiff's State Law IIER Claim

Defendants next move for summary judgment on Plaintiff's IIER claim. In order to prevail on an IIER claim at trial, a plaintiff must prove the following six elements: (1) the existence of a professional or business relationship; (2) intentional interference with that relationship; (3) by a third party; (4) accomplished through improper means or for an improper purpose; (5) a causal effect between the interference and damage to the economic relationship; and (6) damages. *McGanty v. Staudenraus*, 321 Or. 532, 901 P.2d 841, 535 (1995). Because the Court finds there is no genuine issue of material fact relating to the fourth element—whether an "interference" was accomplished through improper means or for an improper purpose—and because all elements must be established at trial if Plaintiff is to prevail, this failure is dispositive and the Court need not address the remaining elements.

Defendants contend that because their decision to cease call coverage with Plaintiff was not accomplished through improper means or for an improper purpose, Plaintiff's IIER claim fails. Buchholz Mot. Summ. J. at 26, ECF No. 147. Plaintiff contends that Defendants intentionally interfered with Plaintiff's business and contractual relations through the improper means of combining to refuse to share call coverage with Plaintiff and his clinic. Ireland Decl. ¶¶ 5, 71, ECF No. 154.

The Oregon Supreme Court has found that a defendant's interference through improper purpose or improper means is a necessary element of the plaintiff's case. *Straube v. Larson*, 287 Or. 357, 374 (1979). To establish improper purpose, a plaintiff must prove that the defendant did not have a legitimate purpose, shown with direct evidence, for actions which resulted in injury to a plaintiff. *Id.* "Improper means" must be independently wrongful by reason of statutory or common law, and include "violence, threats, intimidation, deceit, misrepresentation, bribery, unfounded litigation, defamation and disparaging falsehood." *Conklin v. Karban Rock, Inc.*, 94 Or. App. 593, 601 (1989).In other words, the means must be wrongful in some manner other than simply causing the damages claimed as a result of the conduct. *Id.*; *see also Straube*, 287 Or. 357 (1979) (finding that the plaintiff's conspiracy claim fails even where the defendants deprived the plaintiff of his staff privileges in the hospital). To prevail, a plaintiff must establish "not only . . . that [a] defendant intentionally interfered with his business relationship but also that [a] defendant had a duty of non-interference, *i.e.*, that [a defendant] interfered for an improper purpose rather than for a legitimate one, or that [a] defendant used improper means which resulted in injury to [a] plaintiff." *Straube*, 287 Or. 357 (1979)

Here, Defendants assert that Plaintiff cannot demonstrate that Defendants acted with improper purpose. Significantly, the record reflects no direct evidence that Defendants acted with improper purpose. Defendants testified to ceasing call coverage

for the legitimate purpose of maintaining the quality of patient care. BNA Mot. Summ. J. at 9 (citing Schaben Dec. Ex. 23 (106:06–08, 125:02–07), ECF No. 151. Defendants repeatedly expressed "they were not willing to share assigned call coverage 'because the relationship had become non-collegial enough that it would be a problem . . . for patient care." *Id.*

Defendant Schloesser testified "he was no longer 'comfortable' sharing a call with [Plaintiff]," while Defendant Bell expressed "that it was 'potentially dangerous' for his patients to share call with [Plaintiff] because of [Plaintiff's] hostility and aggression towards hospital staff and neurologist peers." Buchholz Mot. Summ. J. at 20, ECF No. 147; *see also* BMC Mot. Summ. J. at 18, ECF No. 149; BNA Mot. Summ. J. at 27, ECF No. 151.

Defendants testified that they were not aware that Plaintiff intended to leave the Bend market; instead, Defendants understood that Plaintiff was searching for another neurologist to join his practice after the call-sharing agreement ended. Buchholz Mot. Summ. J. at 17, ECF No.147. Plaintiff's inability to find call coverage does not create a genuine dispute of material fact as to whether Defendants' purpose was improper because Oregon courts have flatly rejected that argument. *See, e.g., Empire Fire & Marine Ins. Co. v. Fremont Indem. Co.,* 90 Or. App. 56 (1988) ("even if [d]efendant knew that [plaintiff] could not [fulfill] its [contracts], that does not raise a question of fact as to . . . [d]efendant's [purpose]."). Furthermore, the Oregon Supreme Court has previous found that "incidental interference" with a plaintiff's ability to engage in regular business

relationships with its economic relationships is not actionable. *Wampler v. Palmerton,* 250 Or. 65, 439 P.2d 601 (1968).

Accordingly, Plaintiff has failed to establish that Defendants acted with "improper means or for an improper purpose" as a matter of law. *McGanty,* 321 Or. 532. As such, Defendants' Motions for Summary Judgment as to Plaintiff's IIER claim are GRANTED.

CONCLUSION

For the reasons above, Defendants' Motions for Summary Judgment (ECF Nos. 147, 149, 151) are GRANTED. Plaintiff's Amended Motion for Summary Judgment (ECF No. 153) is DENIED.[6]

DATED this 31st day of March 2021.

s/ Mustafa T. Kasubhai
MUSTAFA T. KASUBHAI (He / Him)
United States Magistrate Judge

[6] Because the Court finds granting Defendants' Motions for Summary Judgment appropriate, it need not resolve the following motions that are accordingly DENIED as moot: BMC's Motion to Strike and Limit Expert Testimony (ECF No. 150); Plaintiff's Amended Motion for Partial Summary Judgment (ECF No. 153); Plaintiff's Motion to Recharacterize Srinagesh as Principal Expert (ECF No. 159); Plaintiff's Motion to Amend/Correct Declaration (ECF No. 175); and Plaintiff's Motion for Leave to File Surreply (ECF No. 193).

APPENDIX C

United States Court of Appeals for the Ninth Circuit, Denial of Rehearing, Filed Jul. 19, 2023

STEPHEN IRELAND, M.D., an individual, Plaintiff-Appellant, v. BEND NEUROLOGICAL ASSOCIATES, LLC, an Oregon limited liability company; et al., Defendants-Appellees.	No. 21-35337 D.C. No. 6:16-cv-02054-MK ORDER

Before: WALLACE, D. NELSON, and FERNANDEZ, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing and recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing and the petition for rehearing en banc are denied. SO ORDERED.

APPENDIX D

Statutory Provisions Involved

1. **15 U.S.C. 1** provides in relevant part:
Trusts, etc., Constitutional and Statutory Provisions Involved 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. * * *

2. **15 U.S.C. § 15** provides in relevant part:
Suits by persons injured

> (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.

3. **15 U.S.C. § 22** provides:
District in which to sue corporation

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

4. **28 U.S.C. § 1131** provides:
Federal question.

> The district courts shall have original jurisdiction **of** all civil actions arising under the Constitution, laws, or treaties of the United States.

5. **28 U.S.C. § 1137** provides in relevant part:
Commerce and antitrust regulations; amount in controversy and costs

> **(a)** The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies:

6. **28 U.S.C. § 1254(1)** provides:
Courts of appeals; certiorari; certified questions

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> **(1)** By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

7. **28 U.S.C. § 1367** provides in relevant part:

Supplemental jurisdiction.

> (a)Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

8. **42 U.S.C. § 1395nn.(b)(2).**) provides:
Limitation on certain physician referrals

> (b) General exceptions to both ownership and compensation arrangement prohibitions

(2) In-office ancillary services

In the case of services (other than durable medical equipment (excluding infusion pumps) and parenteral and enteral nutrients, equipment, and supplies)-

(A) that are furnished-

(i) personally by the referring physician, personally by a physician who is a member of the same group practice as the referring physician, or personally by individuals who are directly supervised by the physician or by another physician in the group practice, and

(ii)(I) in a building in which the referring physician (or another physician who is a member of the same group practice) furnishes physicians' services unrelated to the furnishing of designated health services, or

(II) in the case of a referring physician who is a member of a group practice, in another building which is used by the group practice-

(aa) for the provision of some or all of the group's clinical laboratory services, or

(bb) for the centralized provision of the group's designated health services (other than clinical laboratory services), unless the Secretary determines other terms and conditions under which the provision

of such services does not present a risk of program or patient abuse, and

(B) that are billed by the physician performing or supervising the services, by a group practice of which such physician is a member under a billing number assigned to the group practice, or by an entity that is wholly owned by such physician or such group practice, if the ownership or investment interest in such services meets such other requirements as the Secretary may impose by regulation as needed to protect against program or patient abuse. Such requirements shall, with respect to magnetic resonance imaging, computed tomography, positron emission tomography, and any other designated health services specified under subsection (h)(6)(D) that the Secretary determines appropriate, include a requirement that the referring physician inform the individual in writing at the time of the referral that the individual may obtain the services for which the individual is being referred from a person other than a person described in subparagraph (A)(i) and provide such individual with a written list of suppliers (as defined in section 1395x(d) of this title) who furnish such services in the area in which such individual resides.

APPENDIX E

Regulatory Provisions Involved

1. **45 C.F.R. § 60.12** provides in relevant part:
Reporting adverse actions taken against clinical privileges

(a) ***Reporting by health care entities to the NPDB*** —

(1) ***Actions that must be reported and to whom the report must be made.*** Each health care entity must report to the NPDB and provide a copy of the report to the Board of Medical Examiners in the state in which the health care entity is located the following actions:

(i) Any professional review action that adversely affects the clinical privileges of a physician or dentist for a period longer than 30 days,

(ii) Acceptance of the surrender of clinical privileges or any restriction of such privileges by a physician or dentist:

(A) While the physician or dentist is under investigation by the health care entity relating to possible incompetence or improper professional conduct, or

(B) In return for not conducting such an investigation or proceeding, or

(iii) In the case of a health care entity which is a professional society, when it takes a professional review action concerning a physician or dentist.

(2) ***Voluntary reporting on other health care practitioners.*** A health care entity may report to the NPDB information as described in paragraph (a)(3) of this section concerning actions described in paragraph (a)(1) in this section with respect to other health care practitioners.

(3) ***What information must be reported.*** The health care entity must report the following information concerning actions described in paragraph (a)(1) of this section with respect to a physician or dentist:

(i) Name,

(ii) Work address,

(iii) Home address, if known,

(iv) Social Security Number, if known, and if obtained in accordance with section 7 of the Privacy Act of 1974,

(v) Date of birth,

(vi) Name of each professional school attended and year of graduation,

(vii) For each professional license: the license number, the field of licensure, and the name of the state or territory in which the license is held,

(viii) DEA registration number, if known,

(ix) A description of the acts or omissions or other reasons for privilege loss, or, if known, for surrender,

(x) Action taken, date the action was taken, and effective date of the action, and

(xi) Other information as required by the Secretary from time to time after publication in the Federal Register and after an opportunity for public comment.

(b) ***Reporting by the Board of Medical Examiners to the NPDB.*** Each Board must report any known instances of a health care entity's failure to report information as required under paragraph (a)(1) of this section. In addition, each Board of Medical Examiners must simultaneously report this information to the appropriate state licensing board in the state in which the health care entity is located, if the Board of Medical Examiners is not such licensing board.

(c) ***Sanctions*** —

(1) ***Health care entities.*** If the Secretary has reason to believe that a health care entity has substantially failed to report information in accordance with this section, the Secretary will conduct an investigation.

If the investigation shows that the health care entity has not complied with this section, the Secretary will provide the entity with a written notice describing the noncompliance, giving the health care entity an opportunity to correct the noncompliance, and stating that the entity may request, within 30 days after receipt of such notice, a hearing with respect to the noncompliance. The request for a hearing must contain a statement of the material factual issues in dispute to demonstrate that there is cause for a hearing. These issues must be both substantive and relevant. The hearing will be held in the Washington, DC, metropolitan area. The Secretary will deny a hearing if:

(i) The request for a hearing is untimely,

(ii) The health care entity does not provide a statement of material factual issues in dispute, or

(iii) The statement of factual issues in dispute is frivolous or inconsequential.

In the event that the Secretary denies a hearing, the Secretary will send a written denial to the health care entity setting forth the reasons for denial. If a hearing is denied, or, if as a result of the hearing the entity is found to be in noncompliance, the Secretary will publish the name of the health care entity in the

Federal Register. In such case, the immunity protections provided under section 411(a) of HCQIA will not apply to the health care entity for professional review activities that occur during the 3-year period beginning 30 days after the date of publication of the entity's name in the Federal Register.

(2) ***Board of Medical Examiners.*** If, after notice of noncompliance and providing opportunity to correct noncompliance, the Secretary determines that a Board of Medical Examiners has failed to report information in accordance with paragraph (b) of this section, the Secretary will designate another qualified entity for the reporting of this information.

APPENDIX F
United States Court of Appeals for the Ninth Circuit
Appellant's Opening Brief, Filed Sept. 8, 2021

No. 21-35337

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEPHEN IRELAND M.D.,
Plaintiff — Appellant,
vs.

BEND NEUROLOGICAL ASSOCIATES LLC, an Oregon limited liability company; BEND MEMORIAL CLINIC, P.C., an Oregon professional corporation; MICHAEL BELL M.D., P.C., an Oregon professional corporation; MICHAEL BELL M.D., an individual; DAVID T SCHLOESSER M.D., P.C., an Oregon professional corporation; DAVID SCHLOESSER M.D., an individual; LAURA J SCHABEN M.D., P.C., an Oregon professional corporation; LAURA SCHABEN M.D., an individual; FRANCENA ABENDROTH M.D., an individual; CRAIGAN GRIFFIN M.D., an individual; GARY BUCHHOLZ M.D., an individual and GARY D BUCHHOLZ M.D., P.C., an Oregon professional corporation,
Defendants — Appellees.

On Appeal From the United States District Court
For the District of Oregon, Eugene Division
Case No. 6:16-cv-002054-MK
The Honorable Muhammed Kasubai

APPELLANT'S OPENING BRIEF

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TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) .....
Angel v. Seattle-First Nat. Bank, 653 F.2d 1293, 1299 (9th Cir. 1981) .....
Brantley v. NBC Universal, Inc., 675 F3d 1192, 1197 (9th Cir 2012) .....
California Dental Ass'n v. Federal Trade Commission, 224 F. 3d 942, 948 (9th Cir. 2000) 56
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Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).....
County of Tuolumne v. Sonora Community Hosp, 236 F.3d 1148, 1155 (9th Cir. 2001) .....
Disability Rights Mont., Inc. v. Batista, No. 15-35770, at *18 (9th Cir. July 19, 2019) .....
Klor's Inc. v Broadway-Hale Stores, Inc., 359 U.S. 207, 210 (1959) .....
L. F. v. Lake Washington School District #414, 947 F.3d 621, 625 (9th Cir. 2020) .....
Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F2d 504, 508–09 (9th Cir 1989) .....
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). .....
McWane, Inc. v. F.T.C., 783 F3d 814, 841 (11th Cir 2015). .....
Mourning v. Gore, Case No.:3:18-cv-02245-WQH-RBM, at *4 (S.D. Cal. Feb. 20, 2019).....
Nissan Fire Marine Ins. Co. v. Fritz Co., 210 F.3d 1099, 1106 (9th Cir. 2000).....
Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1445 (9th Cir. 1988) .....

Poller v. Columbia Broad. Sys., Inc., 368 US 464, 473 (1962).....
Program Eng'g, Inc. v. Triangle Publications, Inc., 634 F.2d 1188, 1195 (9th Cir 1980).....
S.A. Empresa, Etc. v. Walter Kidde & Co., 690 F.2d 1235, 1238 (9th Cir. 1982).....
See Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018).....
Standard Oil Co. of New Jersey, 221 US at 75.....
Summit Health Ltd. v. Pinhas, 500 US 322, 330 (1991).....
Theme Promotions, Inc. v. News Am. Mktg. FSI, 546 F3d 991, 1003 (9th Cir 2008).....
Top Serv. Body Shop, Inc. 283 Or at 209.....
United States v. Griffith, 334 US 100, 105 (1948).....
United States v. Paramount Pictures, 334 U.S. 131, 161 (1948).....
United States v. Patten, 226 US 525, 543 (1913).....
United States v. Socony-Vacuum Oil Co., 310 US 150, 223 n 59 (1940).....
Weiss v. York Hosp., 745 F.2d 786, 820 (3rd Cir. 1984).....

Statutes

15 U.S.C. § 1.....
15 U.S.C. § 15.....
15 U.S.C. §§ 15 and 22.....
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28 U.S.C. § 1331.....
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Other Authorities

45 CFR 60 § 12.....

45 CFR 60 § 17 .....
45 CFR 60 § 18 .....
Ethics Opinion 9.06 of the AMA Code of Medical Ethics. .....
Rules
Federal Rule of Civil Procedure 12(b)(6) .....
Federal Rule of Civil Procedure 56 .....
Rule 56 .....

INTRODUCTION

Appellees violated § 1 of the Sherman Act when they formed a conspiracy among multiple independent neurology practices to eliminate Appellant, Stephen Ireland, M.D. ("Ireland"), and his clinic from the Bend neurology market by excluding them from a preexisting call-sharing arrangement. As a result, Ireland was forced to relocate to a practice where he has shared call coverage, the output of neurologic services in the Bend neurology market was reduced, and patient access to neurologic care in the Bend neurology market was restricted or eliminated.

In its *Opinion and Order* denying Ireland's amended motion for partial summary judgment ("MPSJ") and granting Appellees' motions for summary judgment ("MSJ"), the district court failed to take into consideration any of the evidence Irelan[i]d presented in support of his antitrust claim. [1-ER-4–15]. It ignored the admissible evidence Ireland presented that established that Appellees had the requisite intent to restrain competition — simply stating that it did not exist. It employed as evidence argumentative assertions from Appellees' legal memoranda that are wholly unsupported by factual

evidence to speculate that Appellees had procompetitive justification for their conduct. The district court asserted that any anticompetitive harm to the market from Appellees' conduct was offset by these proffered procompetitive justifications, without taking into consideration any of the factual evidence of anticompetitive harm that Ireland presented. It ignored substantive law governing summary judgment and antitrust litigation.

If Appellees' conduct is allowed to succeed without redress, it would encourage physicians, who practice in markets where their services are provided by a single hospital, to combine to refuse to share call with solo practitioners and drive them from the market — injuring competition by reducing the output of physician services, restricting, or eliminating access to medical care, and depriving patients and referring providers of their choice of physician.

STATEMENT OF JURISDICTION

Ireland brought this action to recover damages caused by Appellees' violation of Section 1 of the Sherman Act (15 U.S.C. § 1) and intentional interference with his economic relationships under Oregon State Law. The federal and state claims are based on a common nucleus of operative facts and the entire action constitutes a single case that would ordinarily be tried in one judicial proceeding.

The federal claim is filed under 15 U.S.C. §§ 15 and 22. The district court had jurisdiction over this claim under 28 U.S.C. §§ 1331 and 1337.

The district court had jurisdiction over the state claim under 28 U.S.C. § 1367 because this claim is so

related to the federal claim that it forms part of the same case or controversy.

On March 31, 2021, the district court dismissed this action and entered final judgment. [1-ER-2–3] [1-ER-4–15].

Ireland filed timely notice of appeal under Federal Rule of Appellate Procedure 3(a)(1) on April 30, 2021. [6-ER-1297–1300].

Jurisdiction is conferred on this Court under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Ireland has provided admissible evidence that establishes that there is no genuine dispute as to any of the elements required to prove his rule of reason Sherman Act claim and that he is entitled to judgment as a matter of law for each of those elements. Did the district court err in denying Ireland's amended motion MPSJ and granting Appellees' MSJ?

2. Federal Rule of Civil Procedure 56 provides that a party moving for summary judgment that does not have the burden of persuasion at trial must point to materials on file that show that the nonmoving party will not be able to meet its burden — it is not enough to simply state that the nonmovant cannot meet that burden. The district court held that summary judgment was appropriate by simply stating that Ireland presented no admissible evidence to establish the intent element of his Sherman Act claim without taking into consideration the admissible evidence Ireland presented that establishes that Appellees had the requisite intent. Did the district court err in denying Ireland's MPSJ and granting

Appellees' MSJ because it ignored the evidence Ireland presented that establishes that Appellees had the requisite intent?

3. In claims for violation of § 1 of the Sherman Act that are analyzed under the rule of reason the court must weigh the anticompetitive effects of defendants' conduct against any legitimate procompetitive justifications to determine whether the conduct under scrutiny was unreasonable. The district court held that any anticompetitive effects of Appellees' conduct were offset by their proffered procompetitive effects without taking into consideration any of the evidence Ireland provided of those anticompetitive effects. Without taking these effects into consideration, it could not have weighed the anticompetitive effects of Appellees' conduct against their proffered procompetitive effects and correctly determined whether those anticompetitive effects were offset. Did the district court err in denying Ireland's MPSJ and granting Appellees' MSJ by failing to take into consideration Ireland's evidence of anticompetitive effects?

4. Rule 56 provides that argumentative assertions in legal memoranda and deposition testimony that fail to set out facts that would be admissible in evidence are insufficient to grant or defeat a motion for summary judgment. The district court granted Appellees' MSJ, and denied Ireland's MPSJ by employing, as evidence of procompetitive justification for Appellees' conduct, argumentative assertions that are directly quoted from Appellees' legal memoranda and cited to deposition testimony that either contradicts those assertions or contains only

conclusory allegations and inadmissible hearsay. Did the district court err by granting Appellees' MSJ and denying Ireland's MPSJ on the basis of this kind of evidence?

5. Over a century of binding precedent holds that it is not necessary to find specific intent to restrain trade in order to find that the antitrust laws have been violated — it is sufficient that a restraint of trade results as the consequence of a defendant's conduct or business arrangements. Ireland has presented admissible evidence that establishes that Appellees' concerted refusal to share call injured competition and consumer welfare. Did the district court err in denying Ireland's MPSJ and granting Appellees' MSJ by ignoring the well-established legal principle that it is not necessary to prove specific intent to restrain trade where a defendant's conspiracy results in injury to competition?

6. Binding precedent also holds that, in a civil action under the Sherman Act, liability may be established by proof of either an unlawful purpose or an anticompetitive effect. Ireland has presented admissible evidence that proves that Appellees combined in a refusal to share call with him and his clinic for the purpose of restraining competition. Did the district court, by ignoring this evidence and failing to apply this well-established principle of antitrust law, err in denying Ireland's MPSJ?

7. This Court has held that, when parties and observers may justifiably doubt whether the future disposition of their matter will be based on proper considerations of law and equity and responsive to the facts and rational arguments before it, the appearance

of justice requires remand to a different district court. The district court ignored all the admissible evidence Ireland presented that establishes his Sherman Act claim, employed as evidence argumentative assertions taken from Appellees' legal memoranda that are not supported by factual evidence, and failed to follow substantive governing law related to motions for summary judgment and antitrust litigation. In so doing, the district court has raised doubt that its future disposition of this case will be based on proper considerations of law and equity and responsive to the facts and rational arguments before it. To preserve the appearance of justice, should this case be remanded to a different district court?

CONCISE STATEMENT OF THE CASE

I. Background

A. The parties

Ireland practiced neurology in Bend, Oregon at Neurology of Bend ("NOB") from 1992 until he closed NOB in August 2015. [4-ER-715, ¶ 19]. Since then, he has practiced as an employed neurologist at St. Luke's Health System in Meridian, Idaho. [4-ER-713, ¶ 4].

Drs. Michael Bell ("Bell"), Laura Schaben ("Schaben"), and David Schloesser ("Schloesser") are neurologists who practiced at all relevant times at Bend Neurological Associates ("BNA"). [5-ER-938, No. 1].

Drs. Francena Abendroth ("Abendroth") and Craigan Griffin ("Griffin") are neurologists who practiced at all relevant times at Bend Memorial Clinic ("BMC"), a multi-specialty clinic. [5-ER-936, No. 1].

Dr. Gary Buchholz ("Buchholz") is a neurologist who practiced at NOB until April 2013. He practiced in his own clinic from April 2013 to April 2014, after which he practiced as an employed neurologist at BMC until he took an emergency leave of absence from BMC in the fall of 2014. [2-ER-198:22–200:1].

At all relevant times, Ireland and Appellee neurologists held privileges at St. Charles Medical Center-Bend ("SCMC-Bend"), the only hospital in Central Oregon with neurologists on its medical staff. [2-ER-135:6–12], [4-ER-713, ¶ 5].

B. The relevant service and geographic markets

The relevant service market for this action is the market for inpatient and outpatient neurologic services. The relevant geographic market is the vicinity of Bend, Oregon. The outer boundary of the geographic market is defined by the time allowed by hospital Rules and Regulations for a neurologist to arrive at the hospital when an emergency medicine physician requests that they attend a patient at the bedside — 40 minutes. [5-ER-934, p. 5 § b].

C. Hospital call-coverage requirements

During the period of interest, call-coverage requirements for neurologists on staff at SCMC-Bend were different for unassigned patients — patients who did not have a treating relationship with a staff neurologist — and assigned patients — patients who had established a treating relationship with a neurologist on the hospital staff.

Call coverage for unassigned patients — "ER" or "hospital" call —was rotated among the neurologists with medical staff privileges at SCMC-Bend in a mutually agreed upon schedule. [2-ER-137:14–19].

Hospital Rules and Regulations required physicians to provide for "round the clock coverage" for any of their assigned patients who presented to the hospital for care. [5-ER-933 § a], [3-ER-337:15-24].

Before July 1, 2013, all neurologists on the SCMC-Bend medical staff agreed to share call-coverage responsibility for their assigned patients. From 5 p.m. to 7 a.m. weekdays and all day on weekends, the neurologist on call for unassigned patients would cover all the other neurologists' assigned patients. [2-ER-152:7-15]. From 7 a.m. to 5 p.m. weekdays, neurologists were responsible for covering their own assigned patients unless they made special arrangements with another neurologist to cover their "day call." [2-ER-202:2-7].

Hospital Rules and Regulations provided that "[r]epeated failure . . . to provide adequate and timely coverage of patients shall result in loss of medical staff privileges." [5-ER-934 § 5.c.].

D. Consequences of the loss or restriction of hospital privileges

Hospitals are required to report the loss or restriction of medical staff privileges to the National Practitioner Data Bank ("NPDB"). 45 CFR 60 § 12. Hospitals must request information from the NPDB when a practitioner applies for privileges and every 2 years for as long as the practitioner holds privileges.

45 CFR 60 § 17. Hospitals, state licensing boards, health insurance plans, and physician employers have access to NPDB information. 45 CFR 60 § 18. Physicians are required to report adverse actions on clinical privileges when they apply for or renew hospital privileges, state medical licenses, contracts with health insurance plans, and employment contracts. [4-ER-747–753], [5-ER-946]. Therefore, the loss or restriction of medical staff privileges at SCMC-Bend can have draconian effects on a physician's career — not just in Bend — but throughout the country.

E. Health insurance plans' call-coverage requirements

Health insurance plans required that contracted physicians provide continuous coverage of patients who were members of their plans. [5-ER-946], [5-ER-863 § 9.1], [4-ER-769, 791, 816, 834], [5-ER-846], [2-ER-151:20–152:4], [4-ER-743, 751, 758].

If a neurologist resigned their hospital privileges, they would not be able to comply with these contractual call-coverage obligations without an agreement from a neurologist who held active staff privileges to cover their patients. [2-ER-155:8-15] [2-ER-125:23–126:5]. Because out-of-pocket costs are higher for patients when they see providers who are "out of plan," many patients are unwilling to see a physician who is not contracted with their health plan. [2-ER-147:17–148:8], [2-ER-128:11-19], [3-ER-343:22-25].

II. Brief summary of the facts

The evidence, presented in more detail in the sections that follow this **Brief summary of the facts**, shows:

In March 2013, BNA neurologists, Bell, Schaben, and Schloesser moved their practice to a new office building with room for another two neurologists that included an MRI suite that housed a new MRI. [3-ER-355:12-18]. As a result, each BNA neurologist was mired in over a million dollars of debt. [5-ER-852] [3-ER-470:21–471:6] [3-ER-356:5-14]. At the same time, the Center for Medicare and Medicaid Services ("CMS") drastically reduced reimbursement for MRI procedures. [3-ER-472:13-17].

At the time BNA moved into their new office building and MRI facility, Ireland, BMC, and BNA were actively recruiting for neurologists to join their clinics. NOB's attempts to recruit competed with BNA's. [5-ER-1077] [3-ER-350:8-18] [2-ER-222:1-21] [5-ER-855] [5-ER-936] [4-ER-714 ¶ 13].

Faced with large debt, large overhead related to their MRI facility, drastically reduced reimbursement for MRIs, the prospect of increased competition for patient and MRI referrals from the neurologist NOB was attempting to recruit, and increased competition for recruiting neurologists to join their clinic; BNA enlisted the participation of the BMC neurologists and Buchholz in a concerted refusal to continue their pre-existing call-sharing relationship with Ireland. [5-ER-854–855] [2-ER-90:6-18] [2-ER-161:4-10] [3-ER-500:7-10] [2-ER-93:17-20] [2-ER-246:8-13] [2-ER-248:9-10] [2-ER-204:21–207:11] [2-ER-146:5-10].

BNA threatened the BMC neurologists and Buchholz that, if they continued to share call with Ireland, BNA would stop sharing call with them. [2-ER-103:13-23] [2-ER-210:12-21] [2-ER-211:21–212:3].

Schloesser testified that he sought BMC's and Buchholz's cooperation to interfere with Ireland's attempt to recruit. [3-ER-385:2–386:2].

In early June 2013, Ireland received two letters, signed by all BMC and BNA neurologists, informing him of BNA's and BMC's intention to discontinue their call-sharing relationship with him and his clinic beginning July 1, 2013. [5-ER-940–942]. Buchholz testified that he joined BMC and BNA in their concerted refusal to share call. [2-ER-204:21–207:11].

When neurologists, Drs. Gregory Ferenz and Steven Goins, moved to Bend and began working at BMC, Appellees made sure that they participated in the coordinated group boycott. [5-ER-855] [5-ER-853]. Therefore, Appellees' coordinated group boycott included all neurologists on staff at SCMC-Bend capable of sharing call with Ireland from the date it began until Ireland closed his practice.

Both of the letters explicitly stated that Appellees would refuse to share call with Ireland's clinic, NOB, as well as Ireland personally, even though Ireland was in solo practice. [5-ER-940–942]. This meant that any neurologist who joined NOB would share call with just one other neurologist, Ireland. If they joined an Appellee practice, they would share call with at least six other neurologists. Griffin testified that call burden is an important consideration for physicians looking to join a practice.

[3-ER-323:20-22]. Appellees' inclusion of Ireland's clinic in their coordinated group boycott placed Ireland at a distinct competitive disadvantage in recruiting a neurologist. The stigma attached to Appellees' coordinated refusal added to this competitive disadvantage.

By preventing Ireland from recruiting, Appellees' coordinated conduct eliminated competition for patient referrals and MRI procedures from any neurologist Ireland would have recruited, eliminated competition from NOB for neurologists to join their clinics, and took away Ireland's only chance of obtaining regular call coverage.

When Ireland asked Appellees whether they would cover his patients in the event he needed to leave town, Appellees threatened that, if they had to cover one of Ireland's patients, they would report the incident to the SCMC-Bend Medical Staff President and begin a medical staff process that could result in disciplinary action and end or severely damage Ireland's career. [2-ER-21] [2-ER-113:24–114:19] [3-ER-460:14-17] [3-ER-390:6-9] [2-ER-208:10-18] [2-ER-118:15–121:1].

A little over a year after the coordinated group boycott began, Ireland approached Schloesser to see if he would meet to discuss the call-sharing dispute. [5-ER-850]. When Schaben learned of Ireland's request, she responded that she hoped that Ireland's request meant that "the end is near — for his practice in Bend at least." *Id.* When Schloesser informed her that he heard Ireland intended to stay in Bend, Schaben responded: "Oh, that sucks." *Id.*

Appellees researched the consequences their combined conduct held for Ireland and assured themselves that their coordinated refusal to share call, leveraged by hospital Rules and Regulations, meant that Ireland was required to provide coverage for his patients, 24/7/365, for as long as he held hospital privileges. [3-ER-264:14–265:7].

Providing continuous coverage for his patients would be impossible over the long run due to, among many other reasons, sick days, out-of-town continuing education, and obligatory travel. Providing continuous call coverage was also inconsistent with an acceptable quality of life for Ireland and his family. [4-ER-714 ¶ 16]. Griffin testified that, if he had to provide continuous coverage of his patients, he would find a new job in another location where he had the support he needed. [3-ER-325:14-18] [3-ER-328:1-2] [3-ER-331:13-14].

Sooner or later, for myriad potential reasons, Ireland would inevitably be unable to make it to the hospital in time and Appellees, as they threatened, would move against his privileges. To preserve his quality of life and his career, Ireland closed his Bend neurology practice and started practicing at St. Luke's Health System in Meridian, Idaho where he has call coverage. [4-ER-714 ¶¶ 16, 17].

When Ireland was excluded from the Bend neurology market, he lost his business relationships with patients and referring providers and his contracts with health insurance carriers in the relevant market. He had to resign his SCMC-Bend hospital privileges.

When Ireland's 23-year Bend neurology practice closed, the number of neurologists practicing in Bend decreased from seven to six and the number of neurology clinics decreased from three to two. [5-ER-936 No. 1] [5-ER-938 No. 1] [3-ER-418:6-11] [3-ER-418:21–419:2].

By November 2016, a little over a year after NOB closed, the demand for neurologic services so outstripped the supply that BMC had stopped accepting referrals of new patients and BNA refused to see the vast majority of patients with dementia. [5-ER-947–949] [5-ER-953] [3-ER-509:12–510:4] [3-ER-514:5-8] [3-ER-298:11-22] [3-ER-302:17-22]. Bell testified that it would have been helpful at that time to have more neurologists in town to meet the demand for neurologists' care. [4-ER-519:10-13]. Patients rejected by BMC and BNA, who previously would have been seen by Ireland at NOB, had to travel hundreds of miles to see a neurologist or go without neurologic care. [3-ER-448:22–449:4] [2-ER-188:18–189:2] [3-ER-454:6–9] [3-ER-455:8–9].

The only differences in the number of neurology providers and clinics between early August 2015, just before Ireland closed his Bend neurology practice, and November 2016, were that Ireland and NOB were no longer available to see patients in the Bend service area. [5-ER-936 No. 1] [5-ER-938 No. 1].

Almost all patients with dementia have Medicare or Medicaid insurance. [3-ER-311:21-25]. In 2015, BNA saw 729 Medicaid insured patients. In 2016, the first full year after Ireland closed his Bend neurology practice, BNA saw 513 Medicaid patients, 30% fewer than in 2015, despite the fact that Ireland

could no longer see his established Medicaid patients, there were fewer neurologists in Bend available to see new Medicaid patients, and BMC had stopped accepting new patient referrals. [4-ER-701].

When Ireland closed his Bend practice, patients and referring providers lost a neurologist they liked and trusted and, in many cases, preferred to Appellees. [4-ER-728–729 ¶ 96].

III. Procedural history

On October 26, 2016, Ireland filed claims for damages from Appellees' violation of § 1 of the Sherman Act (15 U.S.C. §1), under both the *per se* rule and the rule of reason, and intentional interference with his economic relationships ("IIER"). [5-ER-1269–1296].

All Appellees filed motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). On March 27, 2018, the district court dismissed Ireland's action with prejudice. [5-ER-1253].

On appeal, this Court affirmed the district court's dismissal of Ireland's *per se* Sherman Act claim but vacated and remanded its dismissal of his rule of reason Sherman Act and IIER claims. Case: 18-35316 [5-ER-1113–1116].

Following discovery, Appellees filed MSJ. [5-ER-1078–1112], [5-ER-1055–1076], [5-ER-1025–1054]. Ireland filed a MPSJ that included a separate motion for each element of his rule of reason Sherman Act claim and an MPSJ of the entire antitrust claim. [5-ER-960].

On March 31, 2021, Magistrate Judge Mustafa T. Kasubhai granted Appellees' MSJ, denied Ireland's MPSJ, and dismissed this action with prejudice. [1-ER-2–3] [1-ER-4–15].

STANDARD OF REVIEW

"A grant of summary judgment is reviewed de novo." *L. F. v. Lake Washington School District #414*, 947 F.3d 621, 625 (9th Cir. 2020).

Federal Rule of Civil Procedure 56 provides that "[t]he court shall grant summary judgment 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). A fact is material when, under the substantive governing law, it affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). It must "produce evidence negating an essential element of the nonmoving party's case, or . . . *show* that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial" *Nissan Fire Marine Ins. Co. v. Fritz Co.*, 210 F.3d 1099, 1106 (9th Cir. 2000) (emphasis added).

Courts must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of the nonmovant.

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The Supreme Court has held that "summary procedures should be used sparingly in complex antitrust litigation . . . ." *Poller v. Columbia Broad. Sys., Inc.*, 368 US 464, 473 (1962).

SUMMARY OF ARGUMENT

I. The district court erred by denying Ireland's MPSJ of his rule of reason Sherman Act claim.

In vacating the district court's dismissal of his rule of reason antitrust claim, this Court held that Ireland sufficiently alleged "that defendants' decision to terminate call coverage for Ireland's patients was intended to restrain competition unreasonably and actually caused injury to competition that harmed consumer welfare." [5-ER-1114]. Ireland has presented admissible evidence that proves these allegations and establishes that there is no genuine dispute as to any of the elements of his rule of reason Sherman Act claim. The district court's decision to deny Ireland's MPSJ and grant Appellees' MSJ should be reversed.

II. The district erred in granting Appellees' MSJ of Ireland's antitrust claim.

The district court asserted that granting Appellees summary judgment was appropriate because Ireland did not present admissible evidence that established that Appellees had the requisite intent to restrain competition and because the

procompetitive effects of Appellees' conduct offset any anticompetitive harm it caused.[7]

But the district court did not refer to any of the admissible evidence Ireland presented that establishes the intent element of his antitrust claim. It simply asserted it did not exist. As a matter of law, this naked

[7] In a footnote, the district court asserted that Ireland "failed to establish an actual injury to competition" because "he continued to treat patients even after the ending of call coverage with Defendants" and because "Plaintiff testified that he was not aware of evidence that prices for neurological services were impacted by Defendants' conduct." [1-ER-11, n. 2].

The former argument was made by the district court in its recommendation to grant Appellees' Rule 12(b)(6) motions to dismiss. *Findings and Recommendation* [6-ER-1263]. On appeal, the issue was fully briefed. See *Appellant's Opening Brief Case* 18-35316 [6-ER-1230–1231; *Appellees' Answering Brief* [6-ER-1147]. This Court rejected that argument. The district court's assertion that; because Ireland continued to practice in Bend until he could wind-up his 23-year neurology practice, find an acceptable job, and lease or sell his medical office building; he cannot demonstrate harm to competition caused by his elimination from the market makes no more sense now than it did then.

The district court's assertion that Ireland fails to establish injury to competition because he does not present evidence that Appellees' conduct increased prices only highlights the fact that the court did not dispute that Ireland has presented admissible evidence that this conduct reduced the output and quality of neurologic services provided in the relevant market. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) ("Direct evidence of anticompetitive effects would be proof of actual detrimental effects [on competition], such as reduced output, increased prices, or decreased quality in the relevant market.") (internal quotation marks and citations omitted) (alterations in the original).