assertion is insufficient to establish the absence of a genuine dispute of the intent element that would entitle Appellees to summary judgment.

Further, review of Ireland's evidence shows that he has established the intent element of his antitrust claim in two ways:

(1) by presenting evidence that Appellees had the specific intent to restrain

competition (see *infra* pp 28-39), [5-ER-969–980] and

(2) by presenting evidence that Appellees' coordinated conduct injured competition (see *infra* pp 39-49), [5-ER-967–969, 980–990].

The district court has speculated that Appellees' conduct could have procompetitive effects based on argumentative assertions drawn from Appellees' legal memoranda that allege a hodgepodge of negative attributes to Ireland's professional conduct.[8] These assertions are cited to deposition testimony that often is contradicted by admissible evidence from the record, including Appellees' own testimony.

Ireland has never harmed or disrupted the care of any patient while covering call and, therefore,

[8] Although the assertions are placed within quotation marks, in the majority of instances, they are not cited to the memorandum from which they are quoted. Instead, they appear to be cited to exhibits in Appellees' declarations in support of their MSJ that contain excerpts from deposition testimony that are contained in one or another of Appellees' declarations in support of their motions, though which of these declarations contain the exhibit is often not indicated. [1-ER-7–8](11–12).

Appellees have not adduced any factual evidence that he has. Their allegations are pretexts — proffered only after they were confronted with the prospect of antitrust litigation "as an excuse to cover up different and anticompetitive reasons." *McWane, Inc. v. F.T.C.*, 783 F3d 814, 841 (11th Cir 2015). Ireland provides factual evidence of those anticompetitive reasons in this brief.

Appellees can provide no factual evidence that their conduct reduced prices, increased output, or improved the quality of care in the Bend neurology market. On the other hand, Ireland has presented factual evidence that Appellees' coordinated group boycott reduced the output and quality of care.

The district court ignored all Ireland's evidence of anticompetitive effects. In so doing, it cannot reasonably maintain that it has balanced those effects with Appellees' proffered procompetitive effects. If it had, it would have found that Appellees' proffered procompetitive effects don't tip the scales.

III. The district court erred by granting Appellees summary judgment as to Ireland's claim for intentional interference with economic relationships.

In vacating the district court's dismissal of Ireland's IIER claim, this Court held: "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." Case 18-35316 DktEntry 25-1 p. 3 [5-ER-1115].

Similarly, because the district court has erred in granting Appellees summary judgment as to Ireland's antitrust claim, it has erred in granting summary judgment as to his IIER claim.

IV. To preserve the appearance of justice, this case should be remanded to a different district court.

The district court granted summary judgment by simply asserting that Ireland presented no admissible evidence to establish the intent element of his antitrust claim and failing to take into consideration any of the evidence Ireland presented that Appellees' conduct restrained competition. It did not demonstrate how the evidence Ireland presented in support of these elements either failed to support them, was not admissible, or was negated by admissible evidence in the record.

The district court employed Appellees' lawyers' argumentative assertions as evidence to support its decision, citing as support for these assertions deposition testimony that either directly contradicts those assertions, is contradicted by admissible evidence in the record, or consists entirely of conclusory testimony and inadmissible hearsay.

By ignoring the admissible evidence Ireland presented to support his claims and accepting as evidence argumentative assertions directly quoted from Appellees' legal memoranda the district court has created 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, this case should be remanded to a different district court.

ARGUMENT

I. The district court erred by denying Ireland's MPSJ.

To establish a rule of reason violation of § 1 of the Sherman Act, plaintiffs must prove: "(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." *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1445 (9th Cir. 1988) (citations omitted). If the plaintiff proves 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." *Id.*

Plaintiffs must also demonstrate antitrust standing by showing "that they were harmed by the defendant's anti-competitive contract, combination, or conspiracy, and that this harm flowed from an anti-competitive aspect of the practice under scrutiny. " *Brantley v. NBC Universal, Inc.*, 675 F3d 1192, 1197 (9th Cir 2012) (internal citations and quotations omitted).

The evidence Ireland presented establishes that there is no genuine dispute as to these elements and that he is entitled to judgment as a matter of law for each element and for summary judgment of his entire Sherman Act claim.

A. Agreement, combination, conspiracy See *Pltf's MPSJ* [5-ER-967–969].

The evidence shows that Appellees, comprising multiple independent neurology practices, agreed to a concerted refusal to share call with Ireland and his clinic.

- On April 18, 2013, BNA neurologist Schaben sent an email to BMC neurologists asking BMC neurologists to meet with the BNA neurologists "to discuss the future of neurology in Bend. Mostly call schedule." [5-ER-854] [2-ER-90: 6-18].

- At that meeting, BNA proposed that Abendroth and Griffin join them in a combined refusal to continue to share call with Ireland. [2-ER-161:4-10], [3-ER-500:7-10] [2-ER-93:17-20]. Later, Bell approached Buchholz about joining BNA and BMC in their concerted conduct. [2-ER-246:8-13, 248:9-10].

- In early June 2013, BMC and BNA neurologists sent two letters to Ireland stating that they would stop sharing call with him and his clinic, NOB, on July 1, 2013. [5-ER-940–942].

- Abendroth describes Appellees' concerted refusal to continue to share call with Ireland in an email sent to the Transfer Center, the hospital switchboard, on June 12, 2013. [5-ER-855]. In that email, "[p]roviders per clinic" are listed: Bell, Schaben and Schloesser are listed for "BNA," Abendroth, Griffin, and Gregory Ferenz (a neurologist who was to begin practicing at BMC in August 2013 ([5-ER-936]) are listed for "BMC," Buchholz is listed as the provider

for his own clinic, "GDB," and Ireland is listed for "NOB." *Id.* In the email, Abendroth states:

> "There are two calendars, one for Dr. Ireland/NOB, and one for the other neurologists at BNA/BMC/GDB clinics. . . . As of July 1, 2013, Dr. Ireland will be covering his own patients at Neurology of Bend (NOB). The other providers will cover after hour calls from the ER or hospital for patients of the other 3 clinics (BNA, BMC and GDB)." *Id.*[9]

- Buchholz testified that this email describes Appellees' combined refusal to share call with Ireland and that he agreed to participate in it. [2-ER-204:21–207:11].

- Schaben testified that, as provided by this agreement, on July 1, 2013, all Appellees refused to share call with Ireland. [2-ER-146:5-10].

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[9] Appellees' coordinated refusal to share call included all neurologists on staff at SCMC-Bend capable of sharing call with Ireland from the time the boycott began until Ireland closed his practice in August 2015. [5-ER-936 No. 1] [5-ER-938 No. 1].

In their submissions to the district court, Appellees have mistakenly asserted that Drs. Richard Koller, Steven Goins, and Ferenz — all of whom were neurologists employed by BMC at one time or another [5-ER-936 No. 1]— could have provided call coverage for Ireland. But, Koller stopped taking call before the boycott began. [2-ER-18]. Bell and Schaben testified that Ferenz and Goins joined the other Appellees in their coordinated group boycott. [3-ER-462:1-10] [2-ER-165:18–16610] [5-ER-936].

- Additional evidence of Appellees' coordinated conduct includes: emails Appellees exchanged discussing the order in which their signatures would appear on the first letter, the fact that Buchholz would not sign the letter because of his attorney's recommendation, how long the letter should be, and whether Bell would run the letter over to BMC for signatures or whether BMC neurologists would sign it at BNA. [2-ER-19–20].

These uncontroverted facts provide direct evidence of Appellees' conspiracy. See *County of Tuolumne v. Sonora Community Hosp*, 236 F.3d 1148, 1155 (9th Cir. 2001) ("A claim will survive a motion for summary judgment if there is direct evidence of a conspiracy."). As a matter of law, Ireland should be granted summary judgment of this element of his claim. *Motion 1* [5-ER-960].

B. Intent to harm or restrain trade. *See Pltf's MPSJ* [5-ER-969–979].

1. Proof of specific intent is not required because Appellees' combined conduct injured competition.

It is not necessary to "find a 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. To require a greater showing would cripple the Act." *United States v. Griffith*, 334 US 100, 105 (1948). See *United States v. Patten*, 226 US 525, 543 (1913) ("And that there is no allegation of a specific intent to

restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts.")

In *California Dental Ass'n v. Federal Trade Commission* this Court discussed the role of intent in antitrust cases:

> "We then observed that good 'motives will not validate an otherwise anticompetitive practice,' citing NCAA v. Board of Regents, 468 U.S. 85, 101 n. 23 (1984). This truncated discussion of intent reflects the well established pattern of the Supreme Court to examine intent only in those close cases where the plaintiff falls short of proving that the defendant's actions were anticompetitive" *California Dental Ass'n*, 224 F.3d 942, 948 (9th Cir. 2000)

The evidence establishes that Appellees' coordinated refusal to share call resulted in injury to competition and patient welfare. See *infra* pp 39-49. Therefore, as a matter of law, Ireland has established the intent element of his antitrust claim and should be granted summary judgment of that element. *Motion 2* [5-ER-960].

2. Appellees had the specific intent to restrain competition — a fact that, as a matter of law, establishes their liability for Ireland's entire rule of reason Sherman Act claim.

In a "civil action under the Sherman Act, liability may be established by proof of *either* an unlawful purpose or an anticompetitive effect." *Summit Health Ltd. v. Pinhas*, 500 US 322, 330 (1991) (emphasis in original). It is "the 'contract, combination or conspiracy, in restraint of trade or commerce' which s 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other." *United States v. Socony-Vacuum Oil Co.*, 310 US 150, 223 n 59 (1940) A "refusal to deal which is anticompetitive *in purpose or effect, or both*, constitutes an unreasonable restraint of trade in violation of the Sherman Act." *Program Eng'g, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1195 (9th Cir 1980) (emphasis added).

- *Appellees' combined conduct gives rise to a presumption of intent.*

In the landmark § 1 rule of reason case, *Standard Oil Co. of New Jersey v. United States*, the Supreme Court held that "the unification of power and control . . . gives rise, in and of itself, . . . to the presumption of an intent . . . of excluding others from the trade." *Standard Oil Co. of New Jersey*, 221 US at 75.

The fact of Appellees' collusion speaks eloquently to their intention to force Ireland and his clinic from

the market. If any Appellee had any other reason to stop sharing call with Ireland and his clinic, they wouldn't have needed to combine with the other neurologists.

Appellees combined because, only by combining all the neurologists in the Bend service area capable of providing call coverage for Ireland and extending that refusal to his clinic, could they be sure that they had enough market power over shared call coverage to drive Ireland out of business — market power that no single Appellee possessed before they engaged in their horizontal coordinated group boycott.

- *BNA threatened BMC and Buchholz that, if they continued to share call with Ireland, BNA would stop sharing call with them.*

Abendroth explicitly admits that BNA coerced BMC to join the conspiracy in her deposition:

Q. "[I]s it true that, in fact, Bend Neurological Associates said to you that if you took call with me they would not take call with you . . . ?

A. Yes. They had said that if we continued to share call with you or wanted to do that they would separate as – their call arrangements and cover their own call." [2-ER-103:13-23].[10]

[10] Appellees have attempted to obfuscate the significance of BNA's threat by suggesting that BMC neurologists and Buchholz had to choose between taking call with Ireland or with BNA. But, the only reason that BMC and Buchholz had to make that choice was BNA's threat. But for that threat, BMC neurologists and Buchholz could have shared call with Ireland and BNA — just as they had for many years — and they would have had less call.

In testimony that belies Appellees' pretextual justifications, Abendroth testified that the reason she joined Appellees' boycott was that, given the options BNA's ultimatum imposed, she opted for less days on call:

Q. So, if you had any reason of any kind to stop sharing call with me, why did you combine with the other neurology practice? . . .

A. I had to consider which options would be best for myself, my family, and my practice, and the options were . . . Dr. Griffin and I doing call on our own or doing call on our own and with you, or doing call with the other clinic ourselves without sharing call with you. [2-ER-99:11-24].

Buchholz, when asked during his deposition why he couldn't have continued to share call with Ireland as well as BNA and BMC, replied: "Could I have? Presumably. Unless the group said that if I covered your patients I wouldn't be part of their group" [2-ER-210:12-21]. Buchholz tried to walk that statement back: "probably shouldn't have even brought that up." [2-ER-212:2-3].

But, when asked why he suggested that Appellees threatened him, he replied: "You asked why I would not cover your patients and that would be the only way I could think of as a possibility . . ." [2-ER-211:24–212:1]. Surely, if there had been another reason, Buchholz would have remembered it.

The fact that BNA resorted to threatening BMC neurologists and Buchholz to gain their cooperation demonstrates their anticompetitive intent by

illustrating the importance they placed on achieving market power over shared call coverage and belies Appellees' proffered justifications. The fact that BNA's threats were effective demonstrates how important shared call coverage is to practicing neurology in Bend.[11]

- *BNA ordered Dr. Steven Goins, a newly arrived BMC neurologist, not to share call with Ireland.*

Neurologist, Dr. Steven Goins began practicing with Abendroth and Griffin at BMC on May 26, 2015. [5-ER-936]. Five days later, Bell, a BNA neurologist, sent Goins an email instructing him: "Steve, please note when Dr. Ireland is on call the BNA/BMC doc in parentheses covers both our clinics while Dr. Ireland covers his own and E.R./unassigned. We do not cover his clinic ever." [5-ER-853].

Bell's clear intention to deprive Ireland of any possibility of shared call coverage, even to the point of ordering a newly-arrived competitor that he was not to cover Ireland's patients, demonstrates anticompetitive intent.

- *BNA orchestrated the concerted refusal to share call when they were suddenly faced with financial stress and needed to eliminate competition for patient referrals and for neurologists to join their clinic.*

In March 2013, BNA moved their practice to a new office building with room for another two

[11] The fact that BNA coerced the other Appellees to join the conspiracy does not remove the other Appellees' liability. "[A]cquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one." *United States v. Paramount Pictures,* 334 U.S. 131, 161 (1948)

neurologists and an MRI suite that housed a new MRI. [3-ER-355:12-18]. As a result, BNA acquired $3,362,362.32 of debt, over $1,120,000.00 for each neurologist. [5-ER-852] [3-ER-470:21–471:6] [3-ER-356:5-14].

At the same time, CMS drastically reduced reimbursement for MRI procedures, by up to "roughly three fold." [3-ER-472:13-17]. On May 2, 2013, Schaben complained that her check was "pretty puny" and that the overhead was "high." [5-ER-851].

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

On January 10, 2013, Ireland posted an advertisement for a neurologist in the American Academy of Neurology Career Center, an online service that posts job opportunities for neurologists. [5-ER-1077]. Schloesser testified that BNA advertised for neurologists to join their clinic multiple times on the same online service. [3-ER-391:5-7]. In the fall of 2012, Schloesser learned of Buchholz's plans to withdraw from NOB in April 2013. [3-ER-352:10-13; 354:9-11]. He knew Ireland would face very high overhead after Ireland became a solo practitioner in April of 2013 and that recruiting a neurologist was one way that Ireland would be able to defray that overhead. [3-ER-354:19–355:4].

BNA operated their MRI under the in-office ancillary services exception to "Stark" law's prohibition

against billing federally funded insurance for scans performed on an MRI in which the referring provider has a financial interest. [3-ER-364:11-21], 42 U.S.C. § 1395nn.(b)(2). Essentially, this meant that BNA could only accept MRI referrals from the three neurologists practicing at BNA. The small number of providers who could refer to BNA's MRI under this exception accentuated the adverse financial effects of CMS's payment cuts. Recruiting more neurologists would increase referrals to BNA's MRI and reduce their substantial overhead. Bell testified: "In a high overhead practice . . . with an MRI, definitely it's tough to float without a large number of MRI's, . . ." [3-ER-475:15-17].

- *Schloesser testified that he sought BMC's cooperation in a coordinated refusal to share call with Ireland to interfere with Ireland's ability to recruit a neurologist.*

Mired in debt; strapped with high overhead; and facing drastically reduced reimbursement for MRIs, the prospect of increased competition from the neurologist NOB was attempting to recruit, and competition for recruiting neurologists to join his clinic; on March 13, 2013, Schloesser sent an email to his BNA partners suggesting that they enlist BMC neurologists in a coordinated refusal to share call with Ireland — stating he saw "no reason to support and even encourage [Ireland's] practice in the event that he recruits ." [3-ER-381:3-6]. The only "support" Appellees provided Ireland was sharing call. [3-ER-381:14-17].

Schloesser testified that he viewed the cooperation of the BMC neurologists to be particularly

important because of the possibility that Ireland would recruit — a possibility he viewed as "a problem." [3-ER-383:20–384:1] [3-ER-398:6-12]. Schloesser testified he intended to enlist the cooperation of Abendroth and Griffin to interfere with Ireland's ability to recruit. [3-ER-385:2–386:2].

- *Appellees explicitly extended their concerted refusal to share call coverage to Ireland's clinic to prevent Ireland from recruiting and drive him from the market.*

Even though Appellees knew Ireland was in solo practice, both letters Appellees sent to Ireland announcing their coordinated group boycott explicitly stated that they would refuse to share call with Ireland's clinic, NOB, as well as Ireland personally. [5-ER-940-942].

The explicit inclusion of Ireland's clinic in Appellees' refusal to share call meant that any neurologist who joined NOB would share call with just one other neurologist, Ireland, rather than a minimum of six other neurologists if they joined one of Appellees' clinics. [5-ER-936 No. 1] [5-ER-938 No. 1].

Griffin testified that "call burden is definitely a factor . . . [that] would influence my decision [to join a practice]." [3-ER-323:20-22]. Appellees' coordinated conduct placed Ireland at a significant disadvantage in competing for recruits.

Further, the stigma attached to Appellees' coordinated group boycott made it unlikely that Ireland would be able to recruit an acceptable candidate. [4-ER-724 ¶ 71.]

By explicitly including Ireland's clinic in their boycott, Appellees eliminated competition for patient referrals from the neurologist Ireland would have recruited, eliminated competition from NOB for neurologists to join their clinics, and took away Ireland's only chance for obtaining regular call coverage. Targeting Ireland's clinic unmistakably marks Appellees conduct with anticompetitive intent.

- *BNA initiated the concerted refusal to share call when Ireland became vulnerable to its effects as a solo practitioner.*

Ireland and Appellees shared call for many years. The fact that BNA organized a coordinated group boycott when Ireland became a solo practitioner and vulnerable to its effects demonstrates their anticompetitive intent.

- *Schaben exposes her intention to drive Ireland from the market in email correspondence with Schloesser.*

On July 15, 2013, Schloesser sent Schaben an email informing her that Ireland had asked to meet with him "to have some sort of arrangement /settlement." [4-ER-850]. Schaben responded: "[H]opefully the end is near — for his practice in Bend at least." *Id.* When Schloesser replied, informing Schaben that he had heard that Ireland intended to "to practice here in another building," Schaben responded: "Oh, that sucks." *Id.*

- *Appellees researched the consequences their conduct held for Ireland and were aware that it would force Ireland from the market.*

Griffin testified that "when we talked with the hospital they clarified that . . . you would need to continue to provide coverage for your assigned patients . . . 24-hours seven-day-a-week." [3-ER-264:23–265:7].

Griffin admits "that would not be the quality of life that I would be looking for" and "being on call 24/7 would not be conducive to a good quality of life as a physician." [3-ER-328:1-2; 331:13-14]. He testified that if he were in a situation where he had to personally provide continuous call coverage for his patients, he "would find a new job in another location where I had the support that I needed." [3-ER-325:14-18].

- *Appellees threatened Ireland's privileges.*

In mid-June 2013, Ireland asked BMC and BNA neurologists whether they would cover his patients when he was out of town and one his patients needed immediate in-person neurologic care. [5-ER-856]. Schloesser drafted a response refusing this request, adding: "we will expect the hospital to make every effort to assist you to fulfill your obligations" and "will notify the administration if you are unavailable." [5-ER-847]. Schloesser ended with two sentences: "We will simultaneously allow the system to work while allowing no patient to be denied proper access to care. If you choose to resign your hospital privileges, this is one way to avoid your obligations." *Id.* Schloesser sent the draft for Bell to review. Bell indicated that he "would omit the last two sentences." *Id.*

On June 18, 2013, Abendroth replied to Ireland's request. She indicated that if Ireland were unable to provide coverage for his patients in a "timely manner the Medical Staff president would be notified . . . and an EMS [event management system] report filed." [2-ER-21] [2-ER-113:24–114:19]. Appellees testified that informing the medical staff president and filing an EMS report could lead to the loss or restriction of medical staff privileges and that the loss or restriction of medical staff privileges could damage Ireland's career. [3-ER-460:14-17] [3-ER-390:6-9], [2-ER-208:10-18] [2-ER-118:15–121:1].

The emphasis Appellees placed on ensuring that Ireland would have no one to cover *his* patients undermines their assertion that they were motivated by concern for Ireland's care of *their* patients.

3. Summary of intent

The above evidence establishes that Appellees had the specific intent to restrain trade, a fact that not only establishes the intent element of Ireland's antitrust claim, but also establishes their liability for Ireland's entire Sherman Act claim. See *supra* pp. 28-29. The intent element is also established by evidence that proves Appellees' combined conduct injured competition. See *infra* pp. 39-49. *Motion 2* [5-ER-960].

C. Injury to competition. *See Pltf's MPSJ* [5-ER-980–990].

Plaintiffs can prove injury to competition by demonstrating "reduced output, increased prices, or decreased quality in the relevant market." *Ohio* 138 S Ct at 2284.

1. Appellees' Coordinated Group Boycott Reduced the Output of Neurologic Services in the Bend Neurology Market.

Citing *Oltz v. St. Peter's Cmty. Hosp.*, 861 F2d 1440 (9th Cir 1988) where "exclusion of a single nurse anesthetist was tantamount to a reduction in competition where a single hospital's service area was the relevant geographic market and the exclusion reduced the number of competing anesthesia service providers from five to four," this Court held that "convergence of injury to a market competitor and injury to competition is possible when the relevant market is both narrow and discrete and the market participants are few." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F2d 504, 508–09 (9th Cir 1989).

When Ireland and his clinic were eliminated from the Bend neurology market, a market where the outer boundary was delineated by SCMC-Bend's Rules and Regulations, the number of neurologists decreased from seven to six and the number of competing neurology clinics decreased from three to two. [5-ER-936 No. 1] [5-ER-938 No. 1.] [3-ER-418:6-11].

A little more than one year after Ireland was forced to close his Bend neurology practice [2-ER-43], access to neurologic care in the Bend neurology market had deteriorated to such an extent that, on November 5, 2016, Bend's major newspaper, THE BULLETIN, published a full-page article titled *Neurologists in short supply in Bend.* [5-ER-947–952].

The article quotes Bell: "It's been brutal. We've had to turn away all kinds of stuff, ... We have literally [sic] had to close our doors to 95 percent of dementia referrals to keep the doors open for more urgent problems." [5-ER-948].

Bell testified that the article quoted him accurately and that "at that time it was a challenge to accommodate" patients with Alzheimer's type dementia who wanted to see a specialist. [3-ER-509:11–510:4, 514:5-8]. He testified that it would have been helpful to have more neurologists in Bend to meet the demand for neurologists that was present in November of 2016. [3-ER-519:10-13].

In the same article, Goins is quoted: "We've been so busy we had to shut down our practice to new referrals about three months ago." [5-ER-949]. Goins declared under penalty of perjury that the quoted statements from the article accurately portrayed his opinions. [5-ER-953]. In reference to Goins's statement, Griffin testified that BMC was "closed to new patients." [3-ER-298:11-22] [5-ER-949].

The only difference in the number of providers of neurologic services in the Bend service area between early August 2015, just before Ireland closed his Bend practice, and November 5, 2016, when the BULLETIN article was published, was that Bend had one less neurologist — Ireland — and one less neurology clinic — NOB. [5-ER-936 No. 1] [5-ER-938 No. 1]. Therefore, the loss of access to neurologic care and attendant injury to patient welfare and competition, described in the BULLETIN and admitted by Appellees, are directly attributable to Appellees' conduct.

Because the vast majority of patients with dementia, almost all of whom are over 65 and disabled, have Medicaid or Medicare health insurance, BNA's refusal to accept dementia referrals had a disproportionate adverse effect on the quality of care patients with lower-paying, federally funded health insurance received. [2-ER-311:21-25].

Even before Ireland closed his Bend neurology practice, BNA and BMC refused to see patients referred from Mosaic Medical, a clinic that served almost exclusively lower-income, Medicaid-insured patients. [2-ER-111:13-15; 183:6-18], [5-ER-904; 867–931]. Many of the patients Appellees refused to see were, subsequently, referred to NOB and evaluated by Ireland. ECF [2-ER-23–42; 44-81]. Schloesser testified that, while Ireland continued to practice in Bend, the only place where a patient whom BMC and BNA refused to see could be seen by a neurologist in the Bend neurology market was NOB. [3-ER-448:22–449:4]. When Ireland closed NOB, there was no other neurology clinic available to patients whom BNA and BMC rejected.

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

2. Appellees' conduct reduced the quality of care provided in the Bend neurology market.

- *The quality of neurologic care provided in the Bend neurology market was profoundly decreased for those patients who couldn't get appointments.*

Schaben testified that, while Ireland continued to practice in Bend, patients BMC and BNA refused to see were referred to Ireland. [2-ER-188:18-23]. After Ireland closed his Bend practice, Schaben testified that patients BMC and BNA refused to see "could talk with their provider who could make the call on their behalf and try to get them in for high acuity, or they could go to the valley or Portland." [2-ER-188:24–189:2].

Schloesser testified that patients who could not be seen in the Bend neurology market could be seen in Klamath Falls, "metro Salem, Eugene, Portland, and Hood River." [3-ER-454:6-9, 455:8-9]. The closest of these cities is Eugene, which, according to Google Maps, is a 258 mile, five-hour round trip drive.

All cities Schaben and Schloesser listed require travel that traverses higher elevations that can be difficult to safely navigate in the fall, winter, and spring. Such drives can be especially difficult for patients with neurologic disorders. Lower-income patients sometimes don't have the means to make such trips.

Some patients would not be able or willing to make the drive and would forego neurologic evaluation. But whether a patient, who could not be

seen in Bend, saw a neurologist in one of the cities listed by Schaben and Schloesser, or had to give up seeing a neurologist altogether, they represent a decrease in the output of neurologic services provided in the relevant market and an injury to those patients' welfare.

- *Appellees' conduct reduced the quality of care provided by increasing wait times.*

When patients have long wait times before they can see a provider, the quality of the care is decreased — patients may suffer longer before receiving needed treatment or delay in diagnosis and treatment may lead to permanent disability, or even death.

Appellees testified that the addition or subtraction of one neurologist from the Bend neurology market has a significant effect on wait times. [3-ER-277:5-14] [2-ER-108:23–109:12]. Schloesser testified that the addition of a neurologist could reduce wait times, and allow more patients access to care. [3-ER-396:22–398:1].

If Ireland had not been excluded from the Bend neurology market, patient wait times would have been less and the quality of patient care would have been better.

- *Appellees' conduct injured competition and consumer welfare by causing patients and referring providers to lose their choice of neurologist.*

In *Klor's Inc. v Broadway-Hale Stores, Inc.* the Supreme Court granted certiorari to consider the question of whether a violation of the Sherman Act occurs where a group of businessmen act in concert to deprive a single merchant of the goods he needs to

compete effectively, even though such action by the businessmen does not result in a reduction of "opportunities for customers to buy in a competitive market." *Klor's Inc.* 359 U.S. 207, 210 (1959). The Court held that the challenged restraint was "not to be tolerated . . . ." *Id.* at 213. The "suggest[ion] that there is no violation of the antitrust laws because the public will still receive the same service, . . . has been foreclosed by this Court's decision in *Klor's* . . . ." *Poller v. Columbia Broad. Sys., Inc.*, 368 US 464, 473 (1962).

In *Oltz v. St. Peter's Cmty. Hosp.*, 861 F2d 1440 (9th Cir 1988), Oltz, a nurse anesthetist, claimed that the hospital and its physician anesthesiologists violated the Sherman Act when they entered into an exclusive contract to provide anesthesia services and terminated Oltz's billing contract. At trial, the jury found that Appellees' conduct had actual detrimental effects on competition. In upholding the jury's verdict, this Court found that "[t]he evidence amply supports that "finding" in part because "[s]ome patients and surgeons who preferred the services of Oltz were hindered from obtaining them." *Id.* at 1448. See *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F3d 991, 1003 (9th Cir 2008) ("Coercive activity that prevents choice between market alternatives, including agreements to restrain trade, is one form of antitrust injury.")

When patients and referring providers lose their preferred neurologist or anesthesia provider, the injury to consumer welfare is far greater than when customers lose their choice of an appliance store, like Klor's Inc.

The heart of medical care is the doctor-patient relationship. The AMA Code of Medical Ethics recognizes this ideal when it states that "free choice of physicians is the right of every individual." *Ethics Opinion 9.06 of the AMA Code of Medical Ethics*.

Bell testified that, when a patient is referred to a neurologist, it indicates that the patient or the referring provider chose that neurologist. [3-ER-534:6–535:4].

When Ireland was excluded from the Bend neurology market, patients and referring providers who preferred Ireland lost their choice of neurologist.

The reduction in the number of neurologists reduced the choices available to patients and referring providers. And, because Ireland's exit from Bend was the result of multiple, independent neurology practices gaining significant market power by coordinating their conduct, this reduction in the choice of neurologists was an anticompetitive harm to the market.

- *Appellees' coordinated group boycott erected a barrier to the entry of neurologists into the Bend neurology market.*

Ireland had sole ownership of a medical office building with space for four neurologists, a high field strength MRI, and the state-of-the-art suite in which the MRI was housed. The MRI was debt free. [4-ER-730 ¶¶ 109, 110]. NOB offered an excellent financial opportunity for prospective associates, because of the high-income generating potential of its unencumbered MRI. The Bend area has numerous attractive outdoor

and cultural amenities. Recruiting neurologists had never been a problem for NOB.

But for Appellees' explicit inclusion of Ireland's clinic in their coordinated group boycott, Ireland would have recruited at least one, more likely two or more, neurologists who would have reduced or prevented the crisis in neurologic care delivery that occurred after he was forced to close his practice.

- *Appellees' policy of screening patients for acuity before scheduling them reduced the quality of care provided.*

BNA decided whether or not to accept referrals based on their staff's, not a neurologist's, assessment of the acuity of the patient's need for neurologic care. [2-ER-184:14-15] [3-ER-420:14-18]. But, as Schloesser admitted, he "couldn't be sure the patient didn't have a serious problem until [he] saw them." [3-ER-413:21-25]. Therefore, Bell's assertion that "people with acute neurologic issues had complete access" to care fails for at least one obvious reason — Appellees could not have known which patients had "acute neurologic issues" without seeing them. [3-ER-520:1-3].

BNA and BMC gave preference for appointments to "E.R." patients or "hospital discharges" over patients referred from outpatient clinics. [2-ER-186:20-22] [2-ER-111:23–112:1]. But, many patients referred from outpatient clinics have just as urgent a need, or a more urgent need, for neurologic evaluation as those referred from the emergency room or recently discharged from the hospital. But for Appellees' conduct, NOB would have been available to see those patients.

Even for patients with less-severe neurologic problems, the inability to get an appointment with a neurologist can compromise their care. Bell testified that patients "with mild, . . . occasional migraines" can be effectively treated by their primary providers. [3-ER-517:6-12]. But, he also testified that "sometimes we get referrals from doctors for migraines when they've never tried a single abortive agent or a preventative." *Id.* Although Bell may think it is "fine for us to expect the primary care doctors to try a few things," primary care doctors are, obviously, not willing to or comfortable in providing that care. *Id.*

3. Summary of harm to competition and patient welfare

These undisputed facts establish that Appellees' conduct reduced the output and quality of neurologist services provided in the Bend neurology market, injuring competition. Ireland should be granted summary judgment of that element of his antitrust claim. *Motion 3* [5-ER-960].

D. Balancing

The rule of reason "weighs legitimate justifications for a restraint against any anti-competitive effects." *Paladin Associates, Inc. v. Montana Power Co.*, 328 F.3d 1145, 1156 (9th Cir. 2003).

The district court could not have weighed Appellees' proffered justifications against the anticompetitive effects of their conduct because it ignored all the evidence Ireland presented that established injury to competition.

Appellees have provided only speculation that excluding Ireland from shared call coverage would prevent harm to their patients based on argumentative assertions their lawyers made in their briefs — assertions that are false, for which Appellees have provided no admissible supporting factual evidence, and that are often contradicted by their own testimony and documentary evidence from the record. They are pretexts.

Ireland should be granted summary judgment of this element. *Motion 4* [5-ER-960].

E. Antitrust standing

Appellees' coordinated refusal to share call, harnessed to hospital rules and regulations, put Ireland in the untenable position of having to provide call coverage for his patients, 24/7/365, for as long as he held privileges at SCMC-Bend. See *supra* pp 8-10. Because health insurance plans required that he provide continuous coverage of his patients, he could not resign his hospital privileges without giving up his contracts with health insurance carriers and suffering the financial consequences. See *supra* p 10.

Personally providing continuous coverage for his patients was unsustainable and inconsistent with an acceptable quality of life for Ireland and his family, but there was no other practical way for him to provide that coverage. [4-ER-732–734, ¶¶ 119–125].

Appellees explicitly threatened that, if they had to provide urgently needed in-person treatment for one of Ireland's hospitalized patients, the Medical Staff President would be notified and a report filed that could lead to the loss or suspension of his hospital

privileges and end or severely damage his career, not just in the Bend neurology market, but nationwide. [2-ER-21]. Although Ireland could avoid such an injury to his career for a limited period of time, sooner or later Appellees would find an excuse to move against his privileges. To preserve his career and his family's quality of life, Ireland relocated to a practice where he has call coverage.

When Ireland closed his practice the output of neurologic services was reduced. Patients in the Bend service area lost their choice of neurologist, timely access to a neurologist and, in many cases, access to any neurologist — the quality of neurologic care in the Bend service area was reduced.

Ireland was injured by the same anti-competitive conduct that injured competition. He should be granted summary judgment of the antitrust standing element of his Sherman Act claim. *Motion 4* [5-ER-960].

F. The district court's decision to deny Ireland's MPSJ as to his Sherman Act claim should be reversed.

Because Ireland has presented evidence that establishes all elements of his Sherman Act claim, he should be granted summary judgment of that claim. *Motion 6* [5-ER-960].

II. The district court erred in granting Appellees summary judgment of Ireland's antitrust claim.

The district court granted Appellees' MSJ of Ireland's Sherman Act claim by:

(a) ignoring the admissible evidence Ireland presented that Appellees had the requisite intent to restrain competition, simply asserting that evidence did not exist [1-ER-9–10],

(b) accepting, as evidence, argumentative assertions from Appellees' legal memoranda that are not supported by facts to conclude that any anticompetitive harm from Appellees' conduct was "offset by procompetitive effects" [1-ER-12], and

(c) ignoring the evidence Ireland presented that establishes that the anticompetitive harm caused by Appellees' conduct outweighs their proffered procompetitive justifications.

A. The district court's mere assertion that Ireland presented no admissible evidence that established the intent element of his § 1 claim is insufficient to establish the absence of a genuine dispute of that element.

A moving party without the ultimate burden of persuasion at trial "must point to materials on file which demonstrate that a party will not be able to meet [its] burden." *Nissan Fire & Marine Ins. Co.*, 210

F.3d at 1105 (internal quotations and citations omitted). It is "never enough simply to state that the non-moving party cannot meet its burden at trial." *Id.* (internal quotations and citations omitted).

As detailed above, Ireland has presented admissible evidence that establishes the intent element of his antitrust claim. The district court's mere assertion that Ireland has not presented such evidence does not hold up on review of that evidence and, as a matter of law, is insufficient to establish the absence of a genuine dispute of the element of intent.

B. Arguments that are taken from Appellees' legal memoranda and deposition testimony that contains only conclusory allegations and inadmissible hearsay do not negate Ireland's evidence of Appellees' anticompetitive intent or support procompetitive justifications.

Rule 56(c)(4) provides that "[a]n affidavit or declaration used to support or oppose a motion must . . . set out facts that would be admissible in evidence." This requirement "applies with equal force to deposition testimony." *Carmen v. San Francisco Unified School Dist*, 237 F.3d 1026, 1028 n.4 (9th Cir. 2001).

Argumentative assertions from legal memoranda that are supported only by deposition testimony that is conclusory or contains only inadmissible hearsay can neither support nor defeat a motion for summary judgment. See *Mourning v. Gore*, Case No.:3:18-cv-02245-WQH-RBM, at *4 (S.D. Cal. Feb.

20, 2019) ("A moving party cannot establish a sufficient basis for summary judgment simply with argumentative assertions in legal memoranda.") (citing *S.A. Empresa, Etc. v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982) and Fed.R.Civ.P. 56(c) and (e)). See *Angel v. Seattle-First Nat. Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981) ("A motion for summary judgment cannot be defeated by mere conclusory allegations unsupported by factual data.")

The district court quotes the following arguments from Appellees' legal memoranda as support for its decision to grant Appellees' MSJ and deny Ireland's MPSJ:

- *"Defendants testified that '[Plaintiff's] relationship with each of the neurologists became strained to varying degrees.'" Opinion and Order* [1-ER-10–11] (quoting, but not citing, BMC's MSJ [5-ER-1056] and citing excerpts from Ireland's deposition contained in BNA's Dec ISO MSJ Ex. 18 [5-ER-1003–1023].

The cited portions of Ireland's deposition testimony only refer to problems Bell, Schloesser, Buchholz, and Ireland had with each other during the time they worked together at NOB. Until the boycott, Ireland had no problems with BMC neurologists Abendroth and Griffin, or BNA neurologist Schaben. Further, none of the problems Bell, Schloesser, Buchholz, and Ireland had with each other involved sharing call. Bell and Schloesser continued to share call with Buchholz and Ireland for years after they left NOB.

- *"Defendants testified that on several occasions '[they] expressed concerns that poor communication with [Plaintiff] was disruptive and harmful to patients'* [1-ER-11] (quoting, but not citing, BNA MSJ [5-ER-1046] and citing deposition testimony from Schaben [2-ER-174:6-8], Schloesser [3-ER-404:12-15], Bell [3-ER-481:23–482:14], Abendroth [2-ER-100:25–101:7], and Griffin [3-ER-259: 9-14].

First, there is no factual evidence that sharing call with Ireland disrupted or harmed the care of any patient. Appellees' deposition testimony consists entirely of pretextual, conclusory allegations.

Second, in the cited excerpt from his deposition testimony, Schloesser testified that, "when [he and Ireland] were cross-covering each other [he] didn't have any problems." [3-ER-404:4-5]. Further, he testified that email sign-outs were very brief, "not even" a few paragraphs long, and that the covering provider had the hospital record to consult if they had any questions. [3-ER-399:13-25].

Third, the only factual evidence of on-call communication shows that Ireland's communication was as robust as any Appellees'. [2-ER-82].

- *"[Appellees] 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.'"* [1-ER-11] (quoting BNA's motion for summary judgment [5-ER-1033] and citing Schaben's deposition testimony [2-ER-174:6-8, 180:2-7].

Schaben's testimony is conclusory and predicated on speculation. Appellees can cite no facts to support this allegation. Schaben's vague allegation

that her relationship with Ireland was non-collegial does not provide procompetitive justification for collusive conduct that reduces or eliminates patients' access to care.

- *"Defendant Schloesser testified 'he was no longer 'comfortable" sharing a* [sic] *call with [Plaintiff]'"* [1-ER-11] (quoting, but not citing, BNA's MSJ [5-ER-1033] and citing Schloesser's deposition testimony [3-ER-404:4-22].

Schloesser testified that the reason he was no longer comfortable sharing call was: "[W]e didn't have, being — feeling like we could trust you, that you are not going to, you know, do your thing and try to be the smartest man in the room on Monday, prove everyone else wrong." [3-ER-404:12-15]. Bell stated that "[Y]ou enjoy catching me with my pants down, you enjoy diagnosing patients with — or differing in my opinion on the diagnosis of patients." [3-ER-495:2-5].

But, concern for the possibility that Ireland would suggest different diagnoses or treatments for their patients does not provide a procompetitive justification. Instead, it advocates for risking patient welfare so that Appellees can save face. It is anticompetitive.

- *"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.'"* [1-ER-11] (quoting, but not citing, BNA's MSJ [5-ER-1033] and citing Bell's deposition testimony [3-ER-481:23–482:14].

This is a false assertion that is not even addressed, let alone supported, by the cited false, conclusory testimony from Bell's deposition.

- *"Defendants expressed that '[p]atients complained to defendants about [Plaintiff's] abrasive bedside manner, describing it as "callous" and "dismissive" of their concerns.'"* [1-ER-11] (quoting, but not citing, BNA's MSJ [5-ER-1046–1047] and referencing Bell's deposition [476:17-25].

There is no factual evidence to support Appellees' attorney's assertion that Ireland's bedside manner was abrasive or Bell's allegation that it was callous or dismissive.

That some patients may have been dissatisfied with Ireland's care does not justify Appellees' conduct. Appellees testified that they have had dissatisfied patients. [3-ER-477:20] [2-ER-106:10–14]. All physicians have.

- *"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.'"* [1-ER-11] (quoting, but not citing BNA's MSJ [5-ER-1032] and referring to Ireland deposition [5-ER-1003:15–1004:5], Bell deposition [3-ER-476:17-25].

The cited excerpt from Ireland's deposition refers to a June 4, 2013 email Ireland sent Abendroth *after* Appellees informed him of their concerted refusal to share call. [5-ER-1001–1002]. Although this email contains Ireland's unvarnished assessment of some of the Appellees' professional and personal qualities,

Appellees cannot rely on an email Ireland sent *after* they notified him of their plans for a coordinated group boycott as procompetitive justification for that conduct.

Bell's conclusory testimony is false.

C. Ireland presents evidence that establishes that the anticompetitive harm caused by Appellees' conduct outweighs their proffered procompetitive justifications.

The district court asserted that "in balanc[ing] the harms and benefits . . . any anticompetitive harm [was] offset by . . . procompetitive effects." [1-ER-12] (internal quotation marks omitted) (alterations in the original). But, the district court provides no analysis that would support this assertion.

There is no factual evidence that shows that Appellees conduct decreased the price, increased the output, or improved the quality of neurologic care delivered in the Bend neurology market. Ireland has presented factual evidence that the output and quality of patients' care suffered as a consequence of Appellees' coordinated group boycott.

D. Appellees asserted that they had problems sharing call with Ireland only after Ireland informed them that he was concerned their conduct was unlawful.

Appellees cannot provide any document where they expressed concern about sharing call with Ireland before he let them know that he was concerned that their conduct violated antitrust law.

E. The evidence directly contradicts Appellees' allegations that they were concerned that Ireland would harm their patients.

- Griffin asked Ireland to cover his patients for him on April 15, 2013, just a few weeks before he joined the boycott. [2-ER-22] [3-ER-253:1–254:6]. Griffin asked Ireland to cover his patients before he asked co-conspirators Bell and Buchholz. *Id.* Ireland was not his last choice.

- On March 12, 2013, Buchholz asked Ireland to cover his patients while he was out of town. [2-ER-83].

- Abendroth asked Ireland to cover her patients in December 2012. [2-ER-17].

- Bell testified that he referred patients to Ireland after Appellees' boycott began. [3-ER-494:15-16].

- Griffin testified that Ireland's patient care was "more than adequate." [3-ER-255:24–256:1].

F. Schloesser testified that Appellees' coordinated group boycott had exclusively anticompetitive effects.

Schloesser's testimony directly contradicts the district court's assertion that Appellees' conduct had procompetitive effects:

Q. [H]ow was neurologic care for patients improved in Bend by your combining with the other neurologists to refuse to share call with me?