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OPINION, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (JANUARY 13, 2026)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ENDURE INDUSTRIES, INCORPORATED,

Plaintiff-Appellant,

v.

VIZIENT INCORPORATED, a Delaware corporation; VIZIENT SUPPLY L.L.C., a Delaware limited liability company; VIZIENT SOURCE L.L.C., a Delaware limited liability company; PROVISTA INCORPORATED, a Delaware corporation,

Defendants-Appellees.

No. 24-10995

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:20-CV-3190

Before: SMITH, STEWART, and RAMIREZ,
Circuit Judges.

JERRY E. SMITH, *Circuit Judge*:

This appeal is about market definition under antitrust law. With the exception of certain *per se* violations such as horizontal agreements on market

division or price fixing, antitrust plaintiffs must always establish market definition to show injury. The district court resolved market definition on summary judgment for the defendants, holding that the plaintiff had identified no genuine dispute of material fact, or equivalently that no reasonable jury could return a favorable verdict with respect to plaintiff's two proposed markets. Finding no error, we affirm.

I.

A.

Endure Industries, Inc., is a seller of Disposable Medical Supplies ("DMS") such as bandages, medical tape, and syringes, which are used by healthcare providers such as hospitals, doctors' offices, schools, and prisons. DMS are used in great volume by General Acute Care Centers ("GACs"), which are healthcare facilities that range from small, critical-access hospitals to large academic medical centers. GACs are equipped and staffed to provide short-term, inpatient medical and surgical services, as distinguished from intensive care facilities, specialized surgical centers, and nursing homes.

Vizient, Inc., Vizient Source, LLC, Vizient Supply, LLC, and Provista, Inc. (collectively, "Vizient"), are organized around parent company Vizient, which is the largest Group Purchasing Organization ("GPO") in the country, controlling 53% of market share. Vizient is also the largest GPO focused on GACs, serving over 50% of acute-care health systems and 97% of academic medical centers. GPOs are contracting agents that pool demand from their member healthcare

providers, including GACs, to reduce administrative burden and negotiate lower pricing from suppliers.

Vizient offers DMS to its members in thirteen different categories such as "General Surgery" or "Family Care" product bundles, each of which contains some number of individual stock-keeping units ("SKUs") or inventory items. Members who buy enough DMS within a bundle receive rebates under Vizient's "Impact Standardization Program" ("ISP"). Vizient charges fees to its members called Contract Administrative Fees ("CAFs"), which vary depending on the number of Vizient-brokered contracts the member assumes, and may be prorated down if the member participates in Vizient's ISP rebate program.

So, like many businesses, Vizient buys wholesale and sells retail. Historically, the GPO market contained twelve national purchasing member organizations in 1997 along with several regional and local GPOs, but today has consolidated to three national GPOs and several local GPOs accounting for 2.5% or less of the market. Vizient is the largest GPO; it captures more than 53% of net patient revenue in the GPO market, and its contract portfolio aggregates more than $140 billion in demand, including at least $7 billion in the GAC market.

Vizient's ISP rebate program is organized into thirteen different product categories such as "Airway Management," "Bowel Management," "General Surgery" and "Family Care" bundles, each containing relevant SKUs. The ISP requires a Vizient Member to project its total annual spending across the SKUs in the bundle (diapers, lactation care, and medical nutrition for example). According to an internal document, this projection "should cover a member's entire spend in

the category with all suppliers." The GPO member must then meet 90% compliance for each individual SKU to receive a rebate for that product, as well as 75% overall compliance to receive any rebates across that ISP bundle. Vizient monitors compliance with the category-spend obligations on a quarterly basis.

Endure, after its own fashion, also buys wholesale and sells retail. Endure is a "relabeler" or "repackager," commissioning DMS from manufacturers overseas and then selling directly to health care providers. Such providers would include pooled demand vehicles such as GPOs and the twenty-eight hospitals that participate in Vizient's GPO and rebates program.

When Endure made a bid to join Vizient's GPO as a supplier of medical tape, Vizient rejected that bid in favor of 3M, the well-known maker of Scotch Tape and many consumer goods. Following that rejection, the spurned Endure brought an antitrust complaint in 2020 against Vizient, alleging monopolization by exclusive dealing with bid-rigging, unilateral refusal to deal, essential facilities monopolization, and vertical rebate agreements in restraint of trade in two proposed markets for medical products. Following a motion to dismiss, failed settlement negotiations, unresolved motions to exclude expert testimony, and the close of discovery, Vizient moved for summary judgment for failure to define any sufficient antitrust market.

B.

On October 9, 2024, the district court granted the motion for summary judgment in an opinion reasoning that Endure had failed to establish a legally sufficient definition of the relevant market; it entered final judgment for Vizient. Although Vizient had moved for

summary judgment on (1) Endure's proposed antitrust markets' legal insufficiency; (2) Vizient's allegedly not actually competing in the proposed markets; and (3) Endure's theories of anticompetitive conduct's failing as a matter of law, the court ruled on only the first issue.

The district court correctly identified that where a plaintiff fails to define a sufficient antitrust market, the court may grant summary judgment on antitrust claims. The court observed that to survive summary judgment, the defined relevant market "must include all commodities reasonably interchangeable by consumers for the same purposes." *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 417 (5th Cir. 2010).

The court then analyzed each of Endure's proposed markets proffered by its expert, Loren Smith. First, the court considered the "GPO DMS Market," which Smith defined as encompassing "the sale of DMS through GPO-negotiated and administered contracts to GACs." Second, the court addressed the "Vizient DMS Market," which Smith defined as the sale of DMS to Vizient Member GACs.

On the first market definition, the district court faulted Smith's report for excluding non-GPO DMS sales and conceding that 174 of the 629 GAC hospitals that have left Vizient over the years abandoned the GPO model entirely (27.6%), suggesting that non-GPO sales represented a reasonably interchangeable substitute. The court similarly faulted Smith's report for failing to account for the fact that only 72% of U.S. hospital purchases ran through GPOs, such that Endure had left out nearly 30% of the relevant market, which

the court called, "powerful evidence of the alternatives reasonably available to customers."

On the second proposed definition, the district court faulted Smith's report for failing to show lock-in, given that "no allegations suggest [Vizient] members are prevented from buying the supplies they need outside a GPO, joining and purchasing through additional GPOs, or leaving the GPO altogether."

Therefore, Endure had failed to establish a legally sufficient definition of the relevant market.

C.

On appeal, Endure contends first that its proposed market definitions meet the summary judgment standard of posing a genuine dispute of material fact, and second lodging alternative theories on standing, exclusive dealing, market foreclosure, and Vizient's alleged competition through its "house label" or proprietary brand NovaPlus.

We rule only on the first issue—whether Endure's proposed market definitions satisfy the summary judgment standard—and hold that plaintiffs failed to muster evidence to raise a genuine dispute of material fact as to their preferred market definition of GAC demand routed through GPOs, as well as the proposed submarket of GAC demand by Vizient members only. We need not address Endure's alternative arguments because the district court did not rule on them in the first instance but decided only the definition of relevant market.

II.

First, we consider market definition. Next, we apply that definitional discussion to Endure's first proposed market for GPO DMS demand. Finally, we apply it to Endure's second proposed market for Vizient-Member demand.

A.

The Sherman Act outlaws every contract "in restraint of trade" and attempts to monopolize. 15 U.S.C. §§ 1-2. The Clayton Act adds more specific content to these bans, prohibiting exclusionary acts such as price discrimination, rebates, and exclusive dealing and boycotts "where the effect of such [practice] may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce." 15 U.S.C. § 14. The challenge is that monopolization of any line of commerce involves defining that relevant market within which monopolization injuries may occur.

To support claims under Sections 1 and 2 of the Sherman Act, a plaintiff must "define the relevant market." *Universal Computer Sys., Inc. v. Volvo Cars of N. Am., Inc.*, 207 F.3d 658, *3 (5th Cir. 2000) (per curiam) (unpublished) (table). Restraints evaluated under the Rule of Reason, such as exclusionary dealing and rebates, require courts "to conduct a fact-specific assessment of 'market power and market structure . . . to assess the [restraint]'s actual effect' on competition." *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018) (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984); P. Areeda & H. Hovenkamp, FUNDAMENTALS OF ANTITRUST LAW § 5.02 (4th ed. 2017)). "The relevant market is . . . the area of effective competition," which is the "arena

within which significant substitution in consumption or production occurs." *Id.* at 543 (citation modified). A market has two parts: (1) the product market, and (2) the geographic market. *See Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 626 (5th Cir. 2002). The product market defines which products compete. The geographic market defines where they compete. Here, the proposed geographic market is national, so the disputed question is the product market.

As above, a "proposed product market must include all 'commodities reasonably interchangeable by consumers for the same purpose.'" *PSKS*, 615 F.3d at 417 (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956)). Antitrust law fundamentally defines product markets by cross-elasticity of demand, that is, from the demand side.[1]

"The cross-elasticity of demand for substitutes measures consumers' propensity to switch from one product to another, similar product when relative prices change." *United Farmers Agents Ass'n v. Farmers*

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[1] *Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."); *see also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *Merger Guidelines* § 4.3 (2023) ("The outer boundaries of a relevant product market are determined by the 'reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it'") (quoting *Brown Shoe*, 370 U.S. at 325 (1962)). Cross Elasticity of Demand is the Percent Change in Quantity of good X/Percent Change in Price of good Y, *see* Adam Hayes, *Cross Price Elasticity: Definition, Formula, and Example*, INVESTOPEDIA (Aug. 5, 2025). Here, Goods X and Y would be proposed as GPO-GAC sales, and non-GPO GAC sales; etc., for the Vizient Members.

Ins. Exch., 89 F.3d 233, 236 n.3 (5th Cir. 1996). To illustrate, as explained in *du Pont*, 351 U.S. at 400, "[i]f a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication that a high cross-elasticity of demand exists between them; that the products compete in the same market."

This court has oriented its market analysis toward consumers' choices: "A proposed product market must include all 'commodities reasonably interchangeable by consumers for the same purposes.'" *PSKS, Inc.* 615 F.3d at 412 (quoting *du Pont*, 351 U.S. at 395). In dismissing an antitrust complaint, this court has stated,

> Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient.

Apani, 300 F.3d at 628. Indeed, the proposed market's "area of effective competition" is essentially equivalent to the "arena within which significant substitution in consumption or production occurs.'" *Am. Express*, 585 U.S. at 543 (internal quotation marks and citation omitted).

Other classical measures of market definition and market power include the Hypothetical Monopolist

Test[2] and the *Brown Shoe* qualitative factors.[3] But the *Brown Shoe* factors are really practical indicia or observable proxies that are probative of cross-elasticity

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[2] *See 2023 Merger Guidelines* § 4.3.A ("The Hypothetical Monopolist Test . . . evaluates whether a group of products is sufficiently broad to constitute a relevant antitrust market . . . [by] ask[ing] whether a hypothetical profit-maximizing firm . . . likely would undertake at least a small but significant and nontransitory increase in price "SSNIP" or other worsening of terms.") An SSNIP generally looks for a 5% price increase, but it incorporates cross-price elasticity and a diversion ratio (also calculated by cross-price elasticity) into its measure, so it is really a mapping of elasticities onto profit margins. Also, "other worsening of terms" may include reductions in quantity or quality, which redound to price. *See generally Standard Oil Co. v. United States*, 211 U.S. 1, 52 (1911) ("The evils which led to the public outcry against monopolies [in England] and to the final denial of the power to make them [by the King] may be thus summarily stated: (1) The power which the monopoly gave to the one who enjoyed it, to fix the price and thereby injure the public; (2) The power which it engendered of enabling a limitation on production; and (3) The danger of deterioration in quality of the monopolized article. . . . "); *United States v. Am. Tobacco Co.*, 211 U.S. 106, 187 (1911) ("the [tobacco] combination. . . . might inflict infinite injury upon the public by leading to a stoppage of supply and a great enhancement of prices").

[3] 370 U.S. at 325 ("Within this broad market, well-defined subdivisions may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as [i] industry or public recognition of the submarket as a separate economic entity, [ii] the product's peculiar characteristics and uses, [iii] unique production facilities, [iv] distinct customers, [v] distinct prices, [vi] sensitivity to price changes, and [vii] specialized vendors.").

of demand where low cross-elasticity of demand may otherwise be challenging to observe.[4]

Practical factors are helpful for identifying goods that obviously have different demand structures, *e.g.*, Rolex Watches and Timex Watches, or Mercedes versus Toyota sedans. They can also overcome the misleading shortcomings of elasticities where supplementary goods, *e.g.*, tinned sardines and tinned tuna, have overlapping demand curves while being in reality distinct products. Practical indicia also help cut through the "Cellophane Fallacy," where market power is underestimated because prevailing monopoly pricing encourages spillover into separate goods, such as other wrapping materials, *see generally du Pont*, 351 U.S. at 400-01. That is why the *Brown Shoe* factors invite courts to apply their judgment in distinguishing between goods identified as the same by cross-elasticity of demand and goods thereby distinguished.[5]

The *Brown Shoe* indicia also provide the basic doctrine for distinguishing among wider markets and

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[4] *See 2023 Merger Guidelines* at § 4.3 ("Market Definition") (citing *Brown Shoe*, 370 U.S. at 325; *United States v. U.S. Sugar Corp.*, 73 F.4th 197, 204-07 (3d Cir. 2023) (affirming district court's application of *Brown Shoe* practical indicia to evaluate relevant product market that included, based on the unique facts of the industry, those distributors who "could counteract monopolistic restrictions by releasing their own supplies").

[5] *See Brown Shoe*, 370 U.S. at 294 (pointing out that "the definition of the relevant market" must "'correspond to the commercial realities' of the industry"); *accord Am. Express*, 585 U.S. at 544 ("courts should 'combine' different products or services into 'a single market' when 'that combination reflects commercial realities.'") (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966)).

submarkets. "Though the 'outer boundaries of a product market'" are determined by the framework above, "there may be 'within [a] broad market, well defined submarkets . . . which, in themselves, constitute product markets for antitrust purposes." *United States v. Cont'l Can Co.*, 378 U.S. 441, 449 (1964) (quoting *Brown Shoe*, 370 U.S. at 325). "'The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 980 (5th Cir. 1977) (quoting *Brown Shoe*, 370 U.S. at 325).

"However, 'a submarket analysis incorporates, but does not replace, the standard market test. It merely adds new factors to that test so as to more precisely define the market affected by the defendant's actions.'" *Worldwide Basketball and Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 962 (6th Cir. 2004) (quoting *White & White, Inc. v. Am. Hosp. Supply Corp.*, 723 F.2d 495, 500 (6th Cir. 1983)). "Although a recognized submarket doctrine exists, such markets must exist within broader economic markets. And the requirements for pleading a submarket are no different from those for pleading a relevant broader market." *PSKS*, 615 F.3d at 418 (5th Cir. 2010) (citation omitted). Therefore, they are fundamentally the same phenomenon, such that the "submarkets" language may be misleading, as distinguished from wider or narrower markets characterized by demand structure.

Within submarkets, we note that single-branded markets could exist as a matter of demand, but they

trigger heightened practical concerns. "[I]n rare circumstances, a single brand of a product or service can constitute a relevant market for antitrust purposes." *PSKS*, 615 F.3d at 418. We narrowed that possibility to situations where "structural barrier[s]" cause consumers to be "'locked in' to a specific brand by the nature of the product." *Id.* (citing *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 481-82 (1992)). Indeed, "absent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market." *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488 (5th Cir. 1984).

Finally, another approach "defines a product market as a 'cluster of services' insulated from competition as a result of their distinctiveness, cost advantages, and settled consumer preference." Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 antitrust L.J. 129, 157 (2007). Where the competitive conditions for multiple relevant markets are reasonably similar, it may be analytically convenient to aggregate the products in these markets into a "cluster market," even though not all products in the cluster are substitutes.[6] All the same, the plaintiff bears the burden of establishing a legally sufficient market.

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6 *2023 Merger Guidelines*, § 4.3.D.4.; *see also United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974) ("the relevant product market 'within which the competitive effect of the merger is to be judged' is the 'business of commercial banking . . . and the cluster of products and services denoted thereby"); *U.S. v. Rockford Mem'l Corp.,* 898 F.2d 1278, 1284 (7th Cir. 1990) (Posner, J.) (clustering markets for acute care hospitals); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 565-66 (6th Cir. 2014) (same).

C.E. Servs., Inc. v. Control Data Corp., 759 F.2d 1241, 1244 (5th Cir. 1985) (citing *du Pont*, 351 U.S. at 381).

B.

We apply the foregoing principles to Endure's appeal of the summary judgment on its first proposed definition of "The GPO Market," which Endure pleaded as encompassing the "market for the marketing, supply, and distribution of disposable medical supplies by means of GPOs to acute-care hospitals and academic medical centers." On reasonable interchangeability, Endure claimed that "commercial realities" in the arena of disposable medical supplies make it so that "there are practically no interchangeable substitutes for acute care and academic hospitals to [disposable medical supplies], except through GPOs." Endure also claimed, "[b]ecause of internal polices and additional services offered by GPOs, acute-care hospital customers . . . do not view other methods of purchasing disposable medical supplies to be reasonable substitutes." As for price, Endure claimed that "prices of disposable medical supplies are not meaningfully constrained by the price of alternative distribution methods."

At the summary judgment stage, Vizient posited that the GPO Market was legally insufficient for two reasons. First, because, as defined by Endure and its expert, Smith, the market definition "fails to include all reasonably interchangeable substitutes for the same of [disposable medical supplies]" by excluding "sales through non-GPO channels (*e.g.*, sales direct from suppliers." Second, because, as defined by Endure and its expert, the GPO Market is "limited to one kind of customer—[general acute care hospitals] and thus

excludes all other healthcare facilities and non-healthcare customers that purchase the same products."

Endure countered that the *Brown Shoe* factors favor the proposed GPO Market. Principally, for the "distinct customer and prices analysis," Endure claimed that "Dr. Smith shows that nearly all [general acute care] hospitals use a GPO to purchase from suppliers, and when hospitals switch from a GPO, they most often switch to another GPO supplier." Endure also relied on Smith's report as to no reasonable alternatives, citing "significantly higher transaction costs" and using the same material to argue for specialized vendor and hypothetical monopolist status. As for the qualitative *Brown Shoe* factors, Endure claimed that "the healthcare industry recognizes national GPOs as distinct sales channels" and Vizient "sees itself" as a competitor of other national GPOs.

The plaintiff gets to set the initial terms of engagement on market definition, *Shah*, 985 F.2d at 453-54, but the *Brown Shoe* factors and expert economics testimony are probative of the underlying elasticities. Smith's declaration includes a figure, considered closely by the district court, showing that of the 629 GAC hospitals that have switched from Vizient, 174 or 27.7% have left the GPO model entirely. The fact that somewhere between a quarter and a third of customers now get their disposal medical supplies elsewhere, outside the proposed GPO Market, strongly suggests reasonably available alternatives.

Further, Smith's Declaration says, "a somewhat outdated GAO report stated that 72% of all purchases made by all US hospitals were through GPO-negotiated and administered contracts." While we observe that the report is from 2012, it is elementary that the plaintiff

bears the burden of production. This court is not in a position to infer—as Endure heavily implies—that the number of hospitals departing from the GPO model has declined during the intervening period.

Smith's report also adds, "Another study reported that hospitals, on average, purchased 82% of general medical/surgical products through GPOs." That figure again undermines his theory, both because 18% purchased through non-GPO sources suggests potential alternatives and because the 82% figure is itself an average, for which Endure fails to plead the underlying distribution of GPO purchase shares, which likely include higher and lower figures. As the district court stated, Endure "does not include these [alternative] channels as reasonably interchangeable substitutes" in its definition of the GPO Market.

Given these facts, the district court correctly concluded that though 98% of hospitals use GPOs, a significant portion of their purchases—almost a third—are outside GPOs. That renders the market legally insufficient and susceptible to summary judgment. *See PSKS*, 615 F.3d at 417; *E.I. du Pont*, 351 U.S. at 395.

This court has rejected proposed markets for similar reasons. In *Shah*, an organization of anesthesiologists agreed to provide anesthesiology services exclusively in a local hospital network. *Shah v. VHS San Antonio Partners, L.L.C.*, 985 F.3d 450, 454 (5th Cir. 2021). After the organization terminated that agreement with a pediatric anesthesiologist, he was barred from further practicing in the local hospital network. *Id.* at 453. He filed an antitrust lawsuit, seeking to define the product market as "pediatric anesthesiologists." *Id.* at 455. This court rejected it as "insufficient

as a matter of law" for failure to include reasonably interchangeable substitutes because the plaintiff did not identify "where people could practicably go" to acquire similar services within the geographic market. *Id.* at 454-55.

Most saliently, in *Dr.'s Hospital v. Southeast Medical Alliance, Inc.*, a hospital (DHJ) sued a competitor hospital and a membership organization that "welcomed the competitor into membership and booted out" DHJ, which sued. 123 F.3d 301, 303 (5th Cir. 1997). In defining the geographic market, DHJ attempted to establish an antitrust market of "the East Bank of Jefferson Parish." *Id.* at 311. According to plaintiff DHJ's expert, "over thirty percent of East Bank residents obtained hospital care outside of the East Bank." *Id.* at 312. We affirmed the summary judgment on the basis that this geographic market was insufficient as a matter of law, reasoning that "the substantial percentage of East Bank residents who currently leave the East Bank for their hospital services is powerful evidence of alternatives reasonably available to consumers." *Id.* For that reason, the market was too "narrowly drawn." *Id.* (citation modified).

Endure tries to distinguish *Dr.'s Hospital* as geographic market definition—not product market definition. But "the criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market." *Brown Shoe*, 370 U.S. at 336. Indeed, as the district court correctly observed, the fact that almost 30% of hospital purchases are transacted outside the

GPO model undermines the viability of Endure's GPO Market.[7]

C.

We turn to Endure's second proposed definition of the "Vizient DMS Market," which Endure pleaded as covering the sale of DMS to Vizient Member GACs. According to Endure, this market is a submarket within the GPO Market.[8] This submarket captures "the marketing, supply, and distribution of disposable medical supplies by means of Vizient to Vizient Member Hospitals" (emphasis added). As to reasonable interchangeability, Endure claims that "commercial realities" are such that "there are practically no interchangeable substitutes for Member Hospitals to [disposable medical supplies] except through Vizient." According to Endure, Vizient's incentive programs (ISPs, or Impact Standardization Program) "effectively lock in Member Hospitals to purchasing [disposable medical supplies] exclusively through Vizient." For that reason, Endure maintains that Vizient's "Member Hospitals . . . cannot afford to forego [*sic*] purchasing . . . [disposable medical supplies] through Vizient because it is cost-prohibitive

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[7] We decline to rule on the D.C. Circuit's "core customer" theory proffered by Endure, given that that theory is nonbinding even within that Circuit. *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1039-41 (D.C. Cir. 2008). It also appeared nowhere in plaintiff's second amended complaint and thereby was not ruled on by the district court and is forfeited on appeal.

[8] To the extent that Endure tries to distinguish it as a submarket, we note the pleading standards of markets and submarkets are economically equivalent, even if qualitative factors may occasionally explore the distinction. *PSKS*, 615 F.3d at 418.

for Member Hospitals to switch to a new GPO." As to price, Endure claimed that "prices of [disposable medical supplies] sold through Vizient are not meaningfully constrained by the price of alternative distribution methods."

At the summary judgment stage, Vizient contended that the Vizient Submarket was legally insufficient for the same reasons as the GPO Market and that "it is presumptively improper to limit an antitrust market to the defendant's business or its customers, absent exceptional market conditions that are not present here." Endure countered that Smith's report shows that Vizient "serves more than half of acute care systems and 97% of academic centers, which require access to a vast array . . . of products." Serving a set of hospitals is not the same, however, as either satisfying their full demand or limiting their access to reasonably interchangeable alternative suppliers. Even so, according to Smith, because the "purchase volume" of Vizient's Member Hospitals is so high, those Member Hospitals "cannot easily switch to alternative sources of supply, even for a significant price reduction."

Endure also muddied its second proposed definition by claiming that the Vizient submarket "includes DMS sales both through Vizient's GPO network and outside of Vizient's GPO" (emphasis added). Endure appears to plead a wider definition on appeal than at the summary judgment stage. While this court "may affirm summary judgment on any ground supported by the record, even if it is different from that relied on by the district court," *Campos v. Steves & Sons, Inc.*, 10 F.4th 515, 520 (5th Cir. 2021), generally, the Court "will not reach the merits of an issue not considered by the district court," *PHH Mortg. Co. v. Old Republic*

Nat'l Tit. Ins. Co., 80 F.4th 555, 563 (5th Cir. 2023), absent special circumstances, *Baker v. Bell*, 630 F.2d 1046, 1056 (5th Cir. 1980). Those special circumstances exist only where "the proper resolution is beyond any doubt" and those in which "injustice might otherwise result." *Id.*

Here, the proper resolution is likely "beyond doubt" because, within the summary judgment framework, Endure has not "identified specific evidence in the record" to anchor this market definition, nor has it "articulate[d] the precise manner in which that evidence supports [its] claim." *See Shah*, 985 F.3d at 453. Rule 56 does not require a court to "sift through the record in search of evidence to support a party's opposition to summary judgment." *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915 n.7 (5th Cir. 1992). Therefore, summary judgment on each interpretation is appropriate.

On the merits of the Vizient DMS Market, the general rule is, "absent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market." *Domed Stadium Hotel*, 732 F.2d at 488. The only exception is where "consumers are 'locked in' to a specific brand by the nature of the product." *PSKS*, 615 F.3d at 418. The Supreme Court established this exception in *Eastman Kodak v. Image Tech. Servs.*, 504 U.S. 451, 481-82 (1992).

As the district court observed, the summary judgment record includes no evidence that Vizient GPO members—or any other suppliers of DMS, for that matter—were "locked in." Although Endure alleges that Vizient's incentive programs "lock in" its GPO members, that purely price approach to lock-in is disfavored by this court's precedent. *PSKS*, 615 F.3d at 418; *Domed*

Stadium Hotel, 732 F.2d at 488. In *Eastman Kodak* itself, the single brand lock-in was for proprietary parts tied into undesired in-house repair services. 504 U.S. at 456-58. Endure fails specifically to plead any qualitative differences between Vizient's GPO *service* and other GPO *services*.

Even considering the slightly-wider measure of all demand by Vizient Member GACs, given that Vizient enjoys only a 53% stake in the GPO market, it still seems highly likely that other GPOs would effectively constrain Vizient's pricing power with respect to its Member GACs. Endure also does not adduce or trace specific facts related to high costs of switching to other GPOs—which would be probative of lock-in—as is required to resist summary judgment. Therefore, a Vizient-member only GPO DMS demand market is too "narrowly drawn." *Dr.'s Hospital*, 123 F.3d at 312.

Finally, as discussed *supra*, the record appears to support the opposing view that Vizient Members can buy DMS through another GPO or directly from a supplier, as indicated by Smith's 27.7% non-GPO purchases figure. The Vizient Submarket therefore would not include all reasonably interchangeable substitutes defined fundamentally by cross-elasticity of demand. *See PSKS*, 615 F.3d at 418. For these reasons, the district court did not err in rejecting the Vizient Market.

* * * * *

We elect not to address the remaining issues, such as Vizient's alleged competition through its NovaPlus private label, exclusive dealing, and market foreclosure, under the "well-established general rule [that] this court will not reach the merits of an issue not considered by the district court." *PHH Mortg.*, 80

F.4th at 563 (internal quotation omitted). As mentioned *supra*, "absent special circumstances, this court will not consider an issue passed over by the district court," where such special circumstances include where "'the proper resolution is beyond any doubt,' and those in which 'injustice might otherwise result.'" *Id.* (quoting *Baker*, 630 F.2d at 1056).

* * * * *

Endure has failed to satisfy its burden to establish a genuine dispute of material fact as to either of its proposed antitrust markets. The summary judgment is AFFIRMED.

JUDGMENT, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (JANUARY 13, 2026)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ENDURE INDUSTRIES, INCORPORATED,

Plaintiff-Appellant,

v.

VIZIENT INCORPORATED, a Delaware corporation; VIZIENT SUPPLY L.L.C., a Delaware limited liability company; VIZIENT SOURCE L.L.C., a Delaware limited liability company; PROVISTA INCORPORATED, a Delaware corporation,

Defendants-Appellees.

No. 24-10995

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:20-CV-3190

Before: SMITH, STEWART, and RAMIREZ,
Circuit Judges.

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that Endure has failed to satisfy its burden to establish a genuine

dispute of material fact as to either of its proposed antitrust markets. The summary judgment is AFFIRMED.

IT IS FURTHER ORDERED that Appellant pay to Appellees the costs on appeal to be taxed by the Clerk of this Court.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. *See* Fed. R. App. P. 41(B). The court may shorten or extend the time by order. *See* 5th Cir. R. 41 I.O.P.

MEMORANDUM OPINION AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS (OCTOBER 9, 2024)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ENDURE INDUSTRIES INC,

Plaintiff,

v.

VIZIENT INC., ET AL.,

Defendants.

Civil Action No. 3:20-CV-3190-x

Before: Brantley STARR,
United States District Judge.

MEMORANDUM OPINION AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Before the Court is defendants Provista Inc., Vizient Inc., and Vizient Source LLC, and Vizient Supply LLC's (collectively, "Vizient") motion for summary judgment against plaintiff Endure Industries Inc. (Endure). (Doc. 235). In addition, Vizient moves to

exclude the testimony of three of Endure's experts: Loren K. Smith (Doc. 238) and John Strong and Gary Durham (Doc. 240). In return, Endure moves to exclude the testimony of Vizient's expert, Michael Fahlman (Doc. 245). For the reasons below, the Court **GRANTS** Vizient's motion for summary judgment and **FINDS AS MOOT** all motions to exclude.

I. Factual Background

Endure sells disposable medical supplies (DMS) and brought this case against Vizient, a healthcare group purchasing organization (GPO) after losing bids to contract with Vizient. Endure alleges Vizient has violated the Sherman Antitrust Act by monopolizing the market and engaging in anticompetitive conduct.

As a GPO, Vizient negotiates sales terms with product suppliers on behalf of healthcare providers—such as hospitals, surgery centers, nursing homes, physician offices, jails, and schools—that are members of its network. Members can purchase products through Vizient at the price Vizient negotiates with certain suppliers, through other GPOs with their negotiated prices, or from non-GPO suppliers independently.

Vizient also has various Impact Standardization Programs (Impact Programs) through which some suppliers offer quarterly rebates to members who purchase a certain volume of particular supplies included in the program. When members join an Impact Program, they make an annual spend projection in each product category the Impact Program covers, such as nonsterile kits or bowel management. To be eligible for the rebates, members must purchase at least 75% of their total projected spend. Then, if the member purchases 90% of its projected spend in a

particular category from a specific supplier, the member receives a rebate from that supplier. Members who do not purchase enough to receive the rebate can still purchase supplies at the Vizient-negotiated rate.

The DMS suppliers in Vizient's network sell products like medical tape, syringes, tourniquets, monitoring electrodes, and masks. Endure defines DMS as "the least technically complex subset of all devices sold in the medical supply market," with a "high degree of interchangeability."[1] Suppliers bid to negotiate contracts with Vizient so they can offer their products to Vizient's members through the GPO. In evaluating these bids, Vizient considers both financial and non-financial factors, including clinical quality and acceptability and member preference.

Endure submitted bids to become a supplier in Vizient's network for medical tape and tourniquets, but it did not win. Endure now brings antitrust claims under Sections 1 and 2 of the Sherman Antitrust Act against Vizient for monopolization and anticompetitive conduct.

II. Legal Standards

Summary judgment is proper only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[2] So to defeat a motion for summary judgment, the non-movant must "identify specific evidence in the record and articulate the precise

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[1] Doc. 100 ¶ 23.

[2] Fed. R. Civ. P. 56(a).

manner in which that evidence supports his claim."[3] In ruling on summary judgment, the court views all facts in a light most favorable to the nonmovant—here, Endure—and resolves all factual disputes in its favor.[4] "A fact is material if it might affect the outcome of the suit," and a "factual dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[5]

III. Analysis

Vizient asks the Court for summary judgment because (1) Endure's proposed antitrust markets are legally insufficient; (2) Vizient is not actually a competitor in the markets Endure proposes; and (3) Endure's theories of Vizient's anti-competitive conduct fail as a matter of law. Because Endure fails to survive summary judgment on Vizient's first reason, the Court does not consider Vizient's two additional arguments.

A. Relevant Markets

To bring a successful claim under the Sherman Act, Endure must first define the relevant market within which it claims Vizient has engaged in anti-competitive behavior or monopolized.[6] Where a plaintiff fails to define a sufficient relevant market, the Court may grant summary judgment on antitrust

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[3] *Shah v. VHS San Antonio Partners, L.L.C.*, 985 F.3d 450, 453 (5th Cir. 2021) (cleaned up).

[4] *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988).

[5] *Thomas v. Tregre*, 913 F.3d 458, 462 (5th Cir. 2019) (cleaned up).

[6] *Shah*, 985 F.3d at 453-54.

claims.[7] "Without a definition of the market there is no way to measure the defendant's ability to lessen or destroy competition,"[8] which is the ultimate question in an antitrust case.

Endure proposes two alternative relevant markets through its expert, Loren K. Smith. Smith calls the first the "GPO DMS Market," which encompasses "the sale of DMS through GPO-negotiated and administered contracts to [General Acute Care (GAC)] hospitals."[9] The second he calls the "Vizient DMS Market," which includes the sale of DMS only to those GAC hospitals that are Vizient members.[10] Neither market is legally sufficient.

Whether a relevant market has been properly identified "is usually a question of fact; however, in some circumstances, the issue may be determined as a matter of law."[11] To survive summary judgment, the defined relevant market "must include all commodities reasonably interchangeable by consumers for the same purposes."[12] And it is defined by "the area of effective competition in which the seller operates, and

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[7] *See id.; Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 628 (5th Cir. 2002).

[8] *Ohio v. Am. Express Co.*, 585 U.S. 529, 543 (2018) (cleaned up).

[9] Doc. 239 at App. 7.

[10] *Id.*

[11] *Apani Sw., Inc.*, 300 F.3d at 628.

[12] *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 417 (5th Cir. 2010) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956)). Some courts refer to this as the "rule of reasonable interchangeability and the cross-elasticity of demand." *Apani Sw., Inc.*, 300 F.3d at 628.

to which the purchaser can practicably turn for supplies."[13]

Submarkets can exist within broader product markets as their own sufficient markets for antitrust purposes. The boundaries of these "well-defined submarkets" can be determined through practical considerations like industry or public recognition of their separate economic nature, sensitivity to price changes, and unique product characteristics, customers, uses, prices, or vendors.[14] These are called the *Brown Shoe* factors. However, the Fifth Circuit has stated the presence of one or more of these factors will not necessarily protect against summary judgment on whether a relevant market has been established.[15]

1. GPO DMS Market

Of Endure's two proposed markets, the Court turns first to the GPO DMS Market. According to Smith, Endure does not compete in this market. Rather, Vizient competes with other national and regional GPOs. On its part, Vizient argues that it does not compete in the market as it is defined either, since it does not "sell" DMS.[16] But even assuming, *arguendo*, that

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[13] *Shah*, 985 F.3d at 454 (cleaned up).

[14] *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

[15] *C.E. Servs., Inc. v. Control Data Corp.*, 759 F.2d 1241, 1246 (5th Cir. 1985).

[16] Doc. 238 at 7. In its response to Vizient's motion to strike Loren K. Smith's expert testimony, Endure clarifies the "GPO DMS Market is the market for the sale (by suppliers) of disposable medical supplies ('DMS') through GPO-negotiated and administered contracts." Doc. 252 at 4 (emphasis in original). This seems to

Endure does compete in this market, the definition artificially limits the product market to a particular method of sale when customers can (and do) purchase DMS outside GPOs.

As explained above, a legally sufficient relevant market for antitrust claims must encompass "the area of effective competition" and include all reasonably interchangeable substitutes for the product[17]—here, DMS sales. Smith's GPO DMS Market excludes all non-GPO DMS sales, even though his report states that 174 of the 629 GAC hospitals that have left Vizient over the years left the GPO model entirely.[18] So Endure does not dispute that over a quarter of the GAC hospitals that have discontinued membership with Vizient presumably substituted Vizient's GPO contracts for other channels to purchase DMS, but it does not include these channels as reasonably interchangeable substitutes.

Instead, Endure argues GPO contracts are a submarket under the *Brown Shoe* factors. Endure tries to argue suppliers transacting through GPO-negotiated contracts are "specialized vendors."[19] In a similar case brought by a medical supplier, the Eighth Circuit rejected this very argument, stating "GPOs are not specialized vendors; the vendors are the same

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support Vizient's position that Vizient itself does not even compete in this market.

17 *Shah*, 985 F.3d at 454 (quoting *Am. Express Co.*, 585 U.S. at 543 (2018)) (affirming summary judgment against antitrust claims for failure to establish a relevant market encompassing all "interchangeable substitute[s]").

18 Doc. 239, App. 21.

19 Doc. 255 at 26 (citing *Brown Shoe Co.*, 370 U.S. at 325).

whether sales are GPO or non-GPO."[20] Further, the "Supreme Court has repeatedly said that for identical items, a price differential alone does not establish two separate product markets."[21] And Endure itself noted that DMS are highly interchangeable.[22]

It may be true that GAC hospitals have a "unique demand for a large volume of a broad array of DMS products" that makes GPOs an efficient option.[23] But by Vizient's own report, 98% of hospitals are members of a GPO, yet only 72% of all purchases by U.S. hospitals were through GPO contracts.[24] That means, even though most all hospitals are members of GPOs, almost 30% of their purchases are outside GPOs. And the Fifth Circuit has called 30% of patients being left of out a proposed market a "substantial percentage" and "powerful evidence of the alternatives reasonably available to consumers."[25]

Once again, Vizient fails to address all reasonably interchangeable substitutes and as a result, this proposed market fails as a matter of law.

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[20] *Se. Mo. Hosp. v. C.R. Bard. Inc.*, 642 F.3d 608, 614-15 (8th Cir. 2011).

[21] *Id.* at 615 (citing *Brown Shoe Co.*, 370 U.S. at 326; *United States v. Cont'l Can Co.*, 378 U.S. 441, 455 (1964)).

[22] Doc. 100 ¶ 23.

[23] Doc. 255 at 26.

[24] *Id.* at 28 n. 167.

[25] *Dr.'s Hosp. of Jefferson v. Se. Med. All., Inc.*, 123 F.3d 301, 312 (5th Cir. 1997).

2. Vizient DMS Market

Next, the Court examines Endure's proposed Vizient DMS Market, which includes only those GAC hospitals that are Vizient members. Endure proposes this as a submarket to the GPO DMS Market.[26] However, "absent strong evidence on the issue, a single brand within a product class is presumptively not a separate market."[27] Single-brand markets are only proper where "consumers are 'locked-in' to a specific brand by the nature of the product."[28] This lock-in effect describes situations where consumers are effectively at the mercy of one brand's pricing, like in *Eastman Kodak Co. v. Image Technical Services*, in which a photocopier manufacturer would only sell its proprietary replacement parts (at above-market prices) to customers who used the company's repair services and restricted the manufacturer from selling parts to any other independent repair service.[29] There's a good reason that we only use this myopic submarket for sellers who lock in buyers. If the lock-in constraint weren't there, then we could define the market for, say, fast-food burgers in Texas by standing outside only Whataburger and asking patrons where they buy burgers. The answer would be 100% Whataburger. So too at every burger

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[26] Doc. 100 ¶ 73.

[27] *O'Dell v. GMC*, 122 F. Supp. 2d 721, 734 (E.D. Tex. 2000) (citing *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488 (5th Cir. 1984) (holding that "absent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market")).

[28] *PSKS, Inc. v. Leegin Creative Leather Prods.*, 615 F.3d 412, 418 (5th Cir. 2010).

[29] 504 U.S. 451, 455-58 (1992).

joint. Such a truism only states that a business serves customers, not that it cornered the market.

Though Endure uses the phrase "locked in" in its Second Amended Complaint,[30] none of its factual allegations suggest such a scheme from Vizient. Instead, Endure claims members have "little or no incentive" to leave Vizient because they would miss out on the Impact Program's loyalty rebates.[31] Offering customers incentives to keep them from leaving does not lock them in. By that logic, employee bonuses violate the Thirteenth Amendment. Or Whataburger violates the Sherman Act by serving 100% of its customers and having a loyalty program. Likewise, the internal costs a customer faces when changing suppliers or purchasing procedures do not lock them in either.

Endure makes much of Vizient's rebate program, but no allegations suggest its members are prevented from buying the supplies they need outside the GPO, joining and purchasing through additional GPOs, or leaving the GPO altogether. As noted above, 629 hospitals have left Vizient over the course of its time as a GPO. Vizient is hardly Hotel California. Rebates don't lock in the hospitals that purchase through Vizient, so the submarket of hospitals that work through Vizient fails.

The final nail in the coffin for this proposed market is that, even among Vizient's own GAC

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[30] Doc. 100 ¶ 36. Vizient supports this assertion by citing "the enormous cost a Member Hospital would face attempting to switch from Vizient to another GPO or to purchasing directly from suppliers" and the loss of "significant loyalty rebates." *Id.* Endure does not clarify why leaving Vizient would entail enormous cost.

[31] *Id.*

hospital members, 30% of DMS purchases are made outside Vizient's negotiated contracts, according to Smith's report.[32] As discussed for the GPO DMS Market above, missing 30% of the activity is strong evidence to the Fifth Circuit that the proposed market does not encompass all reasonably interchangeable substitutes. For this reason and those explained above, the Vizient DMS Market fails as a matter of law.

IV. Conclusion

The Court **GRANTS** Vizient's motion for summary judgment because Endure has failed to establish a legally acceptable definition of the relevant market. The Court **FINDS AS MOOT** Endure's motions to exclude the testimony of Loren K. Smith, John Strong, and Gary Durham, and Vizient's motion to exclude the testimony of Michael Fahlman.

IT IS SO ORDERED this 9th day of October, 2024.

/s/ Brantley Starr
United States District Judge

[32] Doc. 239, App. 8 (noting that Vizient holds 70% of the "Vizient DMS Market").

**FINAL JUDGMENT,
U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
(OCTOBER 9, 2024)**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ENDURE INDUSTRIES INC,

Plaintiff,

v.

VIZIENT INC., ET AL.,

Defendants.

Civil Action No. 3:20-CV-3190-x

Before: Brantley STARR,
United States District Judge.

FINAL JUDGMENT

Pursuant to the Court's order at Doc. 280, the Court enters final judgment in this action in favor of Defendants Vizient, Inc., Vizient Supply, LLC, Vizient Source, LLC, Novation, LLC, Novation Ventures, LLC, and Provista, Inc.

Any party seeking fees must file a motion within 45 days of this order. If any party appeals before then, the Court will suspend this deadline pending appeal.

The Court further directs Vizient to file a bill of cost within 45 days of this order.[1] All relief not expressly granted is denied. This is a final judgment.

IT IS SO ORDERED this 9th day of October, 2024.

/s/ Brantley Starr
United States District Judge

[1] *See* Fed. R. Civ. P. 54(d)(1) ("Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party.").

RELEVANT STATUTORY PROVISIONS

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

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

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

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

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED IN THE U.S. DISTRICT COURT FOR THE N.D. TEXAS, EXCERPTS [PUBLIC, REDACTED] (AUGUST 3, 2024)

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ENDURE INDUSTRIES, INC.,

Plaintiffs,

v.

VIZIENT, INC., VIZIENT SUPPLY, LLC, VIZIENT SOURCE, LLC, and PROVISTA INC.,

Defendants.

Civil Action No. 3:20-cv-3190-X

FILED UNDER SEAL

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[. . .]

IV. Argument and Authorities

A. Ample Evidence Raises a Fact Question on Endure's Proposed Relevant Markets.

The definition of the relevant market is ordinarily a fact question left to the jury. *Bell v. Dow Chemical Co.*, 847 F.2d 1179, 1184 (5th Cir.1988); *see also Shah v. VHS San Antonio Partners, L.L.C.*, 985 F.3d 450, 454 (5th Cir. 2021) ("Whether a relevant market has been identified is usually a question of fact.") (citing *Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 628 (5th Cir. 2002)). Relevant markets are arenas to "measure the defendant's ability to lessen or destroy competition." *Shah*, 985 F.3d at 453-54 (citations omitted). The relevant market has two components: a product market and a geographic market. *Id.* (citing *Wampler v. Sw. Bell Tel. Co.*, 597 F.3d 741, 744 (5th Cir. 2010)).

The relevant product market includes "commodities reasonably interchangeable by consumers for the same purposes."[151] *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 487 (5th Cir. 1984) (citing *E.I. du Pont de Nemours*, 351 U.S. at 395). However, "[w]ithin a broad product market, economically significant submarkets may exist which in themselves constitute product markets." *Hornsby Oil Co., Inc. v. Champion Spark Plug Co., Inc.*, 714 F.2d 1384, 1393 (5th Cir. 1983) (citing *Brown Shoe Co. v. U.S.*, 370

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[151] Endure has also alleged a relevant geographic scope of the United States for both Relevant Markets. Dkt. 100 ¶¶ 72 & 81. Vizient does not challenge this in its Motion. Its arguments are limited to the relevant product market. *See Apani*, 300 F.3d at 625 (noting that the relevant market inquiry includes both product market and a geographic market).

U.S. 294 (1962); *see also W. Tex. Util. Co. v. Tex. Elec. Serv. Co.*, 470 F. Supp. 798, 820 (N.D. Tex. 1979) ("Analysis of the market may reveal well defined submarkets for antitrust purposes."). "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 980 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978) (quoting *Brown Shoe*, 370 U.S. at 325) (emphasis added).

Vizient ignores the industry's commercial realities, as Vizient's own documents and data, and Endure's two experts, show. *See Illumina, Inc. v. Fed. Trade Comm'n*, 88 F.4th 1036, 1049 (5th Cir. 2023) ("[T]he relevant product market must 'correspond to the commercial realities of the industry.'") (citing *Brown Shoe*, 370 U.S. at 336). The evidence easily raises a fact issue on GPO DMS Market and Vizient DMS Market.

1. There Is a relevant GPO DMS Market

GAC hospitals engage with suppliers through GPO-negotiated and administered contracts, and when switching, they do so to a different GPO-sanctioned supplier. The evidence thus conforms with the "'practical indicia' of an economically distinct submarket." *Heatransfer*, 553 F.2d at 980 (quoting *Brown Shoe*, 370 U.S. at 325).

First, the evidence reveals a GPO DMS Market of GPO-negotiated and administered supplier contracts

through which suppliers sell DMS to GAC hospitals.[152] *See Heatransfer*, 553 F.2d at 980 (finding the boundaries of a relevant submarket may be determined by distinct customers and prices) (quoting *Brown Shoe*, 370 U.S. at 325). Dr. Smith shows that nearly all GAC hospitals use a GPO to purchase from suppliers, and when hospitals switch from a GPO, they most often switch to another GPO supplier.[153]

According to the Merger Guidelines,[154] targeted customer markets may be appropriate under two conditions: when (1) suppliers can charge distinct prices to GAC hospitals, which requires that suppliers distinguish GAC hospitals from other customers; and (2) GAC hospitals are as a practical matter unable to engage in arbitrage (purchasing indirectly from non-targeted buyers).[155] The evidence shows that GPOs allow suppliers to charge distinct prices to GAC hospitals because GPO interests align with suppliers through the fees generated by and in proportion to sales through GPO contracts.[156] For example, Vizient

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152 *See* App. 9 (Smith Decl. ¶ 8).

153 App. 7-8 (Smith Decl. ¶ 11).

154 The Merger Guidelines are often used as persuasive authority Sherman Act violation cases in the Fifth Circuit. *See, e.g., Deauville Corp. v. Federated Dep't Stores, Inc.*, 756 F.2d 1183, 1189-91 (5th Cir. 1985) (citing Merger Guidelines when analyzing Sherman Act § 2 violations); *In re: Pool Products Distribution Mkt. Antitrust Litig.*, No. 2328, 2016 WL 3567059, at *5-6 (E.D. La. July 1, 2016) (citing Merger Guidelines when analyzing the relevant market in Sherman Act § 2 violations).

155 *See* App. 11-14 (Smith Decl. ¶¶ 12-16).

156 *See* App. 374 (Smith Dep. Tr., Dec. 5, 2023, at 69:19-71:5); *see also* App. 16, 25-26 (Smith Decl. ¶¶ 21 n.31, 41-42).

recognizes GAC hospitals separately in its ordinary course of business. It separately manages them,[157] has separate contracting entities,[158] and uses separate, independent sales teams[159] for GAC hospitals. Through identification of GAC hospitals, Vizient allows pricing to Vizient GAC hospitals not available to other Vizient members.[160]

Additionally, GAC hospitals cannot easily purchase DMS from or through other customers. Doing so would require significantly higher transaction costs

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[157] App. 470 (Steele Dep. Tr. 144:10–14) [redacted].

[158] App. 357 (Kaufman Dep. Tr. 24:4–7) ("[redacted]").

[159] App. 471 (Steele Dep. Tr. 146:6–8) ("[redacted]"); and 146:20–22 ("[redacted]").

[160] *See, e.g.*, App. 1165 (Product Supplier Agreement for Medical Tapes between Vizient Supply, LLC and [redacted] Ex. 172 to Maness Dep., DEF-00000004-037) at DEF-00000024; App. 383-84 (Maness Dep. Tr. 96:9-98:24) (recognizing [redacted]; App. 1590 (Product Supplier Agreement for Transparent Dressings between Vizient Supply, LLC and [redacted] DEF-00007530-566) at DEF-00007551 [redacted]; *see also* App. 473 (Steele Dep. Tr. 232:17-233:3).

that are not sufficient to defeat a small price increase targeted at them.[161]

Second, contrary to Vizient's argument, the GPO DMS Market need not include non-GPO channels. "[S]pecialized vendors" like suppliers through GPO administered contracts can indicate a relevant submarket. *See Heatransfer*, 553 F.2d at 980 (quoting *Brown Shoe*, 370 U.S. at 325). Due to the reduced transaction costs resulting from GPOs' ability to aggregate hospitals' purchasing power and facilitate the sale of hundreds, if not thousands, of products to hospitals,[162] hospitals choose to "become members of a GPO rather than negotiate contracts independently."[163] This is even more true for GAC hospitals due to their unique demand for a large volume of a broad array of DMS products.[164] For both suppliers and GAC hospitals, then, GPO-procured contracts are unique; there are no reasonable substitutes to suppliers for contracts immediately applicable to thousands of GAC hospitals, or for GAC hospitals for contracts with greater volume at special pricing. *See Domed Stadium Hotel*, 732 F.2d at 487 (the relevant product market is "commodities reasonably interchangeable by consumers

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[161] *See* App. 13-14, 25 (Smith Decl. ¶¶ 15, 41).

[162] *See* Dkt. 236 at 7 ("[redacted]"); *see also* App. 444 (Sandhu (Vizient, formerly Cleveland Clinic) Dep. Tr. 57:11-16).

[163] App. 10 (Smith Decl. ¶ 10); *see also* App. 179 (Strong Decl. ¶ 17).

[164] App. 15 (Smith Decl. ¶ 19).

for the same purposes") (emphasis added) (citing *E.I. du Pont de Nemours*, 351 U.S. at 395).

Reasoanable interchangeability is a key feature of any relevant market, and is established by Dr. Smith's hypothetical monopolist test ("HMT") analysis,[165] a standard market definition technique widely adopted by Circuit courts to define relevant markets for antitrust purposes. *See, e.g., McWane, Inc. v. FTC*, 783 F.3d 814, 829-30 (11th Cir. 2015) (approving expert's consideration of "a hypothetical monopolist test and the lack of interchangeability between domestic and imported fittings in domestic-only projects" in defining a relevant market); *Regeneron Pharm., Inc. v. Novartis Pharma AG*, 96 F.4th 327, 338-39 (2d Cir. 2024) ("Our Court has evaluated interchangeability by, for instance, imagining that a hypothetical monopolist has imposed a small but significant non-transitory increase in price ('SSNIP') within the proposed market.") (citations omitted); *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 975 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 681 (2024) ("SSNIP analyses are relevant"). Dr. Smith concludes that the proposed GPO DMS Market is a relevant market because a hypothetical GPO monopolist controlling the prices of all GPOs would be incentivized to increase the price of DMS by at least a small but significant amount at one or more GPOs to earn a higher margin on hospitals that remained with that GPO, and would recoup the

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[165] Courts also refer to this analysis as a "SSNIP" analysis. *See Epic Games*, 67 F4th at 975 (A SSNIP analysis "uses past consumer-demand data and/or consumer-survey responses to determine whether a hypothetical monopolist could profitably impose a Small, Significant, Non-transitory Increase in Price above a competitive level.").

majority of revenue lost by that GPO when hospitals substituted away through its ownership of other GPOs.[166]

Third, evidence of other "practical indicia" supports the GPO DMS Market. *See Brown Shoe*, 370 U.S. at 325. For one, the healthcare industry recognizes national GPOs as a distinct sales channel.[167] Moreover, Vizient's witnesses,[168] business records,[169] GPO contracts with hospitals,[170] and supplier agreements between Vizient

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[166] App. 81; App. 146.

[167] *See, e.g.*, App. 10-11 (Smith Decl. ¶ 11) (data shows that from the 629 hospitals switching away from Vizient, 70% of them switched to one of the other two large GPOs) & ¶ 10 (the vast majority of hospitals—98% by count, and 99.5% by net patient revenue—use a GPO, 72% of all purchases made by US hospitals were through GPO-negotiated and administered contracts, and hospitals on average purchased 82% of general medical/surgical products through GPOs).

[168] *See, e.g.*, App. 360 (Kaufman Dep. Tr. 277:17–21) ("[redacted]; App. 469 (Steele Dep. Tr. 114:14-18) ("[redacted]).

[169] *See, e.g.*, App. 1460, 1470, 1480 ([redacted]) at DEF-00001216 (for skin care products), DEF-00001226 (for bowel Management products), at DEF-00001236 (for medical tapes).

[170] *See, e.g.*, App. 1678 (Group Purchasing Program Statement of Work between Vizient and [redacted] DEF-00051122-133) at DEF-00051126 ([redacted]

and suppliers[171] all indicate that *Vizient sees itself* chiefly competing with other national healthcare GPOs.

2. There is a relevant Vizient DMS Market.

Dr. Smith defines the Vizient DMS Market around a group of targeted customers, *i.e.*, Vizient member GAC hospitals.[172] The evidence shows that Vizient member GAC hospitals are a targetable group of customers with particular needs "that make them particularly susceptible to harm from Vizient's chal-

[redacted]); App. 1664 (Group Purchasing Program Statement of Work between Vizient and [redacted] DEF-0000051052, (similar language).

[171] *See, e.g.,* App. 573 (Product Category Agreement for Medical Tapes between Vizient Supply, LLC and [redacted] Ex. 10 to Kaufman Dep., DEF-00000514–543) at DEF-00000516 ([redacted]); App. 1631 (Product Supplier Agreement for Respiratory Disposables between Vizient Supply, LLC and [redacted] DEF-00022751 (similar language).

[172] Vizient argues the Vizient DMS Market is inconsistent with Endure's Second Amended Complaint, but it is not. Endure adopts and incorporates by reference its Response to Defendants' Motion to Exclude Dr. Smith ("Smith *Daubert* Response"). FED. R. CIV. P. 10(c). The Vizient DMS Market remains anchored by Vizient member GAC hospitals as the defining customer. Relevant markets are usually developed and refined through discovery, as it is fact intensive. *See, e.g.*, *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 482 (1992) (The "proper market definition . . . can be determined only after a factual inquiry into the 'commercial realities' faced by consumers.").

lenged conduct."[173] This evidence (and the evidence discussed below) more than sufficient to raise a fact issue to defeat Vizient's Motion.

Vizient serves more than half of acute care systems and 97% of academic medical centers, which require access to a "vast array of patient care products."[174] Data shows that Vizient members spend significantly more on Vizient-administered suppliers than do members of other GPOs.[175] Accordingly, the purchase volume of Vizient member GAC hospitals exceeds that of average hospitals, and they cannot easily switch to alternative sources of supply, even for a significant price reduction.[176] Vizient itself sets distinct pricing terms for its GAC hospitals.[177] The Vizient DMS Market is therefore a relevant submarket. *See Heatransfer*, 553 F.2d at 980 (finding the boundaries of a relevant submarket may be determined by distinct customers) (quoting *Brown Shoe*, 370 U.S. at 325) (emphasis added); *Apani Sw.*, 300 F.3d at 626; *W. Tex. Util.*, 470 F. Supp. at 820.

Vizient calls the Vizient DMS Market a single-brand market. But the Vizient DMS Market includes DMS sales both through Vizient's GPO network and outside of Vizient GPO.[178] It includes DMS offered by

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[173] App. 14 (Smith Decl. ¶ 17).

[174] App. 17-18 (Smith Decl. ¶ 24).

[175] *Id.*

[176] *Id.* (citing Definitive Data).

[177] App. 13, 14-15 (Smith Decl. ¶¶ 14, 18).

[178] App. 9-10 (Smith Decl. ¶¶ 8-9).

suppliers like Endure and others.[179] It is not limited to Vizient's business or to a single brand. *Id.*; *cf. O'Dell v. Gen. Motors Corp.*, 122 F. Supp. 2d 721, 734 (E.D. Tex. 2000) ("[T]he market for repair work on Delco products"); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488 (5th Cir.1984) (the market "comprised only of Holiday Inn hotel rooms"); *United Farmers Agents Ass'n, Inc. v. Farmers Ins. Exch.*, 89 F.3d 233, 236 (5th Cir. 1996) (electronic access to Farmers policy information is a single brand (Farmers) market).

Endure's burden this stage is to raise a question of fact on the existence of a sales channel with Vizient member GAC hospitals as the defining customer, and it more than meets that burden.

3. The Cluster Market is Appropriate Because DMS in Both Relevant Markets Share Similar Competitive Conditions and Market Share

The Supreme Court and several circuit courts recognize cluster markets in defining the markets for disparate products with similar competitive conditions, recognizing that in such circumstances, analysis for individual product market is not necessary. *See, e.g.*, *Brown Shoe*, 370 U.S. at 325-28 (evaluating the markets for men's, women's, and children's shoes for different sizes together); *U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321, 355-57 (1963) ("the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking' composes a distinct [relevant

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[179] *Id.*

market]" because of similar competitive conditions when they were "so distinctive that they are entirely free of effective competition from products or services of other financial institutions").[180]

The evidence shows DMS share similar competitive conditions and market share in the Relevant Markets: (1) all DMS periodically compete through a biding process to be included in a GPO's network of approved products; (2) all DMS are sold to GAC hospitals; (3) all DMS have similar market entry avenue to GAC hospitals—via GPOs; (4) all DMS are similarly impacted by Vizient's challenged conduct, including the ISP; (5) Vizient has significant share in the 12 DMS product categories, many of which exceeds 50%;

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[180] *Fed. Trade Comm'n v. Hackensack Meridian Health, Inc.*, No. CV 20-18140, 2021 WL 4145062, at *15 n. 19 (D.N.J. Aug. 4, 2021), *aff'd*, 30 F.4th 160 (3d Cir. 2022) ("Although specific inpatient GAC services are not interchangeable, courts and parties look at these services together as a 'cluster' when the competitive conditions are reasonably similar across services.") (citing *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 565-66 (6th Cir. 2014) and *Penn State Hershey Med. Ctr.*, 838 F.3d at 338); *ProMedica Health Sys*, 749 F.3d at 565-68 (agreeing with the FTC to cluster discrete noninterchangeable inpatient acute-care hospital services into a single cluster relevant market); *U.S. v. Rockford Memorial Corp.*, 898 F.2d 1278, 1284 (7th Cir. 1990) (identifying a cluster market for "the provision of inpatient services by acute-care hospitals in Rockford and its hinterland"); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1210-11 n.11 (11th Cir. 1991) (affirming that the relevant product market was "the provision of acute-care services in general"); *Fed. Trade Comm'n v. Staples, Inc.,* 190 F. Supp. 3d 100, 117 (D.D.C. 2016) (finding consumable office supplies as cluster market); *Fed. Trade Comm'n v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 48–50 (D.D.C. 2018) (finding boiler water treatment products/services and cooling water treatment products and services as a cluster market).

and (6) Endure competes in the Relevant Markets for all DMS.[181]

[. . .]

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[181] App. 19-21 (Smith Decl. ¶¶ 28-29); App. 372-373 (Smith Dep. Tr., Dec. 5, 2023 at 23:10-25:25); *see also* App. 361 (Kaufman Dep. Tr. at 314:21-25); *see generally* App. 1853-1919 (Endure's product catalog, Endure000025-Endure000090). Note that due to the discovery limit, Dr. Smith could only review evidence of the 12 Product Categories. However, the Relevant Markets include all DMS. *See* Smith Daubert Response at 22-23. Still, Vizient failed to produce market share data for all the 12 product categories.

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DECLARATION OF LOREN K. SMITH, FILED IN THE U.S. DISTRICT COURT FOR THE N.D. TEXAS, EXCERPTS [PUBLIC, REDACTED] (AUGUST 3, 2024)

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ENDURE INDUSTRIES, INC.,

Plaintiffs,

v.

VIZIENT, INC., VIZIENT SUPPLY, LLC, VIZIENT SOURCE, LLC, and PROVISTA INC.,

Defendants.

Civil Action No. 3:20-cv-3190-X

DECLARATION OF LOREN K. SMITH

[. . .]

I. There Are Two Relevant Markets

8. There are two relevant markets impacted by Vizient's challenged conduct. One is the GPO DMS Market, the market for the sale of disposable medical supplies ("DMS") through group purchasing organization ("GPO") negotiated and administered contracts to

general acute care ("GAC") hospitals.[1] The other is Vizient DMS Market, the market for the sale of DMS to Vizient member GAC hospitals, including sale of DMS through Vizient contracts and other sources. For the purposes of this report, the "sale of DMS" is intended to encompass activities related to the marketing, supply, and distribution of DMS products. DMS are supplies that are intended for one-time use and include products such as medical tapes, syringes, tourniquets, and transparent dressings.[2]

A. The GPO DMS Market

9. GPO DMS Market is a relevant antitrust market. GAC hospitals generally see a wider range of patients and must be prepared to offer a broader range of care—requiring access to a wide array of medical supplies and equipment—relative to outpatient facilities and other types of healthcare providers.[3] Vizient's documents note that [redacted]

[1] GAC hospitals are healthcare facilities that provide a broad array of medical and surgical diagnostic and treatment services. GAC hospitals range from small critical access hospitals to large academic medical centers that have hundreds of beds. *See*, *e.g.*, Virginia Health Information, "Types of Hospitals: Acute Care General Hospitals," available at https://www.vhi.org/HospitalGuide/general-hospitals.asp.

[2] Complaint, ¶ 2; *See also*, U.S. Food and Drug Administration, "Labeling Recommendations for Single-Use Devices Reprocessed by Third Parties and Hospitals; Final Guidance for Industry and FDA", available at https://www.fda.gov/media/71405/download (stating that a "disposable device" is also referred to as a "single-use device").

[3] H1, "Acute Care Hospitals & Their Role in Healthcare," *available at*: https://h1.co/blog/acute-care-hospitals-their-role-in-healthcare.

[redacted].[4]

10. Given the array of products hospitals must buy, most hospitals prefer to become members of a GPO rather than negotiate contracts independently. For instance, a Vizient witness formerly employed by the Cleveland Clinic testified that [redacted].[5] Available data indicate that the vast majority of hospitals—98% by count, and 99.5% by net patient revenue—use a GPO. A somewhat outdated GAO report stated that 72% of all purchases made by US hospitals were through GPO-negotiated and administered contracts.[6] Another study reported that hospitals, on average, purchased 82% of general medical/surgical products through GPOs.[7] I have seen no evi-

[4] DEF-00002088, [redacted]

[5] Deposition of [redacted]

[6] GAO, "Group Purchasing Organizations: Federal Oversight and Self-Regulation," March 2012 ("GAO 2012 Report"), at 4.

[7] Schneller, E., "The Value of Group Purchasing – 2009: Meeting the Needs for Strategic Savings," Health Care Sector Advances, Inc., 2009, ("Schneller 2009 Report") at 14, *available at*: https://www.supplychainassociation.org/wp-content/uploads/2018/05/schneller.pdf.

dence that purchases made through GPO-negotiated and administered contracts have decreased in the years since these reports were published.

11. Evidence indicates that GPOs compete principally with other GPOs. For example, available data indicate that when GAC hospitals switch away from the Vizient GPO, they most often switch to another GPO, as opposed to a non-GPO solution. Figure 1 shows that from the 629 hospitals that have switched away from Vizient,[8] 440 hospitals comprising 70.0% by count and 76.1% by net patient revenue of the 629 hospitals that have ever switched from Vizient—switched to one of the other two large GPOs, HPG and Premiere. An additional 15 hospitals—comprising 2.4% by both count and net patient revenue—switched to regional GPOs, leaving 174 hospitals, comprising 21.5% of net patient revenue, that switched away from GPOs entirely.

[8] In the small number of instances where hospitals switched away from Vizient multiple times, the figure tracks the most recent switching destination.

Figure 1: Switching Destinations of the629 GAC Hospitals Who Have Switched Away from Vizient

Switching Pattern: Vizient to HPG

Total Hospitals:	299
Share of Total Hospitals Switching from Vizient:	47.5%
Net Patient Revenue:	$ 88,517,285,758
Share of Net Patient Revenue of Hospitals Switching from Vizient	59.6%

Switching Pattern: Vizient to Non GPO

Total Hospitals:	174
Share of Total Hospitals Switching from Vizient:	27.7%
Net Patient Revenue:	$31,969,405,980
Share of Net Patient Revenue of Hospitals Switching from Vizient:	21.5%

Switching Pattern: Vizient to Premier

Total Hospitals:	141
Share of Total Hospitals Switching from Vizient:	22.4%
Net Patient Revenue:	$24,487,253,728
Share of Net Patient Revenue of Hospitals Switching from Vizient:	16.5%

Switching Pattern: Vizient to Regional GPO

Total Hospitals:	15
Share of Total Hospitals	2.4%

Switching from Vizient	
Net Patient Revenue:	$ 3,602,930,521
Share of Net Patient Revenue of Hospitals Switching from Vizient:	2.4%

Source: Definitive Healthcare. Hospitals switching away from Vizient multiple times are classified based on their most recent switch.

12. GAC hospitals represent a targetable group of customers under GPO-negotiated and administered contracts. As the Guidelines state, targeted customer markets can be appropriate when two *conditions* are met.[9] First, sellers must be capable of charging distinct prices to the targeted group, which requires that sellers can distinguish targeted customers from non-targeted customers.[10] Second, targeted customers must be unable to engage in arbitrage, *i.e.*, to purchase indirectly from non-targeted buyers. As explained

[9] U.S. Department of Justice and the Federal Trade Commission, "Merger Guidelines," Issued: December 18, 2023 (hereinafter, "*2023 Guidelines*"), § 4.3.D.1. *See also,* Draft Merger Guidelines released in August 2023 (U.S. Department of Justice and the Federal Trade Commission, "Draft – For Public Comment – Not Final Merger Guidelines," (hereinafter, "*2023 Draft Guidelines*"), Appendix 3, § B.1 and U.S. Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines," Issued: August 19, 2010, (hereinafter, "*2010 Guidelines*"), § 3.

[10] *2023 Guidelines,* § 4.3.D.1 ("For targeting to be feasible, two conditions typically must be met. First, the suppliers engaging in targeting must be able to set different terms for targeted customers than other customers. This may involve identification of individual customers to which different terms are offered or offering different terms to different types of customers based on observable characteristics."). *See also, 2023 Draft Guidelines,* Appendix 3, § B.1 and similar language in *2010 Guidelines*, § 3.

below, both of these conditions are met for GAC hospitals.

13. GPOs can set distinct prices for GAC hospitals than for other purchasers of DMS, such as surgery centers. As the Guidelines state, setting different terms "may involve identification of individual customers to which different terms are offered or offering different terms to different types of customers based on observable characteristics."[11] GPOs can, in fact, distinguish GAC hospitals from non-GAC hospitals, so this condition easily is met. Most GAC hospitals have words like "hospital" or "medical center" in their name, and most non-hospitals do not. Where there is ambiguity, a web search could offer additional information as to whether a facility is or is not a GAC hospital; this appears to be the approach used by Vizient's expert, Mr. Fahlman, in determining which of Endure's customers were GAC hospitals and which were not.[12] Government agencies such as CMS track the performance of hospitals, and publicly available CMS data contain the names and associated metrics of all Medicare-certified hospitals.[13] Vizient could download these data from CMS's website and apply them to determine whether

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[11] *2023 Guidelines*, § 4.3.D.1.

[12] Endure Industries v. Vizient, Inc., et al., Civil Action No. 3.20-cv-3190-X, Expert Report of Michael A. Fahlman, December 18, 2023, footnote 3 to Schedule 6.

[13] Centers for Medicare & Medicaid Services, "Hospitals," *available at*: https://data.cms.gov/provider-data/topics/hospitals. For example, the data file "Complications_and_Deaths-Hospital.csv," *available at* https://data.cms.gov/provider-data/dataset/ynj2-r877, contains a list of hospitals and associated metrics. Such a list could be used by Vizient and sellers of GPOs to distinguish hospitals from non-hospitals.

a given customer was a GAC hospital or not. Commercially available data, including the data from Definitive relied on by both me and Dr. Maness in this matter, also identify GAC hospitals.[14] If Vizient could not otherwise tell GAC hospitals apart from other purchasers of DMS, it could purchase the same Definitive data used by myself and Dr. Maness and use these data to identify GAC hospitals within Vizient's customers.

14. Analysis of Vizient contracts indicates that Vizient suppliers actually do offer pricing to GAC hospitals that is not available to other Vizient members. For instance, [redacted] of Vizient's contracts with [redacted] specify distinct criteria [redacted] for "Acute" and "Non Acute" Vizient members.[15] Vizient's contract with [redacted] specifies [redacted] with [redacted] only available to "Non Acute" facilities and [redacted] available to "Acute Care" members.[16]

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[14] *See, e.g.*, Definitive, which advertises data on "9.3K hospitals", *available at*: https://www.definitivehc.com/free-trial?rp_source=industry/healthcare-providers; American Hospital Directory, which advertises "data [. . .] about more than 7,000 hospitals" and whose "free hospital profiles" identify "type of facility", with "Short Term Acute Care" being one of the types; *available at*: https://www.ahd.com/.

[15] DEF-00000004, Product Supplier Agreement for Medical Tapes between Vizient Supply, LLC and [redacted] (at 024, describing criteria to access [redacted]); DEF-00007530, Product Supplier Agreement for Transparent Dressings between Vizient Supply, LLC and [redacted] (at 551, describing criteria to access [redacted]

[16] DEF-00076903, Product Supplier Agreement for Stethoscopes between Novation, LLC and [redacted]

15. GAC hospitals cannot easily engage in arbitrage by purchasing DMS from or through other customers. According to the Guidelines, the second condition necessary for a targeted customer market is that targeted customers must not be able to arbitrage around the targeting, meaning purchasing indirectly from or through other customers.[17] In the present matter, this condition is met because it is infeasible for GAC hospitals to purchase DMS from other healthcare providers.[18] As the Guidelines note, arbitrage is

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at 922 (Vizient was formed by a merger of Novation, VHA, and University HealthSystem Consortium in 2015, see https://www.vizientinc.com/frequently-asked-questions). As noted in my initial report, this is consistent with other Vizient practices that [redacted] (see, Smith Expert Report, ¶ 41) and [redacted] (*see*, *e.g.*, DEF-00075925, [redacted] at 929-930).

[17] *2023 Guidelines*, § 4.3.D.1. *See also*, 2023 *Draft Guidelines*, Appendix 3, § B.1 and *2010 Guidelines*, § 3.

[18] Dr. Maness made some speculative claims in his deposition regarding how GAC hospitals may engage in arbitrage to circumvent a price increase. (Maness Deposition 230:24-231:9 [redacted].”). I have seen no evidence of such arbitrage, and Dr. Maness cites no such evidence and admitted that he does not know “one way or

"inherently impossible for many services" and in many industries "transaction costs or search costs" would deter arbitrage on the scale needed to defeat a price increase.[19] Indirect purchases of DMS from non-GAC hospitals would require hospitals to locate a willing non-GAC seller, negotiate a mutually agreeable price, and ensure the quality of the DMS. I have seen no evidence that hospitals would be willing to undertake such steps regardless of the savings involved, much less to defeat a small price increase targeted at GAC hospitals.

16. Defining the GPO DMS market allows me to assess Vizient's market power as a GPO. Because distributors and suppliers do not provide GPO services, there is no reason to account for their sales separately from sales made through GPOs.

B. The Vizient DMS Market

17. The Vizient DMS Market is also a relevant antitrust market. As the Guidelines describe, it is appropriate to define a market around a subset of

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the other" whether any such arbitrage has occurred. (Maness Deposition 231:10-11 ([redacted]). To the degree that Dr. Maness' claims relate to distributing products across facilities within the same Integrated Delivery Network ("IDN"), such arbitrage would not imply that GAC hospitals are not targetable because Vizient could consider such relationships within an IDN when negotiating terms. Moreover, evidence indicates that arbitrage whereby GAC hospitals garner lower prices through related non-GAC hospitals generally would not apply because GAC hospitals tend to receive more favorable terms from Vizient than do non-GAC hospitals (*see* ¶ 14, *supra*).

[19] *2023 Guidelines*, § 4.3.D.1. *See also*, 2023 *Draft Guidelines*, Appendix 3, § B.1 and similar language in *2010 Guidelines*, § 3.

targeted customers—in this case, GAC hospitals—if the effects of conduct differ significantly across different groups of customers. As explained in this section, Vizient member GAC hospitals have distinct demands that make them particularly susceptible to harm from Vizient's challenged conduct.

18. Vizient's internal operations indicate that Vizient views GAC hospitals as a distinct group of customers. [redacted][20] A Vizient witness stated that [redacted][21] Vizient contracts [redacted][22] Vizient additionally [redacted][23]

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[20] *Kaufman (Vizient) Deposition*, 24:4-7 ([redacted]).

[21] *Steele (Vizient) Deposition,* 144:10-14 ([redacted]).

[22] *Steele (Vizient) Deposition,* 232:17-233:3.

[23] *Steele (Vizient) Deposition,* 146:6-8 ("[redacted]"); and 146:20-22 ([redacted]).

19. As noted above, I understand that GAC hospitals, especially large GAC hospitals, demand a large volume of a broad array of DMS products.[24] The sale and distribution of DMS through Vizient-negotiated and administered GPO contracts is distinctive in the breadth of products offered.[25] For example, Vizient's website claims that Vizient's supply chain grants member GAC hospitals access to more than 1,400 suppliers and over 715,000 product line items on GPO contracts. Vizient competes in the Vizient DMS Market both as a GPO and as the owner of the Novaplus brand.[26]

20. Evidence indicates that Vizient's actions, fees, and contractual terms—including its ISPs and other rebate programs—affect the attractiveness of purchasing through Vizient relative to purchasing outside of Vizient[27] and mute competition between DMS sold through the Vizient GPO and other sources of DMS.[28]

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[24] *See, e.g.*, DEF-000002088 at tab "[redacted]

[25] *See, e.g.,* Vizient, "Supply Chain," *available at*: https://www.vizientinc.com/what-we-do/supply-chain.

[26] DEF-00001303 at 306 [redacted]).

[27] *See infra* III.

[28] *See, e.g.,* DEF-00011711 at 712 noting that [redacted]" Vizient also notes that [redacted]

Endure's correspondence with hospitals indicates that Vizient's member GAC hospitals may purchase DMS through Vizient's GPO even when better prices are available from outside suppliers. For example, in response to a February 2019 email from Endure to a representative at [redacted] suggesting that Endure could provide [redacted] responded [redacted]"[29] Endure also reports that in 2018, [redacted] communicated to Endure that [redacted]"[30]

[redacted] (*See, e.g.*, DEF-00026584 at 625 ([redacted]"); S*ee also*, DEF-00012891 at 892 ([redacted]; and DEF-00019443 at 444 (showing the [redacted]).

[29] Endure000229. The [redacted] is listed as a Vizient member in a file dated February 2019. (S*ee* DEF-00001804 (Vizient_Membership_02_2019.xlsx)).

[30] Endure000309 at 310.

21. Vizient benefits when more purchases are made through the Vizient GPO, because Vizient earns a margin on sales made through Vizient, and does not earn a margin on sales made outside of Vizient.[31] Vizient competes for this margin by attempting to make purchasing through Vizient more attractive than

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[31] Vizient collects an administrative fee on all purchases made through its contracts. A Vizient witness describes a typical fee as [redacted] of the purchase amount. *Kaufman (Vizient) Deposition*, 262:2-12 ("Q: [redacted]; 186:23-187:4 ("[redacted]), at 886 [redacted] DEF-00004918 [redacted] at 129, establishing [redacted]; DEF-00051264 [redacted] at 264-265, establishing a [redacted]

purchasing directly from suppliers or through other GPOs.

22. Vizient competes with suppliers of DMS despite the fact that it participates in a different portion of the supply chain than do manufacturers or distributors of DMS, just as a retailer may compete against manufacturers of products sold by the retailer. Like GPOs, a retailer earns a margin on products sold through the retailer, and competes with both other retailers and suppliers who sell directly to customers for this margin (even if the particular nature of this competition varies across different industries). Both GPOs and retailers become more or less competitive with direct purchases as the terms they offer—including fees and contractual restrictions—become more or less favorable.

23. Both GPOs and retailers add value at a particular point in a supply chain. Both earn a margin from purchases made through them and do not earn such a margin from other purchases. Both compete to induce consumers—be they retail buyers or GAC hospitals—to make purchases through their platform, as opposed to through other platforms or directly from manufacturers and suppliers.[32] Clearly, Wal-Mart competes with direct sales by producers such as Nike or Apple, even though Wal-Mart does not produce shoes or laptops, and even though Wal-Mart constitutes only a portion of the supply chain for such products. For the same reason, Vizient competes with suppliers of DMS, even though Vizient does not produce medical tapes or monitoring electrodes.

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[32] For instance, Amazon lists not only other retailers, but "distributors, manufacturers, and producers of the products we sell" as competitors in its financial filings. *Amazon 202210-K* at 4.

24. Vizient is particularly successful in winning the business of GAC hospitals. Vizient emphasizes that it serves more than half of acute care systems and 97% of academic medical centers.[33] Academic medical centers ("AMCs") are a subset of GAC hospitals that are prestigious not-for-profit health care organizations responsible for training future physicians and health care professionals in the early stages of their careers.[34] These facilities require access to a "vast array of patient care products."[35] Accordingly, "their purchase volume exceeds that of average hospitals, and they have a track record for moving market share and for contract compliance."[36] Definitive Healthcare ("Definitive") tracks hospital spend by GPO on medical and surgical supplies, a category that includes DMS and other products.[37] Figure 2 reports average annual spend on medical and surgical supplies per member by GPO,

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33 [redacted] *See also*, Vizient, "The nation's leading healthcare improvement company," *available at*: https://www.vizientinc.com.

34 DEF-00002088, tab [redacted]").

35 DEF-00002088, tab "Instructions."

36 DEF-00002088, tab "Instructions."

37 Data from Definitive Healthcare that is cited in this report was extracted from the Definitive Healthcare database by Access Strategy Partners, Inc. at my direction based on criteria that were provided by me to Access Strategy Partners, Inc.

among hospitals tracked by Definitive.[38] The Definitive data I have reviewed shows that Vizient members spend significantly more on these supplies than do members of other GPOs.

Figure 2 Medical/Surgical Supply Spend by GPO, average per member

GPO	Sales Per Member
Vizient	$ 62,129,540
Premier	$ 42,648,681
The Resource Group	$ 39,940,263
HPG	$ 36,499,398
Non GPO	$ 11,304,644
Regional GPOs	$ 7,049,169

Source: Definitive Healthcare. Definitive reports data on medical/surgical spend by hospital with different hospitals having different reporting dates.
91% of hospitals by medical/surgical spend have financial data recorded in 2022, 8% in 2021, and 1% before 2021. The Resource Group is classified as a regional GPO.

25. Evidence here indicates that Vizient member GAC hospitals are a targetable group of customers with particular needs that cannot easily switch to alternative sources of supply, even given a significant reduction in price. Hence, under the Guidelines,

[38] The term 'medical/surgical supplies' is generally used to refer to products and supplies used in medical and surgical procedures, and would include the 12 relevant DMS products. [redacted]

Vizient member GAC hospitals constitute a discrete antitrust market.[39]

C. The Cluster Market

26. Economists refer to antitrust markets consisting of multiple products that are not substitutes for one another as "cluster markets." Cluster markets are described in detail in the *Guidelines*,[40] and are commonly used in the consideration of antitrust markets.[41]

27. As the Guidelines explain,

> A relevant antitrust market is generally a group of products that are substitutes for each other. However, when the competitive conditions for multiple relevant markets are reasonably similar, it may be appropriate to aggregate the products in these markets into

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[39] *2023 Guidelines*, § 4.3.D.1. *See also*, *2010 Guidelines*, § 4.1.4.

[40] *2023 Guidelines,* § 4.3.D.4. While the 2023 Merger Guidelines were released on the day Dr. Maness submitted his rebuttal report, similar material was included in the Draft Merger Guidelines released in August 2023 (U.S. Department of Justice and the Federal Trade Commission, "Draft – For Public Comment – Not Final Merger Guidelines," (hereinafter, "*2023 Draft Guidelines*"), Appendix 3.B.4.

[41] *See, e.g.,* the FTC's complaint in Staples-Office Depot (at 6, stating "grouping the hundreds of individual consumable office supplies into an assortment for analytical convenience enables the efficient evaluation of competitive effects with no loss of analytic power."); the FTC's complaint in Methodist-Tenet (at 4, stating that the GAC services market "encompasses a broad cluster of medical and surgical diagnostic and treatment services" and stating that "it is appropriate to evaluate [. . .] likely effects across this cluster [. . .] because these services are offered [. . .] under similar competitive conditions.").

> a "cluster market" for analytic convenience, *even though not all products in the cluster are substitutes for each other*.[42]

28. Here, individual DMS products may be sold in discrete relevant antitrust markets. However, it is appropriate to cluster DMS products and consider them as a single market for analytical convenience[43] because individual DMS products face similar competitive conditions within the GPO DMS Market, and they are similarly impacted by the challenged conduct. All DMS, regardless of use or individual demand, periodically compete through a bidding process to be included in a GPO's network of approved products.[44] Vizient has significant share in the 12 DMS product categories I have reliable data to review: For example, a 2019 Vizient analysis of medical tapes shows a Vizient share of [redacted] based on data from 2017 and 2018.[45] A Vizient analysis of facial protection products

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[42] *2023 Guidelines,* § 4.3.D.4 (emphasis added). *See also*, *2023 Draft Guidelines*, Appendix 3.B.4.

[43] *See, e.g.*, Hahm, K. and Smith, L., "Clarifying Bundle Markets and Distinguishing Them from Cluster Markets," The Antitrust Source, February 2021.

[44] *Kaufman (Vizient) Deposition*, 314:21-25 ("[redacted] *See also, e.g.*, Vizient Bid Calendars showing the Vizient bidding timelines for various products across various years (*available at*: https://www.vizientinc.com/who-we-serve/suppliers/bid-system).

[45] DEF-00001212 at 1238 (a November 8, 2018 presentation showing [redacted]

reporting data from 2020 shows a Vizient share of [redacted][46] Other Vizient analyses show Vizient shares of: [redacted] for monitoring electrodes,[47] [redacted] for sterilization packaging,[48] [redacted] for respiratory disposables,[49] [redacted] for non-invasive ventilation,[50]

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[46] DEF-00009231 at tab 'Facial Protection' showing "[redacted] Another Vizient bid strategy document related to Facial Protection dated March 2018 shows [redacted] (DEF-00047737 at 740).

[47] DEF-00057745 at 750 (a May 24, 2018 presentation showing [redacted].

[48] DEF-00057764 at 768 (a January 11, 2022 presentation showing [redacted] (DEF-00057764 at 766).

[49] DEF-00057878 at 914 (a November 2020 presentation showing [redacted] *See also*, DEF-00057825 at 865 (a July 29, 2020 presentation showing [redacted]

[50] DEF-00057878 at 903 (a November 2020 presentation showing [redacted]; *See also*, DEF-00057825 at 862 (a July 29, 2020 presentation showing [redacted]

and [redacted] for suction tubing.[51]

29. In the same vein, in the Vizient DMS Market, the challenged conduct impacts DMS that are sold outside of the Vizient GPO. Although it would be possible to define a discrete market around each individual DMS product, such an approach would complicate without clarifying, as Vizient's conduct has similar effects on each DMS product. Hence, it is appropriate as a matter of analytic convenience to aggregate the DMS in defining the Vizient DMS market.

30. However, the differences in the number of suppliers and the concentration of those suppliers for each DMS do not imply material differences in competitive conditions across DMS categories. The presence or significance of suppliers *other* than Endure that also compete with Vizient is not material to my opinion that Vizient's conduct suppresses competition between Vizient and Endure. At most, the presence of additional competitors outside of the Vizient GPO would mean that Vizient's conduct has the potential to not only suppress competition from Endure, but to also suppress additional competition from other suppliers.

31. Finally, clustering DMS into a single market is solely for analytic convenience and does not materially affect my analysis. Evidence indicates that Vizient's share in each of the 12 categories for which I have reliable data is above levels that typically

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[51] DEF-00057695 at 698 (a March 8, 2018 presentation showing [redacted]) and 699 (showing [redacted].

are associated with significant market power,[52] and Vizient's challenged conduct has similar effects on each DMS category. Hence, analyzing each DMS product as a separate antitrust market would create noise and complication but would be unlikely to lead to material changes in my conclusions.

D. The Geographic Market

32. The relevant geographic market for both the GPO DMS Market and the Vizient DMS Market is no broader than the Unites States. As a general matter, targetable customer markets are defined by the locations of customers. Hence, in this case, separate geographic markets could be defined at the level of a single GAC hospital system by the locations where it receives delivery of DMS products. However, doing so is unnecessary and it is appropriate to cluster GAC hospitals that are customers in the GPO DMS Market and the Vizient DMS Market for analytical convenience because GPOs face similar competitive conditions for the delivery of medical equipment to GAC hospitals in those relevant markets across the United States.[53]

33. In general, sales of DMS in the United States to GAC hospitals are subject to different regulatory requirements than in other countries.[54] I understand

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[52] *See supra* ¶ 28.

[53] *See infra* ¶ 34.

[54] *See* U.S. Food & Drug Administration, "Products and Medical Procedures," *available at*: https://www.fda.gov/medical-devices/products-and-medical-procedures. ("The FDA regulates medical devices sold in the United States to assure their safety and effectiveness. Medical devices range from simple tongue depressors and hospital gowns to complex programmable pacemakers

that, to sell many DMS, companies must meet FDA standards and, in some cases, receive FDA approval.

34. Specifically for the GPO DMS and Vizient DMS Markets, GAC hospitals that purchase DMS from GPOs, including Vizient, are spread throughout the United States.[55] A Vizient witness testified that [redacted] Moreover, [redacted][56] [redacted][57]

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and robotic surgical systems."); *see also, e.g.*, Steele (Vizient) Deposition, 186:23-187:5 [redacted]

[55] *Steele (Vizient) Deposition,* 74:4-9 ("[redacted]

[56] *Kaufman (Vizient) Deposition,* 56:10-22 [redacted]

[57] *Kaufman (Vizient) Deposition,* 45:6-10 [redacted]

From the supply side, Vizient's supply contracts are national in geographic scope.[58] When Vizient negotiates contracts with a potential supplier, it is generally with the supplier's "national account manager."[59]

36. Finally, as required by the Guidelines, regulatory and practical requirements prevent GAC hospitals located in the United States from engaging in arbitrage with those located in other countries.[60]

E. The Hypothetical Monopolist Test

37. In the merger context the analytical framework for defining relevant markets is known as the hypothetical monopolist test—a conceptual framework that identifies a set of products (and targeted customers), including the merging parties' products, that are close enough substitutes that a hypothetical monopolist owner of those products could raise prices by a small but significant amount (or by a SSNIP, or small but significant and non-transitory increase in price, in the

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[redacted] (*Kaufman (Vizient) Deposition*, 46:2-15). [redacted] (*Kaufman (Vizient) Deposition*, 55:4-9).

[58] *Kaufman (Vizient) Deposition,* 55:15-18 ("[redacted]

[59] *Kaufman (Vizient) Deposition,* 168:23-25 ("[redacted].

[60] *2023 Guidelines*, § 4.3.D.2.b. *See also*, 2010 *Guidelines,* § 4.2.2.

language of the Guidelines) above current levels.[61] The Guidelines presume—with support from basic economics—that a significant increase in concentration (an increase in the combined share of sales of the merging parties) in a highly concentrated relevant antitrust market defined in this way is likely to enhance market power.[62]

38. Because it is a merger concept, the hypothetical monopolist test cannot always directly be applied to a monopolization case like this one because a monopolist may already be pricing significantly above the competitive level and thus, by definition, would not have any close competitors.[63] Hence, the hypothetical monopolist test would result in an overly broad market that fails to illuminate the monopolist's market power. This phenomenon is well-known to antitrust practitioners as the "cellophane fallacy"—named for a famous instance of a search for close sub-

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[61] *2023 Guidelines*, § 4.3.A. *See also*, *2010 Guidelines*, § 4.1.1.

[62] *2023 Guidelines*, § 2.1. *See also*, *2010 Guidelines*, § 5.3.

[63] White, L., "Market Power: How Does it Arise? How is it Measured?" *The Oxford Handbook of Managerial Economics*, Thomas, C., and Shughart, W., eds., 2013, at 52 (stating "the market definition paradigm that works well for the HMG approach to [. . .] merger cases generally does not apply to such monopolization cases [. . .]" and explaining that in a monopolization case a SSNIP test is "useless" because no profit-maximizing firm could profitably increase its price by a SSNIP, regardless of market power.).

stitutes for a monopoly product resulting in an overly broad relevant antitrust market.[64]

39. Although the hypothetical monopolist test often cannot directly be applied in monopolization inquiries, its central tenet of identifying significant competitive constraints still can be applied (although, as noted above, there may not be any significant competitive constraints). One approach commonly used by economists to define relevant markets in nonmerger matters is to determine a "competitive" price—that is the price that would exist but for the alleged anticompetitive conduct that created or maintained the monopoly.[65] Then, the hypothetical monopolist test is applied by determining a set of products that, if under the control of a hypothetical monopolist, would cause at least a small increase in price above the competitive level.[66] At bottom, this approach identifies markets in which a firm's conduct can cause competitive harm.

40. Here there are at least two markets in which it is appropriate to assess whether Vizient's market

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[64] *See, e.g.*, White, L., "The Dead Hand of Cellophane and the Federal Google and Facebook Antitrust Cases: Market Delineation Will Be Crucial," The Antitrust Bulletin, 67(1), 2022, § II.A.

[65] *See* Werden, G., "Market Delineation under the Merger Guidelines: Monopoly Cases and Alternative Approaches," Review of Industrial Organization, 16, 2000 at 215, (stating "the proper benchmark price for purposes of evaluating whether conduct is unlawfully exclusionary is the price that would prevail but for the challenged conduct.").

[66] This small increase in price is called a "small but significant non-transitory increase in price" (or "SSNIP") in the 2023 Guidelines. (*2023 Guidelines*, § 4.3.A). *See also Id.*, § 4.3.B (discussing benchmark prices and SSNIP size.). *See also*, *2010 Guidelines*, §§ 4.1.1 and 4.1.2.

shares raise concerns about its ability to exercise market power and harm competition. First, significant market power in the GPO DMS Market may limit GAC hospitals' options for platforms through which they can contract to purchase DMS products. Second, significant market power in the Vizient DMS Market may further limit Vizient's GAC hospital members' options for purchasing DMS products, either through or outside of a GPO. That is, the market for the sale of DMS products to Vizient GAC hospital members is a relevant antitrust market for a targeted group of customers.

41. The GPO DMS Market passes the hypothetical monopolist test. The quantitative and qualitative evidence presented above indicates that a hypothetical monopolist controlling the prices of all GPOs would be incentivized to increase prices of DMS by at least a small but significant amount at one or more GPOs (*i.e.*, a hypothetical monopolist would be incentivized to increase DMS prices by a SSNIP). That is, although a price increase at a GPO would cause some hospitals to substitute away, evidence indicates that most hospitals would substitute to another GPO. A survey relied by Vizient's expert, Dr. Maness found that individual hospitals would require a [redacted] in labor to replace the functions performed by their GPOs.[67] Basic economic logic dictates that in the event a monopoly GPO increased DMS prices by a SSNIP, GAC hospitals would prefer to purchase from the GPO even at an elevated price rather than to switch to direct purchases and face the [redacted] in labor costs needed to negotiate thousands of indi-

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[67] Maness Expert Report, ¶ 118.

vidual contracts with suppliers. That is, following a price increase at one or more GPOs, a hypothetical monopolist would earn a higher margin on hospitals that remained with that GPO and would recoup significant revenue lost by that GPO when hospitals substituted away through its ownership of other GPOs. Hence, following the Guidelines,[68] that a hypothetical GPO monopolist would be incentivized to increase the price of DMS at one or more GPOs indicates that the market for the sale of DMS through GPO-negotiated and administered contracts to GAC hospitals is a relevant antitrust market.

42. Note that whether a hypothetical monopolist would or would not also increase prices to non-GAC hospital members is immaterial to the validity of a market with targeted GAC hospital customers. I have not analyzed prices charged to non-GAC Vizient members, as these prices are not relevant to any opinion of mine. Moreover, a targeted customer market is consistent with the targeted group having greater, lesser, or the same demand elasticity as the non-targeted group. Similarly, a targeted customer market is consistent with a greater, lesser, or equivalent price increase to the non-targeted group. This is because applying the hypothetical monopolist test to a targeted group of customers does not depend on the hypothetical monopolist's behavior towards non-targeted customers.

43. The Vizient DMS Market also passes the hypothetical monopolist test. The Vizient DMS market "passes" the HMT if a monopolist seller of DMS to Vizient member GAC hospitals could increase DMS prices by a SSNIP above those that would be charged

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68 *2023 Guidelines*, § 4.3.A. *See also*, *2010 Guidelines*, § 4.1.1.

if such products were [redacted][69] By definition, a hypothetical monopolist DMS supplier would not face such competitive threats, and so would not need to offer discounts. Hence, evidence indicates that a hypothetical monopolist seller of DMS to Vizient hospitals would increase prices by at least a SSNIP.

[. . .]

III. Vizient Harms Competition by Penalizing GAC Hospitals for Purchases Outside of The Vizient GPO

A. Vizient's Loyalty Programs Materially Influence Member GAC Hospitals' Purchase Decisions

66. Vizient's ISPs offer rebates to participating GAC hospitals, conditional on a GAC hospital making a sufficient share of its purchases within and across product categories through Vizient. As described, after electing to participate in a Vizient ISP and identifying its potential spend and preferred suppliers in each product category, a participant that achieves overall program compliance is eligible for rebates in any product category for which it also achieves product-category compliance.[95] Rebate percentages vary by

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[69] *See, e.g.,* DEF-00000937 at 938; DEF-00011711 at 712.

[95] Vizient's Patient Care ISP also contains [redacted] (DEF-00000937 at 942). [redacted]

product, but evidence indicates they are generally between [redacted].[96] Data provided by Vizient show that rebates paid in the five ISPs that include the relevant DMS products ranged from [redacted] in 2021.[97] These data indicate that the five ISPs that include the relevant DMS products generated [redacted] in sales in 2021, while paying out [redacted] million in rebates.[98] Vizient's other ISPs are similarly structured. A Vizient document states [redacted]"[99]

67. The all-or-nothing nature of the ISP rebates means that small changes in a GAC hospital's purchases can result in large changes to its rebate. For a GAC hospital whose quarterly purchases put it near the ISP rebate thresholds— *i.e.*, 75% of purchases across all product categories in an ISP and 90% of purchases in a given category—rebate eligibility depends on its incremental purchases. For example, if these incremental purchases are from the hospital's chosen

[redacted]

96 *See, e.g.*, DEF-00011908 and DEF-00011574.

97 DEF-00009164 (Impact Standardization 2017-2022.xlsx). See my backup materials for calculations.

98 See my backup materials.

99 DEF-00011711 at 712.

ISP supplier and push the hospital above the 75% aggregate purchase threshold, the GAC hospital gains a rebate on all of its quarterly purchases across all of the ISP categories for which it is eligible. However, if incremental purchases are not from the hospital's chosen ISP supplier and the hospital fails to reach the overall program compliance threshold, the GAC hospital loses all rebates. Similarly, for hospitals that are close to the 90% threshold for any individual product category rebate eligibility depends on whether incremental purchases are made from the hospital's chosen ISP provider: Incremental purchases from the chosen provider will trigger a rebate but incremental purchases made from other vendors will cause the hospital to miss their 90% threshold and forfeit the rebate in that category.

68. Vizient's ISP rebates are thus a form of bundled loyalty discount (or, in this case, rebate), in which discounts on one product are conditioned on "loyalty" to the selling firm(s), meaning a sufficient share of purchases of other products.[100] Such rebates can create powerful incentives that steer incremental purchases towards Vizient suppliers participating in the ISP, and away from non-Vizient suppliers. Consider by way of example a GAC hospital that makes approximately 75% of its purchases in a given Vizient ISP from the GAC hospital's designated ISP suppliers. Because the GAC hospital is close to the threshold for receiving an ISP rebate, incremental purchases in any of the ISP categories would determine whether the

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[100] *See* Greenlee, P., D. Reitman, and D. Sibley, "An antitrust analysis of bundled loyalty discounts," *International Journal of Industrial Organization*, 26, 2008.

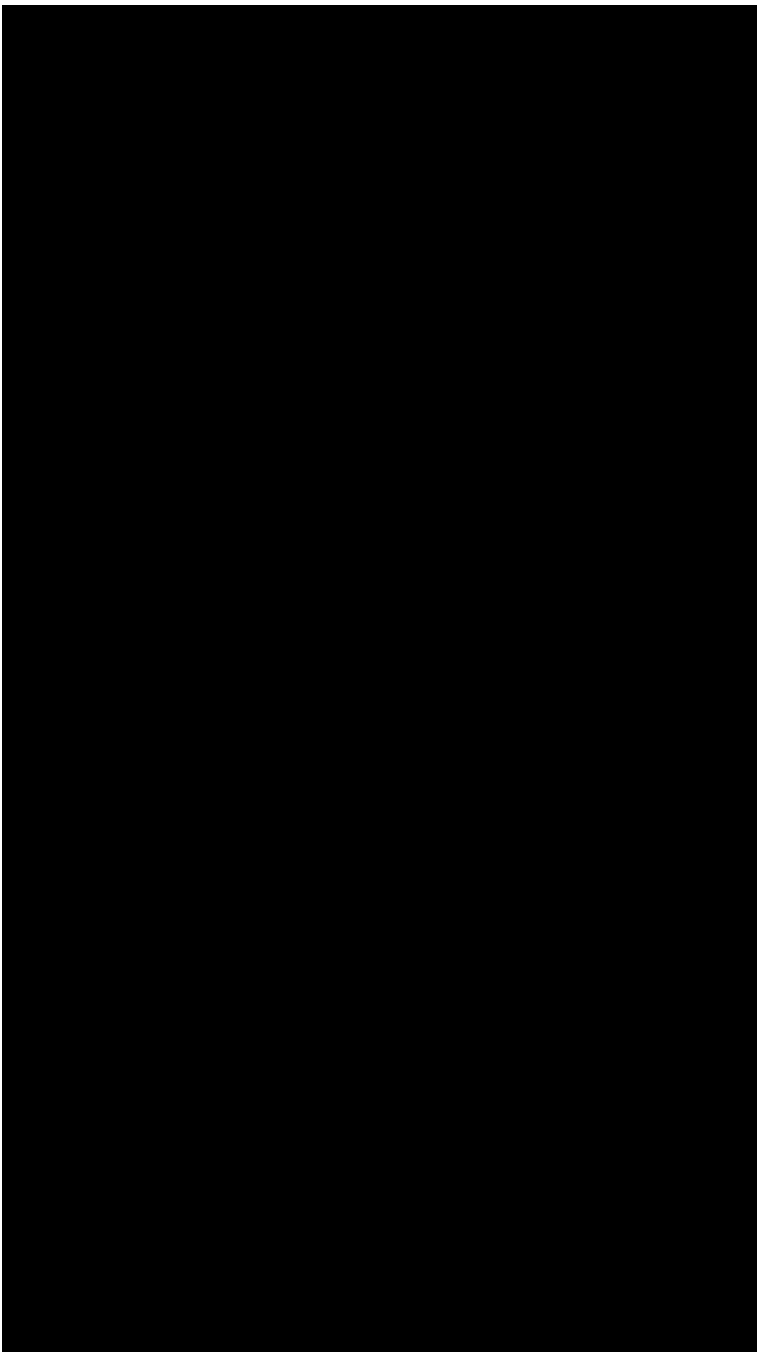
hospital receives a rebate across several ISP categories.

69. Figure 7 reproduces a Vizient document showing an "Impact Program Example" that illustrates how ISP rebates work.[101] In this example, the ISP participant has exactly achieved "Overall Program Compliance" of 75%. Hence, the ISP participant depicted in this example is on the margin of receiving or not receiving a rebate on all of its purchases across the six product categories in which the GAC hospital made more than 90% of its purchases from its chosen ISP suppliers.[102]

Figure 7: Example of ISP Participant at Threshold of Overall Program Compliance

[101] DEF-00000937 at 951.

[102] In the example, the hospital would be eligible for a rebate on its quarterly purchases of



Source: DEF-0000937 at 951.

70. The ISP participant depicted in this example would lose all of the rebates in every eligible category if its incremental purchases in any category (except its opt-out category) were made from a supplier other than its chosen ISP supplier. For instance, if this participant chose to purchase [redacted] instead of [redacted] supplies from its Vizient ISP supplier, it would cause the participant's overall program compliance to fall below 75% (to 74.96%), making the hospital ineligible for a rebate on all six product categories in which they are eligible to receive rebates. Assuming a rebate of [redacted] the GAC hospital depicted in Figure 7 would lose a rebate of over [redacted] if it chose to deviate from its ISP supplier for even small incremental purchases.[103]

71. In this example, the amount of the rebate exceeds the dollar value of incremental purchases that determine rebate eligibility. If the hospital had made just [redacted] more [redacted] purchases through a

[103] The example depicts [redacted] in total Patient Care ISP purchases, with [redacted] and [redacted] of purchases in two categories for which the hospital is below 90% complaint and thus will not receive a rebate. The hospital's purchases in compliant categories total [redacted] A [redacted] rebate on these compliant purchases would amount to [redacted] plus [redacted] of the amount of any incremental purchases made from Vizient ISP suppliers.

non-ISP supplier, it would not have received a rebate. If it makes that [redacted] in purchases through its ISP supplier, it earns a rebate of over [redacted] As this example illustrates, the structure of Vizient's ISP rebates ensures that the relative price of Vizient suppliers' products is artificially lower than that of competing non-Vizient supplier products by the amount of the rebate.

72. Below are three specific examples that qualitatively match the scenario from the Vizient document depicted in Figure 7, in which a hospital right at a rebate threshold would lose a large rebate given even a small decrease in purchases.

73. Table 1 depicts spend for [redacted] in 2021 Q4 and 2022 Q1 for each of the nine product categories in the Infection Prevention ISP. Vizient data indicate that this hospital was "compliant" in 2021 Q4, meaning in aggregate across the ISP categories it purchased at least 75% of its "potential" and thus received a rebate, but was not compliant and thus did not receive a rebate in the following quarter. In 2022 Q1, the hospital reduced its spend in two of the ISP categories, and increased its spend in five. In 2022 Q1, the hospital appears to be [redacted] short of 75% compliance.[104] If the hospital's rebate were roughly [redacted] of spend across the Infection Prevention ISP, the hospital would have lost a rebate of more than [redacted] by missing the 75% threshold.

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[104] See my backup materials. Vizient data state that the overall compliance of [redacted] was 73.7% in 2022 Q1, which implies a 75% threshold of [redacted]. Hence, I estimate that the actual purchases of [redacted] were [redacted] short of this threshold.

Thus, if the hospital shifted a small amount of spend away from Vizient in either the [redacted] category, or in the [redacted] category, this shift could have caused the hospital to lose a rebate greater than the amount of spend shifted to a supplier. In effect, such a shift would have more than doubled the price of the product when purchased from a non-Vizient supplier.

Table 1: Spend in the Infection Prevention ISP for [redacted] 2021 Q4–2022 Q1

Product Category: [redacted]
- 2021 Q4:
- 2022 Q1:
- Change:

Product Category: [redacted]
- 2021 Q4:
- 2022 Q1:
- Change:

Product Category: [redacted]
- 2021 Q4:
- 2022 Q1:
- Change:

Product Category: [redacted]
- 2021 Q4:
- 2022 Q1:
- Change:

Product Category: [redacted]
- 2021 Q4:
- 2022 Q1:
- Change:

Product Category: [redacted]
2021 Q4: [redacted]
2022 Q1: [redacted]
Change: [redacted]

Product Category: [redacted]
2021 Q4: [redacted]
2022 Q1: [redacted]
Change: [redacted]

Product Category: [redacted]
2021 Q4: [redacted]
2022 Q1: [redacted]
Change: [redacted]

Product Category: [redacted]
2021 Q4: [redacted]
2022 Q1: [redacted]
Change: [redacted]

Total (excluding opt-out categories)

2021 Q4: [redacted]
2022 Q1: [redacted]
Change: [redacted]

Apparent ISP threshold

2021 Q4: [redacted]
2022 Q1: [redacted]

Compliant?

2021 Q4: Yes
2022 Q1: No

Source: DEF-00077189

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74. Table 2 depicts spend for [redacted] 2021 Q2 and 2021 Q3 for each of the nine

product categories in the [redacted] ISP. The hospital lost compliance in 2021 Q3, following a drop in its purchases in the [redacted] category, one of the categories in which Endure competes. Assuming a [redacted] rebate, [redacted] would have lost an [redacted] ISP rebate of roughly [redacted] in 2021 Q3. According to Vizient data, [redacted] was roughly [redacted] short of the 75% compliance threshold.[105] Thus, by shifting a mere [redacted] in spend in the [redacted] category to Endure, [redacted] would have lost a rebate equal to [redacted] of the spend that was shifted to Endure. In other words, in the case of [redacted] the loss of the [redacted] ISP rebate was equivalent to a [redacted] tax on incremental purchases from Endure. [redacted] returned to compliance in 2021 Q4.

Table 2: Spend in the [redacted] ISP for [redacted] 2021 Q2–2021 Q3

Product Category: [redacted]
2021 Q2: [redacted]
2021 Q3: [redacted]
Change: [redacted]

Product Category: [redacted]
2021 Q2: [redacted]
2021 Q3: [redacted]
Change: [redacted]

Product Category: [redacted]

[105] See my backup materials. Vizient data states that [redacted] overall compliance was [redacted] in 2021 Q3, which implies a 75% threshold of [redacted]. Hence, I estimate that [redacted] actual purchases were [redacted]

2021 Q2: [redacted]
2021 Q3:
Change:

Product Category: [redacted]
2021 Q2:
2021 Q3:
Change:

Product Category: [redacted]
2021 Q2:
2021 Q3:
Change:

Product Category: [redacted]
2021 Q2:
2021 Q3:
Change:

Product Category: [redacted]
2021 Q2:
2021 Q3:
Change:

Product Category: [redacted]
2021 Q2:
2021 Q3:
Change:

Product Category: [redacted]
2021 Q2:
2021 Q3:
Change:

Total

2021 Q2: [redacted]
2021 Q3:
Change:

Apparent ISP threshold

2021 Q2: [redacted]
2021 Q3:

Compliant?

2021 Q2: Yes
2021 Q3: No

Source: DEF-00077201

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75. Table 3 depicts spend for [redacted] 2020 Q1 and 2020 Q2 for each of the ten product categories in the [redacted]. The hospital lost compliance in 2020 Q2, following a drop in its purchases in the [redacted] categories. Assuming a 3% rebate, [redacted] would have lost a [redacted] ISP rebate of nearly [redacted] in 2020 Q2. According to Vizient data, [redacted] was roughly [redacted] short of the 75% compliance threshold.[106] Thus, by shifting [redacted] in spend, [redacted] would have lost a rebate equal to more than the amount of spend shifted away from Vizient.

Table 3: Spend in the Specialty Care ISP for [redacted], **2020 Q1–2020 Q2**

Product Category: [redacted]

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[106] See my backup materials. Vizient data states that [redacted] overall compliance was [redacted] in 2020 Q2, which implies a 75% threshold of [redacted]. Hence, I estimate that [redacted] actual purchases were [redacted]

2020 Q1:
2020 Q2:
Change:

Product Category:

2020 Q1:
2020 Q2:
Change:

Product Category:

2020 Q1:
2020 Q2:
Change:

Product Category:
(Opt Out)

2020 Q1:
2020 Q2:
Change:

Product Category:

2020 Q1:
2020 Q2:
Change:

Product Category:

2020 Q1:
2020 Q2:
Change:

Product Category:

2020 Q1:
2020 Q2:
Change:

Product Category:

2020 Q1:
2020 Q2:

Change: [redacted]

Product Category: [redacted]
2020 Q1:
2020 Q2:
Change:

Product Category: [redacted]
2020 Q1:
2020 Q2:
Change:

Total (excluding opt-out categories)

2020 Q1:
2020 Q2:
Change:

Apparent ISP threshold

2020 Q1:
2020 Q2:

Compliant?

2020 Q1: Yes
2020 Q2: No

Source: DEF-00077194

76. Together, these three examples indicate that Vizient's ISPs can materially impact the incentive of a Vizient member to make purchases outside of Vizient. As in the example in Figure 7 of my initial report, because small decreases in spend on Vizient products can cause a relatively large loss of rebate, the ISPs penalize such purchases.

77. The conditioning of a large rebate on a small amount of incremental purchases creates material incentives to shift purchases towards Vizient suppliers,

even when a GAC hospital may prefer non-Vizient suppliers. In effect, the conditioning of Vizient's ISP rebate on these incremental purchases penalizes the GAC hospital for purchases from any competitor to Vizient suppliers.

78. Note that the presence of "inframarginal" customers—*i.e.*, customers who are likely to purchase the same amount of DMS through Vizient with or without the ISPs—is consistent with anticompetitive harm from the challenged conduct. It is not my opinion that *every* Vizient customer or ISP participant is disincentivized from purchasing outside of Vizient. But some are, and the "marginal" GAC hospitals who would be most likely to consider purchasing DMS from a non-Vizient supplier like Endure may be the most likely to participate in an ISP program. As I have shown, the ISPs can disincentivize purchases of marginal GAC hospitals, even if there are some infra-marginal GAC hospitals who would purchase from Vizient with or without the ISPs.

79. Vizient's documents make statements that are consistent with this effect. For instance, one Vizient document states that Vizient's ISPs offer [redacted]"[107] Another Vizient document states that the impact of the ISPs [redacted]

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107 DEF-00000937 (*Kaufman (Vizient) Deposition*, Exhibit 9) at 938; *Kaufman (Vizient) Deposition*, 237:8-10 (stating that the document is a supplier-facing presentation that talks about Vizient's ISPs).

[redacted][108] A different Vizient document notes that [redacted] of the impact programs include that the program provides [redacted] that members are [redacted] [109] Another Vizient document states that [redacted]."[110]

80. In what appears to be a transcript of a call between Vizient and Endure, [redacted].[111] In the transcript, the Vizient representative describes [redacted]

[108] DEF-00000417 (*Kaufman (Vizient) Deposition*, Exhibit 3).

[109] DEF-00011711 at 712 (speaker notes).

[110] DEF-00021164, at 167.

[111] DEF-00004818, at 825.

[redacted] losing rebates in bowel management, disposable sharps containers, monitoring electrodes and so far [sic].

81. In an unattributed quote produced by Vizient within a PowerPoint presentation titled [redacted] an individual claimed the ISPs enabled him or her to [redacted]"[112] A separate Vizient presentation states in reference to supplier challenges that [redacted].[113]

82. Table 4 depicts the ISP participation of Vizient's top [redacted] hospitals and hospital systems, by spend on DMS. Collectively, these [redacted] hospitals account for [redacted] of spend by Vizient members on the 12 DMS products at issue, according to my analysis of Vizient's Supplier Sales Reports.[114] In 2021, these [redacted] GAC hospitals purchased [redacted] million in the 12 DMS categories through ISPs, or [redacted] of all DMS sales made through Vizient ISPs in 2021. As the table shows, virtually all of these large hospitals participate in at least one ISP, with [redacted] participating in all five of the ISPs containing the DMS at issue in this matter. This finding is consistent with Vizient's own claims about wide participation in ISP programs, including that

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[112] DEF-00057018.

[113] DEF-00026472.

[114] See my backup materials.

ISP suppliers will have access to [redacted][115] or [redacted][116] of Vizient members.

Table 4: ISP participation of Vizient's 250 largest GAC hospitals (2021)[117]

- **ISP Participation:** Participating in 5 Vizient Impact Programs
  - Number of GACs:
  - Share of Total GACs: 
- **ISP Participation:** Participating in 4 Vizient Impact Programs
  - Number of GACs:
  - Share of Total GACs: 
- **ISP Participation:** Participating in 3 Vizient Impact Programs
  - Number of GACs:
  - Share of Total GACs: 
- **ISP Participation:** Participating in 2 Vizient Impact Programs
  - Number of GACs:
  - Share of Total GACs: 
- **ISP Participation:** Participating in 1 Vizient Impact Program
  - Number of GACs:
  - Share of Total GACs: 

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[115] DEF-00000937 at 938.

[116] DEF-00011711 at 712.

[117] For the purposes of constructing this table, I identified the top [redacted] Vizient members who are hospitals, hospital systems, or entities associated with hospital systems.

- **ISP Participation:** Participating in 0 Vizient Impact Programs
  - Number of GACs:
  - Share of Total GACs:
- **Total**
  - Number of GACs:
  - Share of Total GACs:

Source: Supplier Sales Report Data: DEF-00077185 - DEF-00077188, DEF-00077190 - DEF-00077193, DEF-00077196 - DEF-00077200, DEF-00077203; Impact Program Data: DEF-00077189, DEF-00077194, DEF-00077195, DEF-00077201, and DEF-00077202.

83. Other Vizient rebate programs are structured similarly to Vizient's ISPs, and thus may penalize purchases made outside of the Vizient GPO.

84. Vizient documents indicate that Vizient offers various programs that offer rebates or price concessions in exchange for member commitments to make a sufficiently high share of the member's purchases through Vizient. For instance, a Vizient document describes the Vizient [118] The document states that [119]

[118] DEF-00016934 at 939.

[119] DEF-00016934 at 939.

85. Some Vizient agreements with suppliers specify tiered pricing, with tiers with more favorable pricing available to members that make higher commitment levels to the suppliers. For instance, a contract between Vizient and [redacted] specifies that [redacted][120] Other Vizient agreements require purchasing commitments of [redacted] across multiple contracts to garner access to the lowest costs price tiers. For example, [redacted] agreement with Vizient conditions access to [redacted][121]

86. Vizient's [redacted] is structured similarly to the Vizient ISPs, in that members receive rebates for committing to make a certain percentage of spend with specified Vizient suppliers. A Vizient document states that the threshold for earning [redacted]

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[120] Other examples of lower pricing for "committed spend" include a Vizient contract with [redacted] pricing available to members with a [redacted] and [redacted] pricing available to members with [redacted] (DEF-00078624 at 645) and a Vizient contract with [redacted] specifying that [redacted] is available to members with [redacted] (DEF-00078552 at 570-572).

[121] DEF-00077973 at 994.

87. Vizient has failed to produce data that would allow me to quantitatively assess either participation in these programs or their likely effects. However, economic principles indicate that such programs could have similar effects to those of Vizient's ISPs. Like Vizient's ISPs, these other programs condition rebates on broad classes of products on a member's purchasing a high enough share of those products from Vizient suppliers. Like the ISPs, such programs can penalize purchases made outside of Vizient, and reduce competition between Vizient and suppliers like Endure.

[. . .]