No. _____

In the
Supreme Court of the United States

UNITED BIOLOGICS, L.L.C., doing business as United Allergy Services,

Petitioner,

v.

AMERIGROUP TENNESSEE, INC., doing business as Amerigroup Community Care, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 12, 2026

QUESTION PRESENTED

Petitioner United Allergy Services ("UAS") partners with primary care physicians around the country to provide allergy testing and immunotherapy services. When UAS entered the market in 2009, it was an immediate success in large part because it met a massive unsatisfied demand. But a group of allergists and health insurers did not take kindly to that market disruption. Over the course of several years, respondents conspired with each other and with other insurance companies to oust petitioner from the market by coercing UAS's customers to cut ties with UAS. The Sixth Circuit acknowledged that UAS was the target of a scheme by market incumbents to drive it from the market. Yet the court nonetheless held that *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), barred UAS from seeking lost-profit damages because UAS's customers were more immediate victims. As Judge Bush recognized, that decision squarely conflicts with decisions from other circuits limiting *Illinois Brick* to cases where multiple plaintiffs seek to recover a single overcharge. In those circuits, *Illinois Brick* has no application where the actual and intended victim of a group boycott seeks to recover lost-profit damages.

The question presented is:

Whether *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), bars the intended and actual target of a group boycott from recovering lost-profit damages when market incumbents band together to coerce the target's customers to stop doing business with the target.

PARTIES TO THE PROCEEDING

Petitioner (plaintiff-appellant below) is United Biologics, LLC, d/b/a United Allergy Services.

Respondents (defendants-appellees below) are Amerigroup Tennessee, Inc.; Physicians' Medical Enterprises, LLC, d/b/a PME Communications; Allergy Associates, P.A., d/b/a The Allergy, Asthma and Sinus Center, P.C.; and Ned DeLozier.

CORPORATE DISCLOSURE STATEMENT

United Biologics, LLC, d/b/a United Allergy Services is a privately held entity. Its parent company is United Biologics Holdings, LLC. No publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to the case within the meaning of Rule 14.1(b)(iii):

Academy of Allergy & Asthma in Primary Care v. Amerigroup Tennessee, Inc., No. 24-5153 (6th Cir.) (opinion issued Oct. 10, 2025; rehearing denied Jan. 13, 2026); and

United Biologics, LLC v. Amerigroup Tennessee, Inc., No. 3:19-cv-180 (E.D. Tenn.) (opinion issued Jan. 27, 2022).

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PETITION FOR WRIT OF CERTIORARI

The basic question in this case is whether the intended and actual target of a group boycott by market incumbents has antitrust standing to recover profits lost as a result of the boycott. The answer to that question should be obvious. Indeed, this Court seemed to answer that question in the affirmative four decades ago in *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983), and *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). Yet the Sixth Circuit held to the contrary based on a massive overreading of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)—a case that neither respondents nor the district court even cited, because it is wholly inapposite to a case involving a joint boycott, rather than a single overcharge. According to the Sixth Circuit, *Illinois Brick* establishes a "bright-line rule" that bars suit by any party "two or more steps removed" from a violator. App.32, 35. So even though the entire point of respondents' anticompetitive scheme was to drive petitioner United Allergy Services ("UAS") out of the market by coercing UAS's customers to stop doing business with it—*and the scheme succeeded in driving UAS out of Tennessee*—the Sixth Circuit held that UAS lacks antitrust standing because its customers were the more "directly injured" parties. App.73.

That "sounds absurd, because it is." *Sekhar v. United States*, 570 U.S. 729, 738 (2013). The decision below creates a "roadmap" for antitrust violators to exclude upstart rivals from the market. *Apple v. Pepper*, 587 U.S. 273, 284 (2019). By the Sixth Circuit's telling, incumbents are free to band together

to drive an upstart rival from the market so long as they carry out their scheme by targeting the upstart's customers (or its suppliers or anyone beside the upstart itself). Within the Sixth Circuit, the upstart, a.k.a., the object of the entire anti-competitive scheme, lacks antitrust standing because it is not the "directly" injured party. And customers (or suppliers) have little incentive to sue because their (distinct and non-duplicative) injuries are comparatively small and because they need the conspirators' business. Under the decision below, Uber would lack antitrust standing to sue a group of taxi companies that conspire to exclude Uber from the market by agreeing not to hire Uber drivers or by coercing banks not to finance Uber drivers' cars. As Judge Kethledge recognized, the decision below "serves to harm consumer welfare rather than advance it." App.60. And as Judge Bush explained, "consumers in general may suffer" because the decision imposes "a virtually insurmountable hurdle for certain joint-venture participants to sue when a group boycott drives them out of a market." App.67.

All those negative consequences are entirely of the Sixth Circuit's own making. The decision below fundamentally misreads *Illinois Brick*. *Illinois Brick* did not announce a categorical rule that bars suit whenever an antitrust conspiracy targets a rival by jointly coercing the rival's customers and suppliers to deny the rival relationships it needs to compete. That is a classic antitrust violation, the targeted rival is the ideal party to sue, and that suit raises no risk of duplicative recovery. As courts across the country have recognized, *Illinois Brick* is "a rule concerning overcharges" and the unique problems occasioned

when multiple plaintiffs seek to recover a single overcharge. *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 606 (7th Cir. 1997). It has zero application in a case like this, where different plaintiffs suffer different damages measured by their own distinct lost profits, and where there is no need to divide a single overcharge or wrestle with difficult questions of apportionment.

That is why other circuits have concluded, in direct conflict with the decision below, that *Illinois Brick* is inapplicable where plaintiffs seek damages for "lost profits" rather than "overcharges." *Mosaic Health v. Sanofi-Aventis U.S.*, 156 F.4th 68, 80 & n.5 (2d Cir. 2025), *cert. filed*, No. 25-1070 (U.S. Mar. 5, 2026). "Given the disharmony in the application of *Illinois Brick* in the lower courts," this Court should grant certiorari to "clarify the application of *Illinois Brick* in the context of an alleged group boycott." App.88.

OPINIONS BELOW

The opinion of the Sixth Circuit, 155 F.4th 795, is reproduced at App.1-62. The Sixth Circuit's order denying rehearing en banc, 164 F.4th 529, is reproduced at App.63-97. The district court's opinion, 2022 WL 22897162, is reproduced at App.152-181.

JURISDICTION

The Sixth Circuit issued its opinion on October 10, 2025, and denied a timely rehearing petition on January 13, 2026. Justice Kavanaugh granted timely applications extending the time to file a petition for certiorari until June 12, 2026. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. §15, is reproduced at App.250.

STATEMENT OF THE CASE

A. Factual Background

1. Allergies affect millions of Americans every year. To take just one example, it is estimated that 30% to 40% of the population suffers from seasonal hay fever. App.3. Yet the vast majority of allergy sufferers manage their allergies with over-the-counter drugs, which "merely mask a patient's symptoms" and do not treat the "underlying cause." App.187-88. The only available treatment to actually cure allergies is allergen immunotherapy. App.191.

To test for allergies and determine whether immunotherapy might be helpful, service providers must either perform a skin prick test—where a technician, under a physician's supervision, pricks the patient's skin with allergens and records the reactions—or send the patient to a lab for an "allergy blood test." App.191, 194. When a provider opts for the skin prick test, the supervising physician interprets the result to determine whether the patient has tested positive. App.194. From there, the physician will consider a host of benefits and risks in deciding whether to prescribe immunotherapy. App.195.

When a patient chooses immunotherapy, a technician under a physician's supervision combines and dilutes FDA-approved antigen vials into proper doses. App.4. Those doses are then administered

through subcutaneous shots, often as frequently as "2 to 3 times per week for several years." App.197. While technicians or physicians may administer these shots, "a majority of physicians who prescribe allergen immunotherapy for their patients recommend patient self-administration in appropriate cases." App.196.

2. "Allergy testing and immunotherapy are services for which demand already greatly exceeds output in markets in Tennessee." App.187. This is largely explained by the high barriers to entry a prospective market entrant faces. To offer immunotherapy, a firm must have access to a physician, a trained technician, and expensive equipment and products such as testing devices and FDA-approved antigens. App.188. It must also seek reimbursements from the health insurance companies who largely pay for these services. App.188. After all, without reimbursement from companies like respondent Amerigroup Tennessee, "services such as allergy testing and immunotherapy cannot be made available to most consumers." App.193.

As a result of that economic reality, respondent Allergy, Asthma and Sinus Center, P.C. (the "Center") and its associated board-certified "allergists" dominate the Tennessee market for immunotherapy. App.5. They cover both fronts. Physicians often refer their patients to allergists rather than assume the costs of offering immunotherapy. And the Center (like UAS) also contracts with "primary care clinics to place a trained technician or nurse in those clinics to assist the physicians with allergy skin testing and immunotherapy." App.191-92. It is thus little surprise that the Center "controls more than 70% of

the allergy testing and immunotherapy services." App.189.

UAS sought to increase competition in the immunotherapy market by working together with physicians to offer allergy skin testing and immunotherapy in a cost-effective manner. App.190. UAS does this by providing physicians the necessary equipment and non-physician technicians; in exchange, the service providers pay UAS a set fee. App.190-91. Before the events that led to this case, UAS had contracted with more than 80 primary care physicians, many of whom work in rural areas miles away from the nearest allergist. App.190-91. Many physicians who partnered with UAS stopped referring their patients to the Center or contracting with the Center. App.191-92.

3. As with most innovators, UAS's entry into the market threatened incumbents. The threat posed by UAS was particularly palpable, as allergists, including allergists at the Center, noticed that UAS was converting primary care doctors who were once a source of referrals into competitors. The Center had been "providing the same exact services to primary care clinics" as UAS, but many clinics turned to UAS because it was able to expand access to immunotherapy in a cost-effective manner. App.205.

The allergists were not the only incumbents threatened by UAS's entrance. By rapidly expanding the number of patients who could receive allergy testing and immunotherapy services, UAS's innovation produced a substantial uptick in reimbursement requests submitted by primary care

doctors to third-party payors. Third-party payors like respondent Amerigroup were thus threatened too.

The Center, Amerigroup, and other health insurers (two of which subsequently settled with petitioner) began exploring ways to limit their exposure. They held meetings with the state's major insurers and other players affected by UAS. When advocacy failed, they conspired to drive UAS out of the market for allergy testing and immunotherapy services in Tennessee. App.203, 205.

The Center led this effort through respondent Physicians' Medical Enterprises ("PME") and PME's director, Ned DeLozier. App.8. DeLozier realized that UAS's model "would really hurt" the Center because it offered patients what they were looking for, "the convenience of home therapy." App.202. After trying and failing to convince federal and state agencies to go after UAS, and contemplating options such as "filing a frivolous *qui tam* against UAS and certain primary care doctors," App.202, DeLozier, the Center, and Amerigroup eventually "came to an agreement": They would encourage insurers like Amerigroup to audit and harass the physicians partnering with UAS under the guise of fraud and medical necessity, eventually threatening to cut off reimbursements altogether if doctors continued to work with UAS. App.204-05.

As respondents understood, insurers "have the ability to coerce" physicians, who will be "less likely to offer the questioned service" if audited or if they receive claim denials. App.193-94. Respondents thus decided that audits and reimbursement denials were "the best way to 'cut [UAS] out of the picture.'" App.202. To that end, respondents opened secret

investigations of physicians who contracted with UAS. App.206-07. Amerigroup also organized "monthly coordination calls" with competitors like United Healthcare to encourage them to similarly boycott UAS by targeting physicians. App.208-09. Amerigroup and its competitors ultimately "agreed to have consistent policies" to put maximal pressure on UAS and the physicians with which it worked. App.229-30. Their internal notes documented that they "met together" and "agreed to have consistent policies" aimed at running UAS out of the state. D.Ct.Dkt.299-15,pp.148-150. Indeed, their goal in doing so was clear: to "flush[]" UAS "out of Tennessee." App.8.

Respondents' boycott had the desired effect. UAS lost significant revenue and profits because clinics terminated their contracts with it. UAS was forced to expend substantial resources to keep its relationships with physicians brave enough to face respondents' concerted efforts. And UAS found it difficult to establish new relationships with physicians wary of respondents' boycott. App.232-33.

B. Procedural Background

1. UAS filed this suit in May 2019 against Amerigroup, the Center, DeLozier, and PME. D.Ct.Dkt.1.[1] UAS brought two Sherman Act claims and three state-law claims, seeking both damages and injunctive relief. App.234-48. As to the federal claims at the heart of this dispute, UAS alleged that

[1] The complaint also named BlueCross BlueShield of Tennessee, Inc., and BlueCare Tennessee, but both of these defendants settled. D.Ct.Dkt.389 at 1-2.

respondents violated Section 1 of the Sherman Act by "agree[ing] among themselves to engage in a coordinated campaign to boycott [UAS] and primary care physicians to drive them from the market." App.235. In addition, UAS alleged that respondents violated Section 2 of the Sherman Act by conspiring to protect and expand the Center's dominance in the market for allergy testing and immunotherapy by, *inter alia*, reimbursing claims for allergy services only if the claims were submitted by certified allergists. App.239.

2. Respondents moved to dismiss, arguing (among other things) that UAS lacked antitrust standing to sue. App.162-64. The district court granted respondents' motion on the ground that UAS lacked antitrust standing under the Sixth Circuit's multi-factor test. App.163-64. The court began by correctly noting that "UAS adequately allege[d] a causal connection between its harm and an antitrust violation." App.164. The court similarly acknowledged that respondents "intended such harm," which weighed in favor of allowing UAS to pursue its Sherman Act claims. App.164. The court nevertheless concluded that UAS lacked antitrust standing for two reasons. First, it believed that UAS was "not a competitor" of the Center, despite the fact that UAS contracted with physicians to offer the very services the Center offers. Indeed, the Center too at times contracted with physicians to place technicians in physicians' clinics, just as UAS does. App.166-67. Second, the court held that the existence of an arguably more-direct victim (physicians) meant that UAS itself could not recover its lost profits because UAS was akin to a mere "supplier" to those physicians.

App.174. At no point did the court discuss (or even cite) *Illinois Brick*. And it recognized that its decision conflicted with numerous other decisions addressing similar allegations. D.Ct.Dkt.299,PageID##7856-7860.

3. The Sixth Circuit affirmed. The panel found it "difficult" to say that UAS had not suffered an antitrust injury, given that the complaint alleged that UAS and physicians "together compete with an integrated defendant," which strongly suggests that both were respondents' competitors. App.22 (emphasis omitted). It also acknowledged that, while this Court has suggested that a plaintiff who is neither a consumer nor a one-to-one competitor is "less likely" to have antitrust standing, it was still possible for those entities to bring Sherman Act claims when, as here, the entity is the "direct target" of the anticompetitive conduct. App.19, 22. Nevertheless, the Sixth Circuit held that UAS lacked antitrust injury by virtue of this Court's decision in *Illinois Brick*. App.29.

Neither the district court nor the parties in their principal appellate briefs cited *Illinois Brick*—as evidence by the panel's felt-need to call for supplemental briefing addressing the case. Undeterred, the panel held that *Illinois Brick* categorically bars antitrust suits by any plaintiff that can be characterized as an "indirect" seller or supplier, regardless of whether that "supplier" is akin to a joint venture with its customers competing against a vertically-integrated firm, the anticompetitive conduct was openly directed at that joint competitor, or the plaintiff seeks to recover from a common

undercharge or for a distinct and non-duplicative harm such as lost profits, App.23-24, 31, 33-35. Because the Sixth Circuit's viewed UAS as at least "two … steps removed from the antitrust" violation, it held that it lacked antitrust standing under *Illinois Brick*. App.30.

Judge Kethledge concurred. App.60. Though he agreed with the majority opinion that caselaw "directs—albeit by analogy—the outcome" the court reached, he maintained that the result would "harm consumer welfare rather than advance it." App.60. "Unlike the harm to a second-hand buyer in *Illinois Brick*," the "damage to United Allergy was not collateral." App.61. "Quite the contrary: the ejection of United Allergy from th[e] market was the very object of the defendants' scheme," and the "harms for which United Allergy seeks redress were harms that the defendants specifically intended." App.61. While Judge Kethledge "appreciate[d]" this Court's "concerns about allowing parties harmed indirectly to bring antitrust claims," he noted that "the Court's concerns must be strong indeed … to leave without a remedy the pattern of conduct alleged here." App.61-62.

4. UAS sought rehearing en banc, which the Sixth Circuit denied. App.63-64. In a statement respecting denial of rehearing en banc, Judge Bush highlighted why the decision below "warrant[s] the Court's review to clarify the parameters of *Illinois Brick* in the context of an alleged group boycott." App.66. Judge Bush explained that UAS and the physicians with which it contracted were not in an ordinary supplier-purchaser relationship, but were "participants in a

joint venture" entitled to fairly compete against vertically-integrated firms like the Center. App.66. The decision below created a "virtually insurmountable hurdle for certain joint-venture participants to sue when a group boycott drives them out of a market." App.67.

Judge Bush also explained why *Illinois Brick* does not bar UAS's suit. *See* App.67-85. Among other things, he noted that *Illinois Brick*'s rule against double-recovery for a single overcharge fell away because this case concerns a group boycott and a claim for lost profits. App.68-71. In fact, Judge Bush noted, this Court had previously recognized that *Illinois Brick* did not announce an overarching theory of proximate causation and antitrust standing and thus "does not … exclude the possibility that a defendant could foresee" and cause "harm to a plaintiff that lacks contractual privity." App.78. By ruling otherwise, Judge Bush concluded, the panel read this Court's caselaw more formalistically than necessary and left "joint-venture participants" with "less antitrust protection in our circuit." App.85-86. "Given the disharmony in the application of *Illinois Brick* in the lower courts" more generally, Judge Bush again acknowledged that "this case may be appropriate for Supreme Court review." App.88.

Judge Murphy—the author of the panel decision—wrote a concurrence doubling down on the panel's reading of *Illinois Brick*. App.89. He maintained that *Illinois Brick* was not merely a supplement to earlier precedents concerning overcharges but a bright-line interpretation of the Sherman Act's private cause of action, *see* 15 U.S.C.

§15(a). App.89-90. For that reason, he thought it made no difference that UAS was seeking lost profits because that was a "mere" difference of pleading. App.90. Last, and relatedly, Judge Murphy rejected the notion that UAS and the physicians with which it contracted were a joint venture. Not that this would matter, he argued, because *Illinois Brick*'s bright-line rule would apply unless and until a court carved out an "exception" for joint ventures. App.93.

REASONS FOR GRANTING THE PETITION

In *Illinois Brick*, this Court addressed a narrow issue: whether indirect purchasers could recover 100% of a single overcharge that impacted both direct and indirect purchasers. The Court held that, "with respect to [that] pass-on issue," Section 4 of the Clayton Act prevented such indirect purchasers from recovering the overcharge. *Illinois Brick*, 431 U.S. at 729. Much of the analysis focused on the risk of duplicative recovery (or difficult apportionment issues) if both direct and indirect purchasers were both allowed to sue based on a single overcharge. The Court certainly did not purport to develop a theory of proximate causation or antitrust standing for all antitrust cases, much less lay down the Sixth Circuit's "bright-line" rule barring in every antitrust case the suit of any plaintiff that is "two … steps removed from the antitrust violat[ion]." App.29-30. Indeed, just a few years after *Illinois Brick*, this Court clarified in *McCready* that "the restrictions on the §4 remedy recognized in … *Illinois Brick*" are "[a]nalytically distinct" from the "conceptually more difficult question" of "which persons have sustained injuries too remote … to give them standing to sue for damages

under §4." *McCready*, 457 U.S. 476 (emphasis omitted) (quoting *Illinois Brick*, 431 U.S. at 728 n.7). So whatever else may be said of the Sixth Circuit's bright-line rule, it cannot claim any footing in *Illinois Brick*.

The Sixth Circuit's decision not only departs from this Court's precedents and basic economic (and common) sense, but entrenches a split on the scope of *Illinois Brick*. Just weeks after the panel issued its decision (and before petitioner sought rehearing), the Second Circuit squarely limited *Illinois Brick* to cases involving efforts by multiple plaintiffs down the distribution chain to recover a single overcharge—nothing more. Indeed, the Second Circuit squarely held that *Illinois Brick* has no role to play when the plaintiff alleges lost profits, rather than damages from an overcharge. The Second Circuit accords with precedent throughout the nation, including multiple district court decisions upholding UAS's antitrust standing to bring materially identical claims concerning other geographic markets.

As Judge Bush stated, review is warranted here because only this Court can "clarify the parameters of *Illinois Brick* in the context of an alleged group boycott and plaintiffs that operated essentially as part of an apparent joint venture." App.66. Until this Court does so, confusion will continue to abound, harming businesses and consumers alike who depend on upstart innovators like UAS to gain access to certain services in a cost-effective and practical manner. The Sixth Circuit's decision perversely grants market incumbents carte blanche to eliminate their competitors by targeting the competitor's customers

(or banks or suppliers). This petition cleanly presents an ideal vehicle for the Court to resolve the disharmony in the lower courts and clarify that the actual and intended victim of a group boycott by market incumbents has antitrust standing to recover profits lost because of the scheme.

I. The Decision Below Conflicts With Decisions From Other Courts Of Appeals.

The decision below puts the Sixth Circuit on the wrong side of a circuit split. Indeed, as Judge Bush recognized in his separate en-banc-stage opinion, App.83, the decision below squarely conflicts with a wealth of lower-court precedent, including the Second Circuit's recent decision in *Mosaic Health*.

In *Mosaic Health*, the plaintiffs (two health centers) alleged that a group of drug manufacturers conspired to limit drug discounts to distributors and suppliers, harming the plaintiffs, who purchased the drugs from distributors and suppliers. 156 F.4th at 73. The defendants argued in response that *Illinois Brick* barred the plaintiffs' claims, but the Second Circuit disagreed because "Plaintiffs seek damages not for losses incurred due to increasing prices"—the type of overcharge claim at issue in *Illinois Brick*—"but instead, for losses incurred as a result of lost access" (i.e., "lost profits"). *Id.* at 80. Because the plaintiffs' claims did not "implicate the concerns at the heart of *Illinois Brick*," they were not "precluded from seeking damages in this limited form." *Id.*

Mosaic Health followed previous Second Circuit caselaw holding that *Illinois Brick* does not bar the actual and intended victim of a group boycott from seeking lost profit damages, even if the conspirators

carry out the boycott by coercing the victim's customers. In *Crimpers Promotions Inc. v. HBO, Inc.*, 724 F.2d 290 (2d Cir. 1983) (Friendly, J.), for example, HBO and Showtime colluded to boycott Crimper's tradeshow, which sought to compete with HBO and Showtime by serving as a middleman between producers and cable operators. *Id.* at 290-91. HBO and Showtime carried out their scheme by coercing potential participants of the trade show not to appear, including by threatening to stop purchasing programming from suppliers who attended the show. *Id.* at 291. The Second Circuit held that Crimpers unquestionably had standing to sue. As Judge Friendly explained, "[i]njury to Crimpers was the precisely intended consequence of defendants' boycott," which was carried out "to further the conspirators' restraint of trade and stifling of competition." *Id.* at 294.

In so holding, Judge Friendly explained why *Illinois Brick* was irrelevant: The plaintiff's loss of profits "from having its trade show destroyed" were "distinct and different from the losses of producers," the more direct victim under the Sixth Circuit's test. *Id.* at 293-94. Nor was the plaintiff's injury too remote; the trade show organizer "was not just a 'supplier' of a competitor," but was "endeavoring to forge a link in a chain of the sale of programming." *Id.* at 294. And the injury the plaintiff suffered "was the precisely intended consequence of defendants' boycott." *Id.* As a result, the plaintiff had antitrust standing because it was "the victim of a successful boycott designed to support a broad policy of market limitation," and *Illinois Brick* was irrelevant. *Id.* at

297. A contrary holding would run counter to "elementary common sense." *Id.*

This case would therefore have come out the other way in the Second Circuit. UAS, like the trade organizer in *Crimpers*, was "not just a 'supplier' to" the Center's more "direct" competitor; it competed directly with the Center. *Id.* at 293-94. The injuries UAS suffered were "the precisely intended consequence of [respondents'] boycott." *Id.* And UAS seeks to recover its own lost profits—not an overcharge shared by multiple purchasers along a complex chain of distribution. *See id.*; *Mosaic Health*, 156 F.4th at 80. Those factors, which are dispositive under the Second Circuit's (correct) reading of *Illinois Brick*, were deemed irrelevant by the court below.

To be sure, the Sixth Circuit panel tried to distinguish *Crimpers* on the theory that Crimpers "competed with HBO and Showtime," whereas UAS is a "supplier" of the primary care physicians, who were the true competitors. App.40. But that does not wash. In fact, as the panel itself acknowledged just a few pages earlier, "when a plaintiff sells to a third party and the two businesses *together* compete with an *integrated* defendant, both the plaintiff and the third party are the defendant's 'competitors' in 'every relevant economic sense.'" App.22 (quoting IIA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* §348f, at 285 (5th ed. 2021)).

While the split with the Second Circuit is the freshest, the split runs far deeper. UAS's suit would go forward in the Fourth Circuit (just as it has cleared the antitrust-standing threshold within the Fifth). Like the Second Circuit, the Fourth Circuit recognizes

that *Illinois Brick* does not stand in the way of the victim of a group boycott seeking to recover its own losses. In *Novell, Inc. v. Microsoft, Corp.*, 505 F.3d 302 (4th Cir. 2007), the Fourth Circuit held that the plaintiff—the producer of WordPerfect and other office applications—had antitrust standing to sue Microsoft for using its monopoly power to require or encourage PC manufacturers to refrain from installing its products on their computers. It did not matter to the Fourth Circuit that the plaintiff competed by teaming up with operating-systems producers, whereas Microsoft (its competitor) was vertically integrated and offered both its own operating system and its own office applications. *Id.* at 308-09. *But see* App.29-30. Nor did it matter that the PC manufacturers were the more direct victims (albeit not the targets) of Microsoft's scheme. Because Microsoft "specifically targeted" the plaintiff's products "as a means to damage competition" and succeeded in "erod[ing]" the plaintiff's market share by using its monopoly power to "prohibit[] or punish[]" manufacturers from installing the plaintiff's competing applications, the court concluded that the plaintiff had antitrust standing. *Id.* at 309, 316-17. In doing so, the Fourth Circuit squarely held that the "*Illinois Brick*" rule was "inapplicable" to the case. *Id.* at 311 n.17.

Numerous other lower court decisions apply *Illinois Brick* in the overcharge context in which it applies, while correctly recognizing that it does not begin to prevent the direct and intended target of a joint boycott from suing. *See, e.g.*, *Andrx. Pharm., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 815-17 (D.C. Cir. 2001); *Am. Ad Mgmt. Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1059-60 (9th Cir. 1999); *Reazin v. Blue*

Cross & Blue Shield of Kansas, 899 F.2d 951, 962-63 (10th Cir. 1990); *cf. In re Brand Name*, 123 F.3d at 606. Indeed, multiple district courts within the Fifth Circuit rejected antitrust standing objections to UAS's effort to bring similar suits challenging concerted efforts to force it from the market. *Acad. of Allergy & Asthma in Primary Care v. La. Health Serv. & Indem. Co.*, 2021 WL 5029418, at *1-2 (E.D. La. May 14, 2021)[2]; *Acad. of Allergy & Asthma in Primary Care v. Superior HealthPlan, Inc.*, 2022 WL 18076843, at *10-12 (W.D. Tex. July 14, 2022), *report & recommendation adopted*, 2022 WL 18034365 (W.D. Tex. Oct. 18, 2022); *Acad. of Allergy & Asthma in Primary Care v. Allergy & Asthma Network/Mothers of Asthmatics, Inc.*, 2017 WL 11824765, at *12-13 (W.D. Tex. Sept. 29, 2017).

II. The Decision Below Is Egregiously Wrong.

Section 4 of the Clayton Act permits "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to bring suit. 15 U.S.C. §15(a). The breadth of this language reflects Congress' "expansive remedial purpose" in enacting it: to "create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims." *McCready*, 457 U.S. at 472. Of course, just as this Court has not read "any contract in restraint of

[2] That court granted summary judgment to defendants on other grounds, *Acad. of Allergy & Asthma in Primary Care v. La. Health Serv. & Indem. Co.*, 2023 WL 8237276, at *2 (E.D. La. Nov. 28, 2023), and UAS's appeal from that decision remains pending in the Fifth Circuit. No. 23-30925 (5th Cir. 2023).

trade" to its literal limit, this Court has not read §4 so broadly as to provide a treble-damages remedy for any injury that can be connected to an antitrust violation in any way, no matter how remote. *See Assoc. Gen. Contractors*, 459 U.S. at 529-30. The Court instead has crafted rules of "antitrust standing" that "determin[e] whether [a given] plaintiff is a proper party to bring a private antitrust action." *Id.* at 535 n.31.[3] But this Court's antitrust standing caselaw has not so starkly departed from the text Congress enacted as to run the statute away from "elementary common sense." *Crimpers*, 724 F.2d at 297 (Friendly, J.). On the contrary, this Court's caselaw makes clear that—just as common sense would suggest—the intended and actual target of a group boycott has antitrust standing to sue.

1. No one could seriously dispute that loss of market share as a result of a concerted effort by rivals to exclude a plaintiff from the market constitutes antitrust injury. *See* Areeda & Hovenkamp ¶348. Nor could anyone seriously dispute that group boycotts—i.e., joint efforts to "disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the

[3] This Court has since clarified that so-called "statutory standing" has nothing to do with Article III standing or jurisdiction and is better described as a matter of "whether [a plaintiff] falls within the class of plaintiffs whom Congress has authorized to sue"—or, "[i]n other words, … whether [the plaintiff] has a cause of action under the statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 & n.4 (2014). Given that statutory focus, judicial efforts to impose atextual narrowing constructions on Congress' broad text are particularly suspect.

competitors need" to compete—are *per se* violations of the Sherman Act. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing, Co.*, 472 U.S. 284, 294 (1985). It should therefore have been undeniable that UAS—who was driven out of the Tennessee market due to a group boycott intended to produce exactly that result—suffered an injury "of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

Indeed, the losses UAS suffered because of respondents' boycott "flow[ed] from that which makes defendants' acts unlawful," another point in favor of antitrust standing. *See id.* This Court has long interpreted the Clayton Act against the backdrop of the common law, including common law principles of proximate cause. *See Apple*, 587 U.S. at 279. And under traditional rules of proximate cause, "one who intentionally causes injury to another is subject to liability to the other for that injury." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 656-57 (2008) (quoting Restatement (Second) of Torts §870 (1979)). That is so even if the wrongdoer harms an intervening actor as part of the scheme to cause injury to his victim, such as "where the defendant 'defrauds another for the purpose of causing pecuniary harm to a third person.'" *Id.* at 657 (quoting Restatement (Second) of Torts §435A, cmt. *a.* (1965)). That principle is particularly important in antitrust law, where a classic mechanism for implementing a joint boycott is to target a rival's customers or suppliers. *See, e.g., Nw. Wholesale*, 472 U.S. at 294; *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). It is thus hardly surprising that, while this Court has held that intent to harm is not *always* sufficient, it has

also suggested that the "specific intent of [the] defendant to cause injury to a particular class of persons should 'ordinarily by dispositive' in creating standing to sue." *Assoc. Gen. Contractors*, 459 U.S. at 537 n.35 (quoting Milton Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits*, 71 Colum. L. Rev. 1, 30 (1971)).

Applying those principles, there is no question that UAS has antitrust standing. The whole point of respondents' boycott was (in their own words) to "flush[]" UAS "out of Tennessee." App.8. That respondents accomplished that anticompetitive objective by targeting UAS's customers and coercing them into cutting ties with UAS is a detail of how the scheme is implemented, not a basis for doubting UAS's ability to seek redress. *Bridge*, 553 U.S. at 650. Indeed, "coercing" a competitor's "suppliers or customers to deny relationships the competitor[] need[s] in the competitive struggle" is a textbook means for implementing the kind of joint boycott that antitrust laws condemn as illegal *per se*. *Nw. Wholesale*, 472 U.S. at 294. That explains why this Court has stated that the fact that the customers (or suppliers or distributors or banks) of the boycott's intended target are incidentally injured does not deprive the target of a remedy.

In *McCready*, for example, a health insurance company allegedly conspired with a group of psychiatrists to exclude psychologists from the market for psychotherapy services by refusing to reimburse patients who received treatment from the latter. 457 U.S. at 468-70. While the specific question in *McCready* was whether the patients had standing, the

Court took it as a given that *psychologists* could sue as well. *See id.* at 478-79; *id.* at 489-90 (Rehnquist, J., dissenting). It made no difference that the means for excluding psychologists from the market was by declining reimbursement to their potential customers. *See id.* at 484 n.21. The antitrust laws sensibly allow the intended victim to sue, rather than giving the cause of action exclusively to their customers (or suppliers) who suffer distinct and smaller injuries by virtue of being the means of the conspirators' illicit end.

Similarly, in *Associated General Contractors*, an association of contractors allegedly conspired with its members to coerce landowners and some non-member general contractors to do business with non-union firms instead of union firms. 459 U.S. at 527-28. While the Court held that unions lacked standing, it left no doubt that the union contractor and subcontractor firms could sue. *Id.* at 540-41. Again, it did not matter that the defendants injured those union firms by coercing their potential customers (landowners and other general contractors) to stop doing business with them. A "rival clearly has standing to challenge the conduct of rival(s) that is illegal precisely because it tends to exclude rivals from the market, thus leading to reduced output and higher prices." Areeda & Hovenkamp ¶348a. That principle makes this a straightforward case, as "UAS stands in the same position as the unionized firms in *Associated General Contractors* who lost business due to the defendants' efforts to coerce customers to switch to nonunion firms." *Acad. of Allergy & Asthma*, 2021 WL 5029418, at *1; Oral Argument at 32:19-32:30, *Acad. of Allergy & Asthma in Primary Care v. La. Health*

Serv. & Indem. Co., No. 23-30925 (5th Cir. Argued Jan. 6, 2025) (Oldham, J.) (suggesting that UAS is no different from the unionized firms in *AGC*).

2. The Sixth Circuit nonetheless held that *Illinois Brick* barred UAS's antitrust claim. That is incorrect. *Illinois Brick* addressed the distinct problem of whether two sets of customers can sue for a single overcharge.

The limited scope *Illinois Brick* follows directly from the decision on which it built. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Court held that an antitrust defendant could not relieve itself of its obligation to pay damages to a direct purchaser based on a "passing on" theory—i.e., that the direct purchaser had passed off the amount of the overcharge to its own customers who were the real victims. *Id.* at 492-93. The Court reasoned that because the true incidence of an overcharge, just like the true incidence of a tax, is a notoriously complex matter influenced by a "wide range of factors," divining how much of a single overcharge was passed on to consumers would be a "nearly insuperable" task requiring "long and complicated proceedings involving massive evidence and complicated theories." *Id.* The Court also expressed concern that divvying up a single overcharge among multiple entities in the distribution chain might leave too little incentive for anyone to sue, so that "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality." *Id.* at 494.

Illinois Brick held that *Hanover Shoe* should apply "equally to plaintiffs and defendants." 431 U.S.

at 729. Because an antitrust defendant may not "use a pass-on defense" to limit its liability "in a suit by a direct purchaser," an "indirect purchaser should not be allowed to use a pass-on theory to recover damages from a defendant." *Id.* If the intermediary may recover the full overcharge even if it passes on some (or all) of it to its own consumers, as *Hanover Shoe* held, then awarding overcharge damages to its consumers would risk imposing duplicate damages on the defendant for the same injury, *id.*—and allowing *indirect* purchasers to recover would create the same "evidentiary complexities and uncertainties" that *Hanover Shoe* sought to avoid, *id.* at 731-33.

3. That is all *Illinois Brick* held. *Illinois Brick* did not announce an all-purpose rule for antitrust standing any time there happens to be multiple potential plaintiffs, especially when the defendants inflict distinct injuries on distinct entities (as opposed to a single overcharge).

To the contrary, *Illinois Brick* is a distinct doctrine limited to overcharges and necessitated by *Hanover Shoe*'s decision to allow the direct purchaser to recover the full amount of the overcharge—i.e., the full amount of the defendant's illicit gain—rather than just the losses the direct purchaser actually suffered given its ability to pass on some of the overcharge to its downstream customers. *Hanover Shoe* was an overcharge-specific deviation from the default rule that an antitrust plaintiff recovers only its own damages, not the full amount of the defendant's illicit gain. Having deviated from the more typical default rule in *Hanover Shoe*, the Court felt compelled to impose the corollary rule of *Illinois Brick* to prevent

double recovery in the overcharge context. But in other contexts where the default rule that plaintiffs recover their own damages (rather than the full amount of the defendant's illicit gain) continues to hold sway, there is no justification for applying the *Illinois Brick* corrective. To the contrary, "it is appropriate to focus on the nature of the plaintiff's alleged injury" including "the central interest in protecting the economic freedom of participants in the relevant market." *Assoc. Gen. Contractors*, 459 U.S. at 538. Transplanting a rule designed to account for an overcharge-specific deviation from the default rule to cases where the default rule continues to apply is a fundamental category mistake.

None of the concerns that animated *Illinois Brick* applies when market incumbents conspire to exclude a competitor from the market—by, e.g., coercing its customers to stop transacting with it—and seeks to recover its lost profits from that exclusion. Consider concerns about duplicative recovery. In an overcharge case, there is a single overcharge that, absent the rule of *Illinois Brick* and *Hanover Shoe*, would need to be apportioned among different customers along the distribution chain. *Apple*, 587 U.S. at 287. Because *Hanover Shoe* held that a direct purchaser may recover 100% of the overcharge even if it is partially passed on to downstream consumers, a rule allowing indirect purchasers to also recover the percentage of that same overcharge passed on to them would guarantee duplicative recoveries. *Illinois Brick*, 431 U.S. at 729. After *Hanover Shoe*, the rule of *Illinois Brick* was all but necessary to prevent truly duplicative recoveries in overcharge cases. *Id.* at 735.

By contrast, there is rarely any risk of duplicate recovery when—as here—a potential competitor alleges that market incumbents conspired to exclude it from the market and seeks "damages based upon the amount of injury suffered by the plaintiff" (e.g., its own distinct lost profits), "rather than the benefits derived by the defendants" (e.g., the "overcharge" or the total excess profits enabled by defendants' anticompetitive conduct). *Mid-West Paper Prods. Co. v. Cont'l Grp.*, 596 F.2d 573, 585 n.47 (3d Cir. 1979); *accord Crimpers*, 724 F.2d at 293-94. After all, because the typical remedy in a boycott case is lost profits, there is no threat of double recovery and no justification for an *Illinois-Brick*-like corrective. *See Andrx. Pharm.*, 256 F.3d at 815-17.

This case proves the point. Here, primary care physicians and UAS both suffered economic harm because of respondents' scheme, but those injuries are distinct. UAS seeks to recover profits it would have earned under its physician contracts had respondents not conspired to exclude UAS from the market. Although physicians may also seek to recover the profits *they* would have earned from administering allergy services, those profits would exclude what they would have owed UAS under their contracts (which were avoided costs, not lost profits). "Contrary to the circumstances in *Illinois Brick*, evidence in this case is not that PCPs were passing an overcharge to UAS, but instead that, because of the alleged conspirators' actions, PCPs were no longer employing UAS's services." *Acad. of Allergy & Asthma in Primary Care*, 2022 WL 18076843, at *11. It is black-letter law that "all costs that were avoided because sales were not made must be deducted from the lost sales revenue to

arrive at the net harm suffered by the plaintiff." Areeda & Hovenkamp ¶397a.

For similar reasons, allowing the intended and actual victim of a group boycott to sue does not typically lead to the kind of complicated apportionment issues that concerned the Court in *Illinois Brick*. *See Apple*, 587 U.S. at 286. While "true 'apportioning'" of a single passed-on overcharge raises "difficult measurement problems," Areeda & Hovenkamp ¶346k4; *see* p.24, *supra*, there is no such difficulty when two different victims suffer their own distinct lost profits, which is the typical remedy in a group boycott case. *See Mid-West Paper*, 596 F.2d at 585 n.47; *see also* Areeda & Hovenkamp ¶397a ("When a firm has been completely or partially foreclosed from participating in a market … the injury to the foreclosed firm's business is the lost profit on lost sales."). Put differently, the difficulty of determining the true incidence of a single overcharge is fundamentally different from any additional work required to separately calculate the distinct damages suffered by two victims of a joint boycott. Again, this case illustrates the point. As Judge Bush explained, calculating lost profits here is "relatively easy": UAS is entitled to recover "the agreed-upon share of revenue that each participant would have received from sales lost because of the boycott." App.69-70.

4. Nor would barring the intended and actual victim of a group boycott from suing "promote effective enforcement of the antitrust laws." *See Apple*, 587 U.S. at 286. Quite the opposite. Transplanting *Illinois Brick* to this context would exacerbate the sort

of underenforcement of the antitrust laws that *Illinois Brick* sought to avoid.

When market incumbents conspire to exclude a potential rival by coercing the rival's customers or suppliers to stop doing business with it, the bulk of the injury typically falls on the rival rather than its customers or suppliers. After all, the conspirators are not necessarily seeking to drive the customer or supplier from the market, as evidenced by the fact that the Center itself tried to partner with primary care physicians, *see* App.191-92; they are seeking to destroy their rival. If insurance companies conspired to exclude a new expensive but efficacious drug from the market by refusing to reimburse doctors who administer the new drug, the doctors may or may not suffer an economic loss (depending on whether they would earn more from administering the new drug versus the incumbent treatment) while the branded drug manufacturer will suffer massive economic losses from market exclusion. It would make no sense to say that only the doctors with at most "only a tiny stake in the lawsuit" could sue, *Illinois Brick*, 431 U.S. at 725-26, but the targeted manufacturer must lose at the antitrust-standing threshold. Doing so would ensure that "antitrust violators 'would retain the fruits of their illegality.'" *Id.* at 725-26.

That likely explains why this Court has never applied *Illinois Brick* outside the overcharge context. As the Court recently made clear, "*Illinois Brick* did not purport to bar multiple liability that is unrelated to passing an overcharge down a chain of distribution." *Apple*, 587 U.S. at 287. That also explains why *Illinois Brick* did not drive the analysis

in *McCready* or *Associated General Contractors*, even though those cases were decided just a few years later. Indeed, *McCready* made clear that the "restrictions on the §4 remedy recognized in … *Illinois Brick*" are "[a]nalytically distinct from" the "conceptually more difficult question 'of which persons have sustained injuries too remote from an antitrust violation to give them standing to sue for damages under §4.'" 457 U.S. at 476 (emphasis omitted). And if *Illinois Brick* really announced a general rule barring suit by any party "two or more steps removed" from a violator, App.30, then the union contractor and subcontractor firms in *Associated General Contractors* would have lacked standing, since landowners and general contractors were more "direct" victims. 459 U.S. at 527-28, 540-41.

Transplanting *Illinois Brick* to the group boycott context would also be particularly "arbitrary and unprincipled" because antitrust standing would turn on the happenstance of whether the intended victim of the boycott is vertically integrated. *Apple*, 587 U.S. at 282. This case again illustrates the point. Had UAS employed physicians (as the Center did) instead of entering a joint venture with them, there would be no question that UAS has standing to sue.

But there is no good reason "why the form of the upstream arrangement" between the victim of the boycott and its customers (or suppliers or distributors) should matter when market incumbents conspire to exclude a potential competitor from the market. *Id.* at 283. If a group of taxi companies conspired to exclude Uber from the market by agreeing not to hire Uber drivers or by coercing banks not to finance the Uber

drivers' cars, it would make no sense to bar Uber from suing just because Uber is not a vertically integrated firm that owns its own cars and employs its own drivers. Indeed, many disruptive new entrants are threatening to incumbents and attractive to consumers precisely because they have innovative business models. It would hardly promote competition or sensible antitrust policy to preclude companies with novel and competitive business models from suing market incumbents that conspire to boycott them from the market.

For that reason, the Sixth Circuit was incorrect to characterize UAS as a mere "supplier" that seeks indirect damages following anticompetitive conduct directed at a downstream market of one of its customers. *See* App.40. That is akin to saying that Uber does not compete with taxi companies because Uber merely supplies drivers rather than employing them itself. Uber is no mere supplier, but a competitive threat to incumbent taxi companies, in no small measure because it does not have to employ drivers. The notion that Uber would lack antitrust standing to challenge a group boycott by taxi companies is a non-starter, and the same is true of UAS here. As a leading treatise explains:

> Consider a vertically integrated defendant who sells directly to consumers while the plaintiff manufactures the same product but sells to dealers who sell to consumers. The dealer has undoubted standing to complain of the defendant's [anticompetitive conduct], for the dealer is the most immediate victim and is the defendant's competitor. But the rival

> manufacturer is the defendant's competitor in manufacturing. Although the rival manufacturer seeks the patronage of dealers rather than ultimate consumers, the two manufacturers are competitors in every relevant economic sense even when one or more intermediaries lie between the manufacturer and consumers. Standing should be accorded the manufacturer.

Areeda & Hovenkamp ¶348f(1).

That principle makes standing straightforward in this case. Even though UAS and the Center were "partially or differently integrated vertically," they were "competitors in every relevant economic sense." *Id*. In fact, the complaint alleges that respondents only began coercing primary care physicians after learning of their UAS contracts—*contracts the Center had previously sought for itself*. *See* App.191-92. And when the physicians chose UAS, the Center responded not by competing but by colluding with insurers like Amerigroup to destroy the new market entrant. App.200-01. In a case like this, the "objection" that the plaintiffs' injuries are akin to "the injury of a[] supplier" is "not persuasive." Areeda & Hovenkamp ¶348f(1). The rival's situation "is fundamentally different," since its "interest is the core concern of the substantive rule allegedly violated"—exclusion from the market by the anticompetitive behavior of incumbents. *Id.*

5. Finally, to "the extent that *Illinois Brick* leaves any ambiguity" about whether it should apply in this context, the Court should "resolve that ambiguity in the direction of the statutory text." *Apple*, 587 U.S. at

282. And, under the statutory text, the question here is not close. Section 4 provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue … the defendant … and shall recover threefold the damages by him sustained." 15 U.S.C. §15(a) (emphasis added). Simply put, "[t]he broad text of §4—'any person' who has been 'injured' by an antitrust violator may sue"—readily covers the intended and actual victim of a group boycott, even if the boycott was carried out by targeting the victim's customers. *Apple*, 587 U.S. at 279. The Sixth Circuit's contrary holding flouts bedrock principles and decades of precedent.

III. This Case Is An Ideal Vehicle For Deciding This Important Question.

As Judge Bush recognized in his separate opinion, this case cries out for plenary review. The Sixth Circuit's massive overreading of *Illinois Brick* gives antitrust violators a playbook for erasing competition while escaping antitrust scrutiny. The decision below, as Judge Bush aptly said, makes it "very difficult, if not impossible, for participants in a joint venture … to bring Sherman Act claims." App.66. It thus "undermine[s] important legal protections for … new market entrants," particularly those who seek to compete with a vertically integrated firm despite not being vertically integrated themselves. App.67.

That is not the worst of it. As Judge Kethledge candidly acknowledged in his separate opinion, the Sixth Circuit's novel rule "serves to harm consumer welfare rather than advance it." App.60. At the same time, the Sixth Circuit's aberrant holding gives cartels

a step-by-step guide for excluding disruptors from the market by indirectly targeting them through their customers, suppliers, bankers, insurers and any other third-party necessary to the new entrant's business model. Taxi companies wishing to force Uber out of their market simply have to target Uber drivers (or the banks that finance Uber drivers' cars), and they need not worry about being sued by the direct target with the most to lose and the greatest incentive to vindicate the antitrust laws. That approach thus blesses the very "disguised naked boycott" the antitrust laws nearly always condemn *per se*. App.60.

Finally, this case is an ideal vehicle for resolving this important issue. The Sixth Circuit's resolution of the antitrust standing issue was dispositive. And because this case is at the motion-to-dismiss stage, there are no factual disputes to resolve in order to answer the question presented. This Court should take this opportunity to bring the Sixth Circuit back into line with its precedents and clarify that *Illinois Brick* remains a rule about indirect purchasers seeking to recover an overcharge and does not prevent the actual and intended target of a group boycott from recovering its lost profits.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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June 12, 2026

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-5153

ACADEMY OF ALLERGY & ASTHMA IN PRIMARY CARE,
Plaintiff,

UNITED BIOLOGICS, LLC, dba United Allergy Services,
Plaintiff-Appellant,

v.

AMERIGROUP TENNESSEE, INC., dba Amerigroup Community Care; PHYSICIANS' MEDICAL ENTERPRISES, LLC, dba PME Communications, LLC; ALLERGY ASSOCIATES, P.A., dba Allergy, Asthma and Sinus Center, P.C.; NED DELOZIER,
Defendants-Appellees.

Argued: Feb. 5, 2025
Decided and Filed: Oct. 10, 2025

Before: SUTTON, Chief Judge; KETHLEDGE and MURPHY, Circuit Judges.

OPINION

MURPHY, Circuit Judge. The plaintiff in this case—which we will call "United Allergy"—provides personnel and supplies to primary-care physicians so

that the physicians may offer allergy testing and immunotherapy to patients. United Allergy charges the physicians a set fee for its goods and services, and the physicians, in turn, charge medical insurers for their own allergy care. According to United Allergy, though, several insurers conspired with each other and with the predominant allergy-care medical group to drive United Allergy and its contracting physicians from the market. United Allergy brought two antitrust claims against the insurers and medical group. Yet the antitrust laws permit plaintiffs to sue only if they have suffered injuries "by reason of" an antitrust violation. 15 U.S.C. § 15(a). And the district court dismissed United Allergy's antitrust claims on the pleadings because it lacked "standing" to invoke this provision. The court then rejected United Allergy's state-law claims at the summary-judgment stage.

We agree with the district court's results. In the process, though, we must clarify the nature of the antitrust inquiry. To sue under the antitrust laws, a plaintiff must show both that it suffered an antitrust injury and that the defendant proximately caused the injury. United Allergy's suit flunks the latter element. Relying on proximate-causation principles, the Supreme Court has held "that *indirect* purchasers who are two or more steps removed from [an antitrust] violator in a distribution chain may not sue." *Apple Inc. v. Pepper*, 587 U.S. 273, 279 (2019). And the same rule should apply in reverse to *indirect sellers* for antitrust violations that a group of buyers (like the insurers here) commit. United Allergy is also an indirect seller because it is "two" "steps removed from" the insurers in the distribution chain. *Id.* The insurers directly bought from (and harmed) the primary-care

physicians by allegedly conspiring to fix their reimbursement rates and deny their claims. And that conduct harmed United Allergy only indirectly because it led the physicians not to pay United Allergy's fees and to end their relationship. We thus affirm.

I

The district court dismissed this case in part at the pleading stage and in part at the summary-judgment stage. When considering the claims that the district court rejected at the pleading stage, we must rely on the factual allegations in United Allergy's complaint. *See Blackwell v. Nocerini*, 123 F.4th 479, 482 (6th Cir. 2024). And when considering the claims that the district court rejected on summary judgment, we must rely on the facts that United Allergy has supported with evidence. *See Gambrel v. Knox County*, 25 F.4th 391, 400 (6th Cir. 2022). To describe the facts, then, we rely primarily on the complaint while adding some supplemental (undisputed) information from the record.

A

Allergies affect millions of Americans. Some 30 to 40% of the population suffers from seasonal hay fever (or "allergic rhinitis") every spring and fall. Compl., R.103, PageID 2668. This case concerns the medical *services* that treat allergies, the medical *suppliers* who provide these services, and the third-party *payors* who pay for them on behalf of patients.

Services. To test for allergies, providers can perform "a skin prick test" on a patient or send the patient to a lab for "an allergy blood test." *Id.*, PageID 2671. The first test requires a "technician" to prick the

patient's skin with allergens and measure the reactions. *Id.*, PageID 2674. Doctors then interpret the results to decide whether a patient tested positive. *Id.* To make this decision, they may also rely on a "physical examination" and the "patient's clinical history." *Id.*

Many people use over-the-counter or prescription drugs to treat their allergies. *Id.*, PageID 2673. But these drugs simply "mask" the symptoms and do not remedy the "underlying cause" (at least for seasonal allergies). *Id.* Only one treatment—immunotherapy—can "cure" these allergies. *Id.*, PageID 2671. Immunotherapy "introduc[es] allergens incrementally into the patient's system to desensitize the patient to [those] allergens." *Id.*

Doctors can prescribe immunotherapy only if testing has confirmed a patient's allergy. *Id.*, PageID 2674. Before doing so, they must consider immunotherapy's risks and benefits based on each patient's unique needs. *Id.* When patients choose the therapy, technicians will combine and dilute FDA-approved vials of antigens into proper doses for them. *Id.*, PageID 2674-75. Doctors must supervise these technicians. *Id.* They or the technicians will administer the immunotherapy through "subcutaneous" or "allergy" shots. *Id.*, PageID 2675. Some patients may receive the shots "2 to 3 times per week for several years" in a doctor's office. *Id.*, PageID 2676. Because patients must make frequent trips to a doctor's office, they typically want treatment "close to their homes or workplaces." *Id.* And "a majority of physicians" permit patients to self-administer the

shots at home "in appropriate cases." *Id.*, PageID 2675.

Suppliers. Doctors who specialize in this area—called "allergists"—provide the main supply of allergy testing and immunotherapy in Tennessee. *Id.*, PageID 2669. To become an allergist, a doctor must "complete[] a fellowship" with the American Board of Allergy and Immunology. *Id.* And one corporation—the Allergy, Asthma and Sinus Center, P.C. or "the Center" for short—dominates the Tennessee market. *Id.*, PageID 2668-70. Its allergists conduct about "70% of the allergy testing and immunotherapy services" across the State. *Id.*, PageID 2670.

No law or regulation bars primary-care physicians from offering allergy testing or immunotherapy. *Id.*, PageID 2669-70. But these doctors historically have faced high barriers to entry. *Id.*, PageID 2669-71. To enter the market, doctors must hire technicians who know how to conduct the skin-prick tests and prepare the allergens. *Id.* And they must obtain "expensive equipment and products," such as "testing devices" and "antigens and diluents[.]" *Id.* So rather than perform these services, primary-care physicians have typically referred patients to allergists. *Id.*, PageID 2671-72. Many Tennesseans, though, live far from the closest allergist. The restricted supply has allegedly caused many "patient consumers" to forgo treatment. *Id.*, PageID 2665. And it has caused the demand for services to "greatly exceed[]" the supply. *Id.*, PageID 2668.

That is where United Allergy comes in. After recognizing the unmet demand, United Allergy began

to contract with primary-care physicians to help them offer allergy testing and immunotherapy. *Id.*, PageID 2670-71. United Allergy and its partnering physicians perform different roles. United Allergy hires the technicians to "perform allergy testing and mix antigens under the" physician's supervision. Agreement, R.275-1, PageID 10151. It also provides "all supplies and equipment necessary" for testing and immunotherapy. *Id.* The physicians, by comparison, must "make all medical decisions[.]" *Id.*, PageID 10152. They interpret the test results and determine whether to prescribe immunotherapy. *Id.*; Compl., R.103, PageID 2671. Since its 2013 entry into the Tennessee market, United Allergy has helped more than 80 primary-care doctors provide allergy testing and immunotherapy. Compl., R.103, PageID 2671, 2677. Many of these physicians practice in "rural areas" where the "nearest board-certified allergist is many miles away." *Id.*, PageID 2671. And United Allergy technicians commonly teach patients how to take the shots at home, so they can avoid regular trips to a doctor's office. *Id.*, PageID 2680, 2698-99.

Payors. Third-party payors (including private and government insurers) pay for all or part of about "98%" of the allergy care. *Id.*, PageID 2672. Tennessee's Medicaid program ("TennCare") is one such payor. *Id.*, PageID 2678. It contracts with three managed-care organizations to insure eligible patients: Amerigroup Tennessee, Inc., BlueCare (a subsidiary of Blue Cross Blue Shield of Tennessee), and United Healthcare. *Id.*, PageID 2666-67, 2678.

The contracts between Tennessee and these three organizations run on for hundreds of pages.

Agreement, R.275-1, PageID 10161-68. They require Amerigroup (along with the other two insurers) "to reimburse primary care physicians for" eligible claims involving allergy testing and immunotherapy. Compl., R.103, PageID 2678. Physicians must bill Amerigroup under general billing (or "CPT") codes. *Id.*, PageID 2673. For example, they use "CPT Code 95165" to bill for services in administering immunotherapy to a patient. *Id.*, PageID 2675.

United Allergy, by contrast, does not contract with third-party payors for its technicians' services or for the materials that it supplies to them. Rather, United Allergy receives fixed "fees" from physicians for its goods and services. Agreement, R.275-1, PageID 10152. United Allergy's standard agreement with physicians states that its final fee for a service depends on the "then current reimbursement schedule" of the third-party payor from whom physicians will seek payment (such as Amerigroup). *Id.* The agreement adds that United Allergy's services are "incident to" a physician's services for purposes of "federal and state billing guidelines" and that the physicians have the duty to ensure that they can bill for all services. *Id.*, PageID 10151.

B

United Allergy's entry into the Tennessee market in 2013 caught the attention of suppliers and payors of allergy-care services. The primary-care physicians who contracted with United Allergy had been referring their allergy patients to the Center. Compl., R.103, PageID 2672, 2678. Yet these physicians now "became competitors" to the Center's allergists. *Id.*, PageID 2678. And as more doctors treated patients,

third-party payors like Amerigroup spent more reimbursing for care. *Id.*, PageID 2672. TennCare pays Amerigroup on a "per member per month" schedule set annually based on the prior year's usage patterns. *Id.*, PageID 2687. So the sharp increase in supply allegedly harmed Amerigroup's bottom-line more than TennCare's. *Id.*

According to the complaint, Amerigroup and the Center responded by conspiring to drive United Allergy and its partnering physicians from Tennessee. *Id.*, PageID 2678-79. The Center spearheaded these efforts through its management company (Physicians' Medical Enterprises) and that company's business-development director (Ned DeLozier). *Id.*, PageID 2667-68, 78-83.

In April 2014, DeLozier learned of United Allergy's threat to the Center. *Id.*, PageID 2679. He tried to lobby public officials to bar United Allergy's model and to discourage primary-care physicians from contracting with it. *Id.*, PageID 2679-80. When these efforts fell short in 2016, DeLozier turned to Amerigroup and other third-party payors. *Id.*, PageID 2680-82. He allegedly encouraged these payors to conduct costly audits of United Allergy's partnering physicians. *Id.*

Amerigroup estimated that it "stood to recover" around $6 million if it "flushed [United Allergy] out of Tennessee[.]" *Id.*, PageID 2690. Over the years, it allegedly searched for reasons to deny payment to physicians who contracted with United Allergy and submitted claims under the allergy-care billing codes. *Id.*, PageID 2684. Amerigroup hypothesized that these physicians might have engaged in "fraudulent billing"

because the technicians performed without supervision. *Id.*, PageID 2687. It also hypothesized that these physicians had been providing "medically unnecessary" care. *Id.*, PageID 2688. And it hypothesized that the physicians' contracts with TennCare barred them from subcontracting work to United Allergy. *Id.*, PageID 2697-98.

From 2016 through 2019, the complaint adds, Amerigroup and DeLozier repeatedly communicated with Amerigroup's competing payors, including the other two managed-care organizations, to convince them to investigate and stop paying United Allergy's partnering physicians. *Id.*, PageID 2684-703. These conversations led all payors to ramp up their audits of these physicians, to send them "recoupment" letters for paid bills, and to bar them from billing for immunotherapy administered by patients at home. *Id.*, PageID 2697-2700. The insurers also agreed to "fixed prices" by reimbursing for a much smaller number of immunotherapy "doses" than they had previously allowed. *Id.*, PageID 2701.

The complaint says that the harassing efforts succeeded. Many primary-care physicians stopped offering allergy-care services because Amerigroup and other insurers would not reimburse them for these services and because they feared getting kicked out of TennCare. *Id.*, PageID 2703-04. And United Allergy lost "profits" because these physicians refused to pay its fees and later terminated their contracts with the company. *Id.*, PageID 2704. The reduction in output also left many patients without access to allergy care (especially in rural areas). *Id.*, PageID 2704-05.

C

United Allergy sued Amerigroup, two Blue Cross entities, the Center, Physicians' Medical Enterprises, and DeLozier. *Id.*, PageID 2666-68. We will refer to the last three (related) defendants as the "Center." And United Allergy has since settled with the Blue Cross entities. The complaint asserted two federal antitrust claims and three state tort claims. As for the federal claims, it alleged that the defendants violated § 1 of the Sherman Act by conspiring to eliminate United Allergy and primary-care physicians from the allergy-care markets. *Id.*, PageID 2705-08. It next alleged that the Center violated § 2 of the Sherman Act by monopolizing these markets and that the others conspired to permit its monopoly. *Id.*, PageID 2708-11. As for the state claims, the complaint alleged that the defendants tortiously interfered with United Allergy's contracts with physicians. *Id.*, PageID 2711-15. It alleged that they also tortiously interfered with United Allergy's prospective relationships with physicians. *Id.*, PageID 2714-15. And it alleged that they entered a civil conspiracy. *Id.*, PageID 2715.

This litigation progressed in two stages. The defendants first moved to dismiss United Allergy's complaint. The district court dismissed the federal antitrust claims on the ground that United Allergy lacked "standing" to sue under the antitrust laws. *See United Biologics, LLC v. Amerigroup Tenn., Inc.*, 2022 WL 22897162, at *4-9 (E.D. Tenn. Jan. 27, 2022). But the court permitted the state-law claims to proceed. *See id.* at *9-11. After discovery, the defendants moved for summary judgment on those claims. The district court then granted that motion. *See United Biologics,*

LLC v. Amerigroup Tenn., Inc., 2024 WL 770640, at *1 (E.D. Tenn. Jan. 18, 2024).

United Allergy appealed. It now challenges the dismissal of its antitrust claims and the grant of summary judgment on its tort claims. We review both decisions de novo. *See Aldridge v. Regions Bank*, 144 F.4th 828, 836 (6th Cir. 2025).

II. Federal Antitrust Claims

The Sherman Act contains two main prohibitions. Section 1 makes it illegal for businesses to enter a "contract," "combination," or "conspiracy" "in restraint of trade or commerce among the several States[.]" 15 U.S.C. § 1. And § 2 makes it illegal for businesses to "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[.]" *Id.* § 2. We may assume that United Allergy has alleged violations of these sections. But this case is not about the merits. It is about the remedies. And like the district court, we conclude that United Allergy has alleged only indirect injuries that flow out of the harms the defendants inflicted on physicians. Unlike the district court, though, we characterize this defect as a lack of causation rather than "standing."

A. Antitrust "Standing"

The Sherman Act's private right of action states: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . , and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a). On its face, this text could be read to

permit any actor to sue for any harm that an antitrust violation causes. *See Associated Gen. Contractors v. Cal. State Council*, 459 U.S. 519, 529 (1983). That view, though, would subject defendants to unlimited liability because "antitrust violation[s]" often "cause ripples of harm" throughout the economy. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 476-77 (1982).

Consider the harms from a classic manufacturers' cartel that raises prices and reduces output. The cartel will harm retailers by requiring them to pay higher wholesale prices. *Cf. Ill. Brick Co. v. Illinois*, 431 U.S. 720, 726-27 (1977). It will harm end consumers too if the retailers pass on some of the cartel's overcharge to them in the form of higher retail prices. *Cf. id.* at 727. The reduced output might also harm the government by lowering its tax base. *Cf. Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 255 (1972). Further, some retailers might not survive under the higher prices. So the cartel will have injured the shareholders of these bankrupt retailers. *Cf. Stein v. United Artists Corp.*, 691 F.2d 885, 894-97 (9th Cir. 1982) (Kennedy, J.); *Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910). The cartel will have injured the bankrupt retailers' other suppliers as well if those suppliers lose sales that they would have made to the retailers. *Cf. Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 697 F.3d 387, 406 (6th Cir. 2012), *aff'd on other grounds by* 572 U.S. 118 (2014). The retailers' creditors (say, landlords) also might not get paid what the retailers owe (say, rent). *Cf. Apple*, 587 U.S. at 291 (Gorsuch, J., dissenting). And their employees might lose their jobs. *Cf. Associated Gen. Contractors*, 459 U.S. at 541 n.46. In short, the list of harmed parties could go on and on.

May all these parties seek treble damages from the cartel? No, the Supreme Court has not read § 15(a) that way. In *Associated General Contractors*, it instead held that the law permits suit only by those who have what some have dubbed "antitrust standing." *Id.* at 535 n.31. In that case, construction contractors and their trade association sought to harm unions by "coerc[ing]" customers (landowners who needed construction work) and contractors (the defendants and their competitors) to shift business "to nonunion firms." *Id.* at 527-28. Yet the Court refused to allow the unions to sue. *Id.* at 536-46. It conceded that they alleged some facts that supported the suit: that the conspiracy had caused their harm and that the defendants had "intended" it. *Id.* at 537. But these allegations fell short. Among other reasons, the unions did not participate as competitors or consumers in the construction market. *Id.* at 539. Rather, they sought better pay for their members through labor cooperation (not competition). *Id.* at 539-40. The unions thus did not rely on a "type" of harm (reduced competition) that "the antitrust statute was intended to forestall." *Id.* Next, the unions suffered "indirect" and "speculative" injuries that flowed out of the harms to the customers and contractors. *Id.* at 540-42. So their suit would create a "risk of duplicate recoveries" and require a "complex apportionment of damages" among victims. *Id.* at 544.

Soon after *Associated General Contractors*, we identified five "factors" to decide whether a plaintiff has antitrust standing. *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1085 (6th Cir. 1983) (citation omitted). First: Did the antitrust violation cause the plaintiff's injury and did the defendant

intend it? *See id.* Second: Was the plaintiff's "alleged injury" the type that the antitrust laws seek to prevent? *Id.* Third: Was the injury direct or indirect and were the damages concrete or speculative? *See id.* Fourth: Did the suit create a risk of "duplicative recovery" by multiple victims or require a "complex apportionment of damages" among those victims? *Id.* And fifth: Do "more direct victims" who could sue exist? *Id.*

At times, we have said that courts should engage in an ad hoc "balancing" of these factors (and that we will treat no factor as "conclusive"). *Peck v. Gen. Motors Corp.*, 894 F.2d 844, 846 (6th Cir. 1990) (per curiam); *see Static Control*, 697 F.3d at 402; *Indeck Energy Servs., Inc. v. Consumers Energy Co.*, 250 F.3d 972, 976 (6th Cir. 2000); *Province v. Cleveland Press Pub. Co.*, 787 F.2d 1047, 1050-51 (6th Cir. 1986). Yet what happens when the factors point in different directions? Should we add them up and decide where the majority lands? May we find one factor "really" important in a case? If so, when? Here, as elsewhere, amorphous balancing tests can produce "unpredictable and at times arbitrary results." *Lexmark*, 572 U.S. at 136.

In practice, then, we have avoided this balancing. Most notably, we have held that plaintiffs must prove an "antitrust injury" in *all* cases. *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007) (en banc) (citing *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986)). Plaintiffs thus must always satisfy our second factor (which asks about the "nature" of their injury). *See Southaven*, 715 F.2d at 1085-86. And we regularly reject suits for the lack of an antitrust injury

alone. *See NicSand*, 507 F.3d at 450-59; *Tennessean Truckstop, Inc. v. NTS, Inc.*, 875 F.2d 86, 88-91 (6th Cir. 1989); *Axis, S.p.A. v. Micafil, Inc.*, 870 F.2d 1105, 1110-11 (6th Cir. 1989).

Next, the other four factors go to the same question: has the plaintiff shown that the antitrust violation was both a cause in fact and a "proximate cause" of the harm? *Apple*, 587 U.S. at 279. In addition to the factor that expressly lists causation, two others consider the "directness" of the injury and whether "more direct victims" could sue. *Southaven*, 715 F.2d at 1085. And the Supreme Court has since made clear that these directness questions form part of the proximate-cause calculus. *See Holmes v. Secs. Inv. Prot. Corp.*, 503 U.S. 258, 268-69 (1992).

The Supreme Court's *Lexmark* decision confirms this logic. There, the Court addressed a similar question: who may sue under the Lanham Act, 15 U.S.C. § 1125(a)? *See* 572 U.S. at 120. The Court answered that question by incorporating two "background principles" into the Act: that a plaintiff must fall within a statute's "zone of interests" and that the defendant must have "proximately caused" the injury. *Id.* at 129-34. In the process, the Court clarified that "standing" is the wrong label for this who-may-sue question because the question raises an ordinary problem "of statutory interpretation" about the meaning of § 1125(a)'s text. *See id.* at 128. And the Court rejected an "open-ended balancing" test that was nearly identical to the one that we and other circuit courts have sometimes proposed in this antitrust context. *Id.* at 135-36.

Extended to the Sherman Act, *Lexmark* confirms that antitrust courts should not abstractly balance various factors against each other. Rather, they should ask whether plaintiffs have alleged an "antitrust injury" and "proximate causation." We thus turn to those two elements.

B. Antitrust Injury

1. What Types of Harms Count As "Antitrust Injuries"?

The Supreme Court presumes that Congress enacts legislation with knowledge of the presumption that only plaintiffs who "fall within the zone of interests protected by" a law may invoke its protections. *Id.* at 129 (citation omitted). In the antitrust context, this interpretive principle has produced the "antitrust injury" requirement. *Brunswick Corp. v. Pueblo Bowl-OMat, Inc.*, 429 U.S. 477, 489 (1977). Section 15(a) allows plaintiffs to recover damages only if they suffered harm "by reason of anything forbidden in the antitrust laws[.]" 15 U.S.C. § 15(a). The Supreme Court has interpreted that phrase to require proof that a plaintiff's harm grew out of the underlying "rationale" for why the antitrust laws made the challenged conduct illegal. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990). Put differently, plaintiffs may recover damages only if they show that they suffered a "type" of harm that Congress designed the antitrust laws to prevent. *Brunswick*, 429 U.S. at 489 (citation omitted).

Courts thus must explore the purposes of §§ 1 and 2 of the Sherman Act. Those laws represent a "consumer welfare prescription" from Congress. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting

Robert H. Bork, *The Antitrust Paradox* 66 (1978)). When suppliers enter cartels or undertake monopolizing acts, their conduct has a similar "anticompetitive effect": it increases prices and reduces output as compared to the price and output levels in competitive markets. *Brunswick*, 429 U.S. at 489; *see Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1334 (7th Cir. 1986). This effect harms two sets of consumers. It harms *actual* consumers who still buy at the higher price because they must pay the "illegal overcharge" (the difference between the higher cartel or monopoly price and the lower competitive price). *Ill. Brick*, 431 U.S. at 724. It also harms *potential* consumers who now refuse to buy at the higher price (hence why these violations reduce output). *See Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 374 (3d Cir. 2005). And while these "would-be buyers" who forgo purchases lack the right to sue for other reasons, actual purchasers represent the "preferred plaintiffs" who suffer the core antitrust injury. IIA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 345a, at 197 & n.2 (5th ed. 2021); *Reiter*, 442 U.S. at 343.

That said, this case requires us to add a wrinkle to this usual analysis. Typically, a group of *sellers* or one monopolistic seller engages in the acts prohibited by §§ 1 and 2. But a group of *buyers* or a monopsony buyer might also violate these sections. *See Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948); XII Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* § 2012, at 140 (4th ed. 2019). A buyers' cartel has "symmetrical" anticompetitive effects to a sellers' cartel: the cartel lowers (rather than raises) prices and reduces output

below the competitive level. *Vogel v. Am. Soc'y of Appraisers*, 744 F.2d 598, 601-02 (7th Cir. 1984). In other words, a buyers' cartel charges "monopsony prices" (the prices that a single buyer would demand) in the way that a sellers' cartel charges "monopoly prices" (the prices that a single seller would charge). *Id.*; *see Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 705 (7th Cir. 2011). The suppliers who sell to a buyers' cartel thus qualify as preferred plaintiffs who suffer a core antitrust injury too. *See* IIA Areeda & Hovenkamp, *Antitrust Law* § 350b, at 298-99.

Who else might sue? We have held that "competitors" harmed by a defendant's antitrust violations also may suffer the right kind of injury. *Static Control*, 697 F.3d at 404. Yet courts must evaluate a competitor's suit more cautiously. The antitrust laws protect "*competition*, not *competitors*." *Brunswick*, 429 U.S. at 488 (citation omitted). And an antitrust violator's competitors often have "divergent rather than congruent interests" to consumers. *Ball Mem'l Hosp.*, 784 F.2d at 1334; *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 583 (1986). So a competitor's lost profits may not be "a close approximation of the [antitrust] injury caused by" a cartel's or monopolist's "overcharges." Frank H. Easterbrook, *Treble What?*, 55 Antitrust L.J. 95, 96 (1986). Suppose, for example, a large company violated the antitrust laws by merging with near-bankrupt bowling alleys and saving them from closure. *See Brunswick*, 429 U.S. at 480-81. Even if a competitor to these bowling alleys proved this antitrust violation, it could not recover the profits it would have obtained if the illegal merger had not occurred and the bowling alleys had closed. *See id.* at

487-88. After all, the competitor's lost profits in that scenario would have arisen from the *increased* competition that resulted from the otherwise illegal merger (which barred the competitor from harming consumers by charging higher prices). *See id.*

To prove an antitrust injury, then, competitors must show that their "loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Atl. Richfield*, 495 U.S. at 344. Perhaps rivals who had formed an illegal cartel teamed up to eliminate a competitor who was undercutting the cartel prices. *See Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782-83 (7th Cir. 1994). Or perhaps competitors who must cooperate in an industry (such as real-estate agents on both sides of a home sale) tried to drive out a rival by refusing to deal with the rival in home sales. *See Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1014-15 (6th Cir. 1999); *see also W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 103-05 (3d Cir. 2010).

What about other businesses less connected to the market? The Supreme Court has noted that a plaintiff is less likely to have incurred an antitrust injury if it is neither a "consumer nor a competitor in the market" that the defendants restrained. *Associated Gen. Contractors*, 459 U.S. at 539; *see In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 158 (2d Cir. 2016). Courts thus have found that third parties who helped a competitor (such as suppliers, employees, or advertisers) did not suffer an antitrust injury from a defendant's anticompetitive conduct—at least not when the defendant "directed" that conduct at the competitor (rather than the third parties). IIA

Areeda & Hovenkamp, *Antitrust Law* § 350d, at 305-06; *Static Control*, 697 F.3d at 404; *Barton & Pittinos, Inc. v. SmithKline Beecham Corp.*, 118 F.3d 178, 182-83 (3d Cir. 1997) (Alito, J.); *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 596-98 (7th Cir. 1995); *SAS of P.R., Inc. v. P.R. Tel. Co.*, 48 F.3d 39, 44 (1st Cir. 1995). When third-party harm is mere "collateral damage" to (or "a tangential byproduct of") the anticompetitive conduct, the harm does not count as an antitrust injury. *Aluminum Warehousing*, 833 F.3d at 163; *Static Control*, 697 F.3d at 404.

2. Did United Allergy Allege An Adequate Antitrust Injury?

The district court held that United Allergy failed to allege an antitrust injury under this law. *See United Biologics*, 2022 WL 22897162, at *5-8. But we find this question difficult. On the one hand, United Allergy appears to be neither a "consumer nor a competitor" in the market affected by the anticompetitive conduct: the market for "allergy testing and immunotherapy" in Tennessee. *Associated Gen. Contractors*, 459 U.S. at 539; Compl., R.103, PageID 2671. Consider this market's two sides. Who are on the buyer's side? The patients who receive treatment are the main "consumers" (as the complaint calls them). Compl., R.103, PageID 2665. And the insurers—including Amerigroup and the other managed-care organizations—sit on the buyer's side because they act as "purchasing agents" for these consumers. *Ball Mem'l Hosp.*, 784 F.2d at 1334; *see Brillhart v. Mut. Med. Ins., Inc.*, 768 F.2d 196, 199 (7th Cir. 1985); *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 924 (1st Cir. 1984) (Breyer, J.). Who are on the seller's

side? The doctors—both the Center's "allergists" and the primary-care physicians who want to compete with them—are the primary suppliers. Compl., R.103, PageID 2669-70. These doctors must perform the allergy testing and immunotherapy services and supervise the technicians who help them. *Id.*, PageID 2668-70, 2674-75. And only they may bill insurers for these services. *Id.*, PageID 2678.

Where do these facts leave United Allergy? In many ways, it resembles a "supplier" to the primary-care physicians and operates in a distinct market vertically upstream of the affected one. *Static Control*, 697 F.3d at 404, 406. United Allergy provides physicians with the materials and personnel (equipment, products, and technicians) they need to compete with the Center's allergists. Compl., R.103, PageID 2671. In fact, the complaint refers to primary-care physicians *themselves* as United Allergy's "customers" who buy its goods and services for a "fee" in this upstream market. *Id.*, PageID 2665, 2671, 2697. And United Allergy could not "sell or distribute" its goods or services *directly* to patients in the downstream market because only doctors may offer allergy testing and immunotherapy to patients. *Barton & Pittinos*, 118 F.3d at 182. The Center, by comparison, allegedly integrated upstream by employing its own technicians and supplying its own equipment. Compl., R.103, PageID 2672, 2677. These market dynamics might suggest that United Allergy did not suffer an antitrust injury because a "supplier does not suffer an antitrust injury when competition is reduced in the downstream market in which it sells goods or services." *W. Penn Allegheny Health Sys.*, 627 F.3d at 102; *see Static Control*, 697 F.3d at 406.

On the other hand, a preeminent antitrust treatise explains that when a plaintiff sells to a third party and the two businesses *together* compete with an *integrated* defendant, both the plaintiff and the third party are the defendant's "competitors" in "every relevant economic sense." IIA Areeda & Hovenkamp, *Antitrust Law* § 348f, at 285. The complaint also suggests that United Allergy did not simply suffer "collateral damage" from anticompetitive conduct directed at primary-care physicians. *Aluminum Warehousing*, 833 F.3d at 163. It suggests that United Allergy was also a "direct target" of the conduct. Compl., R.103, PageID 2666.

Lastly, the complaint might suggest that United Allergy suffered a "type" of harm that the antitrust laws seek to prevent, *Brunswick*, 429 U.S. at 489 (citation omitted), because its injuries arose "from a competition-*reducing* aspect" of the antitrust violations. *Atl. Richfield*, 495 U.S. at 344. United Allergy alleges an agreement between a seller (the Center) and several buyers (Amerigroup, the other managed-care organizations, and Blue Cross) to "fix prices and boycott competition at the primary care level." Compl., R.103, PageID 2702. As for price fixing, the complaint suggests that the insurers agreed "to fix prices for allergen immunotherapy at a set amount of units" by "adopt[ing] similar reimbursement policies" for claims. *Id.*, PageID 2686; *cf. Mandeville*, 334 U.S at 235-36. As for the boycott, the complaint suggests that Amerigroup and the other insurers agreed "to harass all primary care providers" who offered allergy testing and immunotherapy by auditing them, denying their claims, and seeking to recoup payments. Compl., R.103, PageID 2680, 2697-700, 2703; *cf.*

NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135-36 (1998). The reduced competition resulting from this horizontal cartel and boycott would decrease prices and output below competitive levels. *See Omnicare*, 629 F.3d at 705. And although the suppliers to this alleged cartel—the physicians who receive less pay and provide less services—might represent the preferred plaintiffs, *see* IIA Areeda & Hovenkamp, *Antitrust Law* § 350b, at 298-99, the derivative injuries to United Allergy arose from the same reduction in competition.

Given these uncertainties about the antitrust-injury requirement, we opt to avoid this issue. Even if United Allergy suffered such an injury, its suit still fails on proximate-causation grounds.

C. Proximate Causation

1. When Do Antitrust Violations "Proximately Cause" A Plaintiff's Injuries?

The Supreme Court also interprets private rights of action against the common-law rule that plaintiffs may recover only if a defendant "proximately caused" their injuries. *Lexmark*, 572 U.S. at 132; *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 201 (2017). And the Court has incorporated this rule into § 15(a) because that law permits a plaintiff to sue only if the injury occurred "by reason of" an antitrust violation. 15 U.S.C. § 15(a); *Apple*, 587 U.S. at 279.

Proximate causation imposes several limits on a defendant's liability. *See Holmes*, 503 U.S. at 267. This doctrine sometimes bars a suit when the defendant could not reasonably foresee the type of injury the plaintiff suffered. *See Scheffer v. R.R. Co.*, 105 U.S. 249, 251-52 (1881). The doctrine also sometimes bars

a suit if a "superseding cause" stood between the defendant's conduct and the plaintiff's injury. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996) (citation omitted). And most relevant here, the doctrine sometimes bars a suit if a "direct relation" does not exist "between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. When, for example, a defendant injures a third party, a plaintiff might be unable to recover for *derivative* harms that flow out of that third party's injuries. *See id.* at 268-69 (citing 1 J. Sutherland, *Treatise on the Law of Damages* 55-56 (1882)). As Justice Holmes put it, "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step." *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918).

In the antitrust context, the Supreme Court has turned this general directness element into a specific "rule" that applies when antitrust violators harm multiple parties along a vertical "chain" of distribution. *Apple*, 587 U.S. at 279. The rule permits only "*direct* purchasers" (not "*indirect* purchasers") to sue a cartel or monopolist. *Id.* The Court adopted this rule in a pair of cases: *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick*. In *Hanover Shoe*, the Supreme Court identified the damages that arise to those who directly buy from a cartel or monopolist as the "amount of the overcharge" between the higher cartel or monopoly price and the lower market price. 392 U.S. at 489. The Court calculated damages in this way even though the plaintiff in that case was not an end consumer and had likely passed on some of this overcharge to its own customers in the form of higher prices. *See id.* at 492-

93. The defendant thus sought to reduce its damages to the plaintiff by showing that the plaintiff had avoided all or part of the overcharge's harm. *See id.* at 491-92. The Court rejected this "passing-on defense" to damages. *Id.* at 492-94. Why? It thought that the "task" of proving the defense "would normally prove insurmountable." *Id.* at 493. It added that common-law rules would bar such a mitigation-of-damages theory. *Id.* at 490 & n.8 (discussing *S. Pac.*, 245 U.S. at 533-34).

Illinois Brick represents the "mirror image" of *Hanover Shoe*. William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. Chi. L. Rev. 602, 603 (1979). There, a manufacturers' cartel sold bricks to intermediaries, who resold the bricks (and passed on part of the cartel's overcharge) to end purchasers. *Ill. Brick*, 431 U.S. at 726. The "indirect" end purchasers sued the manufacturers to recover the passed-on overcharge. *Id.* But the Supreme Court rejected their suit. Just as a defendant cannot use a "pass on" theory in a "defensive" way to reduce the damages owed to a direct purchaser, so too an indirect-purchaser plaintiff cannot use the "pass-on" theory in an "offensive" way to seek damages. *Id.* at 729-30. The Court adopted this view to eliminate the "serious risk of multiple liability for defendants." *Id.* at 730. And it adopted this view because the "difficulties in analyzing price and output decisions" remained no matter who asserted the pass-on theory. *Id.* at 731-32; *see Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 207-08 (1990).

Illinois Brick's bright-line rule applies no matter which way the harm flows along a vertical chain of distribution. Take a buyers' cartel that reduces prices and output below competitive levels. Sometimes the cartel's "undercharge" (the difference between the higher market price and the lower cartel price) will harm not just direct sellers from whom it buys (say, wholesalers) but also indirect sellers from whom the direct sellers buy (say, manufacturers). And *Illinois Brick* necessarily covers this reverse situation by permitting only the direct (not the indirect) sellers to sue the buyers' cartel. *See Zinser v. Cont. Grain Co.*, 660 F.2d 754, 760-61 (10th Cir. 1981); *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1158-59 (5th Cir. 1979); IIA Areeda & Hovenkamp, *Antitrust Law* § 346g, at 228-29.

Nor can indirect purchasers (or sellers) avoid *Illinois Brick* by calculating their damages using "lost profits" rather than an "overcharge" (or "undercharge") valuation. A horizontal cartel inflicts two harms on direct purchasers. They pay the overcharge for the products they *continue* to buy, and they lose the additional profits they would have made for the products they *stop* buying (and selling downstream to indirect purchasers) at the higher price. *See Howard Hess*, 424 F.3d at 373-74. Direct purchasers may seek to recover both the overcharge from the completed sales and the lost profits from the "lost sales." *UtiliCorp*, 497 U.S. at 212-13. And *Illinois Brick* leaves no doubt that indirect purchasers may not recover the overcharge. *See id.* at 204. But may these indirect purchasers at least recover the lost profits from the reduced output that flows down the distribution chain along with the overcharge? No, the

Supreme Court's bright-line rule bars indirect purchasers from suing *altogether*—even if they seek these "lost profits as opposed to overcharge damages." *Howard Hess*, 424 F.3d at 375.

At the same time, courts must not overread *Illinois Brick*. Its bright-line rule does not "bar multiple liability that is unrelated to passing an overcharge down a chain of distribution." *Apple*, 587 U.S. at 287. Antitrust violators sometimes *directly* contract with two parties—say, a retailer who buys from suppliers and sells to consumers or a "two-sided platform" (like a credit-card company) that facilitates an exchange between two sets of customers (card holders and retailers). *See id.* at 282-85; *Ohio v. Am. Express Co.*, 585 U.S. 529, 546 (2018). Take Apple, which connects consumers who want to buy apps in the App Store on its iPhones with suppliers who create these apps and put them in that store. *See Apple*, 587 U.S. at 276-77. If Apple has a monopoly, it might force iPhone users to pay an overcharge for the apps, and it might force app creators to sell at an undercharge to Apple. *See id.* at 286-88. In that scenario, both sides *directly* purchased or sold to Apple, so both may sue for their discrete damages. *See id.* at 287-88. Neither qualifies as an indirect purchaser or seller. *See id.*; *see also McCready*, 457 U.S. at 467-68.

One last point. Even if the categorical rule from *Illinois Brick* does not apply, a plaintiff might still not satisfy proximate causation under all the facts. *See, e.g.*, *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 19 F.4th 127, 138-43 (2d Cir. 2021). Many decisions, for example, bar suits by "employees with merely derivative injuries" that arise from harms

inflicted on their employers. *Associated Gen. Contractors*, 459 U.S. at 541 n.46. This harm might not fall within *Illinois Brick*, but it would not satisfy proximate causation all the same. *See Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 27-31 (D.C. Cir. 1987). Or take *potential* purchasers who do not buy at a cartel price but who would have bought at the market price. These plaintiffs also would not fall within *Illinois Brick* because they sit at the correct level of the distribution chain. But the "existing rule" bars them from suing given the speculation required to decide whether they would have bought. Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J. L. & Econ. 445, 463 (1985) (citing *Montr. Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 867-68 (10th Cir. 1981)); IIA Areeda & Hovenkamp, *Antitrust Law* §§ 345a at 197 n.2, 391b1 at 399. Likewise, would-be suppliers cannot simply claim they would have opened a business but for a defendant's anticompetitive conduct. *See* IIA Areeda & Hovenkamp, *Antitrust Law* § 349a, at 289. Rather, they must identify concrete steps they took to enter. *See id.* at 289-94; *Sunbeam Television Corp. v. Nielsen Media Rsch., Inc.*, 711 F.3d 1264, 1272-73 (11th Cir. 2013); *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 11 F.3d 1460, 1464-66 (9th Cir. 1993); *Huron Valley Hosp., Inc. v. City of Pontiac*, 666 F.2d 1029, 1033 (6th Cir. 1981). In sum, "[n]o single formula captures the required proximity." IIA Areeda & Hovenkamp, *Antitrust Law* § 339a, at 147.

2. Did The Alleged Antitrust Violations "Proximately Cause" United Allergy's Injuries?

United Allergy has not plausibly alleged proximate causation under this framework. Most notably, its complaint asserts the indirect harms that fall within the "bright-line rule" from *Illinois Brick*. *Apple*, 587 U.S. at 279. As we have said, the complaint alleges that the Center orchestrated a horizontal agreement among Amerigroup and its competing insurers to "fix prices and boycott competition at the primary care level." Compl., R.103, PageID 2702. Amerigroup and the other insurers allegedly "fixed prices at the reimbursement level of 150 doses/units per member per calendar year with a 3-month supply reimbursement restriction[.]" *Id.*, PageID 2701. So if physicians provided doses above these limits, the insurers paid zero. *Id.*, PageID 2702. The insurers also allegedly conspired to deny the physicians' claims on several pretextual grounds. *Id.*, PageID 2706-07. This horizontal agreement thus caused two basic harms: the insurers denied claims for *completed sales* (in which physicians had already provided allergy-care services to patients) and the insurers caused the market to suffer from *lost sales* (by incentivizing the physicians to stop seeing patients because they knew they would not get paid).

But the complaint leaves no doubt that the physicians—not United Allergy—directly suffered these harms. First consider the completed sales. The physicians directly sold to the insurers and so directly suffered the undercharge from the horizontal agreement (the difference between the market

reimbursement rate and the insurers' agreed rate of zero). Indeed, at least one physician identified in the complaint (Dr. Christopher Sewell) sued to recover the full amount of his "unreimbursed" claims (that is, the *entire* undercharge). Am. Compl., R.42, in *C.S. Sewell, M.D. P.C. v. Amerigroup Tenn., Inc.*, No. 2:17-cv-00062 (M.D. Tenn. Sept. 22, 2017); *see* Compl., R.103, PageID 2695. United Allergy, by contrast, was "two . . . steps removed from the antitrust violator[s] in [the] distribution chain" because it sold to physicians (its "customers") for a fee. *Apple*, 587 U.S. at 280; Compl., R.103, PageID 2671, 2677. And even if the physicians passed on some of the insurers' undercharge to United Allergy (by refusing to pay its fees if they did not get paid themselves), United Allergy could not sue as an indirect seller. *See Zinser*, 660 F.2d at 760-61; *Beef Indus.*, 600 F.2d at 1158-59. If *both* the physicians could recover the full undercharge on these completed sales *and* United Allergy could recover damages for the same sales, its suit would create a "risk of duplicative recoveries" for the same injury. *Ill. Brick*, 431 U.S. at 730.

To be sure, United Allergy does not just seek damages for completed sales. It also seeks far more damages for the *lost* sales that resulted from the vastly lower output at the fixed price of zero. Its complaint alleges that the anticompetitive conduct reduced its output both because its existing primary-care physicians suffered a "decrease in services" (they saw fewer patients) and because prospective physicians refused to enter "new contracts" (they saw no patients). Compl., R.103, PageID 2704. We see two problems with this theory. For one, only direct purchasers or sellers may recover for the "lost sales"

(independent of any overcharge or undercharge) that flow out of an anticompetitive action's reduction in output. *UtiliCorp*, 497 U.S. at 212-13. The Supreme Court has read *Illinois Brick* to set forth a clear "rule of contractual privity," and United Allergy had no contractual relationship with the insurers. *Apple*, 587 U.S. at 289 (Gorsuch, J., dissenting).

For another thing, even apart from *Illinois Brick*'s rule, United Allergy seeks "highly speculative" damages. *Associated Gen. Contractors*, 459 U.S. at 542. Take its request to recover lost profits for the sales it might have made to *prospective* physicians who refused to contract with it because of the insurers' anticompetitive conduct. Just as "would-be buyers" may not recover from a sellers' cartel, "would-be" suppliers (like these prospective physicians) generally may not sue unless they establish that they took concrete steps to enter the market. *See* IIA Areeda & Hovenkamp, *Antitrust Law* § 345a, at 197 n.2; *Dual-Deck*, 11 F.3d at 1464-66. And it would make no sense to allow a further-removed indirect seller (United Allergy) to sue if these unidentified physicians cannot. United Allergy would have to prove that the physicians refused to enter the market as "the result of the alleged" anticompetitive conduct. *Holmes*, 503 U.S. at 273. But the physicians could have refrained from doing so "for any number of reasons unconnected" to that conduct. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006).

United Allergy's contrary arguments do not convince us otherwise. *First*, United Allergy claims that *Illinois Brick* does not apply here because it alleges that the defendants participated in a "boycott"

rather than a price cartel. Appellant's Supp. Br. 7. Set aside that the complaint repeatedly alleges that the insurers "fixed prices" (or engaged in "price fixing")—not just that they engineered a boycott. Compl., R.103, PageID 2665, 2686, 2697, 2701-02, 2706-07, 2709-10. Plaintiffs cannot avoid *Illinois Brick* through artful pleading. *See Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 967 (3d Cir. 1983). That decision establishes a proximate-causation rule tied to § 15(a)'s "by reason of" language—not a rule of substantive liability tied to §§ 1 or 2. So we see no textually plausible path for holding that a party who is "two or more steps removed from the antitrust violator in a distribution chain" may sue if the party alleges something other than price fixing. *Apple*, 587 U.S. at 280. And whether the defendants' conduct is labeled a boycott, a cartel, or anything else, United Allergy's harms are "two . . . steps removed from the antitrust violator[s]" because its harms flow out of the injuries inflicted on its "customers" up the chain: the physicians. *Id.*; Compl., R.103, PageID 2665. Indeed, the complaint alleges a "boycott" at the "primary care *level*"—meaning a boycott of the "primary care physicians" (directly) and United Allergy (indirectly). Compl., R.103, PageID 2705-06 (emphasis added).

The cases on which United Allergy relies for this point do not support a different result. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 606 (7th Cir. 1997); *see also Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 311 n.17 (4th Cir. 2007); *Mid-West Paper Prods. Co. v. Cont'l Grp., Inc.*, 596 F.2d 573, 585 n.47 (3d Cir. 1979). In *Brand Name Prescription Drugs Antitrust Litigation*, Judge Posner suggested in dicta that *Illinois Brick* "would fall away"

if the plaintiffs had alleged a "boycott" rather than price fixing. 123 F.3d at 606. But United Allergy ignores his reason why. *Illinois Brick* would not apply to a boycott theory in that case because the plaintiffs could have alleged that the defendants refused "to enter into *direct* contractual relations" with the defendants—so they would have suffered the boycott harms directly (not through the boycott of other parties). *Id.* Judge Posner even conceded that *Illinois Brick* might apply to a boycott allegation if the plaintiffs were still "seeking to recover overcharges, for that would entail the very [pass-through] analysis that *Illinois Brick* bars." *Id.* As for *Mid-West Paper Products*, the Third Circuit has since clarified that it did not limit *Illinois Brick* to cartel claims. *Merican*, 713 F.2d at 967. So *Merican* applied *Illinois Brick* to boycott allegations. *See id.* at 966-68. Lastly, the Fourth Circuit in *Novell* found that the plaintiff was the "most direct victim" of the anticompetitive conduct in that case and did not suffer its injury indirectly through harms inflicted on others. 505 F.3d at 319. That case thus did not implicate *Illinois Brick*.

Second, United Allergy argues that its request for "lost profits" (rather than for undercharge damages) eliminates the concerns with "duplicative recovery" that drove *Illinois Brick* and so eliminates the need for us to apply its rule here. Appellant's Supp. Br. 8-10. United Allergy's premise is true: *Illinois Brick* expressed concern with the "risk of duplicative recoveries" from allowing indirect purchasers to sue. 431 U.S. at 730. Recall that *Hanover Shoe* held that a direct purchaser could recover the *full* overcharge from a monopolist even if the purchaser passed on that overcharge to its consumers. *See* 392 U.S. at 489-94.

To allow the indirect consumers to recover the passed-on overcharge, then, would force the defendant to pay twice for the same harm. *See Ill. Brick*, 431 U.S. at 730-31. This duplicity risk might arise here if, for example, physicians like Dr. Sewell could recover the *full* undercharge for *denied* claims on completed sales (that is, the difference between the market price and the fixed lower price of $0 that the insurers agreed to). Still, we agree that this duplicity concern would not arise if courts limited *both* direct and indirect victims *only* to their lost profits. Here, for example, if the primary-care physicians could seek only the lost profits from both completed and lost sales, their damages would exclude their costs (which would include United Allergy's set fees on these sales). United Allergy and the physicians thus would have nonoverlapping damages under this damages measure.

But United Allergy's conclusion (that *Illinois Brick* should not apply) does not follow from this premise. To the contrary, this logic would overrule *Illinois Brick*. As the Third Circuit has explained, indirect purchasers and sellers could always recharacterize their damages as lost profits rather than overcharges or undercharges for completed sales. *See Howard Hess*, 424 F.3d at 376. But *Illinois Brick categorically* bars suits by indirect purchasers or sellers; it does not bar them from only specific types of remedies. *See id.* at 375-76. This reading of *Illinois Brick* best reconciles it with § 15(a)'s text. Under that text, a plaintiff may sue only for harms suffered "by reason of" an antitrust violation. We do not see how one type of harm to an indirect party (the lost profits for lost sales) could qualify as "by reason of" the

violation while another type of harm to that party (the undercharge or overcharge for completed sales) could not. *See id.* at 375-76. Put another way, *Illinois Brick* adopts a *plaintiff*-specific rule, not a *damages*-specific rule.

Besides, *Illinois Brick* did not establish its rule just because of the risk of duplicative damages. It also established its rule because "of the uncertainties and difficulties in analyzing price and output decisions 'in the real economic world rather than an economist's hypothetical model[.]'" *Ill. Brick*, 431 U.S. at 731-32 (citation omitted). And it established its rule because of the administrative concerns with forcing judges and juries to make these calculations. *See id.* at 732. These concerns remain even if an indirect seller labels its claim as one for "lost profits" rather than an undercharge. *See* IIA Areeda & Hovenkamp, *Antitrust Law* § 346g, at 228.

Lastly, *Illinois Brick* creates a "bright-line rule" that applies across the board—not a fact-specific standard that courts may disregard when its rationales are absent. *Apple*, 587 U.S. at 279. So even when all agreed that a state-regulated utility passed on 100% of an energy cartel's overcharge to consumers, the Court still held that those consumers could not sue. *See UtiliCorp.*, 497 U.S. at 208-17. The Court thought it "unwarranted" to decide on the applicability of *Illinois Brick* on a case-by-case basis. *See id.* at 217. And once we accept that *Illinois Brick* applies to indirect sellers (not just purchasers), its "bright-line rule" covers this case. *Apple*, 587 U.S. at 279.

Third, United Allergy suggests that *Illinois Brick* should not apply because the complaint describes United Allergy as the "intended target" of the anticompetitive conduct. Appellant's Br. 29. And it claims that proximate causation always exists for the intended victims of intentional torts. But this "'target' theory of antitrust liability would nullify the doctrine of *Illinois Brick*." *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 822 (7th Cir. 2015) (Posner, J.). A manufacturers' cartel almost always targets the end consumers for higher prices—that is, it almost "always *knowingly* causes injury to" these "indirect purchasers"—because it will set its wholesale prices based on the anticipated higher retail prices that its price fixing will cause downstream. *See id.* at 823. But indirect purchasers could not avoid *Illinois Brick* by claiming that the cartel intended their downstream harms. *See id.* at 822. The same logic should also apply in reverse to a buyers' cartel: an indirect seller cannot avoid *Illinois Brick* with the claim that the cartel intended to "driv[e]" the indirect seller "out of business" through its anticompetitive conduct. IIA Areeda & Hovenkamp, *Antitrust Law* § 346g, at 228. As a treatise has explained, "[s]o long as *Illinois Brick* stands, the courts cannot allow evasion of its policies by artfully transforming a monopsony undercharge claim into a plan to destroy . . . upstream producers" like United Allergy. *Id.*

Even apart from *Illinois Brick*, the Supreme Court's cases contradict United Allergy's claim that the intended victims of antitrust violations always satisfy proximate cause. The unions in *Associated General Contractors*, for example, alleged that the

conspiring trade association and contractors "intended to cause" them harm. 459 U.S. at 537. The lone dissent thus agreed with United Allergy that the unions were analogous to the "victim of an *intentional* tort" and so could sue without any inquiry into proximate causation. *Id.* at 548 (Marshall, J., dissenting). But the Court rejected this conclusion, holding that this specific-intent allegation was not a "panacea that will enable any complaint to withstand a motion to dismiss." *Id.* at 537 (majority opinion). When discussing proximate causation in other contexts, the Court has reached the same result. *See Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 12 (2010). So a competitor harmed by a defendant's refusal to pay taxes could not sue even though the defendant acted with the specific intent to gain an advantage over (and take sales from) the competitor. *See Anza*, 547 U.S. at 455-58; *Gen. Motors, LLC v. FCA US, LLC*, 44 F.4th 548, 560-61 (6th. Cir. 2022).

This rule makes sense. Suppose that the primary-care physicians had hired technicians as employees rather than obtain independent-contractor technicians from United Allergy. If the employee technicians claimed that they lost their jobs because the defendants intentionally targeted them with their anticompetitive conduct, could they sue over their lost wages? No, because of the "speculative" nature of their damages and the risk of "unduly complex litigation" in trying to figure out the harms passed on to these indirect employees. *See Adams*, 828 F.2d at 30-31. The rule should not be different simply because the physicians relied on independent contractors rather than employees for the same technician services.

Fourth, United Allergy analogizes its claims to those in three cases that did not trigger *Illinois Brick*. But none of these cases involved an indirect seller seeking to recover for harms inflicted on a direct seller and passed down a distribution chain. Start with the Supreme Court's *McCready* decision. There, an insurer conspired with a psychiatric-services association to harm psychologists by broadly covering psychiatry—but not psychology—services. *See McCready*, 457 U.S. at 468. A patient who opted to see a psychologist despite the lack of coverage paid for the services out of pocket and sought to recoup this payment from the insurer and psychiatric-services association. *See id.* at 468-69. The Court held that the patient could sue. *See id.* at 473-84. It reasoned that the patient did not seek money for injuries flowing "along a chain of distribution" that arose "from a single transaction" up the chain. *Id.* at 475. To the contrary, the insurer in *McCready* resembled the retailer in *Apple*: it acted as an "intermediary" between medical providers on the one side and patients (and their employers) on the other. *Apple*, 587 U.S. at 287. When an insurer acts anticompetitively, parties on both sides of the insurer (just like upstream suppliers and downstream consumers on both sides of a retailer) can sue to recover their distinct damages. *See id.* But *McCready*'s holding does not matter here because United Allergy sits one step removed from the primary-care physicians on the *same supply side* of the insurers. United Allergy thus would be analogous to a (fictional) medical supplier that sold services to the psychologists in *McCready* to help them serve patients. But nothing in *McCready* suggests that this type of indirect seller could sue in addition to the

psychologists themselves (the directly harmed sellers).

United Allergy fares no better with its reliance on *Potters Medical Center v. City Hospital Association*, 800 F.2d 568 (6th Cir. 1986). There, the bigger hospital in a city refused to grant staff privileges to doctors who held privileges at the city's smaller hospital. *See id.* at 571. We concluded that the smaller hospital could sue the bigger one over this exclusive dealing. *See id.* at 575-76. Yet *Potters* involved a suit between two competitors who sat at the same level in the market. The hospitals *directly* contracted with physicians in the physician-labor market, and the exclusive-dealing restraint reduced the supply of labor for the smaller hospital. *See id.* at 575. We thus viewed that hospital as a "direct victim" of the restraint. *Id.* at 576. This case might resemble *Potters* if the Center had restrained the upstream market for *technician* labor—say, by adopting an exclusive-dealing arrangement that barred its technicians from working for competitors. But United Allergy makes no such claim. Rather, it says that the Center convinced insurers to engage in price fixing and a boycott in the downstream market for allergy testing and immunotherapy. The restraints in that market directly harmed the primary-care physicians and indirectly harmed upstream actors with whom the physicians contracted, such as United Allergy. So this case (unlike *Potters*) involves an upstream plaintiff indirectly injured by a downstream restraint that affected "different levels of a distribution chain[.]" *Apple*, 587 U.S. at 287.

United Allergy's citation to *Crimpers Promotions, Inc. v. Home Box Office, Inc.*, 724 F.2d 290 (2d Cir. 1983) (Friendly, J.), fails for the same reason. That case concerned the market for cable-television programs. *See id.* at 291. Producers had been selling these programs to the two monopolist intermediaries (HBO and Showtime), which had been reselling them downstream to local cable-television operators. *See id.* The antitrust plaintiff—a competing intermediary—sought to hold a tradeshow that would bring together program producers and cable-television operators outside the HBO and Showtime bottleneck. *See id.* When HBO and Showtime learned of this tradeshow, they discouraged program producers and cable-television operators from attending. *See id.* The court held that *Illinois Brick* did not bar the plaintiff from suing HBO and Showtime for the harms that they caused its tradeshow. *See id.* at 293-94. The plaintiff competed with HBO and Showtime; it did not buy programming from them or sell it to them. Its tradeshow harms thus differed from the monopsony undercharge and monopoly overcharge that the program producers and cable-television operators paid. *See id.* at 293-94. *Crimpers* would resemble this case if a competing insurer (at the intermediary level) sued Amerigroup and the other insurers for hindering its efforts to enter the market and break up their price fixing and boycott. This hypothetical insurer likely could sue because its injuries would differ from those of the primary-care physicians and patients. But United Allergy resembles a supplier to the program producers, one that seeks to recover for harms that those producers passed along as a result of HBO's and

Showtime's anticompetitive conduct. That type of suit falls within *Illinois Brick*, not *Crimpers*.

Fifth, and finally, United Allergy falls back on policy arguments. *See* Appellant's Supp. Br. 13. It claims to be a better plaintiff than the primary-care physicians because it suffered a single large injury while the physicians suffered smaller, dispersed injuries. And it says the physicians may have a disincentive to enforce the antitrust laws because their livelihood depends on obtaining reimbursement from the very insurance companies that they would have to sue. Yet, as the complaint notes, these concerns have not prevented at least one other physician (Dr. Sewell) from suing over the same conduct. Compl., R.103, PageID 2695. Nor is it obvious that United Allergy's "lost profits" (rather than undercharge damages) represent the proper antitrust remedy because these sorts of profits "get lost primarily from hard competition or from the elimination of monopoly"—not from anticompetitive conduct. Easterbrook, *supra*, 55 Antitrust L.J. at 100; *see Howard Hess*, 424 F.3d at 375. All the same, we find the competing sets of *policy* arguments beside the point. The arguments cannot overcome the *legal* problem with this suit: United Allergy is "two . . . steps removed from" the insurers in the "distribution chain" for allergy testing and immunotherapy services. *Apple*, 587 U.S. at 279. It thus "may not sue" under *Illinois Brick*. *Id.*

III. State Tort Claims

United Allergy also argues that the district court wrongly granted summary judgment to the Center

and Amerigroup on its three state-law claims. We will consider each claim in turn.

A. Tortious Interference with Existing Contracts

Tennessee common law and statutory law both prohibit defendants from intentionally inducing a third party to breach its contract with a plaintiff. *See* Tenn. Code Ann. § 47-50-109; *Quality Auto Parts Co. v. Bluff City Buick Co.*, 876 S.W.2d 818, 822 (Tenn. 1994). Under either law, this tort has the same seven elements. *See Edwards v. Travelers Ins. of Hartford*, 563 F.2d 105, 120 (6th Cir. 1977); *Givens v. Mullikin ex rel. Est. of McElwaney*, 75 S.W.3d 383, 405 (Tenn. 2002). The plaintiff must have entered a valid contract with a third party. *See Givens*, 75 S.W.3d at 405. The defendant must have known of this contract. *See id.* The defendant must have intended to induce the third party to breach the contract. *See id.* When engaging in its tortious actions, the defendant must have harbored "malice" toward the plaintiff. *See id.* The third party must have breached the contract. *See id.* The defendant's actions must have proximately caused that breach. *See id.* And the breach must have injured the plaintiff. *See id.*

Here, United Allergy alleges that the Center and Amerigroup induced primary-care physicians to breach their contracts with it. On appeal, the Center and Amerigroup do not dispute most of the elements of this tortious-interference claim. They concede that United Allergy formed valid contracts with primary-care physicians and that they knew of these contracts. In the district court, the Center and Amerigroup did argue that United Allergy failed to show that the

physicians breached the contracts. But a United Allergy officer testified that 60 contracting clinics had "at some point in time" made at least one "late payment" to United Allergy in violation of their contract's payment terms. McMahon Decl., R.299-12, PageID 16951. The district court held that this testimony created a genuine dispute over the "breach" element, and the Center and Amerigroup do not challenge this conclusion on appeal. *See United Biologics*, 2024 WL 770640, at *12. Next, we find it debatable whether the Center and Amerigroup knew of the contractual provision requiring physicians to timely pay United Allergy, and some caselaw suggests that defendants cannot intend "to induce" a breach of a contractual "duty" that they do not know about. *TSC Indus., Inc. v. Tomlin*, 743 S.W.2d 169, 173 (Tenn. Ct. App. 1987). But we need not consider this issue. The Center and Amerigroup do not dispute that enough evidence existed to suggest that they intended to cause the late-payment breaches (and that the breaches harmed United Allergy).

These concessions leave the "malice" and "proximate causation" requirements. United Allergy's claims against the Center and Amerigroup collapse at one or the other of these elements. The company has failed to present enough evidence that Amerigroup *maliciously* caused any of the identified breaches or that the Center *proximately* caused them.

1. *Amerigroup*. To prove that Amerigroup tortiously interfered with United Allergy's contracts with the 60 physician clinics, United Allergy must show that Amerigroup acted with "malice." *See Cambio Health Sols., LLC v. Reardon*, 234 F. App'x

331, 336-37 (6th Cir. 2007). Like the Restatement of Torts, Tennessee courts have held that "malice" does not require a defendant to have "ill will" toward a plaintiff. *Crye-Leike Realtors, Inc. v. WDM, Inc.*, 1998 WL 651623, at *6 (Tenn. Ct. App. Sept. 24, 1998); *Riggs v. Royal Beauty Supply, Inc.*, 879 S.W.2d 848, 851 (Tenn. Ct. App. 1994); Restatement (Second) of Torts § 766 cmt. s (A.L.I. 1979). Rather, these courts have concluded that a defendant need only commit a "wil[l]ful violation of a known right"—a phrase that requires the defendant to have acted "without legal justification." *Crye-Leike Realtors*, 1998 WL 651623, at *6 (citation omitted); *see Riggs*, 879 S.W.2d at 851.

A pair of cases about noncompete agreements show both that a legally defensible position cannot establish malice and that a legally indefensible position can. *Compare HCTec Partners, LLC v. Crawford*, 676 S.W.3d 619, 642-43 (Tenn. Ct. App. 2022), *with Riggs*, 879 S.W.2d at 851-52. In *Riggs*, an employee plaintiff signed a noncompete agreement with the defendant but switched jobs to work for a new employer. *See* 879 S.W.2d at 849. The defendant sent a letter to this new employer disclosing the noncompete agreement, which caused the new employer to fire the employee. *See id.* The employee claimed that the defendant had wrongly induced the new employer to breach its contract with him because the defendant should have known that state courts would not enforce the noncompete agreement. *See id.* But the state court held that the defendant had not acted maliciously because it "would have been justified in litigating" the validity of the noncompete agreement even if a court would not have enforced it. *See id.* at 851-52. In *HCTec Partners*, by contrast, a

business plaintiff sued a competitor for convincing an employee to quit and work for the competitor. *See* 676 S.W.3d at 625-26. This time, the state court held that the plaintiff had established malice. *See id.* at 642. It reasoned that the competitor had known of the noncompete agreement's validity and convinced the employee to violate the agreement anyway based on the mere hope that the plaintiff "would not bother to sue" over it. *Id.* at 642-43.

Amerigroup looks more like the defendant in *Riggs* than the one in *HCTec Partners*. To start, the insurer did not act with malice because it investigated the primary-care physicians (and denied their claims) "to protect a third person toward whom [it stood] in a relation of responsibility": TennCare. *Mefford v. City of Dupontonia*, 354 S.W.2d 823, 827 (Tenn. Ct. App. 1961) (quoting William L. Prosser, *Handbook of the Law of Torts* 736-37 (2d ed. 1955)). As one of three managed-care organizations that contract with TennCare to operate Tennessee's Medicaid program, Amerigroup has promised to protect public funds against fraud and waste. So its contract with TennCare requires it to adopt "utilization control programs and procedures" that "safeguard the Medicaid funds against unnecessary or inappropriate use of Medicaid services and against improper payments." Contract, R.275-3, PageID 10471; *see* 42 C.F.R. § 438.608(a). And Amerigroup must "cooperate" with state and federal agencies that investigate fraud. Contract, R.275-3, PageID 10472. Amerigroup also must notify TennCare of "suspected fraud cases" and generally undertake a "preliminary investigation" of the fraud. *Id.*, PageID 10472-73.

Amerigroup's actions against the physicians sprang from these duties. Indeed, TennCare *itself* repeatedly raised concerns with allergy-care billing. Its concerns arose as early as 2015 before Ameriprise even knew of United Allergy's existence. Mem., R.275-1, PageID 10144-50. At that time, TennCare "recommend[ed]" "a benefit limitation for allergen immunotherapy" to help its budget. *Id.*, PageID 10144. This recommendation followed from an allergy-care investigation showing (among other things) that physicians "billed" an "[e]xcessive number of units" and that "[t]he person/facility preparing the antigen . . . [was] not the provider/facility who billed and received payment for the service." *Id.*, PageID 10145. The next year, the Tennessee legislature limited immunotherapy billing to no more "than a three month supply at a time." Mem., R.275-5, PageID 10796. And TennCare ultimately asked its managed-care organizations to "meet to discuss . . . a unified reimbursement policy concerning allergy immunotherapy." Email, R.275-10, PageID 11507. After these discussions, TennCare "decided to implement" uniform billing for the immunotherapy that patients administered at home. Email, R.275-10, PageID 11587.

By investigating physicians, Amerigroup simply responded to the concerns of its principal: TennCare. It, for example, audited the allergy-care billings of Dr. Sewell (the primary-care physician who sued) because of a *referral* from TennCare. Taylor Dep., R.275-10, PageID 11581-82. And it learned of Sewell's affiliation with United Allergy only through that audit. *Id.*

Amerigroup also had "legal justification" to investigate (and deny the claims of) the primary-care physicians who contracted with United Allergy. *HCTec Partners*, 676 S.W.3d at 642 (citation omitted). Amerigroup implements TennCare by contracting with physicians to provide services to eligible patients. Contract, R.275-14, PageID 12136. Under these contracts, physicians agree that they and their "employees shall perform all the services required hereunder directly and not pursuant to any subcontract between [them] and any other person or entity[.]" *Id.*, PageID 12152. They also agree that Amerigroup could "deny payment" if the medical "services" were not "provided in accordance with this Agreement." *Id.*, PageID 12148. Interpreting these provisions, Amerigroup concluded that it could deny the physicians' claims because United Allergy's contracts with them qualified as improper subcontracts. Email, R.299- 6, PageID 16043. One of TennCare's own agents even flagged this subcontractor issue for Amerigroup's "investigation" of United Allergy "and other providers." Email, R.275-15, PageID 12350. Like the employer in *Riggs*, then, Amerigroup was "justified in litigating" the issue, and it did not act with malice merely by asserting a reasonable legal position. 879 S.W.2d at 852. The contrary rule would turn every disputed legal or contractual question into a potential tortious-interference claim.

United Allergy's responses do not change things. It first points to a 2018 email from an Amerigroup employee that compiled allergy-care payment data after Amerigroup "opened all of the cases on" United Allergy. Email, R.299-5, PageID 15972. This data

showed a significant drop in payments between 2015 and 2017. *Id.*, PageID 15971-72. That said, the employee explained that Amerigroup had not "completely flushed [United Allergy] out of Tennessee" because it had investigated only the top billers and a lot of "little clinics" might still have contracts with United Allergy. *Id.*, PageID 15971. United Allergy suggests that this language (about flushing out United Allergy) shows malice. Yet Amerigroup took the legal position that the physicians' contracts with Amerigroup barred them from using United Allergy to perform allergy-care services without preapproval. So Amerigroup did not believe that United Allergy possessed any "right" to contract with physicians. *HCTec Partners*, 676 S.W.3d at 642 (citation omitted). And if it did not, Amerigroup had full authority to deny claims to physicians who contracted with United Allergy.

United Allergy next cites workgroup notes suggesting that Amerigroup did not *subjectively* believe that United Allergy's relationship with physicians violated the subcontract rule. One stray statement in these notes provides: "Not considered a subcontracted service." Notes, R.299-6, PageID 16037. This unexplained statement does not create a genuine issue of material fact about Amerigroup's beliefs. Indeed, the notes elsewhere state that "[p]rovider is in contract violation" on the ground that "[s]ubcontracts must be pre-approved[.]" *Id.* And overwhelming evidence otherwise shows that Amerigroup had concluded that United Allergy's contracts with physicians qualified as a "material breach" of the subcontractor provision in Amerigroup's own

contracts with those physicians. Audit, R.299-1, PageID 15590.

United Allergy counters that Amerigroup still acted with malice because it *unreasonably* held this belief. Its evidence? A 2017 letter from TennCare allegedly told Amerigroup that "the subcontract issue had been resolved and that no enforcement action was intended against" United Allergy. Appellant's Br. 49. But United Allergy misrepresents this letter—which concerned Amerigroup's decision to refer Dr. Sewell's potential fraud to TennCare. Amerigroup's contract with TennCare did not permit it to seek to recoup funds from providers while they were "being investigated" by TennCare. Contract, R.275-3, PageID 10471-72. In the letter, TennCare said it was "returning the above case back to" Amerigroup, that Amerigroup should "proceed forward with action as [it] deem[ed] necessary," and that it should let TennCare know if it sought to recoup funds. Letter, R.299-6, PageID 16042. So Amerigroup read the letter as allowing it "to move forward" against Sewell. Email, R.299-6, PageID 16041. And no jury could read the letter (as United Allergy does) to suggest that TennCare approved Sewell's contract with United Allergy.

United Allergy also points to a state-court decision that allegedly "rejected" Amerigroup's conclusion that Dr. Sewell had entered an improper subcontract with United Allergy. Reply Br. 23. Not so. The state court found a dispute of fact that required a jury trial on this question. Order, R.352-43, PageID 20886-87. If anything, then, this order proves Amerigroup's point. Even if it mistakenly interpreted

the subcontract provision, the disputed fact question shows Amerigroup was at least "justified in litigating" the issue. *Riggs*, 879 S.W.2d at 852. In sum, Amerigroup did not act with malice as a matter of law because it had a "legal justification" for its conduct. *Crye-Leike Realtors*, 1998 WL 651623, at *6.

2. *The Center*. We need not consider the Center's alleged "malice" because United Allergy's claim against it fails on causation grounds. To prove tortious interference, United Allergy must show that actions attributable to the Center caused the 60 physician clinics to breach their contracts. *See Givens*, 75 S.W.3d at 405. In common-law tort suits, the Tennessee Supreme Court has required a plaintiff to prove that the defendant's conduct "was both the cause-in-fact and the legal cause" of the plaintiff's injury. *Cotten v. Wilson*, 576 S.W.3d 626, 638 (Tenn. 2019); *Hale v. Ostrow*, 166 S.W.3d 713, 718 (Tenn. 2005). To satisfy the cause-infact requirement, plaintiffs must prove but-for causation. *See Cotten*, 576 S.W.3d at 638; *King v. Andersen County*, 419 S.W.3d 232, 246 (Tenn. 2013). That is, they must show that they would not have suffered their injuries "but for" the defendant's conduct. *Jenkins v. Big City Remodeling*, 515 S.W.3d 843, 852 (Tenn. 2017). To satisfy the legal-cause requirement, plaintiffs must establish proximate causation. *See Cotten*, 576 S.W.3d at 638. The Tennessee Supreme Court has interpreted "proximate causation" to include three primary requirements. *See id.* The defendant's conduct must have been a "substantial factor" in the plaintiff's injury. *Id.* (citation omitted). A decision to hold the defendant liable for this conduct must not conflict with any "rule or policy" that would relieve the defendant of liability.

Id. (citation omitted). And a reasonable person must have been able to foresee that the plaintiff's injury would arise from the defendant's actions. *See id.*

United Allergy cannot establish causation against the Center because any reasonable jury would reach the same conclusion on this summary-judgment record: that the Center's actions were not "substantial factors" in bringing about the claimed contract breaches. *Naifeh v. Valley Forge Life Ins. Co.*, 204 S.W.3d 758, 772 (Tenn. 2006); *see Shouse v. Otis*, 448 S.W.2d 673, 677 (Tenn. 1969). To prove this causation, United Allergy relies on a multistep chain of events. The Center's agents (most notably, DeLozier) allegedly lobbied Amerigroup and other insurers to investigate primary-care physicians who offered allergy-care services. This lobbying allegedly led Amerigroup and the other insurers to audit the physicians. The audits, in turn, caused Amerigroup and the other insurers to deny the physicians' claims and to seek recoupment for paid claims. Finally, the lack of reimbursement (plus the increased scrutiny) from Amerigroup and the other insurers caused all 60 clinics to miss payments of the fees they owed United Allergy.

This chain of events likely would not have allowed a reasonable jury to find that the Center qualified as a but-for cause of the alleged breaches—let alone a substantial factor in bringing them about. Most notably, the evidence shows that TennCare and Amerigroup had *independent* concerns with excessive allergy-care billing by primary-care physicians separate from anything the Center said. United Allergy, for example, identifies no evidence to suggest

that the Center (or DeLozier) caused TennCare to conduct its 2015 investigation into allergy-care billing or to make its recommendations to reduce the reimbursement for this care because of physician abuses. Mem., R.275-1, PageID 10144-50. Likewise, no evidence suggests that the Center even knew of (let alone identified) the subcontract issue on which Amerigroup primarily relied to deny the claims of physicians. *See United Biologics*, 2024 WL 770640, at *13 n.15. So how could the Center have caused any of these subcontract-based denials? More generally, United Allergy does not identify evidence that the Center successfully convinced an insurer to audit even a single primary-care physician. It instead relies on the Center's *generic* lobbying efforts. But we find it too "speculative" to connect those generic efforts all the way through to any specific late payment by any specific physician. *Naifeh*, 204 S.W.3d at 772.

United Allergy has both factual and legal responses. Factually, it relies on an email chain from 2015 among the Center's "marketing managers," including DeLozier. Appellant's Br. 41. In this chain, DeLozier bemoaned that United Allergy's model encouraged physicians "to test everyone" for allergies even though only about a third of patients need testing. Email, R.352-11, PageID 20623. DeLozier also claimed that he had "many examples" of primary-care physicians misdiagnosing nonallergic patients with allergies. *Id.* He suggested that the Center should encourage insurers like Amerigroup to conduct "medical necessity audits" of primary-care physicians because he believed the physicians would flunk these audits, which would "cut [United Allergy] out of [the] pic[.]" *Id.* United Allergy also cites emails and notes

from DeLozier's meetings with insurers that discussed these topics. *See, e.g.*, Notes, R.299-5, PageID 15930; Email, R.299-6, PageID 16165; Mahler Dep., R.299-14, PageID 17244-53. Yet United Allergy does not connect this evidence through the chain of causation that it hypothesizes. In other words, it identifies no evidence that the Center successfully lobbied an insurer to perform a medical-necessity audit of any physician that the insurer "would not have" otherwise audited *on its own initiative*. *Jenkins*, 515 S.W.3d at 852. And it identifies no evidence that DeLozier's actions led any insurer to wrongly deny payments that the insurer "would not have" otherwise denied. *Id.*

United Allergy also points to evidence that the Center tried to discourage a physician (Dr. Christopher Climaco) from contracting with United Allergy in 2015. Appellant's Br. 12, 43; Email, R.292-5, PageID 15911-15. Yet Climaco ended up contracting with United Allergy anyway. And this *pre-contract* evidence about events in 2015 does nothing to show that the Center somehow caused Climaco's clinic (Putnam County Pediatrics) to breach its contract with United Allergy some five years later in 2020. McMahon Decl., R.299-12, PageID 16958.

Legally, United Allergy notes that proximate causation does not require a party to "be the *sole* cause" of a plaintiff's injury. *Hale*, 166 S.W.3d at 718. True enough. But it does require the party to be "*a* cause." *Id.* And United Allergy's evidence would not permit a reasonable person to find that the Center caused any primary-care physician to pay any invoice late. *See Naifeh*, 204 S.W.3d at 772. That "fatal flaw" dooms its claim. *Jenkins*, 515 S.W.3d at 853.

B. Tortious Interference with Business Relations

Tennessee courts also recognize the separate tort of intentional interference with business relationships. *See Trau-Med of Am., Inc. v. Allstate Ins.*, 71 S.W.3d 691, 701 (Tenn. 2002). Yet this tort has a "confined scope." *BNA Assocs. LLC v. Goldman Sachs Specialty Lending Grp., L.P.*, 63 F.4th 1061, 1064 (6th Cir. 2023). Unlike a tortious-interference claim (which requires a breach of contract), this tort covers both early business relationships that have yet to blossom into binding contracts and continuing at-will relationships that will never produce binding long-term commitments. *See id.* To prove this distinct claim, a plaintiff must show five things. *See Trau-Med*, 71 S.W.3d at 701. The plaintiff must have had either an "existing business relationship with specific third parties" or a "prospective" business "relationship" "with an identifiable class of third persons[.]" *Id.* The defendant must have known of this relationship. *Id.* The defendant must have acted with an intent to cause the relationship to end. *Id.* The defendant must have harbored an "*improper motive*" or used "*improper means*" to end the relationship. *Id.* And the plaintiff must have suffered an injury "resulting from" the defendant's interfering actions. *Id.*

Amerigroup asserts that this claim fails at the outset because United Allergy did not present evidence to establish the required prospective relationship with an "identifiable class" of physicians. United Allergy could not pursue this claim for breaches of *existing* contracts with physicians. *See BNA Assocs.*, 63 F.4th at 1064. So it had to point to an

"identifiable class" of physicians with whom it had a "prospective" (that is, *expected*) contractual relationship at the time of the interference. *Trau-Med*, 71 S.W.3d at 701. And United Allergy does not dispute the district court's conclusion that it cannot list *every* physician in Tennessee as its "identifiable class" of potential contract partners. *See United Biologics*, 2024 WL 770640, at *17.

United Allergy instead claims it had an expected relationship with all physicians whom it had "attempted to contract with" in some way in the past, whether by visiting their office or by handing them a business card at a tradeshow. McMahon Dep., R.275-12, PageID 11836-37. And it produced a spreadsheet that listed all these physicians. Does this spreadsheet satisfy the "identifiable class" requirement? *Trau-Med*, 71 S.W.3d at 701. We think not. The Tennessee courts have not provided much guidance on this element. When recognizing the tort claim, though, the Tennessee Supreme Court broadly examined caselaw from other jurisdictions. *See id.* at 699-701. And this caselaw typically requires plaintiffs to establish with "close certainty" that they would have entered the contractual relationship, so a "mere hope of a contract" falls short. *United Educ. Distribs., LLC v. Educ. Testing Serv.*, 564 S.E.2d 324, 329-30 (S.C. Ct. App. 2002) (citing cases); *see Roy Allan Slurry Seal, Inc. v. Am. Asphalt S., Inc.*, 388 P.3d 800, 807-08 (Cal. 2017); *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 221-22 & n.10 (Minn. 2014); *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So.2d 812, 814-15 (Fla. 1994). The notion that United Allergy had a prospective contractual relationship with a physician merely because a United

Allergy salesperson had stopped by the physician's office at some point in the past strikes us as too "speculative" to support this tort. *United Educ. Distribs.*, 564 S.E.2d at 330.

That said, the district court found this element met based on a narrower class: the physicians with whom United Allergy had contracted in the past. *See United Biologics*, 2024 WL 770640, at *17. We find this claim debatable because some state courts have held that "[t]he mere hope that some of [a plaintiff's] past customers may choose to buy again cannot be the basis for a tortious interference claim." *Ethan Allen*, 647 So.2d at 815. On the other hand, Tennessee courts have suggested that an identifiable class can exist for those with whom plaintiffs have an *existing* contractual relationship (say, currently contracted physicians) if the plaintiffs allege interference with "future contractual relationship" between these parties. *Clear Water Partners, LLC v. Benson*, 2017 WL 376391, at *7 (Tenn. Ct. App. Jan. 26, 2017). And the Restatement suggests that the tort might reach interference with "a contract terminable at will" (like United Allergy's contracts with physicians) if the defendant's interference causes the third party to end the at-will contract (without breaching it). Restatement (Second) of Torts § 766B cmt. c.

To avoid these debates, we will assume that the physicians with whom United Allergy had previously contracted and those with whom it had an ongoing at-will relationship could qualify as the identifiable class. The problem for United Allergy? Once we identify the class in this way, its claims fail for the same reasons that its tortious-interference-with-contract claims fail:

partially on motive grounds (as to Amerigroup) and partially on causation grounds (as to the Center).

1. *Amerigroup*. United Allergy has not shown that Amerigroup acted with an "*improper motive*" or used "*improper means*" for the same reasons that it failed to show Amerigroup's malice. *Trau-Med*, 71 S.W.3d at 701. This result follows from the reality that this tort provides *less* protection to business relationships than the protection provided by the tort that bars a party from intentionally inducing a breach of contract. *See Watson's Carpet & Floor Coverings, Inc. v. McCormick*, 247 S.W.3d 169, 177 (Tenn. Ct. App. 2007). One party's efforts to take customers from another party is the essence of a free market, so courts have refused to interpret the tort in a way that would "prohibit or undermine [a party's] ability to contract freely and engage in competition." *BNA Assocs.*, 63 F.4th at 1065 (citation omitted). To establish the defendant's improper motive, then, a plaintiff must show that the defendant acted with the "predominant purpose" of injuring the plaintiff. *Trau-Med*, 71 S.W.3d at 701 n.5. And to establish the defendant's use of "improper means," the plaintiff must show things like the violation of existing laws or distinct torts. *See id.*

As we have said, however, Amerigroup did not act with an improper motive because it investigated the physicians with whom United Allergy had contracted "to protect" TennCare and its public funds. *Mefford*, 354 S.W.2d at 827 (citation omitted). And Amerigroup did not use improper means because its reasonable interpretation of its contracts with those physicians "justified" the complained-of investigations. *Riggs*, 879 S.W.2d at 852.

2. *The Center*. Likewise, United Allergy has not shown that the Center caused physicians to terminate (or refuse to renew) their at-will contracts with United Allergy for the same reason that it has not shown that the Center caused the physicians to breach those contracts. To prove this tort, United Allergy must show that the claimed harms "result[ed] from" improper actions attributable to the Center. *Trau-Med*, 71 S.W.3d at 701. We read this language as incorporating the same cause-in-fact and legal-cause requirements that the Tennessee courts impose in common-law tort suits. *See Cotten*, 576 S.W.3d at 638. And United Allergy points us to no evidence to suggest that the Center's actions were a but-for cause (let alone a substantial factor) in any physician's decision to terminate a contract or refuse to renew one. *See id.*

C. Civil Conspiracy

This conclusion leaves United Allergy's civil-conspiracy claim. To establish a conspiracy, a plaintiff must prove that at least two actors shared a "common scheme" to carry out either an "unlawful" goal or a lawful goal using "unlawful means" and that the agreed-on actions injured the plaintiff. *Trau-Med*, 71 S.W.3d at 703. Yet this type of claim does not qualify as a standalone tort. *See Watson's Carpet*, 247 S.W.3d at 186. Rather, it qualifies as a method to hold one conspirator liable for the actions of the others on vicarious-liability grounds. *See Trau- Med*, 71 S.W.3d at 703. So a conspiracy to complete a lawful act in a lawful way does not create any liability. *See Forrester v. Stockstill*, 869 S.W.2d 328, 330 (Tenn. 1994). And plaintiffs must establish that the conspirators completed a "predicate tort" to hold them liable.

Watson's Carpet, 247 S.W.3d at 186. The district court held that United Allergy's civil-conspiracy claim failed on this ground because it did not establish that Amerigroup or the Center committed a tort against it. *See United Biologics*, 2024 WL 770640, at *19. As far as we can tell, United Allergy does not dispute that court's conclusion that its conspiracy claim necessarily fails if its tortious-interference claims cannot survive. *See* Appellant's Br. 54-58. We thus find any contrary reasoning forfeited. *See Blick v. Ann Arbor Pub. Sch. Dist.*, 105 F.4th 868, 884 (6th Cir. 2024).

United Allergy instead argues that the district court overlooked its claim that the two Blue Cross entities joined the conspiracy. If these Blue Cross entities committed torts against United Allergy as part of a conspiracy, the conspiracy allegations would allow United Allergy to hold Amerigroup and the Center liable for those torts. *See Trau-Med*, 71 S.W.3d at 703. United Allergy is correct as a matter of law. But it is incorrect as a matter of fact. United Allergy's appellate briefing does not elsewhere adequately explain why the conduct of these BlueCross entities met all the required elements of its two tortious-interference claims. So it forfeited these claims too. *See Wilgar Land Co. v. Dir., Off. of Workers' Comp.*, 85 F.4th 828, 842 (6th Cir. 2023).

We affirm.

KETHLEDGE, Circuit Judge, concurring. I join the court's opinion, which offers a careful synthesis of the relevant Supreme Court caselaw. For the reasons that Judge Murphy so ably explains, I agree that the existing caselaw directs—albeit by analogy—the outcome that we reach here. So far as I can tell, however, that result serves to harm consumer welfare rather than advance it.

United Allergy's complaint plausibly alleges that, before 2013, the market for allergen-immunotherapy services in Tennessee was woefully undersupplied. Many patients in need of those services did without; others drove long distances to receive them at the defendant Center, which dominated the market and faced little competition. But the price signal did its work: in 2013 United Allergy entered this market with an innovative package of services that enabled primary-care physicians to provide allergen-immunotherapy services directly to their patients. As a result—with this new supplier—rates came down, access to these services became more convenient, and more patients actually obtained them. But that created new competition for the Center, and more claims for the defendant insurers to pay (on a flat-fee contract with TennCare, no less). And so, the complaint alleges in detail, the Center and the insurers coordinated a response—in which the insurers proceeded to audit, hassle, and otherwise deny payment to physicians who had contracted with United Allergy to provide these services to patients in Tennessee. That kind of campaign is what Judge Bork called a "disguised naked boycott"—disguised, because it cloaks the refusal to deal in the exercise of some regulatory power (here, the insurers' power to review

claims for payment). Robert H. Bork, *The Antitrust Paradox* 335-37 (1978). And the result of that boycott, eventually, was the departure of United Allergy from this market and a return to the former, undesirable status quo.

Thus, the complaint plausibly alleges, these defendants successfully conspired to eject a new and more efficient supplier from a market that had been badly undersupplied before. True—as a matter of strict, mechanical causation—the insurers' boycott affected the physicians directly, and United Allergy indirectly. Unlike the harm to a second-hand buyer in *Illinois Brick*, however, the damage to United Allergy was not collateral. Quite the contrary: the ejection of United Allergy from this market was the very object of the defendants' scheme. The harms for which United Allergy seeks redress were harms that the defendants specifically intended. The parties that suffered collateral damage, rather, were the patients—who must again travel farther and pay more for services at the Center, or go without treatment at all.

The goal of antitrust law is to advance consumer welfare. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993); *ProMedica Health System, Inc. v. F.T.C.*, 749 F.3d 559, 571 (6th Cir. 2014); 2B Areeda ¶ 100 at 4 ("the principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively"); *cf. Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription'") (quoting Bork, *The Antitrust Paradox* 66 (1978)). I appreciate the Supreme Court's concerns about allowing parties

harmed indirectly to bring antitrust claims. And legal rules must be general, rather than crafted to reach an outcome in a particular case. But the Court's concerns must be strong indeed, I suggest, to leave without a remedy the pattern of conduct alleged here.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-5153

ACADEMY OF ALLERGY & ASTHMA IN PRIMARY CARE,
Plaintiff,

UNITED BIOLOGICS, LLC, dba United Allergy Services,
Plaintiff-Appellant,

v.

AMERIGROUP TENNESSEE, INC., dba Amerigroup Community Care; PHYSICIANS' MEDICAL ENTERPRISES, LLC, dba PME Communications, LLC; ALLERGY ASSOCIATES, P.A., dba Allergy, Asthma and Sinus Center, P.C.; NED DELOZIER,
Defendants-Appellees.

Filed: Jan. 13, 2026

ORDER

The Court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision.

The petition was then circulated to the full court. No judge requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

JOHN K. BUSH, Circuit Judge, respecting the denial of rehearing en banc. This case involves an alleged conspiracy to restrain trade in the market for allergy testing and immunotherapy in Tennessee. The First Amended Complaint (FAC) states that defendant-appellee Allergy Associates has a 70% market share and that plaintiff-appellant United Allergy challenged this dominance when it teamed up with primary care physicians (PCPs) to create new competition. According to United Allergy, it provided staffing and supplies so that PCPs could provide similar services to those offered by Allergy Associates. But the venture between United Allergy and the PCPs failed. The reason, according to the FAC, was that Allergy Associates made unfounded accusations to several insurance companies (who are also named defendants) that the PCPs' practices were fraudulent and encouraged those insurers to deny reimbursement to PCPs for services provided jointly by United Allergy and the PCPs. The FAC alleges what amounts to a group boycott by the insurers that Allergy Associates orchestrated. R. 103, FAC, PageID 2715.

United Allergy came to federal court for relief, but the panel in this appeal found no antitrust standing. It characterized United Allergy as only a supplier to the PCPs. United Allergy therefore lacked a direct contractual relationship with Allergy Associates or the insurance companies, which the panel believes is required. The panel relied on *Illinois Brick Co. v. Illinois*, which held that indirect purchasers (i.e., customers of the defendant's victim who was overcharged) cannot sue for damages under the Sherman and Clayton Acts based on the victim

passing on the overcharge to those customers. 431 U.S. 720, 735-36 (1977).

I respect the panel's decision as reasonably applying Supreme Court precedent. But I write separately to suggest that this case may warrant the Court's review to clarify the parameters of *Illinois Brick* in the context of an alleged group boycott and plaintiffs that operated essentially as part of an apparent joint venture.

As discussed below, there is another competing view of the precedent which aligns with the pragmatic view of antitrust law that the Supreme Court generally takes. *See generally Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 191 (2010) ("[W]e have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."). Under this approach, United Allergy has alleged enough to show antitrust standing.

The panel's holding to the contrary may make it very difficult, if not impossible, for participants in a joint venture—how I characterize the arrangement between United Allergy and each PCP[1]—to bring Sherman Act claims. A basic premise of federal antitrust law is that even the smallest companies should have the opportunity to enter a market without illegal interference by incumbents. And sometimes a

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[1] In the parties' home State of Tennessee, a joint venture is "a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill, and knowledge" but do not "creat[e] a partnership in the legal or technical sense of the term." *Fain v. O'Connell*, 909 S.W.2d 790, 793 (Tenn. 1995) (cleaned up).

joint venture is the most efficient means—indeed, it may be the only way—through which new competitors can challenge an entrenched entity.

I fear the panel's decision will undermine important legal protections for such new market entrants. As a result, consumers will be harmed. As Judge Kethledge emphasized in his concurrence to the panel opinion, the majority's decision may be an eminently defensible application of governing precedent. But as he also noted, if the pleaded allegations are true, patients will pay more and suffer from less-available allergy and immunotherapy treatments, particularly in rural areas. More broadly, I worry that consumers in general may suffer because the panel may have created a virtually insurmountable hurdle for certain joint-venture participants to sue when a group boycott drives them out of a market.

I.

My concerns with the panel opinion are four-fold. *First*, I do not think a challenge to an alleged group boycott brought by a joint-venture participant (the fact pattern here) raises the calculation-of-damages problem posed by a challenge of an indirect purchaser to an overcharge (the fact pattern of *Illinois Brick*). *Second*, the panel's approach, while faithful to precedent, may be more formalistic than the Supreme Court would follow if it reviewed this case. *Third*, the panel opinion reads the Court's precedents that apply *Illinois Brick* differently than I would. *Fourth*, the panel held that *Illinois Brick* bars a suit for injunctive relief, even though the Court has never endorsed such a holding and other circuits have expressly rejected it.

A.

My first concern is that the panel applied the *Illinois Brick* rule to a group-boycott case that does not involve overcharge damages. In *Illinois Brick*, the Supreme Court sought to mitigate the potential problems with overcharge plaintiffs who bring antitrust actions. As the Court explained, allowing an indirect purchaser to sue over supra-competitive prices paid by the direct purchaser and then passed down the chain would require "trac[ing] the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge." *Illinois Brick*, 431 U.S. at 725. In other words, a court would need to figure out (1) what the competitive price would have been, (2) what the direct purchaser would have charged the indirect purchaser if the direct purchaser paid the competitive price, (3) what the indirect purchaser would have charged its customers if the direct purchaser paid the competitive price, and (4) what the indirect purchaser's profits ultimately would have been without the defendant's anticompetitive conduct.

Calculating the direct purchaser's loss is easy because we can determine the competitive price and then subtract that from the supra-competitive price it actually paid. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* ¶ 395 (2022). But damages get more speculative the further down the chain we go. Because it is unclear whether the direct purchaser (or the indirect purchaser) would have charged a different price had the defendant not

charged supra-competitive prices, we do not know whether the indirect purchaser would ultimately have suffered any harm.[2] And we are not supposed to speculate about whether a plaintiff has suffered damages. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-63 (1931).

Those concerns do not exist in a group boycott as alleged here. Calculating damages from such a group boycott is relatively easy: they are the profits the victim would have made if it were not driven from the

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[2] In his concurrence in the denial of rehearing en banc, Judge Murphy neglects this rationale for *Illinois Brick* (that is, to avoid speculative damages) when he suggests that overcharge damages and group boycott damages should be treated the same for antitrust standing purposes. *See* Murphy Concurrence at 19-20. The Court's reasoning in *Illinois Brick* stemmed from its "unwillingness to complicate treble-damages actions with attempts to" calculate the overcharge damages. *Illinois Brick v. Illinois*, 431 U.S. 431 U.S. 720, 725 (1977). And "a speculative or illogical theory of damages" is a "traditional proximate-cause problem . . . ." *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 615 (6th Cir. 2004). So proximate causation—the requirement arising from the "by reason of" text emphasized by Judge Murphy—should turn on whether damages are speculative or not. That, I submit, is the true underpinning of the *Illinois Brick* "bright-line rule . . . ." *Apple v. Pepper*, 587 U.S. 273, 280 (2019). And that bright-line rule need not be so broad as to deny a plaintiff antitrust standing where, as here, damages are relatively easy to calculate.

Indeed, the Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*—the case that ultimately led to the *Illinois Brick* rule—determined that "an overcharged buyer" with "a pre-existing 'cost-plus' contract" would fall outside the indirect purchaser rule's scope because it would be "easy to prove" the indirect purchaser's damages. 392 U.S. 481, 494 (1968). Likewise, here, United Allergy's damages from the group boycott would seem to be relatively easy to prove.

market. *See Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432, 439 (10th Cir. 1983). And, for a group boycott that harms a joint venture as alleged here, damages to each venture participant may be calculated based on the agreed-upon share of revenue that each participant would have received from sales lost because of the boycott. *See generally* Areeda & Hovenkamp ¶ 397a (explaining that the measure of damages is the plaintiff's net profits—i.e., the revenue one participant would have made minus the fees paid to the other participant).

This logic finds support from out-of-circuit precedent indicating that *Illinois Brick* generally does not apply in group-boycott cases. Writing for a unanimous Seventh Circuit, then- Chief Judge Posner observed that "the *Illinois Brick* rule, which is a rule concerning overcharges, would fall away" if the plaintiff asserted the defendants were boycotting it. *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 606 (7th Cir. 1997), *abrogated in part on other grounds by Rivet v. Regions Bank of La.*, 522 U.S. 470 (1998). The Second Circuit later adopted that statement as a holding, explaining that *Illinois Brick* does not bar a suit when the "[p]laintiffs seek damages not for losses incurred due to increasing prices, but instead, for losses incurred as a result of lost access" to the market. *Mosaic Health, Inc. v. Sanofi-Aventis U.S., LLC*, 156 F.4th 68, 80 (2d Cir. 2025) (cleaned up). The Second and Seventh Circuits therefore interpret the "by reason of" language as "prohibit[ing] indirect sellers from suing if they allege a downstream horizontal cartel" caused them to pay an overcharge and "permit[ting] indirect sellers to sue if they allege a downstream group boycott" caused them to lose

profits as a result of lost access to the market. Murphy Concurrence at 20 (emphasis deleted).

B.

My second concern is with the panel's formalistic view of antitrust standing. The Supreme Court directs that we analyze a business practice's "demonstrable economic effect rather than . . . [engage in] formalistic line drawing." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 887 (2007) (quoting *Cont'l T. V., Inc. v. GTE Sylvania*, 433 U.S. 36, 58-59 (1977)) (cleaned up). But, I fear, the panel does the latter when it observes that United Allergy "resembles a 'supplier' to the primary-care physicians and operates in a distinct market vertically upstream of the affected one." *Acad. of Allergy & Asthma in Primary Care v. Amerigroup Tennessee, Inc.*, 155 F.4th 795, 810 (6th Cir. 2025) (quoting *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 697 F.3d 387, 404, 406 (6th Cir. 2012), *aff'd*, 572 U.S. 118 (2014)). That might be true in the literal sense that United Allergy provides equipment and specialist technicians to the PCPs. But the FAC also alleges that United Allergy and the PCPs combine inputs to provide products and services in a particular market, R. 103, FAC, PageID 2671, which looks more like a joint venture than the typical arrangement between supplier and manufacturer.

The panel was right to note that United Allergy cannot provide allergy testing or immunotherapy by itself because it needs doctors for that. *Amerigroup*, 155 F.4th at 810. But by the same token, the PCPs cannot provide the allergy testing and immunotherapy by themselves, either, because they do not have the staff, equipment, and products to

provide that service. In other words, the business model does not work without *both* United Allergy's and the PCPs' participation. Unlike a traditional supplier-manufacturer relationship, United Allergy and the PCPs function as one because they are jointly providing a service to that market. *See* R. 103, FAC, PageID 2671 ("Since 2009, UAS technicians and more than 2,000 primary care physicians have jointly provided allergy testing and allergen immunotherapy across 29 states.").

The joint nature of the business venture is key here. In a normal supplier-manufacturer relationship, the supplier is not trying to create a product or service *with* the manufacturer. He is trying to create a component part *for* the manufacturer. But here, United Allergy is trying to sell a service (allergy testing and allergen immunotherapy) *with* the PCPs rather than selling a service or product *for* the PCPs. That is what distinguishes this case from the traditional *Illinois Brick* case, where a consumer might sue a bottle manufacturer because it charged Pepsi supra-competitive prices for plastic bottles. That is also what prevents my proposed rule from becoming a "nebulous standard." Murphy Concurrence at 22. In Judge Murphy's hypothetical about car manufacturers, the supplier and the manufacturer would not be in a joint venture because the supplier is creating a product for the manufacturer, which is then independently using that product to create the car. By contrast, United Allergy and the PCPs are creating a service together because they are jointly providing the allergy testing.

The panel reasoned that United Allergy is an indirect seller under *Illinois Brick* simply because it sells its services to the PCPs, who then sell their services to patients and insurance companies. *See Amerigroup*, 155 F.4th at 814-15. But under the panel's logic, United Allergy would have had antitrust standing if the PCPs sold their services to United Allergy, who sold its services to the insurers. It is hard to understand why a joint venture participant would have standing in the latter scenario (the PCP selling to United Allergy) but not the former (United Allergy selling to the PCP). The only difference is the direction in which money flows through the joint venture.

In substance, United Allergy directly competes with Allergy Associates. Both United Allergy and Allergy Associates seek patients who need allergy testing and immunotherapy. The only difference between the two approaches is whether doctors are on staff to provide the medical services. But either way, United Allergy and Allergy Associates each has unique ways of attracting patients, the essence of a competitor-competitor relationship.

The Second Circuit dealt with similar practical realities in *Crimpers Promotions Inc. v. Home Box Off., Inc.*, 724 F.2d 290 (2d Cir. 1983). It held that a member of a joint venture had antitrust standing to sue two defendants that instigated a group boycott against the joint venture, even though the plaintiff was not directly injured by the boycott. *See id.* at 290. The plaintiff tried to create a joint venture with television executives to run a conference, and HBO and Showtime allegedly began harassing the executives. *Id.* at 291. Judge Henry Friendly, writing

for a unanimous court, observed that the plaintiff "got in the way" of the defendants' relationships with the executives, so the defendants "made it suffer for trying to do so." *Id.* at 294.

Similar illegal conduct is alleged here. Before United Allergy entered the market, the PCPs had to refer their patients to Allergy Associates for allergy and immunotherapy treatment. R. 103, FAC, PageID 2668-70. United Allergy sought to provide the PCPs an alternative, whereby the PCPs themselves could provide the treatment by using United Allergy's products and services. *Id.* at PageID 2671. United Allergy thus "got in the way" of the Allergy Associates-PCP relationship, and Allergy Associates is alleged to have made United Allergy "suffer for trying to do so." *Crimpers Promotions*, 725 F.2d at 294; *see* R. 103, FAC, PageID 2678-2703.

My argument is more nuanced than Judge Murphy understands it to be. *See* Murphy Concurrence at 21. My concern with the panel's formalism is not rooted in the overarching rule of *who* may sue for an antitrust violation. As I note below, we both agree that indirect purchasers cannot sue under *Illinois Brick*. *See infra* Part II. Assuming that this is a formalistic rule—a debatable proposition given the ownership or control exception, *see infra* Part I.C—my concern is with the antecedent issue of how to define an indirect purchaser. That is a substantive question that, like the other substantive questions of Sherman Act liability, should not be answered formalistically. *See McCready*, 457 U.S. at 480-81 (applying the pragmatic and market-centric view I advocate to hold that the plaintiff had antitrust standing).

Even if the panel is correct that United Allergy *itself* is not a competitor in the relevant market, I am not confident that this factor alone is enough to deny United Allergy antitrust standing. In *Novell, Inc. v. Microsoft Corp.*, the Fourth Circuit stated that the Supreme Court had "rejected" Microsoft's theory that an antitrust plaintiff must be either a consumer or competitor in the relevant market. 505 F.3d 302, 311-12 (4th Cir. 2007). Instead, the Fourth Circuit concluded that other affected entities could bring a Sherman Act claim. *Id.* at 314. And in *Ostrofe v. H.S. Crocker Co., Inc.*, the Ninth Circuit recognized antitrust standing of an employee who was "boycotted from further employment in the industry" for failing to cooperate with the defendant's alleged anticompetitive conduct because, although he was not a participant in the market where the alleged restraint was taking place, he lost his job because of his refusal to help carry out the restraint. 740 F.2d 739, 742, 746-47 (9th Cir. 1984). So although the employee was not directly targeted by the anticompetitive conduct, he suffered a harm from it such that he had standing to sue. *Id.* at 743.

C.

My third concern is that the panel opinion reads the Supreme Court's proximate-cause precedents more literally than perhaps it should, given the Court's decisions applying *Illinois Brick*. The Court has twice suggested that the mere existence of a corporate entity between the plaintiff and the defendant would not bar antitrust standing under *Illinois Brick*.

The first case, *California v. ARC America Corp.*, held that *Illinois Brick* does not bar suit "when the direct purchaser is owned or controlled by the indirect purchaser . . . ." 490 U.S. 93, 97 n.2 (1989). The entities contemplated in *ARC* were functionally "a single entity that bears the entire overcharge." Areeda & Hovenkamp ¶ 346f. In such cases, existence of a level of corporate separateness between the plaintiff and defendant thus would not be enough to defeat the claim. *See In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13, 18-19 (3d Cir. 1978) (holding that a subsidiary is inseparable from the parent for *Illinois Brick* purposes). Similarly, here, the single entity is the joint venture between United Allergy and a PCP. This business arrangement is, in a sense, controlled by each entity, for both are necessary for the venture to exist.

The second case, *Blue Shield of Virginia v. McCready*, held that *Illinois Brick* will not bar the suit when "[t]he harm to" the plaintiff "and her class was clearly foreseeable . . . ." 457 U.S. 465, 479 (1982). McCready was a proper antitrust plaintiff because, even though her psychologist bore the brunt of the anticompetitive harm, McCready's "injury was 'inextricably intertwined' with the intended harm to psychologists" given that it was impossible to harm the psychologists without also harming McCready. Areeda & Hovenkamp ¶ 339f (quoting *McCready*, 457 U.S. at 484). Put differently, "[t]he harm to McCready was a necessary step in effecting the ends of the alleged illegal conspiracy and an integral aspect of the conspiracy alleged." *Ostrofe*, 740 F.2d at 745 (quoting *McCready*, 457 U.S. at 479) (cleaned up). That made McCready's injury clearly foreseeable and thus outside the reach of *Illinois Brick*.

Likewise, here, United Allergy's alleged injury was clearly foreseeable. Allergy Associates knew that United Allergy would face harm because Allergy Associates was trying to drive United Allergy out of the market. *See* R. 103, FAC, PageID 2678-79. And the harms to the PCPs and United Allergy are inextricably intertwined. In much the same way the insurers boycotted psychologists in *McCready* precisely because patients like McCready received therapy from psychologists, the insurance companies here allegedly boycotted the PCPs precisely because United Allergy worked with them. By driving the PCPs out of the market, Allergy Associates and the insurance companies necessarily drove United Allergy out of the market as well. Put differently, the harm to United Allergy was a necessary step in carrying out the group boycott and an integral aspect of the boycott alleged. My reading of *McCready* would suggest that this alleged harm to United Allergy was clearly foreseeable and thus outside the reach of *Illinois Brick*.

The panel's rejection of this conclusion rests on what it calls a "clear 'rule of contractual privity'" from *Apple v. Pepper*, 587 U.S. 273 (2019). *Amerigroup*, 155 F.4th at 815 (quoting *Pepper*, 587 U.S. at 289 (Gorsuch, J., dissenting)). Because United Allergy was not in contractual privity with the insurance companies, it could not recover damages for lost sales. *Id.*

That is one way to read *Pepper*'s application of *Illinois Brick*, but it is not the only way. *Pepper* may not set a rule of contractual privity because the majority never frames its decision in that light—the

dissent does. The majority says only that "the absence of an intermediary is dispositive"—i.e., a plaintiff will always have antitrust standing when there is no one between the plaintiff and the defendant. *Pepper*, 587 U.S. at 281. But the fact that a plaintiff will always have antitrust standing if it is in contractual privity with the defendant (or when no one stands between them) does not necessarily mean that it will never have antitrust standing if it is not (or when someone stands between them). Indeed, the *McCready* plaintiff was a third party to psychologists' contracts with the insurance companies, so she lacked privity of contract with the defendant insurers. *See McCready*, 457 U.S. at 468; 13 *Williston on Contracts* § 37:1 (4th ed. May 2025 Update).

I suggest that *Pepper* be read simply to apply *McCready*'s rule of foreseeability for proximate cause, not to establish a rule of privity. It was foreseeable that McCready would have been harmed by the anticompetitive conduct because, as the psychologists' patient, she was the person the insurance companies wanted to coerce into seeing a psychiatrist instead. *McCready*, 457 U.S. at 479. And the harm to the plaintiffs in *Pepper* was foreseeable because Apple was trying to extract the supra-competitive prices from the plaintiffs. *See* 587 U.S. at 281. In other words, the harm to a direct purchaser or a plaintiff in contractual privity is foreseeable as a matter of law. But that does not, of course, exclude the possibility that a defendant could foresee harm to a plaintiff that lacks contractual privity.[3]

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[3] Judge Murphy's concurrence diverges from the contractual privity rule that the panel opinion purports to apply, arguing

I am not, as Judge Murphy suggests, calling for an "exception to *Illinois Brick*." Murphy Concurrence at 21. The question in this case is how to characterize two separate business entities that—in United Allergy's words—"jointly provide[]" a service in a market. R. 103, FAC, PageID 2671, 2677, 2708. And I am suggesting that those entities should be considered one for *Illinois Brick* purposes such that United Allergy would be the direct seller in this case. Adopting my interpretation of the *Illinois Brick* rule would not change *Illinois Brick*'s core holding that indirect purchasers cannot sue for overcharge damages. At most, it would change how we determine who the direct and indirect purchasers are.

Nor does my view, as Judge Murphy asserts, conflict with *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990). *See* Murphy Concurrence at 21. In *UtiliCorp*, the indirect purchaser ratepayers were distinct from, and not acting as a single entity in the market with, the direct purchaser utility companies. *See* 497 U.S. at 204-05. It says nothing about this case, where two entities are functioning as one within the relevant market. Moreover, because it was unclear

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instead that *Pepper* "unambiguous[ly]" set a rule that "all direct purchasers from an antitrust defendant may sue" and "that all indirect purchasers may not sue." Murphy Concurrence at 22. I agree. But that does not contradict the more nuanced point that I make—that a layer of corporate separateness between the plaintiff and the defendant does not deprive the plaintiff of antitrust standing. As noted above, my point is not that indirect purchasers or sellers can have antitrust standing. Rather, it is that participants in a joint venture can each be deemed a direct purchaser or seller when that joint venture is the direct purchaser or seller.

whether "the direct purchaser" in *UtiliCorp* "could [] have raised its rates prior to the overcharge," there is no way to calculate what the direct purchasers would have charged in a competitive market, and so on. *Id.* at 209. That is precisely the problem that the Court identified in *Illinois Brick* and precisely the problem that we do not have in a group boycott case. *See supra* Part I.A.

The operative question, therefore, should be whether the harm to the plaintiff is foreseeable. The increased prices paid by the indirect purchasers in *Illinois Brick* were not foreseeable because the defendants did not know whether the plaintiffs would have to bear those costs. But here, I think a reasonable person could conclude that United Allergy being forced out of the market is foreseeable: that is the natural, logical, and intended consequence of a group boycott allegedly designed to exclude United Allergy from the market.

Judge Murphy misunderstands the nature of the proximate causation inquiry when he suggests that I want to "replace" it "with a case-by-case foreseeability test." Murphy Concurrence at 22. Federal cases involving federally created causes of action, state tort cases, and the secondary sources almost uniformly characterize proximate causation as a foreseeability question. *See, e.g.*, *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 615 (6th Cir. 2004); *D.J. ex rel. R.J. v. First Student, Inc.*, 707 S.W.3d 581, 586-87 (Mo. 2025) (en banc), *reh'g denied* (Apr. 1, 2025); *Werner Enters., Inc. v. Blake*, 719 S.W.3d 525, 532 (Tex. 2025), *reh'g denied* (Sept. 26, 2025); *Osborne v. Atl. Ice & Coal Co.*, 177 S.E. 796, 796-97 (N.C. 1935); 65 C.J.S. *Negligence*

§ 209 (Dec. 2025 Update); 57A Am. Jur. 2d *Negligence* §§ 393, 448 (Nov. 2025 Update). So rather than replacing proximate causation with a case-by-case foreseeability test, I am simply returning to the core of the proximate-causation question that the Court confronted in *McCready*—whether the harm alleged is foreseeable. That is how we reconcile *Illinois Brick*, which said that there must be a direct buyer/seller relationship between the plaintiff and the defendant, and *McCready*, where the plaintiff was neither the buyer nor the seller in the unlawful restraint. And United Allergy's claims fit neatly within this framework because, as a participant in the joint venture that was targeted by the boycott, the harms to it were a necessary and clearly foreseeable result of Allergy Associates' conduct.

Judge Murphy may be correct that "in the RICO context, the focus is on the directness of the relationship between the conduct and the harm," but "the concepts of direct relationship and foreseeability are of course two of the many shapes proximate cause took at common law." *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 12 (2010) (quoting *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992)) (cleaned up). And even if the Court has rejected foreseeability in the RICO context, it has expressly adopted it for cases arising under the Sherman Act. *McCready*, 457 U.S. at 479 ("The harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy.").

D.

Finally, the Court may wish to review this case because the panel applied *Illinois Brick* to a suit for an

injunction.[4] The standing analysis for damages and injunction plaintiffs "will not always be identical." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 111 n.6 (1986). Unlike a damages plaintiff, an injunction plaintiff needs to show only that it has suffered antitrust injury; proximate causation does not come into play. *See id.* The bar is much lower for injunction plaintiffs because "one injunction is as effective as 100, and, concomitantly . . . 100 injunctions are no more effective than one," which eliminates the problems

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[4] That the injunction issue was not raised until United Allergy's petition for rehearing en banc would not have precluded our consideration of that issue had we granted en banc review. "Generally, an argument not raised in an appellate brief or at oral argument may not be raised for the first time in a petition for rehearing." *Costo v. United States*, 922 F.2d 302, 302-03 (6th Cir. 1990). That "rule is not, however, absolute," and courts "may choose to entertain a new argument on rehearing if 'extraordinary circumstances' are present." *United States v. Shafer*, 573 F.3d 267, 276 (6th Cir. 2009) (quoting *Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008)). For example, courts are more willing to overlook the failure to raise the issue when (1) it is not "willful" or strategic and (2) the argument raised for the first time on rehearing "goes to the heart of" the court's "initial holding . . . ." *Id.* at 277.

This case meets those criteria. *First*, there is no sign that United Allergy strategically or willfully failed to assert the injunction issue until the petition. When the district court dismissed the action for lack of antitrust injury, it did not address causation, so there was no reason to address causation in the parties' principal briefs. Only after the panel decided to resolve this case on a different ground from the district court did the injunction issue come into play. *Second*, the argument raised in the petition goes to the core of the panel's original holding. If the petition is correct that *Illinois Brick* does not apply to suits for injunctions, then the panel's holding would conflict with Supreme Court precedent.

from duplicative liability in a damages suit. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 261 (1972).

Textually, that makes sense. Clayton Act § 4 provides a damages remedy for "any person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws . . . ." 15 U.S.C. § 15(a) (emphasis added). By contrast, Clayton Act § 16 lets a plaintiff seek an injunction "against threatened loss or damage by a violation of the antitrust laws . . . ." *Id.* § 26. The broader language in § 16, along with the lack of an explicit causation requirement, suggests that many requirements from *Illinois Brick* do not apply to suits for an injunction.

This is why other circuits have said that *Illinois Brick* cannot bar suits for an injunction. *See, e.g.*, *Mosaic Health, Inc.*, 156 F.4th at 80; *Or. Laborers-Emps. Health & Welfare Tr. Fund v. Philip Morris Inc.*, 185 F.3d 957, 966 (9th Cir. 1999); *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 856 (3d Cir. 1996). Those courts have recognized that "standing under Section 16" of the Clayton Act "raises no threat of multiple lawsuits or duplicative recoveries," so "*Illinois Brick* does not apply" to them. *Mosaic Health, Inc.*, 156 F.4th at 80; *see also Mid-West Paper Prods. Co. v. Cont'l Grp., Inc.*, 596 F.2d 573, 593-94 (3d Cir. 1979).[5]

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[5] To the extent Judge Murphy asserts "that the panel resolved th[is] issue on forfeiture grounds," Murphy Concurrence at 23, I would note that the panel opinion makes no such holding. Additionally, we give the panel an opportunity to amend its decision prior to circulating the petition for rehearing en banc to the full court for en banc consideration, *see* 6th Cir. I.O.P. 40(b)(4)(A), and the panel made no such amendment here. Thus,

E.

Despite my reservations, I can understand why the court reached the decision it did. The Supreme Court has imposed a proximate causation requirement on all federal causes of action. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132-33 (2014). Proximate causation "bars suits for alleged harm that is too remote from the defendant's unlawful conduct," which "is ordinarily the case if the harm is purely derivative of misfortunes visited upon a third person by the defendant's acts." *Id.* at 133 (quoting *Holmes v. Secs. Inv. Prot. Corp.*, 503 U.S. 258, 268-69 (1992)) (quotation marks omitted). Under at least one reading of the FAC, United Allergy is seeking redress that is "purely derivative of misfortunes visited upon a third person by the defendant's acts." *Id.*

That reading, however, may not do full justice to the allegations. At the Rule 12(b)(6) stage, we are supposed to read the complaint liberally to infer liability whenever such an inference is plausible. *See, e.g.*, *Royal Truck & Trailer Sales & Serv., Inc. v. Kraft*, 974 F.3d 756, 758 (6th Cir. 2020). And such a liberal interpretation of the pleadings may suggest that United Allergy suffered a direct, foreseeable injury as a competitor of Allergy Associates and a target of its allegedly unlawful conduct.

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to the extent that Allergy Associates seeks to assert that United Allergy has forfeited review of this question before the Supreme Court, it is worth noting that: (1) the panel opinion that would be subject to certiorari review does not hold the issue forfeited, (2) forfeiture can itself be forfeited, *see Garza v. Idaho*, 586 U.S. 232, 238-39 (2019), and (3) Allergy Associates did not argue that this issue was forfeited in its principal briefing.

The FAC alleges that Allergy Associates organized a per se unlawful boycott. R. 103, FAC, PageID 2665. By convincing the insurers to refuse to pay for claims made by United Allergy's PCPs, Allergy Associates "deprive[d]" a "would-be competitor[] of a trade relationship" that it needs "in order to enter (or survive in)" the allergy testing market. *PLS.Com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 834 (9th Cir. 2022) (quoting *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1178 (D.C. Cir. 1978)); *see also Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294 (1985). According to the FAC, Allergy Associates knew its fraud claims were unfounded, and Allergy Associates had been lobbying for years to keep United Allergy out of the market before turning to the boycott. R. 103, FAC, PageID 2679-81. If United Allergy's allegations are true, this case would appear to be a clear example of an unlawful boycott. *See Amerigroup*, 155 F.4th at 829 (Kethledge, J., concurring).

II.

As Judge Kethledge recognized, the panel opinion may be a major blow to patients and providers in Tennessee. Thanks to United Allergy's competition, "rates came down, access to these services became more convenient, and more patients actually obtained them." *Amerigroup*, 155 F.4th at 828 (Kethledge, J., concurring). But then, the "defendants successfully conspired to eject a new and more efficient supplier from a market that had been badly undersupplied before," requiring patients again to pay the price of "travelling hundreds of miles to clinics run by a single medical practice." *Id.* at 829. Not only that, many

joint-venture participants may have less antitrust protection in our circuit. If one participant is "closer" to the defendant than the other, then only that one participant can seek redress for the harms.[6] And if the closer participant cannot or does not want to sue, then the rest of the joint venture is out of luck.

Ultimately, though, this case does not warrant en banc review. The panel opinion is a reasonable interpretation and application of the Supreme Court's precedent. Our decision whether to grant en banc review may be analogized to how we conduct habeas review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Under AEDPA, we will not disturb a state court's ruling unless it is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," even though we might be inclined to rule differently if we were reviewing the case in the first instance. *Hodge v. Plappert*, 136 F.4th 648, 658 (6th Cir. 2025) (en banc), *cert. denied*, No. 25-6179 (U.S. Jan. 12, 2026) (quoting 28 U.S.C. § 2254(d)(1)); *see also Randolph v. Macauley*, 155 F.4th 859, 871 (6th Cir. 2025). We should use a similar standard in the en banc process to assess our colleagues' view of Supreme Court precedent. If we second-guess our colleagues because we might have adopted the other of two competing and equally reasonable interpretations of the Supreme Court's case law, then there would be little point in using panels to decide cases at all.

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[6] Recall that, at least in Tennessee, a joint venture will never be a single legal entity because it cannot be "a partnership in the legal or technical sense of the term . . . ." *Fain*, 909 S.W.2d at 793.

Indeed, the narrow nature of my disagreement with Judge Murphy (and the panel opinion) highlights why we should avoid second-guessing each other by routinely taking cases en banc. We agree with the core premises that (1) the rules governing monopsonies and monopolies are the same,[7] (2) *Illinois Brick* imposes a bright-line rule barring suits by indirect purchasers,[8] and (3) a supplier to a seller that works directly with the monopsonist is normally an indirect seller under *Illinois Brick*.[9] Our disagreement focuses only on whether participants in a joint venture should be treated as one actor in the relevant market or two when determining whether the participants are indirect sellers under *Illinois Brick*.

In our circuit, granting rehearing en banc effectively throws out all of the work that the panel has done on the case. *See* 6th Cir. Local Rule 40(d). In cases like this, where the scope of disagreement is narrow and the panel's decision is at least reasonable, we should not normally rehear a case en banc. Because the Supreme Court can narrow a grant of certiorari to focus on that core issue without vacating the entire, potentially correct, panel decision, *see, e.g.*, *Willis of Colorado Inc. v. Troice*, 568 U.S. 1140 (2013), we

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[7] *See* Murphy Concurrence at 19; *Acad. of Allergy & Asthma in Primary Care v. Amerigroup Tenn., Inc.*, 155 F.4th 795, 813 (6th Cir. 2025); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321-22 (2007).

[8] *See* Murphy Concurrence at 19; *Amerigroup*, 155 F.4th at 813; *Pepper*, 587 U.S. at 280.

[9] *See* Murphy Concurrence at 1; *Amerigroup*, 155 F.4th at 813; *Zinser v. Cont'l Grain Co.*, 660 F.2d 754, 760 (10th Cir. 1981).

should generally leave it to that higher court to correct any errors in the panel's reasoning.

Given the disharmony in the application of *Illinois Brick* in the lower courts, and for other reasons discussed above, this case may be appropriate for Supreme Court review, though. The Court may wish to clarify the application of *Illinois Brick* in the context of an alleged group boycott of a business arrangement that essentially functions as a joint venture.

MURPHY, Circuit Judge, with whom SUTTON, Chief Judge, and KETHLEDGE, Circuit Judge, join, concurring in the denial of rehearing en banc. Congress has granted a cause of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws[.]" 15 U.S.C. § 15(a). In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court read the phrase "by reason of" to adopt a "bright-line rule" of proximate causation. *Apple Inc. v. Pepper*, 587 U.S. 273, 279 (2019) (quoting 15 U.S.C. § 15(a)). Under this rule, "direct purchasers" (those who buy a product from antitrust-violating sellers) may sue the sellers. *Id.* at 280. But "indirect purchasers who are two or more steps removed from the antitrust violator[s] in a distribution chain may not sue." *Id.* And the circuit courts all agree that this rule applies in the *opposite* direction. *See Acad. of Allergy & Asthma in Primary Care v. Amerigroup Tenn., Inc.*, 155 F.4th 795, 813 (6th Cir. 2025). That is, direct sellers who sell to antitrust-violating purchasers may sue the purchasers, but indirect sellers who are "two or more steps removed" from those purchasers may not. *Apple*, 587 U.S. at 280. The rule thus bars United Allergy's suit in this case because it sells products and services to primary-care physicians who, in turn, sell to the alleged antitrust-violating insurers. *See Acad. of Allergy & Asthma*, 155 F.4th at 814-20.

In his statement respecting the denial of rehearing en banc, Judge Bush finds this holding debatable on four fronts. With respect for my colleague, I do not find the holding particularly debatable. As Judge Kethledge noted, the Supreme Court can depart from *Illinois Brick*'s rule if it sees fit

to do so. *See Acad. of Allergy & Asthma*, 155 F.4th at 828 (Kethledge, J., concurring). But such a change must come from that Court, not this one.

First, Judge Bush asserts that *Illinois Brick*'s rule should apply only to a plaintiff who seeks an illegal overcharge and alleges a horizontal price cartel—not to a plaintiff who seeks lost profits and alleges a group boycott. Start with the substantive theory of the antitrust violation. We typically do not interpret a statutory phrase like "by reason of" (the language that codifies the *Illinois Brick* rule) as a "chameleon" that changes its meaning based on the factual circumstances. 15 U.S.C. § 15(a); *Clark v. Martinez*, 543 U.S. 371, 382 (2005). So I do not see how this language can *prohibit* indirect sellers from suing if they allege a downstream horizontal cartel that harms both direct and indirect sellers, but also *permit* indirect sellers to sue if they allege a downstream group boycott of direct and indirect sellers. Under either theory, the indirect sellers are still indirect. And, as far as I am aware, no circuit court has interpreted the language in this way—as the panel explained. *See Acad. of Allergy & Asthma*, 155 F.4th at 816.

Turn to the requested damages. Like the Third Circuit, I find it unlikely that the Supreme Court would retain *Illinois Brick*'s rule but transform it into a mere "pleading" limit that plaintiffs can readily avoid by seeking lost profits rather than overcharge (or, as here, undercharge) damages. *Id.* at 815, 817 (citing *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 376 (3d Cir. 2005)). Again, how can an indirect seller's lost profits arise "by

reason of" an antitrust violation while the indirect seller's overcharge or undercharge damages cannot? Here, moreover, at least one doctor separately sued to recover "the *entire* undercharge" (the full amount of unreimbursed claims). *Id.* at 814. He was seemingly entitled to ask for this amount under the complementary rule from *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), which prohibits courts from reducing a direct victim's damages by the amount passed on to others. So if *Illinois Brick* does not apply here, then *Hanover Shoe* cannot apply in suits by the directly injured doctors. *Cf. Apple*, 587 U.S. at 298 (Gorsuch, J., dissenting). Otherwise, direct and indirect victims could obtain double recovery over the same harm. In other words, a court must either grant overcharge and undercharge damages to directly injured parties or limit *all* parties to their lost profits. It cannot do both.

For what it is worth, if the Court does consider this question, it should consider which is the proper remedy. Some view lost profits as appropriate damages. *See Howard Hess*, 424 F.3d at 374-75. But others have cautioned that a lost-profits remedy represents a poor measure of the harm from antitrust violations. *See id.* at 375 (discussing Frank H. Easterbrook, *Treble What?*, 55 Antitrust L.J. 95, 96-97, 100-01 (1986)). For example, Medicaid markets are unusual ones in which the government itself sets reimbursement rates (and hence prices). So a lost-profits remedy might overcompensate plaintiffs if their profits arise not from their superior services but from the government's mistaken pricing of isolated services at levels above their costs.

Second, Judge Bush asserts that the panel opinion's formalist view conflicts with the Supreme Court's "pragmatic view" of the antitrust laws. But this claim mistakes the *substantive* standards of antitrust liability in 15 U.S.C. § 1 for the *procedural* standards over who can sue for violations in 15 U.S.C. § 15(a). Yes, when identifying the agreements that qualify as illegal "restraint[s] of trade," 15 U.S.C. § 1, the Supreme Court has looked to "demonstrable economic effect" and avoided "formalistic line drawing"—as the Court well explained in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885–87 (2007) (quoting *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49, 58–59 (1977)). The Court reached this result, in part, because it interpreted the phrase "restraint of trade" as codifying a common-law process that can evolve with business conditions. *See id.* at 887-88. But the panel opinion assumed that United Allergy alleged violations of the antitrust laws. *Acad. of Allergy & Asthma*, 155 F.4th at 806.

This case instead addresses a different question: who may sue for violations? That question implicates a separate statute. As I have said, Congress has granted a cause of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws[.]" 15 U.S.C. § 15(a). And when interpreting this different text, the Court has taken a formalistic approach. Indeed, the Court in *Apple* noted that *Illinois Brick* adopted a "bright-line rule" some six times. *See Apple*, 587 U.S. at 279-82, 285. The Court has stuck to this formalistic rule even when it made little economic sense—such as the case of regulated public utilities that "pass on 100

percent of their costs to their customers." *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 208 (1990). "[E]ven assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case," the Court reasoned, "we think it an unwarranted and counterproductive exercise to litigate a series of exceptions." *Id.* at 217. And once a court concludes that *Illinois Brick* should apply not just when buyers sue sellers but also when sellers sue buyers (a fact that seemingly nobody disputes), its rule applies here.

Perhaps the Court will carve out Judge Bush's "joint venture" exception to *Illinois Brick*. But its refusal to create an exception for regulated public utilities leads me to conclude that *we* cannot. Indeed, the Seventh Circuit has refused to create an exception even when an indirect-purchaser parent owns the direct-purchaser subsidiaries. *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 821-22 (7th Cir. 2015) (Posner, J.). And many entities could claim that they are engaged in a joint venture. Most distribution chains have multiple downstream suppliers. If a car manufacturer buys a large part from one supplier and that part has many components sold by others, why couldn't the car manufacturer claim it was in a joint venture with the part supplier and sue over a price cartel involving one of the components? In short, the proposed exception might well turn *Illinois Brick*'s "bright-line rule" into a nebulous standard. *Apple*, 587 U.S. at 279.

Third, Judge Bush would replace *Illinois Brick*'s "bright-line rule" of proximate causation with a case-by-case foreseeability test. *Id.* He reads *Apple* as

holding that all direct purchasers from an antitrust defendant may sue but not necessarily the converse: that all indirect purchasers may not sue. I find *Apple* unambiguous. It repeatedly indicated that its rule meant not just that "*direct* purchasers" may sue but also that "*indirect* purchasers" may not. *Id.* at 279, 280, 282, 285. And as the panel explained, United Allergy does not sit in the middle of a two-sided market with directly contracting parties on both sides. *See Acad. of Allergy & Asthma*, 155 F.4th at 813-14, 818-19. So this case resembles neither *Apple* nor *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). *See Acad. of Allergy & Asthma*, 155 F.4th at 813-14, 818-19.

Nor can we as a lower court jettison *Illinois Brick*'s bright-line rule in favor of the general foreseeability test that Judge Bush proposes. That test "would nullify the doctrine of *Illinois Brick*." *Motorola*, 775 F.3d at 822. Price fixers can almost always foresee that their illegal conduct will affect not just their direct purchasers but also downstream purchasers. *See id.* Yet the Supreme Court has sometimes even refused to allow the intended victims of antitrust violations to sue—even though that harm is, by definition, foreseeable. *See Associated Gen. Contractors v. Cal. State Council*, 459 U.S. 519, 529 (1983). That is because the Court has long treated the directness of the injury and the foreseeability of the injury as *independent* proximate-causation requirements. *See Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 12 (2010). And the *Illinois Brick* rule arises out of the directness (not the foreseeability) part of proximate causation.

Fourth, Judge Bush asserts that the panel opinion created a circuit conflict over a question about who may seek injunctive relief. But United Allergy has forfeited its belated suggestion that different standards should apply to a request for injunctive relief than a request for damages. The district court dismissed United Allergy's antitrust claims without mentioning that the company had sought injunctive relief or the separate cause of action for that relief: 15 U.S.C. § 26. *See generally United Biologics, LLC v. Amerigroup Tenn., Inc.*, 2022 WL 22897162 (E.D. Tenn. Jan. 27, 2022). In its opening brief on appeal, United Allergy stated that it had sought "injunctive relief" in its procedural background, but it never argued that distinct standards should apply to that relief. Appellant's Br. 22. Nor did United Allergy cite (let alone interpret the text of) the separate cause of action that authorizes this relief. United Allergy instead asserted that it had stated a cause of action under "Section 4 of the Clayton Act" (namely, 15 U.S.C. § 15). Appellant's Br. 26. It also did not use the word "injunction" or mention the cause of action for this relief (15 U.S.C. § 26) in its reply brief or in the supplemental brief that we requested. If parties forfeit (or even waive) arguments not raised in their opening briefs, *see Kuhn v. Washtenaw County*, 709 F.3d 612, 624 (6th Cir. 2013), they certainly forfeit arguments not raised until a petition for rehearing en banc. (The panel opinion itself, of course, could not have *expressly* articulated this forfeiture finding because United Allergy did not raise this argument until the rehearing stage.)

As a result, I do not view the panel opinion as resolving any questions related to injunctive relief on

the merits. In particular, it did not address whether the language in 15 U.S.C. § 26 ("threatened loss or damage by a violation of the antitrust laws") has a different causal scope than the language in 15 U.S.C. § 15 ("injured in his business or property by reason of anything forbidden in the antitrust laws"). Nor did the panel depart from other circuit courts that have proposed more relaxed standards for § 26's cause of action. Perhaps there are good reasons to extend *Illinois Brick*'s rule to the injunction context because that rule flows out of the proximate-causation requirement that the Court presumptively reads into all private rights of action. *See Apple*, 587 U.S. at 291 n.1 (Gorsuch, J., dissenting). But that question must await a case in which the parties litigate it. So if, as Judge Bush says, the Supreme "Court may wish to review" this injunction issue, it should recognize that the panel resolved that issue on forfeiture grounds (not the merits). And the proper standards for injunctive relief remain open in our court.

* * *

United Allergy also implies that the panel resolved this case on a ground that the defendants did not preserve, pointing out that they did not cite *Illinois Brick* in their original briefing. But parties raise and preserve arguments—not case citations. And the defendants advocated for *Illinois Brick*'s *direct-injury* element under what appeared to be our ad hoc balancing test for antitrust standing. *See Acad. of Allergy & Asthma*, 155 F.4th at 807. But, as the panel explained, our test is better read as asserting two distinct elements rather than a jumble of factors: that the plaintiff suffered an antitrust injury and that

the defendants proximately caused that injury. *See id.* at 807- 08. The district court's opinion found that United Allergy did not satisfy either element. So Judge Bush is mistaken to suggest that the court dismissed this case *solely* for lack of antitrust injury. The court held that the company did not compete in the relevant market (and so had not pleaded an antitrust injury). *See United Biologics*, 2022 WL 22897162, at *5-7. And it held that United Allergy was not directly injured (and so had not pleaded proximate cause). *See id.* at *8-9. The defendants on appeal likewise raised both arguments—even before we asked for supplemental briefing on how *Illinois Brick* fits into that framework. *See, e.g.*, Appellee's Br. of Amerigroup Tenn., Inc., at 26-33, 35-41 (antitrust injury); *id.* at 33-35, 41-43 (indirect injury).

Ultimately, the panel opted to resolve this appeal based on *Illinois Brick*'s "bright-line" direct-injury rule. *Apple*, 587 U.S. at 279. If the Supreme Court means to replace that rule with an "open-ended balancing test[]," it can tell us. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 136 (2014). Until it does, I would follow its decisions to their logical conclusions. On this understanding, I concur in the denial of rehearing en banc.

ENTERED BY ORDER OF THE COURT

[handwritten: signature]
Kelly L. Stephens, Clerk

Appendix C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

No. 19-cv-180

UNITED BIOLOGICS, LLC, dba United Allergy Services,

Plaintiff,

v.

AMERIGROUP TENNESSEE, INC., dba Amerigroup Community Care, et al.,

Defendants.

Filed: Jan. 18, 2024

MEMORANDUM OPINION

Tennessee law draws a line between legitimate conduct aimed at protecting business interests and the unlawful conduct of tortious interference with contracts and business relationships. This case is about whether Defendants Allergy Associates, P.A. ("AASC"), Ned DeLozier, Physicians' Medical Enterprises, LLC ("PME"), and Amerigroup Tennessee, Inc. ("Amerigroup") (collectively, "Defendants") crossed that line as they made inquiries and shared information about the safety and appropriateness of Plaintiff United Biologics, LLC d/b/a United Allergy Services's ("UAS") provision of allergy-related services to primary-care physicians.

UAS contends that Defendants conspired and tortiously interfered with UAS's contracts and relationships with those physicians. (*See generally* Doc. 103.) Defendants respond that they aimed to ensure that individuals received appropriate medical care and that medical providers billed for such care consistent with the public's interest in administering the state's Medicare funds.[1] (*See generally* Docs. 266, 267, 268.) Before the Court is Defendants' joint motion for summary judgment.[2] (Doc. 264.) Because UAS has not provided sufficient evidence from which a reasonable jury could conclude that Defendants acted with the malice or that they proximately caused UAS-contracting physicians to breach their contracts with UAS, its claim for tortious interference with contracts fails. UAS's claim for tortious interference with business relationships also fails because it has not provided evidence from which a reasonable jury could conclude that Defendants acted with an improper motive or by improper means. Finally, UAS's claim for civil conspiracy fails for lack of a predicate tort.

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[1] In the operative complaint, UAS also asserted claims against BlueCross BlueShield of Tennessee ("BCBST"), and Volunteer State Health Plan, Inc. ("VSHP"). (Doc. 103.) UAS has since settled its claims with BCBST and VSHP and dismissed its claims against them. (Doc. 389.)

[2] Although Defendants jointly moved for summary judgment, they submitted three memoranda of law in support of their joint motion, one of which makes arguments broadly applicable to all Defendants, and two that make arguments specific to certain subsets of Defendants. (Docs. 266, 267, 268.) BCBST and VSHP have withdrawn their individual memorandum in support of their motion for summary judgment. (Doc. 388.)

Accordingly, the Court will **GRANT** Defendants' motion for summary judgment.[3]

I. Background[4]

A. The Parties

UAS contracts with medical providers and clinics to provide technical services and supplies to assist with allergy testing and immunotherapy. (Doc. 275-1, at 37-46; Doc. 275-19, at 128; Doc. 275-21, at 128.) UAS's technicians conduct allergy testing, mix antigens for immunotherapy, and deliver allergy

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[3] Also before the Court is Defendants' motion to strike the declaration of Patrick McMahon, (*see* Doc. 319, at 11-14), UAS's motion for leave to respond to Defendants' motion to strike (Doc. 323), and Defendants' unopposed motion for leave to reply to UAS's response (Doc. 327). UAS's unopposed motion for leave to respond to Defendants' motion to strike (Doc. 323) and Defendants unopposed motion for leave to reply to UAS's response (Doc. 327) are **GRANTED**. For the following reasons stated herein, the Court will **DENY** Defendants' motion to strike the McMahon declaration (Doc. 319).

[4] UAS objects to the Court's consideration of certain evidence submitted in support of Defendants' motion for summary judgment, arguing, among other things, that Defendants failed to authenticate certain documents as required by Federal Rule of Evidence 901 and that certain documents are inadmissible hearsay under Federal Rule of Evidence 801. (*See* Doc. 292.) The Court may, however, consider evidence in connection with a motion for summary judgment if it can be presented in an admissible form at trial. *See Fraser v. Goodale*, 342 F.3d 1032, 1036 (6th Cir. 2003 ("At the summary judgment stage, we do not focus on the admissibility of the evidence's form. We instead focus on the admissibility of its contents."). UAS's objections are overruled to the extent it seeks to preclude the Court from considering Defendants' evidence in connection with their motion for summary judgment.

injections. (Doc. 275-1, at 38-46; Doc. 275-19, at 128; Doc. 275-21, at 128.)

AASC is a group of board-certified allergists who, among other things, treat patients with allergies by providing allergy testing and immunotherapy. (Doc. 275-13, at 86.) PME provides management and business-development services to AASC, and Ned DeLozier is PME's Marketing Director and Development Director.[5] (Doc. 275-13, at 85-86.)

Amerigroup is a Managed Care Organization ("MCO") that contracts with TennCare, Tennessee's Medicaid program, to provide health coverage to Tennessee Medicaid enrollees. (Doc. 103, at 3-4; Doc. 194, at 3.) TennCare is administered by the Bureau of TennCare, which is an agency of the State of Tennessee. (Doc. 275-5, at 137-38.) TennCare operates Tennessee's Medicaid program in coordination with MCOs, like Amerigroup, pursuant to a contract for the provision of statewide managed care services to TennCare enrollees. (Doc. 275-1, at 47.) Under the terms of these contracts, MCOs work with TennCare to, among other things, detect fraud and waste affecting publicly funded healthcare expenditures. (*See* Doc. 275-3, at 57-62.) Consistent with this obligation, provisions in Amerigroup's contract with TennCare require that Amerigroup: (1) "safeguard Medicaid funds against unnecessary or inappropriate use of Medicaid services and against improper payments"; (2) "have internal controls and policies and procedures in place that are designed to prevent,

[5] AASC, PME, and DeLozier are collectively referred to as the "AASC Defendants."

detect, and report known and suspected fraud and abusive activities"; (3) "have adequate staffing and resources to investigate unusual incidents and develop and implement corrective action plans to assist [it] in preventing and detecting potential fraud and abusive activities"; (4) "have methods for identification, investigation, and referral of suspected fraud cases"; and (5) "promptly perform a preliminary investigation of all incidents of suspected and/or confirmed fraud and abuse." (*Id.*) Separately, Amerigroup contracts with primary-care physicians to provide medical services to TennCare enrollees. (*See, e.g.*, Doc. 275-14, at 72-139.) Amerigroup's contracts with primary-care physicians require the physicians to maintain records for the purpose of auditing and "for the purposes of complying with TennCare requirements regarding the reporting and investigation of fraud and abuse." (*Id.* at 108.) Additionally, Amerigroup's contracts with primary-care physicians expressly state that, "unless otherwise approved in writing by Amerigroup," a medical provider and its employees "shall perform all the services required hereunder directly and not pursuant to any subcontract between Provider and any other person or entity (a "Contracted Provider")." (*Id.* at 88.)

Under the terms of UAS's standard contract with medical providers, a physician is responsible for identifying appropriate patients for allergy skin-prick testing and allergen immunotherapy, and UAS, in turn, provides technicians who conduct allergy tests on patients, mix antigens for allergy immunotherapy, and deliver injections. (*See, e.g.*, Doc. 275-1, at 37-46.) Primary-care physicians are authorized to offer allergy-testing and immunotherapy services. (*See* Doc.

299-14, at 4-7, 92.) Medical providers contract with and pay UAS pursuant to a payment schedule set by the parties' contract. (*See, e.g.*, Doc. 275-1, at 37-46.) Those medical providers then bill claims for allergy testing and immunotherapy to health plans and payers, like Amerigroup, and seek reimbursement for services provided. (Doc. 275-1, at 42.) UAS's standard contract requires the contracting medical clinic to pay UAS within thirty days of receiving an invoice for the technician's services, and a clinic's failure to timely pay is a material breach of the contract. (*Id.* at 39-40.) UAS's standard contract also provides that either UAS or the contracting medical provider can terminate the contract "at any time, without cause, upon 30 days prior written notice to the other party" or "immediately upon an Event of Default." (*Id.* at 40.)

B. Allergy and Immunotherapy Services in Tennessee

As early as 2014, DeLozier expressed quality-of-care concerns about third-party companies working with primary-care physicians to "sell[] the allergy service," understanding that such an arrangement had the potential to decrease referrals to AASC's board-certified allergists. (Doc. 299-5, at 31.) As a result, he pursued lobbying efforts, noting that he wanted to "shine a light on the allergist/asthma specialist role and reducing asthma costs nationally." (*Id.* at 26.) In one e-mail to a lobbyist, DeLozier also noted concerns about quality of care and provided seven examples of "Tencare (sic) and Medicare paying for subpar care from [a] PCP," explaining that the primary-care physicians "may not know the care is poor, but the companies selling the allergy service and

also producing (sic) off the deceiving of [patients] is the real issue." (*Id.*) DeLozier attached a chart to this e-mail comparing seven patients who had allergy testing conducted both by a primary-care physician and an AASC allergist, noting the discrepancies in results of the tests performed by the primary-care physician as compared to the AASC allergist. (*Id.* at 31-32.)

Additionally, DeLozier asserted that the situation was susceptible to abuse. Insurance-company reimbursement policies incentivized primary-care physicians to drive up costs by testing greater numbers of patients without regard to medical necessity. In another e-mail to the lobbyist, DeLozier further explained that primary-care physicians contracting with third parties for the provision of allergy services created "an abusive amount of testing." (*Id.* at 23.) He suggested that insurance companies' medical-necessity audits on primary-care physicians "doing allergy testing and immunotherapy would show some need for payback and would slow the growth and abuse." (*Id.*) DeLozier also argued that paying primary-care physicians for every allergy test incentivized those providers to test every patient, even though only thirty to thirty-five percent of patients needed testing. (*Id.*.) He noted he had "many many examples of non allergic [patients] being tested and shown to be allergic." (*Id.*) Finally, DeLozier explained the effects of insurance company audits and questioned whether they could "cut [UAS] out of the pic" by encouraging insurance companies to audit providers who contract with third-party allergy companies. (*Id.*) Specifically, DeLozier noted that AASC allergists were "hit with med[ical] necessity

audits all the time and pass with flying colors," but that he believed medical-necessity audits performed on primary-care physicians "would generate lots of payback and discourage aggressive testing." (*Id.*)

Internally, DeLozier and other PME employees had conversations about encouraging primary-care physicians not to contract with UAS by focusing on safety and wasteful costs. (*Id.* at 53-57.) For example, upon learning that a particular doctor intended to start using UAS's services, DeLozier instructed another PME employee to focus on communicating that the doctor would not be "told the correct way to bill and would be subject to a large payback over time" and that there was "extreme extreme extreme risk of . . . allowing patients to inject at home," meaning that he "will be liable if a child has a life threatening reaction." (*Id.*)

DeLozier also began communicating directly with insurance companies about his concerns. In May 2015, DeLozier met Dr. Mark Mahler, Medical Director at Amerigroup, and scheduled a follow-up meeting to discuss data he gathered regarding allergy services, how that data informed TennCare's payment model, and how they "can best work together going forward." (Doc. 299-5, at 14.) In an e-mail to Mahler, DeLozier noted that that AASC had collected and analyzed a "substantial data set based on best practices" and that it had "shared some of this data with TennCare in an effort to inform their payment model, so it leads to the highest quality of care while reducing the financial burden on the State [of Tennessee]." (*Id.*)

DeLozier and AASC were not the only ones concerned about how allergy-testing and

immunotherapy services were performed in Tennessee; TennCare independently concluded that physicians were inappropriately billing for allergy-testing and immunotherapy services. (Doc. 275-1, at 30.) In fact, the state agency recommended a budget reduction for "[p]rofessional services for the supervision of preparation and provision of antigens for allergen immunotherapy" based on its investigation of multiple providers. (*Id.*) As the basis for its recommendation, TennCare noted, among other things, that: (1) there was an "excessive number of units billed . . . for single patient encounters"; (2) "[m]edical records reviews reveal that the number of units is being calculated incorrectly, resulting in an inflated number of units being billed to TennCare for allergen immunotherapy preparation"; (3) "the maximum allowable number of units (per MCO policy) is billed for every patient across the board"; (4) "[t]he person/facility preparing the antigen for allergen immunotherapy is not the provider/facility who billed and received payment for the service"; (5) "[t]he person preparing the antigen for allergen immunotherapy is not the provider who examined the patient"; and (6) "[v]ials are given to the patient to take home and self-administer, with no documentation showing that the patient received the vials or was provided adequate training to properly administer the injections." (*Id.* at 31.)

Throughout 2015 and into 2016, DeLozier discussed the issue with Dr. Mahler. DeLozier continued to note his concerns about medically unnecessary treatment and discrepancies in testing results. (Doc. 299-14, at 2-3, 8-12.) On January 22, 2016, DeLozier emailed Dr. Mahler, asking if they

could meet to discuss "data [AASC] could provide on examples of medically unnecessary allergy diagnostics and treatment being performed by primary care providers in [Tennessee]." (Doc. 299-6, at 145; *see also* Doc. 299-5, at 35.) In describing his meetings with DeLozier, Mahler testified that DeLozier "had concerns" about patients at primary-care practices "having testing which turned out to be in error" and that he "had several examples" of testing "outside the allergy setting which yielded results which were not able to be replicated in the - in the allergist's office." (Doc. 299-14, at 10.) DeLozier eventually provided Mahler with documentary examples of "results of allergy testing in the community and results of allergy testing and allergy evaluation in the allergist's office." (*Id.* at 11-12.) DeLozier, nonetheless, avers that he "never had any discussions with Amerigroup . . . regarding any specific provider or practice." (Doc. 275-13, at 87.)

Amerigroup ultimately decided to investigate certain medical providers offering allergytesting and immunotherapy services, but the investigation was not limited to providers who contracted with UAS. (Doc. 299-5, at 79; Doc. 299-6, at 9-14, 53, 140, 146; Doc. 299-7, at 1, 4-5; Doc. 299-14, at 21-24.) Amerigroup investigator Chris Utley, for example, first learned of UAS not from DeLozier or AASC, but while conducting an onsite visit to Advanced Family & Urgent Care ("Advanced Family") in 2016. (Doc. 275-12, at 79.) Interviews revealed that Advanced Family staff "was not doing anything related to the performance of [allergy testing] services" and that "the United Allergy staff was coming in . . . two to three days a week and doing those services and then

billing—and then the provider, the PCP, not United Allergy, was billing for those services as if they had performed them themselves." (*Id.* at 81.) Advanced Family personnel acknowledged to Amerigroup investigator John Taylor that the clinic had a contract with UAS, which Amerigroup relayed to TennCare because Amerigroup understood that "services were being performed by a third party that . . . TennCare [and] Amerigroup [were] unaware of." (Doc. 275-10, at 114-15.)

Amerigroup shared findings with other insurance companies and MCOs, noting possible issues with primary-care physicians' provision of and billing for allergy-testing and immunotherapy services. On March 31, 2016, Utley told William Benson, an investigator for BCBST, about Amerigroup's "concerns" with UAS and the "third party billing issue." (Doc. 299-2, at 19.) In describing his conversation with Utley, Benson testified:

> [H]e mentioned that Amerigroup is looking [at a provider located in Fayetteville, Tennessee]. He said that [UAS], out of Texas, works out of their office two days a week and does allergy and ammuno (sic) therapy work. He said that they do not have an MD on staff, only a NP (I think he was referring to Advanced Family but I am not positive). He said that Amerigroup is concerned about the Third Party Billing issue but we did not get a chance to follow up to ask what specifically he meant by this.

(*Id.*) In another e-mail in June 2016, Benson summarized certain discussions that took place

during conference calls among "Amerigroup/BCBST/United MCOs." (*Id.* at 20.)

> Amerigroup is looking at this provider (NPI #1942375571, located in Fayetteville Tn) concerning the 3rd party payer issue. Amerigroup says that it appears that [UAS] is providing a "technician" who does the scratch test and immunotherapy but has no oversight by nursing staff and family and Urgent Care bills for the services actually provided by the [UAS] staff. According to Amerigroup, NP Melinda Williams owns the clinic. Amerigroup advised that the clinic's allergy billings are high even compared to allergy specific providers.
>
> During another MCO SIU call today (6/16/2016), Amerigroup advised that they have a clinic on prepay review and are denying all of the related (95165?) allergy claims. . . . Amerigroup said their justification for the prepay review was that the provider has to do the calculation for mixing the medication and that is not being done. It is being done by the technician. . . . Amerigroup also referenced TennCare's contract language for 3rd party payers as another reason to deny.

(*Id.*)

Around this time, and after noting a spike in allergy-testing and immunotherapy claims, Amerigroup began investigating Dr. Christopher Sewell, a primary-care physician practicing in

Tennessee.[6] (Doc. 299-6, at 60-71; Doc. 299-13, at 144, 148-49.) Amerigroup's records stated the basis for the investigation:

> According to TennCare OPI, provider's paid claims for 4 immunotherapy related codes including 95165 has risen dramatically for YTD 2016 when compared to previous 2 years. 2014 & 2015 two year total was $6123. 01/04/16 through 06/17/16 $23,752. Possible existence of undisclosed 3rd party servicing provider in violation of TennCare policies and the provider's AGP contract.

(Doc. 299-6, at 60.) Shortly after opening its investigation, Taylor placed Dr. Sewell in the "prepay" process, which subjected him to additional review and delay before reimbursement. (Doc. 299-13, at 152-53, 159.) Taylor communicated to Dr. Sewell that he was in "pre-pay" so that Amerigroup could conduct a routine review of his medical records and take a closer look at his claims. (*Id.*) Within about a month, Dr. Sewell inquired about Amerigroup's payment of his claims, and Taylor responded that his arrangement with UAS might be an unapproved third-party contract for which Amerigroup typically would not pay claims.[7] (Doc. 299-7, at 26.)

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[6] PME also learned that Dr. Sewell had begun offering allergy testing and immunotherapy services, and, on June 2, 2016, a PME employee, Libby Orr, visited Dr. Sewell's practice and learned that he was working with UAS. (Doc. 299-14, at 47-48; Doc. 299-15, at 90.)

[7] Additional internal Amerigroup e-mails in 2017 suggested that, even if primary-care physicians could provide allergy-testing and immunotherapy services within the scope of their

Amerigroup coordinated its investigations of UAS-contracting providers with TennCare's Office of Program Integrity. On August 12, 2016, Jarrod Webb, an MCO Compliance Officer for TennCare, provided Amerigroup with "relevant TennCare policies" as "guidance on how to pursue your investigation of UAS and other providers." (Doc. 275-15, at 136.)

TennCare and the Tennessee legislature also sought to guard against waste by imposing budget reductions and revising billing guidelines for allergy-testing and immunotherapy services. On August 19, 2016, TennCare notified its MCOs that immunotherapy-treatment-supply claims "should not be made for more than a three month supply at a time." (Doc. 275-5, at 82.) According to TennCare, the Tennessee legislature required this change "so there would be closer scrutiny and closer follow-up to ensure that there wasn't waste," because "providers would be mixing together [allergy-treatment] vials for 12 months and charging all of that up front, and either the child would not come back" or they would "get their whole year of treatment or it would be determined that those shots weren't working effectively or that they would need some other form of therapy that would be different and then they would not end up using a whole year's worth of vials." (Doc. 275-13, at 29-30.) TennCare's billing changes, however, created "confusion . . . among providers about the appropriate way to bill for these

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medical licenses, they could be in breach of their provider contract and TennCare policies by using an undisclosed subcontractor to provide those services without Amerigroup or TennCare approval. (Doc. 299-6, at 9-14; Doc. 299-14, at 4-7, 121-22.)

services," and, as a result, TennCare "got the MCOs back together and talked about that in order to try to alleviate some of that confusion." (*Id.* at 32-33.)

Around this time, Amerigroup started denying reimbursements to primary-care physicians contracting with UAS for allergy services, asserting that TennCare policies prohibited payment for services performed under an undisclosed subcontract with UAS without prior approval from Amerigroup and TennCare. (Doc. 299-6, at 23.) In an e-mail from Amerigroup investigator Taylor to an Amerigroup auditor, Taylor stated:

> [I]f you see evidence that service(s) were performed by an allergy tech (CAS) or anyone else who's (sic) name doesn't appear on the attestation form as an employee, and/or based on your information gathered during the course of the investigation (also documented in Notes) that a third party has provided the services, then the denial reason is below. This wording has been approved by Laura Schmidt, General Counsel, and will apply to both post payment as well as prepayment review. If you have any questions, just give me a call.
>
> "Service performed under undisclosed subcontract with [UAS] without prior approval from Amerigroup and TennCare. TennCare policies prohibit payments to entities not registered with TennCare."

(*Id.*)

DeLozier also continued to provide Dr. Mahler and Amerigroup with additional examples of what he

considered medically unnecessary treatment and allergy-testing discrepancies caused by primary-care physicians—not allergists—conducting the testing. (Doc. 299-14, at 8-12.) Dr. Mahler testified that DeLozier was particularly concerned "about quality results" and "that people may be exposed to unnecessary treatment."[8] (*Id.* at 12.) Dr. Mahler forwarded documents supplied by DeLozier to Amerigroup's Special Investigative Unit division, noting that DeLozier gave him the "attached cases documenting possible problems with allergy services provided under the auspices of primary care providers." (Doc. 299-7, at 4-5.) Dr. Mahler further noted that DeLozier represented a "large and well respected group of allergists in TN" and that he could "help support the elimination of inappropriate allergy services in our network." (*Id.*; *see also* Doc. 299-6, at 83-132.)

Amerigroup's investigation revealed numerous issues with billing, allergy-testing, and immunotherapy services of physicians who contracted with UAS. In a February 2017 e-mail to Dr. Mahler regarding the ongoing investigation, Taylor stated, among other things, that: (1) multiple Tennessee providers "have been identified as outliers for billing Tenncare for immunotherapy services," and those providers "may be practicing outside the scope of his

[8] DeLozier avers that "[n]either [he], AASC, nor PME took any action with intent to cause a breach of contract between UAS and one of its provider clinics" and that "at no time did [he] ever believe that [his] actions were certain or substantially certain to disrupt or interfere in any way with UAS's [a]greements with providers or any of UAS's contractual rights thereunder." (Doc. 275-13, at 87.)

or her licenses" because those services "are possibly being administered by a 3rd party subcontractor without prior knowledge or approval of Amerigroup"; (2) Amerigroup had nine Tennessee investigations pending, and five investigations have shown that "providers have billed and/or continue to bill Tenncare for immunotherapy services which were administered via an undisclosed subcontract with united [UAS]"; (3) four of Amerigroup's nine investigations are currently on prepayment review for allergy-testing and immunotherapy billing codes and Amerigroup is denying claims for those four providers based on the undisclosed subcontract without prior approval from Amerigroup or Tenncare; (4) during Amerigroup's investigation of providers, "corroborating interview information was obtained from providers, clinical staff, and one UAS allergy tech which suggests UAS and its employees solely determine the preparation of the antigens, the mixing, the provision, and the calculations for the concentration and volume of the doses with unclear or no provider oversight contrary to CPT requirements and clinical guidelines"; and (5) Amerigroup's investigations revealed examples where "medical records submitted did not support treatment, or there were no records to support the existence of any orders by either a licensed physician treating the enrollee or other licensed healthcare provider practicing within the scope of his or her license." (Doc. 299-6, at 13-14.)

DeLozier continued to communicate with Amerigroup about his concerns with medically unnecessary treatment and risks with patients injecting allergy treatments at home (Doc. 299-7, at 34.) In a call between DeLozier, Taylor, and Shelly

Williamson (another Amerigroup investigator), DeLozier expressed interest in "payment reform" to stop "immunotherapy subcontractors" from engaging in a "mill process" to "leverage Medicaid environments." (Doc. 299-7, at 34; *see also* Doc. 299-6, at 132, 137; Doc. 299-7, at 4, 34.) He asserted that "[t]ests are not accurate and personnel are not properly trained to administer antigens" and that "[a]udits will show "an over utilization of immunotherapy and 'shepherding of patients.'" (*Id.*) Finally, notes from the call indicate that DeLozier "suspects that patients who self administer [allergy injections] at home were given 'severely diluted doses.'" (*Id.*; *see also* Doc. 299-14, at 57-58, 145-48.)

Separate from Amerigroup's investigation, TennCare decided its MCOs should coordinate to address the way allergy-testing and immunotherapy services were provided and billed. In March 2018, TennCare organized a working group comprised of MCO and TennCare representatives "to discuss ideas and options for a unified reimbursement policy concerning allergy immunotherapy" because "we are seeing providers bill units . . . based on the maximum allowed by each [MCO] and not specific to the patients' needs." (Doc. 275-10, at 43; *see also* Doc. 275-13, at 36-37.) At working-group meetings, stakeholders from TennCare and the MCOs discussed TennCare proposals and additional policy revisions, and, during this period, TennCare also communicated directly with MCOs regarding its proposals. (*Id*. at 32-39, 41-46.)

By September 2018, Amerigroup noticed a substantial decrease in billing for allergy-testing and

immunotherapy services from UAS-contracting physicians. Amerigroup investigators noted that billing for "allergy immunotherapy" was down fifty-one percent across Tennessee, "since [Amerigroup] began to (sic) our efforts to stop UAS' activities." (Doc. 299-5, at 98-100.) It noted, however, that its analysis could be "a little misleading" because they opened up investigations for the highest dollar cases and "there are likely many little clinics (associated with UAS) combining to bill the remaining balance." (*Id.* at 99.) The e-mail also notes that "[i]t's likely no surprise that we haven't completely flushed UAS out of Tennessee." (*Id.*)

On November 29, 2018, the TennCare-organized workgroup sent its final recommendations to the MCOs, identifying the "agreed upon changes to Allergy Immunotherapy" and stating that it was TennCare's expectation that MCOs "will develop an educational notice to providers that includes the changes listed in the attached Final Recommendation document along with documentation of appropriate care guidelines similar to those discussed in our meetings . . . ." (Doc. 275-10, at 123-24.) The Final Recommendations established a stricter annual limit for allergen immunotherapy coverage, including a 150-unit annual limit for immunotherapy reimbursement. (Doc. 275-13, at 75-79.)

Three primary-care physicians testified about difficulties they experienced when insurance companies, including, but not limited to Amerigroup, stopped reimbursing allergy-testing and immunotherapy claims and when insurance companies started seeking recoupment of funds they

had already paid in connection with allergy-testing and immunotherapy claims. For example, Dr. Sewell testified that he ultimately terminated his contract with UAS because "[i]t became financially undoable due to customer reimbursement" because "[t]he reimbursement was so low it didn't make sense to continue." (Doc. 299-12, at 121, 124, 131.) Dr. Christopher Climaco recalled that "Amerigroup was the main company that was not reimbursing," which led to him not "seeing Amerigroup patients for allergy services." (Doc. 299-12, at 103-04.) Dr. Climaco further testified: "And we were supposed to, you know, give payment also to UAS, okay, but it was not possible to give payment to UAS if we were not getting paid ourselves." (*Id.*) Dr. Sewell and Dr. Steve Samudrala, primary-care physicians who also carried outstanding account balances with UAS, testified that they decided to stop allergy-testing Amerigroup patients based on recoupments and audits from those insurance companies. (*Id.* at 121, 124, 130-31; Doc. 299-15, at 3, 17-18.) An internal Amerigroup report similarly noted that another UAS-contracting medical clinic that carried an outstanding account balance had not renewed its contract with UAS because of "billing problems," also noting that the clinic does not "pay UAS until they receive payment from the insurance carrier." (Doc. 299-6, at 27.)

Additionally, in a declaration, Patrick McMahon, UAS's Vice President of Payor Relations, identified at least sixty medical clinics that UAS contends breached their contracts by paying UAS late. (*See* Doc. 299-12, at 70-83.) McMahon's declaration, however, does not state that past-due balances carried by these medical clinics were caused by Amerigroup's audits, denial of

allergy-testing and immunotherapy claims, or related recoupments of monies paid by Amerigroup. (*See generally id.*)

C. The Litigation

On May 17, 2019, UAS initiated the present action against Amerigroup, PME, AASC, and DeLozier. (Doc. 1.) UAS filed an amended complaint on June 10, 2021, asserting claims against Defendants, and its claims for tortious interference with existing contracts, tortious interference with a business relationship or advantage, and civil conspiracy remain pending.[9] (*See* Doc. 177.) Defendants have moved for summary judgment on UAS's remaining claims against them (Doc. 264). Defendants have also moved to strike the declaration of Patrick McMahon offered by UAS (*see* Doc. 319, at 7-11), arguing that the declaration constitutes a sham affidavit. Defendants' motions are ripe for the Court's review.

II. Defendants' Motion To Strike McMahon's Declaration

Defendants have moved the Court to strike McMahon's declaration (Doc. 299-12, at 70-83), which was offered by UAS in opposing Defendants' summary-judgment motion, arguing that the declaration is a sham affidavit. (Doc. 319, at 7-11.) In the declaration, McMahon identifies UAS-contracting physicians that breached their contracts with UAS by

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[9] UAS's first amended complaint also asserted claims against Defendants for violations of the Sherman Act. (Doc. 103, at 42-54.) On January 27, 2022, the Court dismissed UAS's claims against Defendants for violations of the Sherman Act. (Doc. 177.)

failing to make timely payments as required under the contracts. (Doc. 299-12, at 70-83.) Defendants contend that McMahon's declaration asserts, for the first time, that UAS's contracts were breached by nonpayment prior to termination of those contracts and that his averments contradict UAS's prior corporate testimony regarding the nature of the alleged breaches. (*Id.*)

"Under the sham affidavit doctrine, after a motion for summary judgment has been made, a party may not file an affidavit that contradicts his [or her] earlier sworn testimony." *France v. Lucas*, 836 F.3d 612, 622 (6th Cir. 2016) (citing *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986)); *see also Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986) ("[C]ourts will disregard a contrary affidavit when they conclude that it constitutes an attempt to create a sham fact issue . . . . [T]he utility of summary judgment as a procedure for screening out sham fact issues would be greatly undermined if a party could create an issue of fact merely by submitting an affidavit contradicting his own prior testimony."). "A directly contradictory affidavit should be stricken unless the party opposing summary judgment provides a persuasive justification for the contradiction." *Aerel, S.R.L. v. PCC Airfoils, LLC*, 448 F.3d 899, 908 (6th Cir. 2006). "[E]ven without a direct contradiction, [the doctrine] can also apply when the witness's affidavit is in tension with that prior testimony as long as the circumstances show that the party filed the affidavit merely to manufacture a sham fact issue." *Boykin v. Fam. Dollar Stores of Mich., LLC*, 3 F.4th 832, 842 (6th Cir. 2021).

In this case, McMahon's declaration is not a sham affidavit, because it does not contradict earlier sworn testimony, and circumstances do not show that the declaration was filed to manufacture a sham issue. In response to Amerigroup's interrogatory asking that UAS identify each provider clinic it contends breached its contract and the date on which the breach or breaches occurred, UAS identified sixty-six clinics and stated that "the alleged breach(es) occurred upon the termination of the date of the agreement between UAS and [the clinic]." (Doc. 275-13, at 7-9.) Defendants also asked UAS to "state the complete factual basis for UAS's contention that the clinic breached its contract with UAS." (*Id.* at 9-10) In relevant part, UAS responded:

> As a result of Amerigroup, BCBST, and [VSHP's] improper and manufactured bases for audits, prepayment reviews, claims denials, and recoupments, the PCPs and clinics identified in Interrogatory Answer No. 11 experienced payment restriction for allergy testing and immunotherapy services at the primary care level—impacting their ability to enjoy the benefits of their contract with UAS. **Those payment restrictions led to the disruption of timely payment for UAS's services as provided under the contracts with UAS**, and ultimately to the premature termination of the contracts and/or reduction in business.

(*Id.* at 11 (emphasis added).) Consistent with these interrogatory responses, when asked about the underlying breaches during his deposition, McMahon

testified, in his capacity as one of UAS's corporate representatives, as follows:

> Q. How would looking at allergy tests determine if Amerigroup interfered with the contract with a particular Tennessee practice listed on Interrogatory 11?
>
> A. Because if no individual payment was being received for the service, they're not able to pay UAS, which would be a breach of nonpayment.

(Doc. 323-4, at 13.) McMahon went on to testify:

> Q. So what is the interference that UAS is alleging was the interference in Interrogatory 11?
>
> . . .
>
> A. Interfere with our ability to contract with the practice groups because you were not—they were not getting paid for the service.
>
> Q. Interfere how?
>
> A. They would cause them to breach it for nonpayment because these customers, the average practitioner, doesn't have the money to front services that are not being reimbursed for.

(*Id.* at 14-15.) McMahon's declaration, which provides additional facts regarding individual clinics' nonpayment, is consistent with these prior sworn statements. (*See generally* Doc. 299-12, at 70-83.)

Accordingly, Defendants' motion to strike McMahon's declaration is **DENIED**.[10]

III. Defendants' Motion For Summary Judgment

A. Standard of Law

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court views the evidence in the light most favorable to the nonmoving party and makes all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Nat'l Satellite Sports, Inc. v. Eliadis Inc.*, 253 F.3d 900, 907 (6th Cir. 2001).

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[10] Defendants alternatively argue that the Court should disregard McMahon's declaration because it violates Rules 37 and 56 of the Federal Rules of Civil Procedure. (Doc. 319, at 13-14.) McMahon states that he "reviewed UAS's records relating to accounts payable and contract terminations, including the spreadsheet provided by UAS in this litigation as EDTN-UAS-00028563," and "[b]ased on my review of these records and institutional knowledge of UAS's agreements and relationships with these providers, I have determined that at least 60 of these clinics have breached their agreement with UAS at some point in time due to late payment of invoices." (Doc. 299-12, at 73.) Defendants argue that McMahon's failure to specifically identify which records he reviewed requires exclusion of his declaration because Defendants requested such records and accounts payable documents in discovery. But McMahon's failure to identify specific documents that he reviewed does not mean that the documents he reviewed were not produced during discovery. Accordingly, Defendants have failed to demonstrate that Rules 37 and 56 of the Federal Rules of Civil Procedure require exclusion of the McMahon declaration.

The moving party bears the burden of demonstrating that there is no genuine dispute as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Leary v. Daeschner*, 349 F.3d 888, 897 (6th Cir. 2003). The moving party may meet this burden either by affirmatively producing evidence establishing that there is no genuine issue of material fact or by pointing out the absence of support in the record for the nonmoving party's case. *Celotex*, 477 U.S. at 325. Once the movant has discharged this burden, the nonmoving party can no longer rest upon the allegations in the pleadings; rather, it must point to specific facts supported by evidence in the record demonstrating that there is a genuine issue for trial. *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 424 (6th Cir. 2002).

At summary judgment, the Court may not weigh the evidence; its role is limited to determining whether the record contains sufficient evidence from which a jury could reasonably find for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A mere scintilla of evidence is not enough; the Court must determine whether a fair-minded jury could return a verdict in favor of the non-movant based on the record. *Id.* at 251-52; *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994). If not, the Court must grant summary judgment. *Celotex*, 477 U.S. at 323.

B. Analysis

As Tennessee courts have explained in connection with claims for tortious interference with prospective business relationships, the tort has a "confined scope." *BNA Assocs. LLC v. Goldman Sachs Specialty*

Lending Grp., L.P., 63 F.4th 1061, 1064 (6th Cir. 2023). "The theory of the tort of interference . . . is that the law draws a line beyond which no member of the community may go in intentionally intermeddling with the business affairs of others." *Brown v. CVS Pharm., LLC*, 982 F. Supp 2d 793, 801-02 (M.D. Tenn. 2013) (quoting *Trau-Med of Am. v. Allstate Ins. Co.*, 71 S.W.3d 691, 700-01 (Tenn. 2002)). The tort, however, "should not be interpreted in such a way as to prohibit or undermine the ability to contract freely and engage in competition" and only applies to situations in which there is "proof of improper conduct extending beyond the bounds of doing business in a freely competitive economy." *Watson's Carpet & Floor Coverings, Inc. v. McCormick*, 247 S.W.3d 169, 178 (Tenn. Ct. App. 2007); *see also BNA Assocs.*, 63 F.4th at 1065. Although explained in the context of interference-with-prospective-relationships claims, the rationale differentiating permissible and legitimate business conduct in a "freely competitive economy" and unlawful "intentional intermeddling in the business affairs of others" is equally applicable to claims for tortious interference with existing contracts.

As explained below, UAS has not met its burden to proffer evidence from which a reasonable jury could conclude that Defendants' actions crossed the line into improper conduct necessary to maintain its claims for tortious interference with existing contracts and future business relationships. As a result, the Court will grant Defendants' motion for summary judgment.

i. Tortious Interference with Existing Contracts

The AASC Defendants and Amerigroup first argue that they are entitled to summary judgment on UAS's tortious-interference-with-existing-contracts claim because UAS has not proffered evidence that contracting primary-care physicians breached their contracts with UAS, and, even if the underlying contracts were breached, their actions were not the proximate cause of any breach. (Doc. 267, at 14-21, 28.) They also separately argue that they are entitled to summary judgment because they did not have knowledge of all of UAS's contracts, they did not intend to induce a breach of any contracts, and they did not act with malice. (Doc. 266, at 16, 18-21; Doc. 268, at 18-25.)

Tennessee Code Annotated § 47-50-109 provides that "[i]t is unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto." Tennessee also recognizes a common-law claim for tortious interference with contract. *See Hauck Mfg. Co. v. Astec Indus., Inc.*, 376 F. Supp. 2d 808, 832 (E.D. Tenn. 2005). "[T]he common law action for tortious interference with contract and the statutory action for unlawful procurement of breach of contract, *see* Tenn. Code Ann. § 47-50-109, have the same elements and operate as alternative theories of

recovery."[11] *Id.* To succeed on either claim, a plaintiff must show:

> (1) that there was a legal contract; (2) that the wrongdoer had sufficient knowledge of the contract; (3) that the wrongdoer intended to induce its breach; (4) that the wrongdoer acted maliciously; (5) that the contract was breached; (6) that the act complained of was the proximate cause of the breach; and (7) that damages resulted from the breach.

TSC Indus., Inc. v. Tomlin, 743 S.W.2d 169, 173 (Tenn. Ct. App. 1987) (citations omitted); *Green v. Champs-Elysees, Inc.,* No. M2012-00082-COA-R3-CV, 2013 WL 10481171, *7 (Tenn. Ct. App. Sept. 11, 2013); *Givens v. Mullikin ex rel. Est. of McElwaney*, 75 S.W.3d 383, 405 (Tenn. 2002).

a. Whether Primary-Care Physicians Breached their Contracts with UAS

Defendants argue that UAS has not proffered evidence its contracts with primary-care physicians were breached, because many of the contracts were terminated in accordance with contractual terms or

[11] The elements for both forms of the action are identical, except that a plaintiff may recover punitive damages in the common law action instead of treble damages mandated by the statute. Additionally, "the statutory claim is in the nature of a penalty, so it, unlike the common law cause of action, requires a clear and convincing showing of defendant's liability rather than mere proof by a preponderance of the evidence." *Cambio Health Solutions, LLC v. Reardon*, 234 F. App'x 331, 336 (6th Cir. 2007) (internal quotations omitted).

were not terminated at all.[12] "In Tennessee, one of the elements for an inducement of breach of contract claim is that there must be a breach of the contract." *Golf Sci. Consultants v. Cheng*, No. 3:07-cv-152, 2009 WL 1256664, at *10 (E.D. Tenn. May 4, 2009). Breach of a contract is "nonperformance" of the contract's material terms. *See Fitness and Ready Meals, LLC v. Eat Well Nashville, LLC*, No. M2021-00105-COA-R3-CV, 2022 WL 601073, at *4 (Tenn. Ct. App. Mar. 1, 2022). Consequently, terminating a contract pursuant to the contract's terms does not constitute a breach of the contract. *See Freeman Mgmt Corp. v. Shurgard Storage Ctr.*, 461 F. Supp. 2d 629, 637 (M.D. Tenn. 2006) (finding that the plaintiff failed to state a claim for tortious interference with regard to certain contracts because they were terminated in accordance with their own terms and, therefore, not breached); *see also Crouch v. Pepperidge Farm, Inc.*, 424 F. App'x 456, 461 (6th Cir. 2011) (holding that a plaintiff cannot maintain a claim for inducement of breach of contract where there is no breach of an underlying contract). A contract termination in accordance with the contract's terms cannot supply the requisite breach necessary to maintain a tortious-interference-with-contract claim. Similarly, wrongful termination cannot supply the requisite breach if the underlying contract was never terminated.

"Breach," however, is defined as any nonperformance of a contract's material terms, and, in this case, UAS contends that primary-care physicians

[12] Defendants do not dispute that UAS had valid contracts with these primary-care physicians and medical clinics. (*See generally* Docs. 264, 266, 267, 268.)

and medical clinics breached their contracts by failing to make payments for UAS's services at the time they were due under the contract. (Doc. 299-12, at 70-83.) Pursuant to UAS's standard contract, payment for UAS's services was due within thirty days of invoicing, and outstanding invoice balances were due within thirty days of final invoice upon termination "for any reason." (Doc. 275-1, at 39-40.) UAS has proffered evidence that certain medical clinics and providers breached their contracts by failing to make payments when due (Doc. 299-12, at 70-83), and, therefore, has proffered evidence from which a reasonable jury could conclude that UAS's customers breached their contracts with UAS.[13]

[13] UAS also argues that it can satisfy its burden at the summary-judgment stage simply by showing there was a "disruption" in the performance of a contract, even if that disruption does not rise to the level of a breach, because the Restatement (Third) of Torts: Interference with Contract § 17 provides that a defendant is liable if, among other things, it "intended to cause a breach of the contract or a disruption of its performance." *See also Zitzow v. AutoOwners Ins. Co.*, No. 1:21-cv-3, 2022 WL 1787110, at *5 (E.D. Tenn. March 7, 2022) (discussing the Restatement (Third) of Torts: Interference with Contract § 17 in analyzing whether a plaintiff failed to state a claim for tortious interference with existing contracts). The Court need not resolve whether a "disruption in performance" not rising to the level of breach can satisfy this element, because, as explained herein, UAS has not satisfied its burden at the summary-judgment stage as it relates to demonstrating proximate causation and malice.

b. Whether Defendants' Actions Proximately Caused Primary-Care Physicians to Breach their Contracts with UAS

Though UAS has met its burden as to breach, its tortious-interference-with-contract claim still fails as a matter of law because there is insufficient evidence in the record for a reasonable jury to conclude that the AASC Defendants and Amerigroup's actions proximately caused UAS-contracting physicians to breach their contracts with UAS. To succeed on a claim for tortious interference with contract, a plaintiff must demonstrate that the defendant's conduct proximately caused the breach of contract.[14] *United Pet Supply v. City of Chattanooga*, 921 F. Supp. 2d 835, 864 (E.D. Tenn. 2013); *Whalen v. Bourgeois*, No. E2013-01703-COA-R3-CV, 2014 WL 2949500, at *11 (Tenn. Ct. App. June 27, 2014) ("The basic principle in awarding compensatory damages to a

[14] In opposing Defendants' summary-judgment motion, UAS argues that it is not required to prove proximate causation to maintain its claim for tortious interference, and that, if confronted with the question of the appropriate causation standard, available data suggests that the Tennessee Supreme Court would only require a plaintiff to demonstrate damages resulting from the breach of contract. (Doc. 296, at 32-33.) Multiple courts in Tennessee have stated that a plaintiff must establish proximate causation to maintain a tortious-interference-with-contract claim. *See e.g.*, *United Pet Supply*, 921 F. Supp. 2d at 864; *Whalen*, 2014 WL 2949500, at *11. As a result, the Court declines UAS's invitation to rely on a case interpreting another state's law to support its argument that the Tennessee Supreme Court would conclude that "but-for" causation is all that is required to prove a claim for tortious interference with contractual relations.

plaintiff who has proven inducement to breach a contract is that the damages must be based on the direct and proximate result of the wrongful acts of the person procuring the breach of contract."). As the Tennessee Supreme Court has explained in the negligence context, "[p]roximate cause puts a limit on the causal chain, such that, even though a plaintiff's injury would not have happened but for the defendants' [conduct], defendants will not be held liable for injuries that were not substantially caused by their conduct or were not reasonably foreseeable results of their conduct." *Hale v. Ostrow*, 166 S.W.3d 713, 719 (Tenn. 2005). Proximate cause is ordinarily a jury question, "unless the uncontroverted facts and inferences to be drawn from them make it so clear that all reasonable persons must agree on the proper outcome." *Id.* at 718.

In this case, there is not sufficient evidence from which a reasonable jury could conclude that the AASC Defendants' actions proximately caused UAS-contracting medical providers to breach their contracts with UAS by failing to remit timely payments. Even assuming that the AASC Defendants were motivated by their own business interests, the undisputed facts are that DeLozier: (1) suggested to a lobbyist that encouraging insurance companies to perform medical-necessity audits on primary-care physicians offering allergy testing and immunotherapy services may uncover fraud and abuse (Doc. 299-5, at 23); (2) told PME employees to communicate to primary-care physicians that they would not be told how to bill for allergy testing and immunotherapy services correctly and that there would be significant liability risk with allowing

patients to inject at home (*id.* at 53-57); and (3) had ongoing conversations with Amerigroup employees about primary-care physicians offering allergy testing and immunotherapy services, including providing examples of medically unnecessary diagnostics, overutilization of immunotherapy services, and differences in patient testing results (*see, e.g.*, *id.* at 14, 35; Doc. 299-6, at 145; Doc. 299-14, at 2-3, 8-12). But while these statements might have been part of the story, it was Amerigroup (and state policymakers) who actually made the decisions that, according to UAS, harmed its business. (Doc. 299-5, at 79; Doc. 299-6, at 9-14, 23, 53, 140, 146; Doc. 299-7, at 1, 4-5; Doc. 299-14, at 21-24.) These decisions were made only after investigations and research by Amerigroup, not to mention TennCare and the Tennessee legislature. (Doc. 275-1, at 30-31; Doc. 275-5, at 82; Doc. 275-13, at 29-30; Doc. 299-6, at 13-14.) The AASC Defendants did little more than raise issues that caused decisionmakers to engage in their own consideration of medical necessity and waste of public funds. (*See, e.g.*, Doc. 299-5, at 14, 35; Doc. 299-14, at 2-3, 8-12.) They certainly presented their point of view, but there is no suggestion they had any leverage over Amerigroup or any state entity or that Amerigroup blindly relied on the information the AASC Defendants provided. The decisionmakers took action to stop paying doctors that, they determined, were likely providing unnecessary and unsafe medical care. (Doc. 275-1, at 30-31; Doc. 275-5, at 82; Doc. 275-13, at 29-30; Doc. 299-6, at 13-14.) Those doctors then decided not to pay UAS for services UAS had already provided. (*See, e.g.*, Doc. 299-12, at 103-04.) The relationship between that decision and the AASC

Defendants' expression of concerns is too attenuated to support UAS's claims, especially in this context of public healthcare policy.[15] Even viewed in the light most favorable to UAS, DeLozier's actions amount to nothing more than suggestions that Amerigroup should investigate and audit primary-care physicians offering allergy-testing and immunotherapy services, including those contracting with UAS, and that doing so may uncover fraud, waste, and inappropriate medical care. The fact that the policymakers found enough evidence of such to change their approach to doctor reimbursement is the proximate cause of those decisions—not the encouragement from the AASC Defendants to look for that evidence.[16]

Similarly, there is insufficient evidence in the record for a reasonable jury to conclude that Amerigroup's decision to audit and investigate UAS-contracting physicians or that its decision to deny claims and seek recoupments proximately caused UAS-contracting physicians to breach their contracts

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[15] Additionally, there is no evidence suggesting that DeLozier knew about or communicated to Amerigroup that UAS-contracting physicians may be violating their provider agreement by contracting with UAS without Amerigroup or TennCare approval.

[16] Even assuming that DeLozier succeeded in motivating Amerigroup to investigate and audit UAS-contracting primary-care physicians, there is no evidence in the record suggesting that UAS-contracting physicians were permitted to withhold payments owed to UAS based on the status of those physicians' claims submitted to insurance companies. (*See e.g.*, Doc. 275-1, at 37-46.) Therefore, the injuries sustained by the physicians' failure to timely remit payment to UAS was not substantially caused by DeLozier's conduct and thus were not a reasonably foreseeable result of his actions.

with UAS. It is undisputed that, pursuant to its contract with TennCare, Amerigroup was under a contractual obligation to, among other things, "safeguard Medicaid funds against unnecessary or inappropriate use of Medicaid services and against improper payments," and "have internal controls and policies and procedures in place that are designed to prevent, detect, and report known and suspected fraud and abusive activities." (*See* Doc. 275-3, at 57-62.) It is also undisputed that, around the time Amerigroup began investigating and auditing primary-care physicians, TennCare expressed concern about how allergy testing and immunotherapy services were provided in Tennessee in general, going so far as to recommend a budget reduction for "[p]rofessional services for the supervision of preparation and provision of antigens for allergen immunotherapy" based on its investigation of multiple providers. (Doc. 275-1, at 30-31.) In doing so, TennCare specifically noted that often "[t]he person/facility preparing the antigen for allergen immunotherapy is not the provider/facility who billed and received payment for the service" and "[t]he person preparing the antigen for allergen immunotherapy is not the provider who examined the patient." (*Id.*) Stated another way, TennCare communicated to Amerigroup that there may be fraud and waste issues related to the provision of allergy-testing and immunotherapy. Against this factual background and after noticing spikes in reimbursement rates for allergy-testing and immunotherapy billing codes, Amerigroup decided to investigate primary-care physicians providing allergy-testing and immunotherapy services, including UAS-contracting physicians, and ultimately determined

that physician contracts with UAS constituted unapproved third-party contracts not permitted under Amerigroup's provider agreements and not permitted by TennCare. (Doc. 299-5, at 79; Doc. 299-6, at 9-14, 23, 53, 140, 146; Doc. 299-7, at 1, 4-5; Doc. 299-14, at 21- 24.) It would be troubling, to say the least, to allow Amerigroup's decision to investigate potential fraud and abusive activities to serve as proximate cause for UAS's tort claims, particularly when Amerigroup was contractually obligated to engage in such actions in order to protect public funds. Further, primary-care physicians were undoubtedly aware of Amerigroup's obligation to conduct such investigations and audits because their provider agreements with Amerigroup expressly required physicians to maintain records "for the purpose of audit" and "for the purposes of complying with the TennCare requirements regarding the reporting and investigation of fraud and abuse." (*See, e.g.*, Doc. 275-14, at 108.) Moreover, conversations between Amerigroup employees and employees of medical practices that contracted with UAS revealed additional issues, including that there may not have been sufficient oversight performed by the UAS-contracting physician or practice in connection with allergy-testing and immunotherapy services. (*See, e.g.*, Doc. 275-12, at 79-81; Doc. 299-2, at 19-20; Doc. 299-6, at 13-14.) These doctors inarguably knew their provider contracts allowed for the very investigations UAS now complains about. UAS cannot point to those same investigations and resulting actions as proximate cause for the doctors' decisions not to pay UAS. The doctors are and have been free to pay UAS. They simply chose not to. Under these circumstances, a reasonable juror could not find

that the contracting physician's breach of their contracts with UAS was a reasonably foreseeable consequence of Amerigroup's decision to investigate and audit UAS-contracting physicians and to take steps it deemed necessary to avoid waste.

Moreover, no reasonable juror could find that Amerigroup's decision to deny claims and seek recoupments based on its investigation of UAS-contracting physicians proximately caused UAS-contracting physicians to breach their contracts with UAS. Again, nothing in UAS's contracts permitted primary-care physicians to withhold payments owed to UAS based on the status of reimbursement claims. UAS-contracting physicians could have remitted payments owed to UAS and then appealed Amerigroup's decisions or could have sought payment directly from patients in connection with claims denied by Amerigroup. Further, UAS could have insisted on timely payment from contracting physicians or pursued litigation for unpaid balances owed, but, as stated in its response brief, it instead "agreed at times to suspend collection efforts or otherwise work with the clinics to resolve reimbursement issues." (Doc. 296, at 22-23.) Under these circumstances, there is insufficient evidence in the record for a reasonable jury to conclude that Amerigroup's actions proximately caused UAS-contracting physicians to breach their contracts by failing to remit timely payment to UAS.

c. Whether Defendants Acted with Malice

Additionally, Defendants are entitled to summary judgment because there is insufficient evidence in the

record from which a reasonable jury could conclude that they acted with malice. (Doc. 266, at 18-19; Doc. 268, at 21-24.) Malice does not require ill will or spite toward a plaintiff, but, instead, "is demonstrated by conduct that is a willful violation of a known right." *AmeriGas Propane, Inc. v. Cook*, 844 F. Supp. 379, 389 (M.D. Tenn. 1993); *HCTec Partners, LLC v. Crawford*, No. M2020-01373-COA-R3-CV, 2022 WL 554288 at *16; *Landers v. LoanCare, LLC*, No. 1:20-cv-284, 2021 WL 6340987, at *5 (E.D. Tenn. Sept. 29, 2021) ("Malice is the is the willful violation of a known right without legal justification.") (citation and internal quotation marks omitted); *Freeman*, 461 F. Supp. 2d at 639 (M.D. Tenn. 2006) ("Consequently, unlike the level of malice ordinarily required for punitive damages under Tennessee law, malice in the context of an inducement-of-breach claim does not require ill-will or spite toward the injured party. It only requires the intentional commission of a harmful act without justifiable cause."). "Interference is without justification if it is done for the indirect purpose of injuring the plaintiff or benefiting the defendant at the plaintiff's expense." *HCTec*, 2022 WL 554288, at *16 (quoting *Crye-Leike Realtors, Inc. v. WDM, Inc.*, No. 02A01-9711-CH-00287, 1998 WL 651623 (Tenn. Ct. App. Sept. 24, 1998)); *see also Urbanavage v. Capital Bank*, No. M206-01363-COA-R3-CV, 2018 WL 3203100, at *3 (Tenn. Ct. App. June 29, 2018); *Whalen*, 2014 WL 2949500, at *12. "A plaintiff can prove legal malice based on a defendant's words and conduct in the context of the surrounding circumstances. The court considers the standpoint of both the parties and determines whether the defendant acted reasonably in the exercise of his own

rights. . . . A finding that defendant acted in good faith or with just cause, however, typically precludes a finding of malice." *Crouch v. Schnuck Markets, Inc.*, No. 08-02044, 2009 WL 10664191, at *5 (W.D. Tenn. July 27, 2009).

In this case, there is insufficient evidence in the record to plausibly suggest that the AASC Defendants and Amerigroup's actions were taken in bad faith or without just cause. As it relates to DeLozier's communications with Amerigroup employees: (1) DeLozier met Mahler in May 2015 and scheduled a follow-up meeting to discuss data he gathered regarding allergy services, how that data informed TennCare's payment model, and how they "can best work together going forward" (Doc. 299-5, at 14); (2) DeLozier e-mailed Mahler in January 2016 asking to meet and discuss "data [AASC] could provide on examples of medically unnecessary allergy diagnostics and treatment being performed by primary care providers in [Tennessee]" (Doc. 299-6, at 145; *see also* Doc. 299-5, at 35); (3) DeLozier hand delivered results of allergy testing in the community and results of allergy testing and allergy evaluation in the allergist's office to Mahler later in 2016 (Doc. 299-14, at 8-12); and (4) DeLozier spoke to Amerigroup investigators in February 2017 indicating that he was interested in "payment reform" to stop "immunotherapy subcontractors" from engaging in a "mill process" to "leverage Medicaid environments." (Doc. 299-7, at 34.) While DeLozier may have taken such actions intending to protect AASC's business interests and to induce Amerigroup to scrutinize allergy-testing and immunotherapy claims submitted by competing primary-care physicians, such actions are a

reasonable exercise of these Defendants' own rights and fall short of bad faith, especially given his observation that AASC allergists were "hit with med[ical] necessity audits all the time and pass with flying colors." (Doc. 299-5, at 23.)

Similarly, even assuming that Amerigroup stood to benefit from decreased reimbursements for allergy services rendered by UAS-contracting physicians, there is no evidence that Amerigroup initiated audits, pre-payment review, or recoupments in bad faith or without justification. To the contrary, as a TennCare MCO, Amerigroup was under a contractual obligation to work with TennCare to detect fraud and waste. (Doc. 275-3, at 57-62.) Moreover, during the relevant time period, investigations conducted by TennCare suggested that allergy-testing and immunotherapy services were not being properly billed by providers, going so far as to revise billing guidelines and implement budget reductions for allergy-testing and immunotherapy services to guard against waste. (*See, e.g.*, Doc. 275-1, at 30-36.) It may be true that Amerigroup relied on information supplied by DeLozier in deciding to investigate primary-care physicians offering allergy-testing and immunotherapy services. But it is undisputed that its ultimate decision to deny reimbursement claims and seek recoupment was based on its own determination that UAS-contracting primary-care physicians violated the terms of their provider agreements that required medical providers and their employees to "perform all the services required hereunder directly and not pursuant to any subcontract between Provider and any other person or entity" unless "otherwise approved in writing by Amerigroup." (Doc. 275-14, at

88.) It is impossible to square UAS's theory of malice with Amerigroup's mere reliance on the plain language of the provider agreement. A decision authorized by a provider agreement's language can hardly be said to have been taken in bad faith, and merely rejecting nonconformity with a contract can hardly be said to be unjustified. As a result, UAS has failed to meet its evidentiary burden to proffer evidence from which a reasonable jury could conclude that the AASC Defendants and Amerigroup acted with the requisite malice necessary to support a claim for intentional interference with contractual relations.[17]

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[17] The foregoing also calls into question whether UAS has satisfied its burden to provide evidence from which a reasonable jury could conclude that Defendants intended to cause UAS-contracting physicians to breach their contracts with UAS by failing to remit timely payment. "The required state of mind for the tort of interference with contractual relations is intent to cause the result, *i.e.* the breach." *Landers*, 2021 WL 6340987, at *4 (quoting *AmeriGas Propane*, 844 F. Supp. at 389). Even if a defendant did not act for the specific purpose of interfering with a contract, the intent element is satisfied if the defendant should have known that interference was certain or substantially certain to occur as a result of their conduct. *AmeriGas Propane,* 844 F. Supp. at 389 (citing Restatement (Second) of Torts § 766, comment j)); *JIT Concepts*, 358 F. Supp. 2d at 685; *Landers*, 2021 WL 6340987, at *4; *Crouch*, 2009 WL 10664191, at *4. Intent is generally a question of fact for a jury to decide. *HCTec Partners*, 2022 WL 554288, at *16; *Crouch*, 2009 WL 10664191, at *4 ("The intent with which an act was done may be proved by . . . the declarations of the party concerned, or by facts and circumstances from which the existence of the intent may be reasonably inferred. . . . Determination of an actor's state of mind usually entails the drawing of inferences as to which reasonable people might differ and is therefore a function typically left to a jury."). Under UAS's theory of the case, any action taken by the

UAS has failed to proffer evidence from which a reasonable jury could conclude that the AASC Defendants and Amerigroup proximately caused UAS's contracting physicians to breach their contracts with UAS or that they acted with requisite malice. Accordingly, the Court will **GRANT** the AASC Defendants and Amerigroup's motion for summary judgment on UAS's claims for tortious interference with existing contracts.

ii. Tortious Interference with Business Relations

The AASC Defendants and Amerigroup also argue that UAS's claim for tortious interference with business relations fails because it has not: (1) identified prospective business relationships with an identifiable class of third persons; (2) provided sufficient evidence from which a reasonable jury could conclude that Defendants knew about UAS's prospective business relationships; and (3) provided sufficient evidence that they intended to cause the breach or termination of any prospective business relationship or that they acted with improper motive or means. (Doc. 267, at 21-28; Doc. 266, at 21-23.)

AASC Defendants and Amerigroup that negatively affects UAS, no matter how legitimate, should be construed as evidence that they intended for UAS-contracting physicians to breach their contracts with UAS. But there must be ways for an economic actor to legitimately protect its own business interests without necessarily intending to induce a breach of contract, especially within the context of advocating for public action or policy. Nonetheless, given that intent is typically a question of fact more appropriately left for a jury, the Court need not resolve whether UAS has satisfied its evidentiary burden regarding intent at the summary-judgment stage.

"[T]he relations protected against intentional interference . . . include any prospective contractual relations, . . . if the potential contract would be of pecuniary value to the plaintiff." *Trau-Med*, 71 S.W.3d at 701 n.4 (adopting § 766B comment c of the Restatement (Second) of Torts). As explained above, however, the tort "has a confined scope," *BNA Assocs.*, 63 F.4th at 1064, and "should not be interpreted in such a way as to prohibit or undermine the ability to contract freely and engage in competition" and only applies to situations in which there is "proof of improper conduct extending beyond the bounds of doing business in a freely competitive economy" *Watson's Carpet*, 247 S.W.3d at 178. *See also BNA Assocs.*, 63 F.4th at 1065. Consistent with these principles, to prevail on a claim for intentional interference with business relationships, a plaintiff must prove the following elements: (1) "an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons"; (2) "the [opposing party's] knowledge of that relationship and not a mere awareness of the [claimant's] business dealings with others in general"; (3) "the [opposing party's] intent to cause the breach or termination of the business relationship"; (4) "the [opposing party's] improper motive or improper means"; and (5) "damages resulting from the tortious interference." *Trau-Med*, 71 S.W.3d at 701.

a. Whether UAS has Identified Prospective Business Relationships with an "Identifiable" Class of Third Persons

Defendants first argue that they are entitled to summary judgment because the tort of intentional interference with business relations does not apply to contractual relationships, and UAS has not otherwise proffered evidence of prospective business relationships with an identifiable class of third persons. (Doc. 267, at 23-27.) To survive a motion for summary judgment, a plaintiff must provide evidence from which a reasonable jury could conclude that it had "prospective business relationships with an identifiable class of third persons." *Trau-Med*, 71 S.W.3d at 701. The parties have not identified, and the Court's independent research has not revealed, a case in which Tennessee courts have defined the word "identifiable" in the context of a tortious-interference claim. As this Court has previously noted, however, the Tennessee Supreme Court's use of the word "identifiable . . . is an attempt to place some limits on a tortious interference with prospective business relations claim" because "liability for tortious interference with prospective business relations could be without limit and impossible to calculate if all potential relationships provided a basis for recovery." *Assist-2-Sell, Inc. v. Assist-2-Build, LLC*, No. 1:05-cv-193, 2005 WL 3333276, at *6 (E.D. Tenn. Dec. 6, 2005). To that end, the Court observed that other jurisdictions recognizing a claim for tortious interference with prospective relationships have limited recovery to third parties who actually

contemplated a business relationship with the plaintiff. *Id.* (citing *Werblood v. Columbia Coll. of Chicago*, 536 N.E.2d 750, 755 (Ill. Ct. App. 1989). The Court further observed, however, that "Tennessee's attempt to place some limitation" on its tortious-interference claim was "somewhat unique," because use of the word "identifiable," instead of "identified," may suggest that the plaintiff need not actually name specific third parties. *Id.* at 7. Courts in Tennessee, however, have found that simply identifying a general class of third parties is not sufficient to survive a motion for summary judgment. *See Golf Sci.*, 2009 WL 1256664, at *10 (finding that general references to "potential customers, clients, and business entities" and other "generalized references" to third parties is insufficient to survive a motion for summary judgment); *Brown*, 982 F. Supp 2d at 805-06 (finding testimony that a doctor "encountered significant difficulty developing relationships with new patients" did not satisfy her burden of producing evidence suggesting that she lost prospective relationships with an identifiable class of third persons). Read together, these cases indicate that, to survive summary judgment, a plaintiff must produce evidence of prospective business relationships beyond mere generalized references to third parties but not necessarily rising to the level of identifying specific third parties who actually contemplated a business relationship with the plaintiff.

In this case, UAS has not produced evidence from which a reasonable jury could conclude that it had prospective business relationships with an identifiable class of third parties other than previously-contracting primary-care physicians who

terminated their relationship with UAS. In response to Defendants' interrogatory asking UAS to "[i]dentify each Tennessee provider clinic that [it] contends it was not able to contract with . . . as a result of Defendants' alleged tortious interference," UAS stated that "potential business relationships with every PCP and ENT in Tennessee was impacted" and that "its potential new business relationships with clinics who have stopped contracting with UAS have been put on hold until it is clear that those clinics can resume offering allergy testing and immunotherapy services to their existing Amerigroup . . . patients." (Doc. 275-13, at 14-16; *see also* Doc. 275-22, at 6 (UAS's corporate representative testifying that "[f]uture relations would represent anybody who can't do business with us in the state because of your actions").) Such generalized references to "every PCP and ENT in Tennessee" do not satisfy UAS's burden to provide evidence of potential business relations with an identifiable class of third persons. Allowing such generalized references to satisfy UAS's evidentiary burden is not consistent with the "confined scope" of Tennessee's tortious-interference-with-business-relationships claim.

Similarly, UAS's production of a spreadsheet identifying every medical provider it attempted to contract with during the relevant time period does not satisfy its burden of producing evidence of prospective business relationships with an identifiable class of third persons. Such a description is functionally no different than UAS's generalized reference to "every PCP and ENT in Tennessee." (Doc. 275-14, at 71.) The spreadsheet produced by UAS is simply a list of over 1000 medical providers in Tennessee. (*Id.*) This

evidence, even viewed in the light most favorable to UAS, is insufficient to create a genuine issue of material fact regarding the existence of prospective business relations with any of these medical providers, especially as it relates to UAS's claim that Defendants tortiously interfered with these prospective relationships; the spreadsheet is completely divorced from any evidence plausibly suggesting that these medical providers elected not to contract with UAS because of Defendants' actions. If such evidence were sufficient, a business would be able to satisfy its evidentiary burden simply by listing each and every potential client it cold called to solicit business during the relevant time period without taking into account the prospective client's reasons for not entering a contract or relationship with the business. Satisfying the identifiable-class-of-third-persons requirement within the confined scope of Tennessee's tortious-interference-with- business-relationships claim necessarily requires more than generalized references and listing businesses that a company solicited during the relevant time period.

The Court notes, however, that UAS has satisfied its burden to provide evidence of an identifiable class of third persons to the extent previously-contracting primary-care physicians terminated their relationship with UAS. As UAS detailed in its interrogatory response, "its potential new business relationships with clinics who have stopped contracting with UAS have been put on hold until it is clear that those clinics can resume offering allergy testing and immunotherapy services to their existing Amerigroup . . . patients." (Doc. 275-13, at 14-16.) And, although UAS cannot use a tortious-interference-

with-business-relations claim to recover damages resulting from its prior contractual agreements with primary-care physicians in Tennessee, it is not foreclosed from asserting that Defendants' alleged improper conduct interfered with future contractual relationships with primary-care physicians who stopped contracting with UAS. *Clear Water Partners, LLC v. Benson*, No. E2016-00442-COA-R3-CV, 2017 WL 376391, at *7 (Tenn. Ct. App. Jan. 26, 2017) (noting that the fact that a plaintiff "had contractual relationships with the same third parties with which it alleged it had business relationships and which formed the basis of its tortious interference claim is inconsequential so long as the tortious interference claim is based on future contractual and/or business relationships").

b. Whether Defendants Acted with an Improper Motive or By Improper Means

UAS's tortious-interference-with-business-relationships claim nonetheless fails because it has not proffered sufficient evidence from which a reasonable jury could conclude that Defendants acted with an improper motive or by improper means. (Doc. 266, at 21-23.) To succeed on a claim for tortious interference, a plaintiff must demonstrate that the defendant had an "improper motive" or used "improper means," meaning that "the defendant's predominant purpose was to injure the plaintiff," or that "the defendant used means that are illegal, independently tortious, or that violate an established standard of trade or profession." *Watson's Carpet*, 247 S.W.3d at 176-77 (quoting *Trau-Med*, 71 S.W.3d at

701). "Examples of illegal or tortious conduct include violations of statutes, rules, or recognized common law rules, violence, threats, bribery, unfounded litigation, fraud, misrepresentation, defamation, duress, undue influence, misuse of confidential information, or breach of a fiduciary duty," and can also include "unethical conduct" described as "sharp dealing, overreaching or unfair competition." *Id.*; *see also BNA Assocs.*, 63 F.4th at 1065. While questions regarding whether a defendant had an improper motive or used improper means "depend on the particular facts and circumstances of the case," unsupported speculation that a defendant sought to injure the plaintiff is insufficient to create a genuine issue of material fact as to whether a defendant had an improper motive or used improper means. *Trau-Med*, 71 S.W.3d at 701 n.5; *Brown*, 982 F. Supp 2d at 803.

In this case, there is insufficient evidence in the record for a reasonable jury to conclude that Defendants acted with an improper motive or used improper means as it relates to UAS's efforts to secure future contracts with Tennessee medical providers. Protecting an entity's business interests is not the same as acting with the "predominant purpose" to "injure the plaintiff," especially in light of Tennessee courts' instructions that the tort of interference with business relationships only applies to situations in which there is "proof of improper conduct extending beyond the bounds of doing business in a freely competitive economy." *Watson's Carpet*, 247 S.W.3d at 178. Even if a reasonable jury concluded that UAS-contracting physicians threatened to reduce the number of patients referred to AASC allergists, it does not follow that each and every action taken by the

AASC Defendants to protect their business interests was taken with the predominant purpose to injure UAS or that such actions qualify as illegal or unethical. The undisputed evidence indicates that DeLozier communicated with Amerigroup about primary-care physicians offering allergy testing and immunotherapy, including providing examples of what AASC believed were medically unnecessary diagnostics and suggesting that insurance company audits would reveal an overutilization of immunotherapy. UAS, however, has not provided any evidence suggesting that the information DeLozier provided to Amerigroup was false or somehow qualifies as unethical conduct, even if DeLozier provided the information hoping that it would motivate Amerigroup to take actions which would ultimately benefit AASC allergists at the expense of UAS-contracting physicians.

Similarly, even assuming that the information DeLozier provided Amerigroup contributed to its decision to investigate primary-care physicians offering allergy-testing and immunotherapy services, there is insufficient evidence for a reasonable jury to conclude that Amerigroup's actions were taken with the predominant purpose of injuring UAS or that it engaged in illegal or unethical conduct such that it tortiously interfered with UAS's future business relationships. To the contrary, Amerigroup's contract with TennCare required it to take reasonable actions to detect and prevent fraud and abuse and "safeguard Medicaid funds against unnecessary or inappropriate use of Medicaid services and against improper payments." (Doc. 275-3, at 57-62.) Further, immediately preceding the time Amerigroup began

investigating UAS-contracting physicians, TennCare implemented a budget reduction to allergy-testing and immunotherapy services based on its finding that such services were performed and billed for improperly. Additionally, the undisputed evidence indicates that Amerigroup's decision to audit and subject certain providers to prepayment review and to ultimately deny reimbursements and seek recoupments was based on its finding that UAS-contracting primary-care physicians violated the terms of their provider agreement which required medical providers and their employees to "perform all the services required hereunder directly and not pursuant to any subcontract between Provider and any other person or entity" unless "otherwise approved in writing by Amerigroup." (Doc. 275-14, at 88.) Based on this contractual language, even a competing interpretation that would permit primary-care physicians to contract with UAS without Amerigroup's approval does not render Amerigroup's interpretation unreasonable or constitute evidence that Amerigroup acted in a manner that could support UAS's claim. As a result, the record is devoid of evidence that Amerigroup's actions were taken for the predominant purpose of injuring UAS or evidence that Amerigroup engaged in illegal or unethical conduct that Tennessee's tortious-interference-with-business relationships claim seeks to curtail.

Once again, UAS has failed to meet its evidentiary burden necessary to survive summary judgment. UAS has not provided sufficient evidence from which a reasonable jury could conclude that Defendants possessed an improper motive or used improper means such that it crossed the line into unlawful

conduct and tortiously interfered with its prospective business relationships in Tennessee. Accordingly, Defendants' motion for summary judgment on UAS's claim for tortious interference with business relationship will be **GRANTED**.

iii. Civil Conspiracy

Defendants next argue that they are entitled to summary judgment on UAS's civil-conspiracy because all of UAS's underlying tort claims fail as a matter of law. (Doc. 266, at 23; Doc. 267, at 29; Doc. 268, at 26.) "The elements of a cause of action for civil conspiracy under Tennessee common law are: (1) a common design between two or more persons; (2) to accomplish by concerted action an unlawful purpose, or a lawful purpose by unlawful means; (3) an overt act in furtherance of the conspiracy; and (4) injury to person or property resulting in attendant damage." *Freeman*, 461 F. Supp. 2d at 642 (citing *Braswell v. Carothers*, 863 S.W.2d 722, 727 (Tenn. Ct. App. 1993)); *Trau-Med*, 71 S.W.3d at 703 ("An actionable conspiracy is a combination of two or more persons who, each having the intent and knowledge of the other's intent, accomplish by concert an unlawful purpose, or accomplish a lawful purpose by unlawful means, which results in damage to the plaintiff."). Liability for civil conspiracy "requires an underlying predicate tort allegedly committed pursuant to the conspiracy." *Watson's Carpet*, 247 S.W.3d at 186. The effect of a finding of conspiracy is that "each conspirator is liable for damages resulting from the wrongful acts of all co-conspirators in carrying out the common scheme." *Trau-Med*, 71 S.W.3d at 703.

As discussed above, undisputed evidence demonstrates that UAS's claims for tortious interference with contracts and tortious interference with prospective business relationships fail as a matter of law. As a result, UAS's derivative civil-conspiracy claim also fails. Accordingly, the Court will **GRANT** Defendants' motion for summary judgment on UAS's civil-conspiracy claim.

IV. Conclusion

For the reasons stated herein, UAS's unopposed motion for leave to respond to Defendants' motion to strike (Doc. 323), and Defendants' unopposed motion for leave to reply (Doc. 327) are **GRANTED**. Defendants' motion to strike the McMahon declaration (Doc. 319) is **DENIED**. Defendants' motion for summary judgment (Doc. 264) is **GRANTED**. All other unresolved motions are **DENIED AS MOOT**.

AN APPROPRIATE JUDGMENT WILL ENTER.

/s/ *Travis R. McDonough*
TRAVIS R. MCDONOUGH
UNITED STATES DISTRICT JUDGE

Appendix D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

No. 19-cv-180

UNITED BIOLOGICS, LLC, dba United Allergy Services,

Plaintiff,

v.

AMERIGROUP TENNESSEE, INC., dba Amerigroup Community Care, et al.,

Defendants.

Filed: Jan. 27, 2022

MEMORANDUM OPINION

Before the Court are motions to dismiss filed by: (1) Defendants Allergy Associates, P.A. ("AASC"), Ned DeLozier, and Physicians' Medical Enterprises, LLC ("PME") (Doc. 108); (2) Defendant Amerigroup Tennessee, Inc. ("Amerigroup") (Doc. 110); and (3) Defendants BlueCross BlueShield of Tennessee ("BCBST") and Volunteer State Health Plan, Inc. ("VSHP") (Doc. 112). For the following reasons, the motions will be **GRANTED IN PART** and **DENIED IN PART**.

I. Background

This is a case about allergy-testing and immunotherapy services provided in Tennessee. To

provide such services to patients, there must be "a physician who provides the medical component of the services, a trained technician acting incident to the medical provider, extensive equipment and products including testing devices, FDA-approved antigens and diluents, and reimbursement from health insurance companies who largely pay for the services." (Doc. 103, at 6.) According to Plaintiff United Biologics, LLC d/b/a United Allergy Services ("UAS"), Defendant AASC is the largest provider of allergy-testing and immunotherapy services in Tennessee and has "nearly 30 Tennessee locations," and "in almost every geographic market in Tennessee, AASC controls more than 70% of the allergy testing and immunotherapy services performed in those local areas." (*Id.* at 7.) Because of the high barriers to entry, most allergy-testing and immunotherapy services are provided by businesses like AASC that are associated with "board-certified allergists"—physicians certified by the American Board of Allergy and Immunology after a training fellowship. (*Id.* at 6.) As alleged by UAS, AASC provides both the medical and non-medical components necessary to provide allergy-testing and immunotherapy services. (*Id.* at 6-7.) Nonetheless, because there is no governmental-certification requirement limiting such medical services to board-certified allergists, primary-care physicians can also provide such services. (*Id.*)

UAS is a company that "provides technical services in conjunction with physicians who provide professional services in the delivery of allergy testing and immunotherapy." (*Id.* at 3.) It, however, does not employ physicians who provide allergy-testing and immunotherapy services to patients. (*See id.* at 7-8.)

Rather, UAS contracts with medical practices in Tennessee, including primary-care physicians, to provide allergy-testing and immunotherapy equipment and non-physician services. (*Id.* at 8, 14.) According to UAS, it "has contracted with over 80 primary care physicians and other providers or medical practices" to help facilitate allergy testing and immunotherapy at those providers' locations "to treat patients for seasonal allergies and perennial allergies." (*Id.* at 8.) According to UAS, many of these medical providers serve rural areas where "the nearest board-certified allergist is many miles away and beyond the distance most consumers will travel for those services." (*Id.*) Based on its contracts with primary-care physicians, UAS alleges that it competes with AASC, which "operates its business similar to UAS, including contracting with primary care physicians to place a trained technician or nurse in those clinics to assist physicians with allergy skin testing and immunotherapy." (*Id.* at 9.) It also alleges, however, that "primary care physicians would often refer patients with seasonal allergies to reference laboratories for allergy blood testing or to board-certified allergists for allergy skin prick testing." (*Id.*) As result, UAS alleges the primary-care physicians it contracts with, who were once sources of referrals for AASC, became competitors in the market for allergy-testing and immunotherapy services. (*Id.* at 15.)

This increased access to allergy testing and immunotherapy caused third-party-payor health-insurance companies, like Defendants Amerigroup[1]

[1] Defendant Amerigroup is a "health insurance and managed healthcare coordinator authorized to arrange for provision and

and BCBST,[2] to face more exposure in claims for reimbursement from medical providers. (*Id.*) According to UAS, "[a]pproximately 98% of the services for allergy testing and allergen immunotherapy are paid for at least in part by third-party payors" under applicable agreements or regulations. (*Id.* at 9-10.) As a result of their control over reimbursement, UAS alleges that managed-care organizations, like Amerigroup, and commercial payors, like BCBST, possess considerable leverage over physicians who cannot risk losing their contracts with these payors. (*Id.* at 10.)

Defendant Ned DeLozier is the business-development director and executive for Defendant Physicians Medical Enterprises ("PME"), which is the management company for AASC. (*Id.* at 4-5.) According to UAS, AASC and its board-certified allergists began losing patients and revenue to medical providers who contracted with UAS, which caused DeLozier, acting on behalf of AASC, "to reach out to Amerigroup to see if they could agree to work together to drive these new competitors out of the allergy services market." (*Id.* at 15-16.) In 2015, DeLozier and AASC "devised a plan to run UAS out of the market by encouraging payors, like Amerigroup,

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reimbursement of healthcare services to patients enrolled in Tennessee's Medicaid program, TennCare." (Doc. 103. at 3.)

[2] Defendant BCBST is a for-profit health insurance company. (Doc. 103, at 4). Defendant Volunteer State Health Plan, Inc. ("VSHP") "is a wholly owned subsidiary of BCBST and a health insurance and managed healthcare contractor that is authorized to arrange for the provision and reimbursement of healthcare services to patients enrolled in Tennessee's Medicaid program, TennCare." (*Id.*)

[VSHP], and Cigna to audit primary care doctors who were in contract with UAS" and lobbied payors "to initiate audits of UAS-contracted [primary care physicians] . . . on the [ ] basis that the allergy care and immunotherapy services were not medically necessary." (*Id.* at 17.)

In May 2015, DeLozier met medical directors from Amerigroup, VSHP, and other payors at a conference and initiated conversations regarding a reimbursement model that would favor specialists like AASC and board-certified allergists. (*Id.* at 18.) DeLozier continued these conversations with Dr. Mark Mahler, medical director at Amerigroup. (*Id.*) The two met privately to discuss their mutual interest in stifling competition resulting from additional primary-care physicians offering allergy testing and immunotherapy. (*Id.* at 18-19.) Following initial communications, "DeLozier, AASC, and Amerigroup came to an agreement to work together to restrict allergy care to board-certified allergists by investigating and eventually shutting off reimbursement to any provider who was in contract with UAS using the justification that they were not allergists," even though AASC provided the "exact same services" to primary-care clinics. (*Id.*) UAS alleges that, "[b]ased on the information provided by DeLozier, Amerigroup eventually decided to target primary-care physicians contracting with UAS for wholesale denial of their allergy claims to coerce them into ending their business arrangement with UAS." (*Id.* at 20.)

Around this time, DeLozier met with representatives for other insurers in Tennessee, and

Amerigroup began coordinating with its competitors. (*Id.* at 21.) According to UAS, DeLozier shared information with the chief medical officer and medical director for BCBST's BlueCare division and "suggested ways for the [managed-care organization] to work more closely with AASC to target UAS." (*Id.* at 22.) Amerigroup investigators also participated in monthly coordination calls with BCBST and United Healthcare, in which the investigators "shared pricing policy information and disclosed comprehensive details about investigations conducted by the respective [managed-care organizations] aimed at cutting off reimbursement to primary care providers, including disclosing the specific names of providers in contract with UAS being investigated." (*Id.*) In September 2016, BlueCare and BCBST hosted Amerigroup and United Healthcare at its office "and adopted similar reimbursement policies on allergy testing and immunotherapy claims submitted by primary care physicians known to be in contract with UAS." (*Id.* at 23.) According to UAS, "[w]hile they all agreed to fix prices for allergen immunotherapy at a set amount of units, at the time, only Amerigroup was willing to completely exclude all allergy skin testing or immunotherapy at the primary care level." (*Id.*)

Additionally, to avoid reimbursement for allergen testing and immunotherapy services provided by primary-care physicians, Amerigroup suggested to physicians that their billing for allergen testing and immunotherapy was inappropriate because an allergist was not performing supervision and the level of supervision did not rise to the level of personal oversight that is necessary to provide the services, in violation of TennCare requirements. (*Id.* at 24.) UAS

alleges that Amerigroup knew this position was incorrect, and, when it realized it did not have a medical director willing to support that position, it circled back to DeLozier to see if he could provide another medical basis for denying allergen-testing and immunotherapy claims from primary-care physicians in contract with UAS. (*Id.* at 24-25.) At a January 3, 2017 meeting with Mahler, DeLozier went over medical records belonging to primary-care physicians he claimed were practicing allergen testing and immunotherapy and communicated that he could "rely on the records and the representations of allergists from AASC to assert that the primary care physicians who were in contract with companies like UAS were supplying medically unnecessary care." (*Id.* at 25.) DeLozier also communicated to Mahler that "AASC and PME had discussed allergy testing and immunotherapy reimbursement policies with UHC and BlueCare and confirmed that those [managed care organizations] had agreed to 'take part in reducing waste.'" (*Id.*)

In February 2017, Amerigroup held a conference call, which included Mahler, Amerigroup investigator John Taylor, and others, regarding its investigation of primary-care providers in contract with UAS and to discuss additional bases to deny claims. According to UAS, an internal Amerigroup email states that Taylor "went for the highest dollar cases" first when Amerigroup began its efforts "to stop UAS'[s] activities." (*Id.* at 27.)

According to UAS, Amerigroup, BCBST, AASC, and PME, through coordinated conduct, ultimately decided to coerce primary-care physicians to end their

relationships with UAS by: (1) conducting audits and sending recoupment letters for reimbursed claims suggesting that UAS's involvement in allergy-testing and immunotherapy services was somehow not permitted and the services provided were not medically necessary (*id.* at 34, 36); and (2) contacting primary-care physicians and stating that their clinics should cease allergy testing and immunotherapy because UAS was not in contract with the insurer (*id.* at 37). Amerigroup also sent a fax to all managed-care providers "announcing new grounds to prohibit claims at the primary care level, including adoption of allergists-only guidelines agreed to with Defendants." (*Id.* at 38.) According to UAS, "[p]rimary-care physicians and UAS are being forced out of the market [for allergy testing and immunotherapy] because Defendants want to allow AASC, PME, and DeLozier to offer these services without competition from this class of competitors and permit managed care organizations and BCBST to avoid paying for these additional services." (*Id.* at 40.)

UAS alleges that, because of Defendants' conduct, physicians and practices that contract with UAS "cannot offer allergy testing or immunotherapy services at the primary care level for both fear of retaliation and because Amerigroup and BCBST appear primed to accept services but not pay for them." (*Id.*) Additionally, UAS contends that it has "lost revenue and corresponding profits that it would have generated" by providing its services to primary-care physicians who provide allergy testing and immunotherapy. (*Id.* at 41.) UAS further alleges that: (1) "certain clinics that contract with UAS have terminated their contracts because of Defendants'

conduct"; (2) it has "been forced to expend substantial resources to ensure that those it does business with do not terminate existing agreements"; and (3) it has experienced difficulty entering into additional business relationships. (*Id.* at 41, 49-51.)

UAS initiated the present action against Amerigroup, BCBST, VSHP, PME, AASC, and DeLozier, alleging that Defendants collectively "restrict competition in the markets for allergy testing and immunotherapy by restricting output of those services in Tennessee to the businesses of board-certified allergists such as AASC." (*Id.*) UAS filed an amended complaint on June 10, 2021, asserting the following claims: (1) violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, *et seq*.; (2) violation of Section 2 of the Sherman Act[3]; (3) tortious interference with existing contracts; (4) tortious interference with a business relationship or advantage; and (5) civil conspiracy. (*Id.* at 42-54.) Defendants have moved to dismiss UAS's claims against them (Docs. 108, 110, 112), and their motions are ripe for the Court's review.

II. Standard of Law

According to Rule 8 of the Federal Rules of Civil Procedure, a plaintiff's complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Though the statement need not contain detailed factual allegations, it must contain "factual content

[3] Specifically, UAS asserts this claim against AASC for willful acquisition and maintenance of a monopoly and attempt to monopolize in the relevant market and against all Defendants for conspiracy to monopolize the relevant market. (Doc. 103, at 45.)

that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.*

A defendant may obtain dismissal of a claim that fails to satisfy Rule 8 by filing a motion pursuant to Rule 12(b)(6). On a Rule 12(b)(6) motion, the Court considers not whether the plaintiff will ultimately prevail, but whether the facts permit the court to infer "more than the mere possibility of misconduct." *Id.* at 679. For purposes of this determination, the Court construes the complaint in the light most favorable to the plaintiff and assumes the veracity of all well-pleaded factual allegations in the complaint. *Thurman v. Pfizer, Inc.*, 484 F.3d 855, 859 (6th Cir. 2007). This assumption of veracity, however, does not extend to bare assertions of legal conclusions, *Iqbal*, 556 U.S. at 679, nor is the Court "bound to accept as true a legal conclusion couched as a factual allegation," *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

After sorting the factual allegations from the legal conclusions, the Court next considers whether the factual allegations, if true, would support a claim entitling the plaintiff to relief. *Thurman*, 484 F.3d at 859. This factual matter must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plausibility "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the

mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

III. Analysis

Although presented in separate motions to dismiss, Defendants effectively make the same arguments. They argue that the Court should dismiss UAS's claims against them because UAS: (1) does not have antitrust standing; (2) fails to allege a claim under the Sherman Act; (3) fails to state claims for tortious interference with existing contracts and business relationships; and (4) fails to state a claim for civil conspiracy. (*See generally* Docs. 109, 111, 113.)

A. Claims for Violation of the Sherman Act

Section 1 of the Sherman Act prohibits conspiracies to restrain trade. 15 U.S.C. § 1. To state a claim under Section 1, there must be allegations that tend "to exclude the possibility that the conspirators were acting independently." *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 697 F.3d 387, 401-02 (6th Cir. 2012). Section 2 prohibits illegal monopolization of the market. 15 U.S.C. § 2. To state a claim under Section 2, a plaintiff must allege "(1) possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." *Static Control*, 687 F.3d at 402.

"To bring a claim for damages under [Section 1 or Section 2] of the Sherman Act," however, "the claimant must first demonstrate that it has standing."

Id. "[S]tanding in an antitrust case is more onerous than the conventional Article III inquiry." *Id.* "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983). "[A]ntitrust standing ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 449 (6th Cir. 2007). Courts decide whether a claimant has adequately pleaded antitrust standing by considering the following factors:

> (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation.

Static Control, 687 F.3d at 402. These factors are to be balanced, and no single factor is conclusive. *See id.* "[A]ntitrust standing is a threshold, pleading-stage inquiry[,] and when a complaint by its terms fails to establish this requirement[,] [the court] must dismiss

it as a matter of law." *Id.* (quoting *NicSand,* 507 F.3d at 450).

In this case, even though UAS adequately alleges a causal connection between its harm and an antitrust violation and that Defendants intended such harm, the remaining factors weigh against finding that UAS has antitrust standing.

i. Consumer or Competitor

"Traditionally, only claimants who are competitors or consumers within the injured market have standing to sue." *Id.* at 404. In this case, UAS does not contend that it is a consumer in the relevant market, but instead argues that its status as a competitor of AASC confers antitrust standing. (*See* Doc. 122, at 25 ("[B]ecause UAS participates in performing the technical services of the product to the patient, it is a competitor of AASC.").)

In determining whether UAS is a competitor of AASC, *Barton & Pittinos, Inc. v. SmithKline Beecham Corporation* is instructive. 118 F.3d 178 (3d Cir. 1997). In that case, Barton & Pittinos ("B&P"), a marketing company, entered into a contract with SmithKline Beecham ("SKB"), a drug manufacturer, to market SKB's vaccine to nursing homes. *Id.* at 179- 80. Under their agreement, B&P provided nursing homes with information about the vaccine and solicited orders, receiving a commission from the manufacturer for orders placed. *Id.* B&P then sent the orders to General Injectables and Vaccines, Inc. ("GIV"), which bought the vaccine from SKB and then resold the vaccine to the nursing homes, with SKB receiving a commission. *Id.* After consultant pharmacists—who traditionally supplied the nursing homes with the vaccine—

complained about this program, SKB stopped using B&P to solicit vaccine sales. *Id.* at 180. B&P then sued SKB, alleging, among other things, that it conspired with pharmacists to restrain competition in the nursing-home market for the vaccine. *Id.* In affirming the district court's decision that the marketing company lacked antitrust standing, the court of appeals explained that, although the package of services provided by B&P, SKB, and GIV was "reasonably interchangeable" with the package of goods and services offered by the pharmacists, the relevant inquiry was whether B&P was in competition with the pharmacists, not whether the B&P/SKB/GIV program competed with the pharmacists. *Id.* at 182. The court of appeals determined that B&P was not a competitor of the pharmacists, because B&P's role was limited to marketing the vaccine, and, as a result, nursing homes could not abandon the pharmacists "in favor of B&P alone." *Id.* "Consequently, there was no cross-elasticity of demand between the pharmacists' offerings and B&P's offerings; no matter how much the pharmacists raised the price of the package of goods and services that they offered, the nursing homes could not have switched to B&P. *Id.* at 182-83. Accordingly, the court of appeals concluded that B&P was not a consumer or competitor "in the market in which trade was allegedly restrained" and, therefore, lacked antitrust standing. *Id.* at 184.

Based on the allegations in UAS's first amended complaint, the package of allergy-testing and immunotherapy services provided by UAS and UAS-contracting primary-care physicians is reasonably interchangeable with the services offered by AASC and its board-certified allergists. But, as *Barton &*

Pattinos instructs, that is not the appropriate inquiry based on UAS's definition of the relevant market. Rather, the inquiry is whether UAS competes with AASC in the relevant market, which UAS defines as the market for allergy-testing and immunotherapy services provided to patients in Tennessee.[4] (Doc. 103,

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[4] Although UAS alleges that AASC "would also operate its business similar to UAS, including contracting with primary care clinics to place a trained technician or nurse in those clinics to assist with allergy skin testing and immunotherapy," it does not allege that the relevant market is for allergy-testing and immunotherapy technical services provided to primary-care physicians. Rather, as the complaint makes clear, UAS defines the relevant market as allergy-testing and immunotherapy services provided to patient-consumers in Tennessee:

- "As a result of Defendants' conduct, consumers have been deprived of the competition facilitated by UAS's participation in the relevant market, leaving many consumers with less access to care, lower output, and higher prices." (Doc. 103, at 44);
- "AASC has market power in local markets within Tennessee in allergy testing and immunotherapy services market." (*Id.* at 45);
- "Defendants have combined and conspired amongst themselves and with competitors of UAS such as AASC to eliminate competition in the markets for allergy testing and immunotherapy services for patients in Tennessee. . . . Defendants' actions include attempting to restrict and in fact restricting participation in the market for allergy testing and immunotherapy services provided by businesses other than those of board-certified allergists." (*Id.* at 46);
- "AASC had also been providing the same exact services to primary care clinics but those clinics were turning to UAS instead of AASC. As AASC knew, such technician services provided by such auxiliary personnel are a necessary aspect of the allergy testing and

at 5.) Viewed in the context of the relevant market,[5] UAS is not a competitor of AASC, because Tennessee

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immunotherapy product and are utilized in the same way by board-certified allergists when provided at AASC clinics." (*Id.* at 19);

- "AASC holds a dominant position in the market for allergy testing and immunotherapy services in Tennessee." (*Id.* at 43).

[5] UAS's responses to Defendants' motion to dismiss confirm that the "relevant market" in this case is the market for allergy testing and immunotherapy offered to patients in Tennessee.

- "At issue is the restriction of competition in the allergy services market, comprised of two related services: (1) allergy testing necessary to diagnose a patient with seasonal and perennial allergies; and (2) allergen immunotherapy necessary to cure those allergies." (Doc. 121, at 23);
- "The [First Amended Complaint] explicitly alleges the bounds of the relevant market—namely how far consumers would be willing to travel for allergy testing and immunotherapy services—is confined to cities and towns, or as the Census defines them, Core-Based Statistical Areas ("CBSAs"). (Doc. 122, at 21);
- "The abuse of market power allowed AASC to improperly maintain its market dominance through anti-competitive means. These actions also led to a reduction in allergy services supplied to customers in the relevant geographic markets." (*Id.* at 23);
- "[T]he services UAS technicians provide alongside the physicians in the clinics are part of the allergy testing and immunotherapy services accessed by the consumer." (*Id.* at 26);
- "Defendants' agreement came at a cost to the allergy services market—ultimately harming consumers' ability to obtain allergy services and choose between different sources of care. Consumers in the relevant

consumers seeking allergy-testing and immunotherapy services could not abandon AASC or a referral from a primary-care physician to AASC in favor of UAS alone. Indeed, UAS expressly alleges that, for entities to provide allergy-testing and immunotherapy services, "they must have access to a physician who provides the medical component of the services, a trained technician acting incident to the provider in providing these services, expensive equipment and products including testing devices, [and] FDA-approved antigens and diluents[.]" (*Id.* at 6.) UAS cannot provide all of these components alone; rather, it has to contract with primary-care physicians to provide the medical components for allergy testing and immunotherapy while it provides the technical, non-medical components. (*Id.* at 7, 14.) Conversely, however, UAS alleges that businesses like AASC that employ board-certified allergists and receive referrals from primary-care physicians can provide all of the necessary medical and non-medical components for allergy testing and immunotherapy to consumers.[6]

> market . . . benefited from increased sources of output generated by UAS-related services." (Doc. 123, at 21.)

[6] Perhaps acknowledging this deficiency, UAS repeatedly attempts to blur the appropriate definition of competitor, arguing that the package of services it offers with contracting primary-care physicians makes it a competitor of AASC. For example, UAS argues that

> it is not a mere supplier complaining of an indirect injury in a downstream market; it is a competitor in the relevant market as defined in the FAC—the services UAS technicians provide **alongside the physicians in the clinics** are part of the allergy testing and immunotherapy services accessed by the consumer. UAS is no more a "supplier" of allergy

(*See id.* at 6-7.) As a result, there is no cross-elasticity of demand between the AASC's allergy-testing and immunotherapy services and UAS's technical services related to allergy testing and immunotherapy[7]; no matter how much AASC raises the price of allergy testing and immunotherapy, patients could not simply switch to UAS.[8] Accordingly, UAS is not a competitor

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> services than AASC, which also "supplies" these products, **including the physician and technician services to consumers**."

(Doc. 122, at 26 (emphasis added).) UAS concedes that it provides only part of the equation necessary to offer allergy-testing and immunotherapy services to consumers and that primary-care physicians provide the other necessary component, but, simultaneously, acknowledges that AASC can provide both the necessary physician and technician components. Such a concession demonstrates that UAS is not a competitor of AASC.

[7] There is, however, cross-elasticity of demand between AASC's allergy-testing and immunotherapy services and allergy-testing and immunotherapy services provided by primary-care physicians who, with or without UAS, are equipped to provide the necessary medical and non-medical components. Such cross-elasticity of demand further demonstrates that primary-care physicians are AASC's primary competitor as it relates to the antitrust-standing inquiry.

[8] The Court notes that, in responding to the motions to dismiss, UAS argues that "Defendants' efforts to drive UAS from the relevant market with the intent and effect of restraining competition is best litigated by UAS, the victim of the conduct. Without UAS, there is no output of the products of allergy testing and immunotherapy at the primary care level." (Doc. 121, at 29.) But this argument is inconsistent with the allegations in the complaint. UAS does not allege that it or any of its employees is licensed to provide medical care in Tennessee, and it does not allege that primary-care physicians are incapable of or prohibited from providing the technical services UAS provides; rather, UAS alleges that there are simply high barriers to entry. (Doc. 103, at

of AASC for the purposes of supporting antitrust standing.[9]

Nonetheless, "claimants who are not direct players in the relevant market may [ ] have standing if their injury is 'inextricably intertwined' with the injury to be inflicted upon the relevant market or participants therein." *Static Control*, 697 F.3d at 404 (quoting *Southhaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1085 (6th Cir. 1983)). "The 'inextricably intertwined exception, however, is narrow," and "was not designed to give standing to claimants whose injuries are a tangential byproduct of monopolistic conduct in a relevant market." *Id.* Rather, "the claimant must show that the defendants 'manipulated or utilized the claimant as a fulcrum, conduit or market force to injure competitors or

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6-7.) According to UAS, it "contracts with medical practices, including those who employ primary care and family physicians, **to provide the equipment and non-physician technician services** necessary to facilitate the treatment of allergy skin testing and immunotherapy in a cost-effective manner." (*Id*. at 8 (emphasis added).) As a result, UAS's complaint acknowledges that a primary-care physician could compete directly with AASC without UAS, assuming the primary-care physician was willing to expend the necessary capital for the non-medical component of allergy-testing and immunotherapy services. The converse is not true for UAS. UAS cannot provide allergy-testing and immunotherapy services that compete with AASC without employing a physician to provide the necessary medical component.

[9] In fact, UAS's first amended complaint acknowledges that the primary-care physicians it contracts with are the actual competitors of AASC. "In other words, these UAS-contracting physicians, who were once sources of referrals for AASC, became competitors in the market." (Doc. 103, at 15.)

participants in the relevant product and geographical markets." *Id.* "An inextricably intertwined injury is one that results from the manipulation of the injured party as a means to carry out the restraint of trade in the product market." *Id.* at 405. The fact that a business is negatively affected by manipulative conduct does not mean that a business has been used as a conduit to achieve the alleged anticompetitive effect in the relevant market; rather, a plaintiff must allege that defendants successfully manipulated it to achieve the anticompetitive conduct. *Id.* Additionally, even if the manipulation question is resolved in a plaintiff's favor, "the standing inquiry turns on a balance of several factors, not simply the plaintiff's status in the market or role as an economic fulcrum." *Bode-Rickett & Assoc. v. Mars, Inc.*, 957 F.2d 287, 292 (6th Cir. 1992).

In determining whether UAS's injuries are inextricably intertwined with the alleged injury to the allergy-testing and immunotherapy market in Tennessee, *Static Control* is instructive. *See* 698 F.3d at 395-96, 403-05. In *Static Control*, a microchip manufacturer, Static Control, asserted that certain business practices employed by a laser-printer and toner-cartridge manufacturer, Lexmark, were anticompetitive and violated the Sherman Act as it related to the replacement toner cartridge market. *Id.* at 395. Seeking to limit toner cartridge sales by "remanufacturers"—businesses that acquired used toner cartridges, repaired and refilled the cartridges, and resold the cartridges at prices lower than Lexmark—Lexmark developed and patented microchips for both its printers and toner cartridges so that its printers rejected any toner cartridge not

containing a matching microchip. *Id.* Static Control, however, "identified how to replicate cartridge microchips and [sold] the microchips to remanufacturers along with other parts to facilitate and repair and resale of Lexmark toner cartridges." *Id.* After Lexmark sued Static Control for copyright violations, Static Control asserted counterclaims against Lexmark for violation of the Sherman Act, alleging that Lexmark reduced output and increased prices in the replacement-toner-cartridge market by, among other things, offering a "prebate" program, in which it would sell toner cartridges to end users at discounted prices if the end users agreed to a single-use license and returned used cartridges to Lexmark after use. *Id.* at 396, 403-04. In holding that Static Control did not have antitrust standing to challenge Lexmark's prebate program, the Sixth Circuit explained Static Control did not allege "that it was harmed because it was manipulated into harming remanufacturers," and, although "Static Control's allegations establish that it was negatively affected by Lexmark's manipulation of end users into buying Prebate cartridges, . . . Static Control itself was not used as a conduit to achieve the alleged anticompetitive effect in the remanufactured cartridge market." *Id.* at 404-05. Rather, "Lexmark [used] end users to obtain the desired anticompetitive effects" in the replacement toner cartridge market. *Id.* at 405. As a result, the Sixth Circuit concluded that Static Control's injury was not inextricably intertwined with the alleged injuries to the replacement-toner-cartridge market. *Id.* ("No such allegations of exploitation or manipulation exist with respect to Static Control. The level of manipulation of

the claimant—and the necessity of the success of such manipulation to achieve anticompetitive conduct—is simply not present in this case with respect to Static Control.")

In this case, UAS's alleged injury is not inextricably intertwined with the alleged injury to the allergy-testing and immunotherapy market, because UAS does not allege that Defendant manipulated it into harming primary-care physicians seeking to offer allergy-testing and immunotherapy services or Tennessee patients seeking allergy-testing and immunotherapy services as a means to achieve its desired anticompetitive effects. Rather, UAS alleges that it was negatively affected by Defendants' manipulation of primary-care physicians. Because UAS does not allege that Defendants successfully manipulated it to achieve the desired anticompetitive effects, UAS fails to plausibly allege that its injury is inextricably intertwined with the alleged harm to the allergy-testing and immunotherapy market in Tennessee. Moreover, and as explained below, even if the Court resolved the manipulation question in UAS's favor, the remaining factors weigh against finding that UAS has antitrust standing.

ii. Directness or Indirectness of Injury, Potential for Duplicative Recovery, and Existence of More Direct Victims

Static Control further instructs that the existence of injuries to more-direct victims of the anticompetitive conduct weighs against finding that indirect victims of the anticompetitive conduct have antitrust standing. *Id.* at 405-06. It also explains that

the existence "of a clear class of direct victims increases the danger of duplicative recovery" if an indirect victim "is given antitrust standing," because it exposes a defendant "to pay treble damages to parties both directly and indirectly injured from the same antitrust violation." *Id.* at 406. To that end, suppliers who seek indirect damages following anticompetitive conduct directed at its customers' market do not have antitrust standing. *Id.* (Static Control's allegations resemble a classic case of a supplier seeking standing to recover for indirect damages following anticompetitive conduct directed at its customers' market. . . . We agree that Static Control lacks standing to pursue its antitrust claims as they relate to the Prebate program.").

In this case, UAS's allegations demonstrate that more-direct victims of Defendants' alleged anticompetitive conduct exist and that this situation is akin to a supplier providing products or services to a more-direct victim of the anticompetitive conduct. As alleged in UAS's first amended complaint, "some family physicians and other primary care physicians practiced allergy testing and allergen immunotherapy in their clinics" but "most did not, based on the large economic barrier to entry into the market," and "UAS was formed to help primary care physicians and their businesses overcome these economic and technical barriers by contracting with those physicians to assist those physicians' entry into the market." (Doc. 103, at 7-8.) The alleged anticompetitive conduct in this case—sending recoupment letters and employing guidelines aimed at not reimbursing primary-care physicians who contract with UAS to facilitate allergy testing and immunotherapy—more directly harms

primary-care physicians, who, with or without UAS, could directly compete with AASC in the market for allergy-testing and immunotherapy services provided to Tennessee consumers. Like a supplier who provides component parts to a manufacturer, UAS helps facilitate the ultimate allergy-testing and immunotherapy services rendered by primary-care physicians, but cannot render the ultimate service by itself. As a result, the more-direct injury of the alleged anticompetitive conduct is the injury to UAS-contracting primary-care physicians who are not reimbursed for allergy-testing and immunotherapy services provided to patients or who forego providing allergy-testing and immunotherapy services because of the leverage exerted by the third-party payor Defendants.[10] For this same reason, finding that the UAS has antitrust standing based on its indirect injury could subject Defendants to duplicative recovery if primary-care physicians also challenge Defendants' conduct.[11] As a result, the existence of

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[10] The indirectness of UAS's alleged injury is further demonstrated by how it is compensated for the services it provides. As alleged, primary-care physicians and AASC compete for reimbursement funds distributed by the third-party payor Defendants. UAS does not allege that it is entitled to any of these reimbursement funds. Rather, it is paid for its services by the primary-care physicians pursuant to the terms of their contracts. As a result, UAS's injury is an indirect byproduct of Defendants' alleged decision to reimburse AASC for allergy testing and immunotherapy and to not reimburse UAS-contracting primary-care physicians for those services.

[11] To that end, a primary-care physician in contract with UAS previously asserted substantially similar antitrust allegations against Amerigroup and BCBST in the United States District Court for the Middle District of Tennessee. In that case, however,

more-direct victims, the potential for duplicative recovery, and the fact that UAS is an indirect victim of the alleged anticompetitive conduct all weigh against finding that it has antitrust standing in this case.

For these reasons, UAS does not have antitrust standing to pursue its claims against Defendants for violation of the Sherman Act. Accordingly, the Court will **GRANT** Defendants' motions to dismiss UAS's claims against them for violations of the Sherman Act.[12]

B. Tortious Interference

Defendants next argue that UAS's first amended complaint fails to state claims for tortious interference with existing contracts and tortious interference with a business relationship or advantage. (Doc. 109, at 19-24; Doc. 111, at 27-30; Doc. 113, at 28-30.)

i. Tortious Interference with Existing Contracts

In Tennessee, to state a claim for tortious interference with existing contracts, a plaintiff must allege:

> (1) that there was a legal contract; (2) that the wrongdoer had sufficient knowledge of the

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the district court dismissed the primary-care physician's Sherman Act claim, finding that he failed to adequately allege the existence of an unlawful agreement. *See Sewell v. Amerigroup Tenn., Inc.*, No. 2:17-cv-62, 2018 WL 6591429 (M.D. Tenn. Dec. 14, 2018).

[12] Because UAS does not have antitrust standing, the Court need not determine whether UAS has otherwise stated a claim for violations of the Sherman Act.

> contract; (3) that the wrongdoer intended to induce its breach; (4) that the wrongdoer acted maliciously; (5) that the contract was breached; (6) that the act complained of was the proximate cause of the breach; and (7) that damages resulted from the breach.

TSC Indus., Inc. v. Tomlin, 743 S.W.2d 169, 173 (Tenn. 1987). Federal courts in Tennessee consistently rule that claims for tortious interference are not subject to the heightened pleading requirements set forth in Rule 9(b) of the Federal Rules of Civil Procedure. *See Card-Monroe Corp. v. Tuftco Corp.*, No. 1:14-CV-292, 2015 WL 11109361, at *5 (E.D. Tenn. Aug. 18, 2015) (collecting cases); *see also Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 702 (Tenn. 2002) (stating standard for tortious interference claims under Tennessee law and not applying a heightened pleading standard).

In this case, UAS has plausibly alleged that Defendants tortiously interfered with existing contracts. UAS alleges that it contracted with primary-care physicians and that "certain clinics terminated their contracts because of Defendants' harassment." (Doc. 103, at 41, 48-51.) UAS further alleges that Defendants knew about these contracts and collectively exerted considerable leverage aimed at inducing UAS-contracting physicians to terminate[13] their contracts with UAS or reduce

[13] Although UAS does not expressly allege that any primary-care physicians "breached" their contracts with UAS, viewing the allegations in the light most favorable to UAS, the allegation that primary-care physicians terminated their contracts in response to Defendants' alleged conduct is sufficient, at the pleading stage,

business with UAS, thereby resulting in lost revenues and profits. (*Id.*) Viewed in the light most favorable to UAS, such allegations are sufficient to reasonably infer that Defendants tortiously interfered with contracts between UAS and UAS-contracting physicians and practices. Accordingly, the Court will **DENY** Defendants' motions to dismiss UAS's claim for tortious interference with existing contracts.

ii. Tortious Interference with a Business Relationship or Advantage

In Tennessee, a party claiming tortious interference with business relationships must allege the following elements: (1) "an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons"; (2) "the defendant's knowledge of that relationship and not a mere awareness of the plaintiff's business dealings with others in general"; (3) "the defendant's intent to cause the breach or termination of the business relationship"; (4) "the defendant's improper motive or improper means"; and (5) "damages resulting from the tortious interference." *Trau-Med*, 71 S.W.3d at 701.

Again, UAS's allegations are sufficient to state a claim for tortious interference with a business relationship or advantage. UAS alleges that it had contracts with and was actively seeking additional contracts with primary-care physicians wanting to

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to plausibly state a claim for tortious interference with existing contracts. Defendants, however, may be entitled to summary judgment on this claim if, after discovery, they can demonstrate that the UAS-contracting primary-care physicians terminated their contracts without breaching these contracts.

offer allergy-testing and immunotherapy services as part of their medical practice and that Defendants knew that UAS was providing non-medical services related to allergy testing and immunotherapy. (Doc. 103, at 15-39.) UAS further alleges that Defendants intended to cause the breach or termination of UAS's relationships with these physicians through anticompetitive conduct and that it suffered damages based on Defendants' actions. (*See id.*) Finally, UAS alleges that the third-party payor Defendants, at the urging of AASC, threatened to deny and actually denied reimbursement claims without a legitimate basis due to primary-care physicians' use of UAS's services. (*See e.g.*, *id.* at 20, 24, 36-38.) UAS sufficiently alleges that Defendants used improper motives or improper means as a mechanism to interfere with UAS's business relationships with primary-care physicians offering allergy-testing and immunotherapy services to their patients. *See Trau-Med*, 71 S.W.3d at 701 (explaining that making false statements about the propriety of a business to drive it out of business or limit its viability is sufficient to allege improper motive and improper means of interference). UAS has therefore plausibly alleged a claim against Defendants for tortious interference with a business relationship or advantage. Accordingly, the Court will **DENY** Defendants' motions to dismiss this claim.

C. Civil Conspiracy

Finally, Defendants argue that UAS fails to state a claim for civil conspiracy because it fails to state a claim for an underlying predicate tort committed as part of the conspiracy. (Doc. 109, at 24-25; Doc. 111, at

30-31; Doc. 113, at 30.) "The elements of a cause of action for civil conspiracy under Tennessee common law are: (1) a common design between two or more persons; (2) to accomplish by concerted action an unlawful purpose, or a lawful purpose by unlawful means; (3) an overt act in furtherance of the conspiracy; and (4) injury to person or property resulting in attendant damage." *Freeman Mgmt. Corp. v. Shurgard Storage Ctrs., LLC*, 461 F. Supp. 2d 629, 642 (M.D. Tenn. 2006) (citing *Braswell v. Carothers*, 863 S.W.2d 722, 727 (Tenn. Ct. App. 1993)). A claim for civil conspiracy must have an underlying predicate tort committed in the course of the conspiracy. *Id.* (citing *Morgan v. Brush Wellman, Inc.*, 165 F. Supp. 2d 704, 721 (E.D. Tenn. 2001)).

In this case, UAS has plausibly alleged that Defendants tortiously interfered with existing contracts and with business relationships. Accordingly, the Court will **DENY** Defendants' motions to dismiss UAS's claim for civil conspiracy for lack of an underlying predicate tort.

IV. Conclusion

For the reasons stated herein, Defendants' motions to dismiss (Doc. 108, 110, 112) are **GRANTED IN PART** and **DENIED IN PART**. UAS's claims for violation of the Sherman Act are **DISMISSED WITH PREJUDICE**. UAS's claims for tortious interference with existing contracts, tortious interference with a business relationship, and civil conspiracy will proceed.

SO ORDERED.

/s/ *Travis R. McDonough*
TRAVIS R. MCDONOUGH
UNITED STATES DISTRICT JUDGE

Appendix E

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

No. 19-cv-180

UNITED BIOLOGICS, LLC, dba United Allergy Services,

Plaintiff,

v.

AMERIGROUP TENNESSEE, INC., dba Amerigroup Community Care, et al.,

Defendants.

Filed: June 10, 2021

FIRST AMENDED COMPLAINT

Plaintiff United Biologics, LLC d/b/a United Allergy Services, ("UAS" or "Plaintiff") files this Complaint against Amerigroup Tennessee Inc. d/b/a Amerigroup Community Care ("Amerigroup"), BlueCross BlueShield of Tennessee, Inc. ("BCBST"), Volunteer State Health Plan, Inc., d/b/a BlueCare Tennessee ("BlueCare"); Physicians' Medical Enterprises LLC d/b/a PME Communications, LLC ("PME"), Allergy Associates, P.A. d/b/a The Allergy, Asthma and Sinus Center, P.C. ("AASC"), and Ned DeLozier (collectively, "Defendants"), and would respectfully show the Court the following:

I. Nature of Case

1. This case concerns a conspiracy among the largest health insurance company in Tennessee, BCBST, two of the State's three managed care organizations, Amerigroup and BlueCare, and the largest provider of allergy care in the State, AASC, to unlawfully restrict the sources of allergy testing and immunotherapy in markets throughout the State of Tennessee. The agreement among these entities, and those acting illegally on their behalf such as PME and Ned DeLozier, includes limiting the sources of output for allergy skin testing and allergen immunotherapy services to the businesses of board-certified allergists, thereby benefitting the business of AASC, PME, and DeLozier and limiting the reimbursement exposure of Amerigroup, BCBST, and BlueCare. These parties have attempted to limit competition through their group boycott of UAS, including by directly harassing and intimidating UAS's primary care provider customers to prevent their participation with UAS in the allergy skin testing and immunotherapy market, convincing providers to deny relationships to UAS that are necessary to compete in the market, and price fixing among the MCOs that would limit competition traditionally occurring among network providers. This boycott and price fixing activity among Defendants is designed to exclude the offering of allergy care at the primary care level by excluding the necessary components of those services and by threatening anyone who participates in such an offering.

2. As a result of Defendants' conduct, competition has suffered. Numerous patient consumers who otherwise would be treated for

allergies with allergy testing and immunotherapy are forced to go without treatment, and the few who are able to obtain treatment spend more money to do so. Meanwhile, Amerigroup and BlueCare pocket the difference in government funds, BCBST is permitted to use the absence of a strong commercial insurance rival to reap a windfall, and AASC is able to protect its domination of the allergy markets in Tennessee. Defendants' internal admissions indicate not only a conscious commitment to this unlawful scheme, but additional efforts by each of them to cover it up, including taking steps to evade government and regulatory scrutiny at every turn.

II. Parties

3. Plaintiff United Biologics, LLC d/b/a United Allergy Services ("UAS") is a Delaware limited liability company with its principal place of business in San Antonio, Bexar County, Texas. UAS provides technical services in conjunction with physicians who provide professional services in the delivery of allergy testing and immunotherapy to consumers nationwide including in Tennessee. As a result, UAS and the primary care and other health care providers UAS supports, compete directly with businesses such as AASC, which generally dominated all markets for allergy testing and allergen immunotherapy prior to UAS's launch in 2009. As a direct target and victim of Defendants' activities to eliminate it from the market for allergy testing and allergen immunotherapy, and thus reduce competition in that market, UAS has standing to seek damages and injunctive relief under the Clayton Act in addition to standing for its other

claims. UAS appears here through undersigned counsel of record.

4. Defendant Amerigroup Tennessee Inc. d/b/a Amerigroup Community Care ("Amerigroup") is a Tennessee corporation with its principal place of business at 22 Century Blvd., Suite 220, Nashville, Tennessee 37214-3787. Amerigroup's registered agent for service is CT Corporation System and may be served at 800 S. Gay Street, Suite 2021, Knoxville, TN 37929- 9710. Amerigroup is a health insurance and managed healthcare contractor that is authorized to arrange for the provision and reimbursement of healthcare services to patients enrolled in Tennessee's Medicaid program, TennCare.

5. Defendant BlueCross BlueShield of Tennessee, Inc. ("BCBST" or "BlueCare") is a Tennessee corporation with its principal place of business at 1 Cameron Hill Circle, Chattanooga, Tennessee 37402-9815. BCBST is a for-profit health insurance company that is by far the largest such entity in Tennessee, providing coverage to over 3.5 million members, including commercial and governmental health insurance products. For example, BCBST has approximately 71% market share of the large group market in Tennessee and has the ability to price its products, reduce coverage, and pay significantly lower rates to providers without any appreciable effect on its market share or sales to consumers and employers. BCBST's registered agent for service is Anne Hance and may be served at BCBST's principal office.

6. Volunteer State Health Plan, Inc., d/b/a BlueCare Tennessee ("BlueCare") is the wholly owned

subsidiary of BCBST and a health insurance and managed healthcare contractor that is authorized to arrange for the provision and reimbursement of healthcare services to patients enrolled in Tennessee's Medicaid program, TennCare. BlueCare's registered agent for service is Anne Hance and may be served at BCBST's principal office.

7. Defendant Physicians Medical Enterprises d/b/a PME Communications, LLC ("PME") is a Tennessee limited liability company with its principal place of business at 6701 Baum Drive, Suite 140, Knoxville, Tennessee 37919-7361. PME's registered agent for service is Frances Prince-DeLozier and may be served at PME's principal office.

8. Defendant Allergy Associates, P.A. d/b/a The Allergy, Asthma and Sinus Center, P.C. ("AASC") is a Tennessee corporation with its principal place of business at 6701 Baum Drive, Suite 140, Knoxville, Tennessee 37919-7361. AASC's registered agent for service is Robert M. Overholt, M.D. and may be served at AASC's principal place of business.

9. Ned DeLozier is an individual, who is also the Business Development Director and Executive for PME, the management company for AASC, and may be served at 6701 Baum Drive, Suite 140, Knoxville, Tennessee 37919-7361, PME's principal place of business.

III. Jurisdiction And Venue

10. This action is brought under the United States Constitution, Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2, the Clayton Act, 15 U.S.C. §§ 15 and 26, and the common law actions for tortious

interference with business relations or advantage and civil conspiracy.

11. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343. This Court has supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367.

12. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claim occurred in this District.

IV. Factual Background

The Markets for Allergy Testing and Immunotherapy

13. This case centers on coordinated efforts by Defendants to restrict competition in the markets for allergy testing and immunotherapy by restricting output of those services in Tennessee to the businesses of board-certified allergists such as AASC. Allergy testing and immunotherapy are services for which demand already greatly exceeds output in markets in Tennessee. The lack of sufficient output for these services is significant because the only known method of actually curing allergic rhinitis is allergen immunotherapy, which can only be performed after a patient has been tested for allergies.

14. Established literature estimates that currently 30-40% of the United States population are affected by allergic rhinitis, which is one of the fastest growing health care epidemics in the United States. Those same studies show only 2-6% of the population that could benefit from immunotherapy actually

receive it, a treatment that actually treats the underlying cause, unlike pharmacopeia and other drugs which merely mask a patient's symptoms. A significant factor in this market need is that the number of sources of output for allergy testing and immunotherapy is lacking due to numerous and high barriers to entry.

15. The barriers to entry for allergy testing and immunotherapy include numerous technical and economic elements essential to the production of the product including certain physician and technician relationships needed in the competitive struggle. For firms to offer these services, they must have access to a physician who provides the medical component of the services, a trained technician acting incident to the provider in providing the services, expensive equipment and products including testing devices, FDA-approved antigens and diluents, and reimbursement from health insurance companies who largely pay for the services.

16. Because of these high barriers to entry, most of the sources of output for these services in Tennessee are businesses such as AASC that are associated with "board-certified allergists," or physicians who have been certified to have completed a fellowship in training by the American Board of Allergy and Immunology ("ABAI"), a private organization established in 1971. Physicians who participate in that fellowship specialize in high-risk allergic and asthmatic conditions far beyond the complexity of the average patient with allergic rhinitis. And while most board-certified allergists also participate in the offering of allergy testing and immunotherapy

services for allergic rhinitis, no governmental authority has ever adopted the private ABAI certification as a requirement of participation in treating that condition. In fact, in 1989, the United States Department of Health and Human Services ("HHS") expressly rejected such a proposal in relation to allergy testing and immunotherapy covered by the Centers for Medicare and Medicaid Services, directing that such services are often provided by family physicians and those under their supervision and should not be so restricted.

17. Nevertheless, for many years AASC has dominated most markets for allergy testing and immunotherapy in Tennessee. AASC has historically been and is still the largest provider of allergy testing and immunotherapy services in the State of Tennessee. Its nearly 30 Tennessee locations include six offices in the Knoxville area, as well as offices in the following geographic markets: Athens, Clarksville, Columbia, Cookeville, Crossville, Franklin, Greeneville, Harriman, Hendersonville, Hermitage, Johnson City, Lawrenceburg, Lenoir City, Madisonville, Maryville, McMinnville, Morristown, Mt. Juliet, Oak Ridge, Sevierville, Spring Hill, West Nashville, and White House. In fact, in almost every geographic market in Tennessee, AASC controls more than 70% of the allergy testing and immunotherapy services performed in those local areas.

Plaintiff Increases Competition in the Market, Drawing Defendants' Backlash

18. Since 2009, a new class of competitors began expanding competition in providing allergy testing and immunotherapy services to patients in the

relevant markets. One such competitor, Plaintiff United Biologics, LLC, was formed and began doing business in San Antonio, Texas under the name "United Allergy Labs" or "UAL," now currently doing business under the name "United Allergy Services" or "UAS." UAS's business model represented a competitive response to the shortage of physicians who practiced allergy testing and allergen immunotherapy despite the growing need for those services, especially in areas like Tennessee. Though some family physicians and other primary care physicians practiced allergy testing and allergen immunotherapy in their clinics, most did not, based on the large economic barrier to entry into the market. Providers must purchase and stock the necessary allergy testing equipment and antigens for immunotherapy, as well as train and maintain technicians to assist in administering tests and preparing immunotherapy. These expenses normally prevent most primary care practices from providing allergy testing and allergen immunotherapy. UAS was formed to help primary care physicians and their businesses overcome these economic and technical barriers by contracting with those physicians to assist those physicians' entry into the market, along with UAS's.

19. UAS contracts with medical practices, including those who employ primary care and family physicians, to provide the equipment and non-physician technician services necessary to facilitate the treatment of allergy skin testing and immunotherapy in a cost-effective manner. In exchange for these services, the provider pays UAS a set fee. Since 2009, UAS technicians and more than

2,000 primary care physicians have jointly provided allergy testing and allergen immunotherapy across 29 states. In Tennessee, UAS has contracted with over 80 primary care physicians and other providers or medical practices to enable the offering of allergy testing and immunotherapy at their locations to treat patients for seasonal and perennial allergies. Many of these providers work in rural areas and offered a necessary service to consumers at their clinics that was not possible without UAS's participation and presence. Certain providers offer medical services in such rural counties that the nearest board-certified allergist is many miles away and beyond the distance most consumers will travel for those services.

20. When a provider works with UAS—overcoming the barriers of entry into the market for allergy testing and allergen immunotherapy—that provider is able to treat his or her patients more effectively with the assistance of a UAS technician. The only known potential cure of allergic rhinitis for seasonal and perennial allergies is allergen immunotherapy, a process of introducing allergens incrementally into the patient's system to desensitize the patient to such allergens.

21. Providers who render care through allergen immunotherapy first test the patient for allergies through use of a skin prick test or an allergy blood test. Before the entry of UAS into the market, primary care physicians often would refer patients with seasonal and perennial allergies to reference laboratories for allergy blood testing or to board-certified allergists for allergy skin prick testing and immunotherapy. AASC would also operate its business similar to UAS,

including contracting with primary care clinics to place a trained technician or nurse in those clinics to assist the physicians with allergy skin testing and immunotherapy. But once providers began contracting with UAS for the services of UAS technicians, those providers stopped using AASC. Thus, providers who did not have a similar service beforehand began expanding output of allergy testing and immunotherapy in places throughout Tennessee while others turned away AASC. This cost-effective and accessible system for patients threatened AASC's referral networks and caused third-party payors, like Amerigroup and BCBST, to face more exposure in claims for reimbursement related to these services than when patients did without.

22. To compete in the relevant markets for allergy testing and allergen immunotherapy, allergy services companies like UAS and related businesses rely on physicians licensed to practice medicine in Tennessee, technicians for which there is no licensing requirement, and other employees, who either administer or participate in the testing or immunotherapy preparation. Any competing firms must also purchase all necessary equipment to compete, including skin prick test kits, antigens, needles, instruments, and other materials necessary to perform allergy testing and preparation of allergen immunotherapy. Any competing firm must also be paid for the services performed, namely by the medical practice, which is often reimbursed for testing and treatment of the patient by a "third-party payor," such as a commercial health insurance company, a managed care health plan, Medicare, or Medicaid. Approximately 98% of the services for allergy testing

and allergen immunotherapy are paid for at least in part by third-party payors, and these services are billed to those third-party payors under agreements or regulations that require submissions in accordance with the Current Procedural Terminology ("CPT") code set maintained by the American Medical Association. Because Medicaid, which is administered by the Bureau of TennCare, concerns Covered Services guaranteed by CMS, 100% of those services are paid by MCOs that contract with TennCare, including Amerigroup and BlueCare. Without reimbursement from payors like Amerigroup or BlueCare, services such as allergy testing and immunotherapy cannot be made available to most consumers.

23. Through their control over the source of funds for Covered Services, MCOs like Amerigroup and BlueCare, as well as commercial payors such as BCBST, have the ability to coerce those who seek to supply such services, as third-party payor reimbursement is a necessary element to offering health care beyond just allergy care. Medical practices and physicians in general are vulnerable to coercion, especially when they offer a wide array of reimbursable services. In this case especially, UAS often contracts with family physicians, primary care physicians, and pediatricians who offer a myriad of services and cannot risk losing their contract with payors, like Amerigroup, BlueCare, and BCBST, for all of the services they provide. Losing a contract with these large payors could shut down a physician's entire practice. When physicians receive claims denials, are audited or investigated by a payor, or even kicked out of a payor's network, physicians are less

likely to offer the questioned service in order to protect their broader practice.

24. Currently, there is no substitute for either allergy testing or allergen immunotherapy in effectively diagnosing or treating seasonal or perennial allergies. While over-the-counter and prescription allergy medications mask symptoms, unlike immunotherapy, they fail to address the underlying cause of allergic rhinitis for seasonal and perennial allergies. During the diagnosis of a patient with seasonal and perennial allergies, the physician performs a physical examination of the patient, and based on that examination and the patient's medical history, may recommend to the patient a skin prick test. If the patient consents, the skin prick test is typically applied by a technician to the patient's skin under the physician's supervision. After approximately 15 minutes, reactions on the skin are measured and recorded by the technician. The physician or a duly designated physician assistant or nurse practitioner then reads and interprets the results to determine, in his or her professional medical judgment, whether the patient has tested positive to a clinically relevant allergen. The physician's professional determination as to whether the patient is allergic not only involves reviewing and interpreting the test, but also incorporates the physician's prior physical examination of the patient and review of the patient's clinical history. In performing this service, physicians submit claims for reimbursement to insurance companies and MCOs under CPT Code 95004.

25. Allergy testing, through either a skin test or a blood test, is a prerequisite for a patient to be considered for allergen immunotherapy. When a physician determines that a patient has tested positive for clinically relevant antigens, the physician considers whether to prescribe professional services related to allergen immunotherapy for that patient. In determining whether to prescribe immunotherapy, the physician assesses whether the patient would benefit from allergen immunotherapy, considers whether the benefit exceeds any inherent risk of treatment, and evaluates whether prior efforts at pharmacological management or avoidance have failed to adequately control the patient's symptoms. The physician also consults with the patient regarding the potential benefits and risks associated with immunotherapy. If the patient elects to proceed with immunotherapy, the physician will obtain the patient's written consent before prescribing the allergen immunotherapy preparation. The physician then supervises the preparation and administration of the allergen immunotherapy, an incident-to, technical service that the technician performs under the physician's supervision, which includes the combination of FDA-approved antigens in vials and serial dilutions of those vials. In performing the professional service related to allergen immunotherapy, the physician submits claims for reimbursement to insurance companies and MCOs under CPT Code 95165.

26. The most common form of administration of allergen immunotherapy in the United States is through the use of subcutaneous shots, otherwise known as "SCIT" or allergy shots. If a firm bills a

third-party payor for the administration of SCIT or allergy shots, the firm does so under CPT Code 95115 for a single injection or 95117 for two or more injections if those injections are administered in the office by a technician. Many physicians in their own professional judgment allow some of their patients to self-administer allergy shots outside of the office, particularly those patients who demonstrate a low risk of side effects and who would benefit from the increased rate of compliance and lower costs that are associated with self-administration. Historically and today, a majority of physicians who prescribe allergen immunotherapy for their patients recommend patient self-administration in appropriate cases. Self-administration is a safe and effective method for certain patients and is also less expensive because the patient and their insurer are not billed for shot administrations that the patient self-administers. Further, the patient does not have to travel to the physician's office every week, let alone two to three times a week, for immunotherapy treatments lasting for one to three years. Additionally, HHS has acknowledged that self-administration of immunotherapy is an appropriate form of treatment.

27. Given travel cost and time considerations for the treatment of seasonal and perennial allergies, there is a limit to how far patients will travel for allergy testing and allergen immunotherapy. The area of effective competition, and hence the geographic scope of the market for allergy testing and allergen immunotherapy from the patient side, tends to be relatively localized. Allergy treatment services are offered in all major cities in the country and in some smaller cities as well. Geographic market boundaries

for a relatively localized market are similar to boundaries of cities, as patients will commonly travel within a city but not from one city to another. Because patients typically seek medical care close to their homes or workplaces, they strongly prefer health care services, including allergy testing and allergen immunotherapy, close to their homes and workplaces. Localized areas where patients travel for such services is commonly determined based on Core-Based Statistical Areas ("CBSAs"). A CBSA reflects the economic reality of where these services are received. It is not usually economically feasible for a patient to travel to another CBSA for non-ambulatory services such as allergy testing and allergen immunotherapy given the economic tangible and intangible costs involved with such travel. For the allergy services at issue and based on CMS's guidelines for travel concerning non-ambulatory services for Medicaid patients of this type, patients are highly unlikely to seek treatment over 15 miles from their nearest provider. This geographic limitation is made all the more meaningful in the specific services market at issue because allergen immunotherapy protocols provided by board-certified allergists usually require in-office visits 2 to 3 times per week for several years. Thus, a patient in Knoxville is highly unlikely to travel to Nashville or even Cookeville just to obtain an allergy test or allergen immunotherapy numerous times per week for several years.

28. These issues are compounded when considering that even when consumers are able to travel considerable distances for the pertinent services, they would face not only the additional travel distance and related costs (*e.g.,* gas, time off of work

and school), but also longer wait times for an appointment with a board-certified allergist than they would for a primary care provider, as well as longer wait times in the offices of a board-certified allergist as opposed to a primary care provider. And while the market may be local, Defendants' actions are aimed at foreclosing an entire class of competitors, and Defendants have attempted to impact localized markets in which they do business, including each of the localized markets in Tennessee.

29. These markets include localized markets in the area surrounding Cookeville, for which AASC and Plaintiff are the only sources of output. For example, UAS and primary care provider Kids Kare jointly offer allergy testing and immunotherapy services in that market in direct competition with AASC, which until recently was the only source of output in that area. AASC has thus engaged in the tortious conduct complained of herein to run Plaintiff and its customers out of that market and to regain its monopoly. Similar issues persist in localized markets throughout the State as, absent competition from primary care providers in contract with UAS, AASC possesses dominant market power statewide.

UAS Increases Competition in the Allergy Testing and Immunotherapy Markets

30. UAS's entry into the marketplace marked an increase in competition in markets nationwide, including in Tennessee, taking market share from its competitors, such as board-certified allergists. UAS began contracting with providers in Tennessee in 2013 and, as discussed in detail below, Defendants took

notice, ultimately agreeing to work together to prevent Plaintiff from participating in the market.

31. UAS's contracting physicians in Tennessee are board-certified family physicians, pediatricians, nurse practitioners, and their business practices who provide health care to members of their respective communities in Tennessee within the scope of their medical licenses. Working together, UAS and their contracting physicians provide a bundled service that enables participation in the markets for allergy testing and immunotherapy—the physicians rely upon their medical expertise to provide the necessary professional services, while UAS provides the technical services and equipment.

32. Many of the patients for which these physicians care are participants in the TennCare program, including TennCare members covered by one of three MCOs: Amerigroup, BlueCare, or United Healthcare ("UHC"), formerly referred to as AmeriChoice. As family physicians and primary health care providers, UAS-contracting physicians provide all of their patients important preventive and primary care services, including allergy care consisting of allergy testing and, if warranted, allergen immunotherapy. In 1989, HHS explicitly found that allergy testing and immunotherapy services are within the scope of practice of primary care physicians. As defined by that authority, UAS contracting physicians may provide those services when assisted by auxiliary personnel acting under their direct supervision.

AASC, DeLozier, and Amerigroup Agree to Run UAS and Primary Care Physicians Out of the Market in Violation of Federal and State Laws and Regulations

33. Allergy skin testing and allergen immunotherapy both are covered benefits under CMS programs such as TennCare. Under the terms of those programs and the MCO's Provider Service Agreements, Amerigroup and BlueCare are contractually obligated to reimburse primary care physicians for all claims that they submit related to the "professional services" billed under 95004 and 95165 and that are provided in accordance with their Provider Service Agreements. And Amerigroup and BlueCare did pay claims submitted under these two codes by primary care physicians contracting with UAS for years without issue.

34. In 2016, however, Amerigroup began communicating with those acting on behalf of board-certified allergists, including Ned DeLozier, who was at all times acting on behalf of PME and AASC. Since family physicians and pediatricians began offering allergy testing and immunotherapy services in conjunction with UAS, AASC has been losing patients and revenue to those physicians. In other words, these UAS-contracting physicians, who once were sources of referrals for AASC, became competitors in the market. Consequently, AASC and PME, including Ned DeLozier, had a great interest in driving these physicians and UAS out of this market. Various efforts to do so over the years have failed, so Ned DeLozier, acting on behalf of AASC, decided to reach out to Amerigroup to see if they could agree to work together

to drive these new competitors out of the allergy services market.

35. In fact, DeLozier was alerted to the threat posed by companies like UAS working with primary care doctors to provide allergy care and immunotherapy in April 2014, when he learned that several former AASC patients had seen primary care providers for allergy skin testing.. And while DeLozier and AASC acknowledged in internal emails that diagnosing and treatment of allergies with immunotherapy by PCPs and pediatricians was not wrong or illegal, AASC was concerned with this dwindling source of referrals as more patients began turning to UAS providers. AASC allergists began contacting these PCPs and requesting that they continue referring their patients to AASC instead of contracting with third parties like UAS.

36. DeLozier had previously kicked off his campaign to shut down these providers by attempting to lobby state and federal agencies to adopt exclusionary policies throughout 2014 and 2015. But as DeLozier admitted to a colleague, his crusade to bring "national lobbying attention" to these PCPs and UAS under the guise of alleged concerns about "quality of care" was a mere pretext to "shine a light on the allergist/asthma specialist role" rather than identifying any actual fraud.

37. As AASC became more concerned with UAS's increasing national and statewide presence and its resulting competition with AASC, DeLozier and AASC allergists continued to discuss different ways to run UAS out of the market. After learning that another PCP and former referral source had contracted with

UAS in March 2015, DeLozier advised an AASC allergist to go to the clinic in person to discourage the provider from working with UAS. AASC was particularly concerned by the convenience and efficiency afforded by the UAS model, with one allergist commenting that "if other PCPs in town get word of these injections at home, it would really hurt" AASC because "that's what so many patients are looking for with [immunotherapy]…the convenience of home therapy."

38. DeLozier and AASC even discussed the idea of filing a frivolous *qui tam* against UAS and certain primary care doctors in order to discourage more AASC referral sources from making the switch. Ultimately acknowledging that there was no actual false kickback because UAS was not improperly providing or billing for services, DeLozier and AASC changed tactics to the private realm.

39. Specifically, in May 2015, DeLozier and AASC devised a plan to run UAS out of the market by encouraging payors like Amerigroup, BlueCare, and Cigna to audit primary care doctors who were in contract with UAS. But as DeLozier and AASC admitted in internal communications, no fraud was actually occurring in the UAS model, which meant AASC, and ultimately payors, would have to get creative in coming up with a defendable basis for initiating audits. Ultimately, DeLozier and AASC decided that "medical necessity audits" were the best way to "cut UAL out of the picture." Pursuant to this plan, DeLozier and AASC would lobby payors to initiate audits of UAS-contracted PCPs on the fabricated basis that the allergy care and

immunotherapy services were "not medically necessary." The idea was that payor audits would "slow the growth" of UAS and discourage PCPs from continuing to contract with UAS to test patients for allergies and provide immunotherapy in their clinics, all without creating any "punitive dialogue" between AASC and the insurance payors. This plan was ideal for AASC, because not only would these baseless audits exclude UAS and the competition it posed from the market, but by falsely labeling these practices as "waste" and "abuse," AASC could present itself as a resource and garner influence among the insurance companies by offering to save them money. AASC's worries that physicians were contracting with UAS at a large rate and were forming organizations such as AAAPC, provided DeLozier and AASC "all the more reason to hit with medical necessity" as part of the plan to enlist payors to boycott UAS as soon as possible.

40. In May 2015, DeLozier was introduced to key players for the state's major insurers at a meeting for Tennessee Asthma Coalition stakeholders, including medical directors from Amerigroup, BlueCare, and other payors. DeLozier reached out to these medical directors shortly thereafter to schedule a follow-up meeting to have a "similar conversation" regarding a reimbursement model that would favor specialists like AASC and board-certified allergists.

41. In September 2015, DeLozier contacted Dr. Mark Mahler, Medical Director at Amerigroup, regarding the increase in providers rendering allergy care to TennCare patients for which Amerigroup was reimbursing. DeLozier and Dr. Mahler agreed to meet

privately to discuss their mutual interest in shutting down this increased competition resulting from the rise in primary care physicians offering allergy testing and immunotherapy.

42. DeLozier followed up their initial meeting by emailing Dr. Mahler on January 22, 2016, warning Amerigroup that it should be wary "of medically unnecessary allergy diagnostics and treatment being performed by primary care providers in TN" in order to demonstrate to Amerigroup that primary care physicians were not qualified to offer such services because they were not board-certified allergists. Amerigroup was interested in DeLozier's proposal because it wanted to find a way to reduce the influx of claims from primary care providers offering these services but could not deny claims based on the scope of their license.

43. Following his January 22, 2016 email, DeLozier dropped off documents for Dr. Mahler in person on January 29, 2016, rather than via email, in an intentional effort to avoid a traceable paper trail. Dr. Mahler agreed to investigate the matter and forwarded the information he received from DeLozier to Amerigroup's special investigative unit ("SIU"), noting that DeLozier represented a "large and well respected group of allergists in TN" and requesting that SIU keep Dr. Mahler in loop on how he could "help support the elimination of inappropriate allergy services in our network."

44. Following these initial communications spearheaded by DeLozier, AASC and Amerigroup came to an agreement to work together to restrict allergy care to board-certified allergists by

investigating and eventually shutting off reimbursement to any provider who was in contract with UAS using the justification that they were not allergists, but in reality because they competed with AASC and were submitting claims for reimbursement to Amerigroup. The plan was that DeLozier and the AASC board-certified allergists would provide Amerigroup with information on which Amerigroup could claim to justifiably rely in denying valid claims from primary care physicians who contracted with UAS. At this time, Amerigroup and DeLozier were aware that UAS was providing auxiliary personnel to assist physicians by performing incident-to services under the physician's supervision, such as applying a skin prick test to the skin, handling paperwork and documentation, and physically combining and diluting antigens in serial dilution vials necessary for immunotherapy. AASC had also been providing the same exact services to primary care clinics but those clinics were turning to UAS instead of AASC. As AASC knew, such technician services provided by such auxiliary personnel are a necessary aspect of the allergy testing and immunotherapy product and are utilized in the same way by board-certified allergists when provided at AASC clinics. Yet, AASC convinced Amerigroup to limit its exposure to claims for the allergy services provided by primary care physicians by refusing to reimburse any services associated with UAS based on any pretext Amerigroup could develop in conjunction with AASC.

45. By May 2016, DeLozier had established himself as the go-to resource for Amerigroup for obtaining information about these competitive services. From 2016 through the present, DeLozier

had numerous in-person meetings, emails and telephone calls with Amerigroup investigators and representatives, including Amerigroup medical director Dr. Mahler, Senior Fraud Investigator John Taylor—among other investigators at Amerigroup, Amerigroup's in-house counsel Laura Schmidt, and the National Medical Director for Reimbursement of Amerigroup's parent company, Anthem, Inc., Dr. Priscilla Alfaro. Based on the information provided by DeLozier, Amerigroup eventually decided to target primary care physicians contracting with UAS for wholesale denial of their allergy claims to coerce them into ending their business arrangement with UAS.

Amerigroup Moves Forward with the Agreement

46. In June 2016—after Dr. Mahler and Ned DeLozier's many meetings about excluding primary care physicians from the market, and after John Taylor's conversation with Dr. Alfaro about formulating any basis to restrict coverage to specialists—Amerigroup secretly opened an "investigation" of both UAS and the first of the then-known primary care physicians who were providing allergy testing and immunotherapy to their patients, Dr. Christopher Sewell. As Amerigroup has stated in internal documents, these investigations originated because Amerigroup was interested in limiting its financial exposure resulting from the spike in amounts that it was paying out in reimbursement for allergy testing and immunotherapy. And by August 2016, while Amerigroup had commenced denying claims that primary care physicians submitted for allergy testing and allergen immunotherapy,

Amerigroup began to focus specifically on eliminating UAS from the market. In fact, Amerigroup's SIU investigators were polled about which providers were specifically in contract with UAS in order to identify clinics on that basis, rather than through random sampling or audits. Further, John Taylor told the Manager of the SIU at Amerigroup that Dr. Mahler "wanted to be a part of any future meetings/discussions regarding UA [United Allergy] and 95165."

47. Amerigroup decided that because primary care providers were in contract with UAS, which facilitated a technical and economic component of competition in the market, Amerigroup would find ways to break that relationship and run these competitors out of the market. Amerigroup thus determined it would stop reimbursement for all allergy claims on any basis it could find—and communicated with other payors to encourage them to stop reimbursement too.

48. One such basis was an advisory opinion issued by the Office of the Inspector General (Advisory Opinion No. 11-17), which was obtained by a sham entity named Universal Allergy Labs, LLC. The opinion was limited to the facts presented by the requesting entity—which had never done any business—and called into question whether the shell of an entity ran a risk of inappropriate use of allergy services. The national director of Anthem's special investigations unit directed that the OIG opinion "cannot be relied upon as an authoritative source" because it did not specifically relate to UAS. Nevertheless, AASC and Amerigroup falsely

attributed the opinion to the business practices of UAS.

Amerigroup Realizes it Needs its Competitors and Continually Works to Induce its Competitor MCOs to Join the Conspiracy to Coerce Plaintiff and its Customers out of the Market

49. In February 2016, Amerigroup began communicating with its competitors, including BCBST and United Healthcare, to enlist them in the efforts to stop UAS from operating in the market for allergy care. For example, on March 31, 2016, Amerigroup investigator Chris Utley reached out to William Benson, a BCBST investigator, to discuss UAS and Amerigroup's "concerns" with the "third party billing issue." Amerigroup investigator John Taylor also continued to stay in touch with BCBST, including sharing the OIG advisory opinion with Benson as purported evidence of UAS's alleged "fraud."

50. In the meantime, DeLozier was hard at work on other MCOs. DeLozier met with Dr. Jeanne James, the medical director of BCBST's BlueCare division, and Dr. David Moroney, BlueCare's Chief Medical Officer, several times during 2015 and 2016. During these discussions, DeLozier shared similar "data" with BlueCare that he discussed with Amerigroup and suggested ways for the MCO to work more closely with AASC to target UAS. All the while, DeLozier continued to meet with Dr. Mahler regularly regarding their plan to exclude UAS from the market.

51. Amerigroup investigators, including John Taylor, also participated in monthly coordination calls

with UHC and BCBST beginning in that time and spanning through the present. During these calls, investigators from each of these competitor MCOs illegally shared pricing policy information and disclosed comprehensive details about investigations conducted by the respective MCOs aimed at cutting off reimbursement to primary care providers, including disclosing the specific names of the providers in contract with UAS being investigated. The investigators then encouraged their competitors to conduct their own investigations and to limit or shut off reimbursement to these providers. For example, in both September and October 2016, John Taylor discussed and shared details of Amerigroup's investigation of primary care physicians contracting with UAS, as well as Amerigroup's subsequent reimbursement decisions, with UHC and BCBST.

52. Following the September 2016 call discussing primary care providers in contract with UAS, Amerigroup conducted its own internal coordination conference call with Amerigroup representatives from SIU and compliance, including investigators from Amerigroup Texas. They discussed allergy testing and allergen immunotherapy and what they called "third party contractors," meaning companies like UAS.

53. In addition to these monthly coordination calls, Amerigroup and its competitors also held health care fraud working group meetings several times a year that served the similar purpose of sharing information about certain providers with their competitors. And again in September 2016, BlueCare and BCBST hosted Amerigroup and UHC at the BCBST office in Chattanooga for one of these working

group meetings in which they discussed and adopted similar reimbursement policies on allergy testing and immunotherapy claims submitted by primary care physicians known to be in contract with UAS. While they all agreed to fix prices for allergen immunotherapy at a set amount of units, at the time only Amerigroup was willing to completely exclude all allergy skin testing or immunotherapy at the primary care level.

Amerigroup Continues to Work with AASC to Convince BlueCare and BCBST to Join Them in Driving Plaintiff Out of the Allergy Testing and Immunotherapy Market

54. While John Taylor was meeting with Amerigroup's competitors in Fall 2016, Dr. Mahler continued to coordinate on Amerigroup's behalf through several additional meetings and phone conferences with DeLozier of AASC and PME to further discuss how to effectuate their agreement on confining payments of allergy claims to board-certified allergists.

55. Amerigroup internal communications demonstrate that by October 2016, Amerigroup understood that primary care providers were providing this service to patients throughout Tennessee, many of whom would otherwise not be able to receive this care without having to travel long distances to see a specialist. Despite understanding that such a decision would risk shutting off necessary allergy care to numerous Amerigroup members and in some cases deprive entire regions of access to such care, Amerigroup continued to try to find ways to stop reimbursement of these providers. These methods

included again publication of suggestions that primary care physicians were engaged in "inappropriate" or fraudulent billing that originated from DeLozier. Specifically, DeLozier and Dr. Mahler falsely claimed that physicians in contract with UAS were engaged in fraudulent billing because an allergist was not performing the "supervision," or that the level of supervision did not rise to the "personal" versus "direct" level that is necessary to provide the services. This theory directly contradicts CMS's regulatory guidance, but that did not stop Amerigroup from falsely using the argument to coerce primary care providers and to defend its illegal conduct to TennCare. Amerigroup took the position that based on this misrepresented level of supervision, the services at issue were being provided by a technician, not the physician, contrary to the law. Based on that faulty premise, Amerigroup asserted the technician was not credentialed in violation of TennCare requirements. Amerigroup then chose to institute a "prepayment review" on primary care providers' claims with the foregone conclusion that it would deny the claims even after medical records were submitted.

56. Amerigroup did not act out of some concern over a hyper-technical reading of its contract or TennCare requirements, nor was it concerned with the standard of care or the quality of primary care physicians' services. Rather, it was about Amerigroup making the money it would pocket by paying out less in claims than it took in from TennCare, as Amerigroup is paid on a per capita basis—meaning the more Amerigroup reimburses, the less it makes. Amerigroup and other MCOs are paid on a schedule of per member per month ("PMPM") that is set annually

by TennCare based on prior payment history and estimates submitted by Amerigroup to TennCare. When Amerigroup noticed that it would be paying out more PMPM from 2016 through present than it had sought from TennCare based on a lawful expansion of access to allergy care for its members, it tried to determine how to eliminate that risk. Consequently, when Amerigroup investigators communicated with each other on how to deny claims for primary care providers in contract with UAS, one investigator stated that they needed a medical director to suggest issues with the medicine. And when that medical director "did not want to do it," the problem was they "didn't know if they would appoint a different Medical Director to do it or not."

57. When Amerigroup realized that it might not have a medical director to uphold its anticompetitive decisions, it turned again to DeLozier, AASC, and PME. On January 3, 2017, DeLozier met with Dr. Mahler in Amerigroup's corporate office to see if he could offer a medical basis for Amerigroup to continue denying claims. During that meeting, DeLozier went over "medical records" belonging to primary care physicians he claimed were practicing allergy testing and immunotherapy. DeLozier told Dr. Mahler that he could rely on the records and the representations of allergists from AASC to assert that primary care physicians who were in contract with companies such as UAS were supplying medically unnecessary care. Dr. Mahler took notes from Mr. DeLozier on what the documents supposedly meant. The documents themselves contained pricing information of Amerigroup's competitors for these services, including BlueCare and UHC.

58. Also at this January 3 meeting, DeLozier advised Dr. Mahler that AASC and PME had discussed allergy and immunotherapy reimbursement policies with UHC and BlueCare and confirmed that those MCOs had agreed to "tak[e] part in reducing waste." DeLozier told Dr. Mahler that at those meetings, Dr. James expressed BlueCare's desire that "all three MCOs engage in this," and that she wanted AASC to continue to be a "resource" for BlueCare." Dr. Mahler also invited DeLozier to an upcoming joint meeting with Dr. James (BlueCare) and Dr. Bradley (UHC) after DeLozier conveyed to Mahler that Dr. James wanted AASC to be a "resource" for how to control allergy care and her desire that "all three MCOs engage in this."

59. On January 6, 2017, Dr. Mahler invited DeLozier to share his ideas on driving primary care physicians out of the allergy testing and immunotherapy services markets at the upcoming joint meeting with Amerigroup's competitors, UHC and BlueCare. Following that call, Amerigroup set out to explore alternative bases to deny primary care physicians' allergy claims.

60. On January 17, 2017, Dr. Mahler sent the notes and materials from his meeting with DeLozier to John Taylor via email to further his investigation and provide a basis for denial of claims of primary care physicians contracting with UAS. Dr. Mahler also stated in the same email, in which DeLozier was copied, "Please connect with Mr. DeLozier. Let me know how I can support elimination of inappropriate allergy services in our network." DeLozier responded to the email stating "I would be happy to discuss," and

Taylor and DeLozier set up a time in early February to discuss. Based on the context of their correspondence, the phrase "inappropriate allergy services in our network" clearly referred to primary care physicians contracting with UAS that the parties had previously agreed should be boycotted for their mutual benefit.

61. Meanwhile, John Taylor distributed the confidential patient records of other competitors provided by DeLozier internally throughout Amerigroup, including to Rhonda Garrard, a senior provider auditor in Amerigroup's SIU. After reviewing the patient records, Garrard informed Taylor that the charts "have the same documentation as the other [UAS] providers so I would venture to say they are using them as well. I can't say about the others but they might be worth looking into…" At this time Amerigroup was attempting to identify any other primary care physicians working with UAS to discontinue paying for their services in order to drive them from the market, and DeLozier helped in this effort by sending records to uncover the identities of those primary care physicians.

62. On February 10, 2017, Amerigroup held another conference call with John Taylor, Dr. Mahler, Dr. Alfaro, and others regarding Amerigroup's investigations of primary care providers in contract with UAS and to further discuss determining if Amerigroup could assert any basis to deny the claims, including materials previously provided by DeLozier. Amerigroup's reason to do so, which is evident from numerous emails on the subject, is that it stood to recover more than $1,000,000 per year by taking such

a position, a figure it later increased to $6,000,000. In fact, internal emails confirm that John Taylor "went for the highest dollar cases" first when Amerigroup "began [its] efforts to stop UAS' activities," which another investigator described as the reason Amerigroup hadn't "completely flushed UAS out of Tennessee" yet.

63. For example, the next week, on February 15, 2017, Taylor updated Mahler stating that "SIU now has 17 immunotherapy investigations. Out of 115 suspect providers identified, these 17 account for approximately $567K of the estimated $1.07 million in 95165/95004 Medicaid exposure over the last 13 months." Mahler thanked Taylor, and Taylor clarified that he needed to run individual reports for select providers to determine Medicaid exposure. He noted that they already had 10 open investigations of primary care physicians in contract with UAS. Taylor also noted that they would have a follow-up meeting with Delozier "in the near future."

64. That same week, Mr. Taylor and another Amerigroup investigator, Shelly Williamson, held a conference call with Mr. DeLozier, which emails suggest were about these "allergy cases" and the materials DeLozier provided. These investigators took notes of the call, but on information and belief Amerigroup destroyed the notes upon deciding these notes would reveal its liability. Following the call, Mr. Taylor asserted multiple times that the physicians at issue could not provide allergy testing or immunotherapy services because it was "outside the scope of their practice" and was fraudulent.

65. On February 16, 2017, TennCare investigator Annette Dreifke and John Taylor communicated regarding primary care providers in contract with UAS, and she stated that she wanted to move one provider "quickly to law enforcement." John Taylor again responded that Amerigroup had paid over a million dollars for approximately 115 providers who Mr. Taylor falsely stated were "practicing outside the scope of their license."

66. On March 8, 2017, the Tennessee Provider Network Workgroup met to discuss primary care providers providing allergy care while in contract with UAS. Kimberly Weakley-Johnson and Carvin Vaughn of Amerigroup gave the presentation. During the presentation, Amerigroup falsely stated that primary care providers practicing these services are at risk from a "quality standpoint" as these services are not being performed by an allergist. During that same meeting, TennCare informed Amerigroup that it was concerned about in-network deficiencies, as Amerigroup as an MCO must have a sufficient network of providers for its members. TennCare also expressed its concern with Amerigroup "terminating without cause."

67. On March 10, 2017, Amerigroup met yet again internally about how to terminate the numerous primary care physician contracting with UAS from the network to ensure they would not offer allergy testing and immunotherapy services. Internal network reviews of the effects of those terminations showed they could not do so and uphold their TennCare-mandated network adequacy requirements if scrutinized. Eventually, Amerigroup decided to wait

to terminate UAS-contracted providers from the Amerigroup network "until after [the Tennessee] legislative session had closed" because it did not want governmental scrutiny of its secret decision to start terminating these physicians.

68. Meanwhile, separate and apart from the Provider Network Workgroup meetings in which the managed care organization competitors discussed reimbursement and how to exclude primary care physicians from the market, the medical directors of the managed care organizations continued to communicate. On April 5, 2017, DeLozier emailed Dr. Mahler regarding an upcoming meeting that Dr. Mahler would have with Dr. Bradley (United) and Dr. James (BlueCare). DeLozier referred to the meeting as an "opportunity to connect the dots on the asthma and immunotherapy discussions."

69. In April 2017, Amerigroup held a Provider Network Workgroup meeting for Amerigroup Tennessee representatives, including executive-level representatives at Amerigroup Tennessee, and discussed the "UAS Provider Termination" issue. The discussion centered on primary care physicians offering these services and the established internal workgroup created after numerous investigations had been initiated. But the notes of the meeting highlight the "decision not to make determination until after legislative decision closed," emphasizing that Amerigroup feared blowback from state legislators if they terminated primary care physicians while the legislature was in session. Also included in the minutes of the workgroup meeting were notes regarding Dr. Mahler and his review of this issue,

including that "Dr. Mahler has been reviewing for one year and treatment is 'inappropriate,'" as well as notes that "allergists joined Dr. Mahler fielded specific documents, escalated it and got involved in contracting." Amerigroup relied on the information received from DeLozier and AASC to exclude primary care physicians in contract with UAS from the market for allergy testing and immunotherapy.

70. The next month in May 2017, DeLozier again communicated with Dr. Mahler about more examples that he would need to pull following a call with an individual in Chattanooga, where BCBST is located. DeLozier asked Dr. Mahler for the individual's email address following their call, as he was "pulling examples for her review."

71. At the next Tennessee Provider Network Workgroup, Amerigroup falsely stated again that UAS technicians, rather than the primary care physicians, were performing all of the services—in contradiction to the many statements made by those providers who had been interviewed and interrogated by John Taylor and other investigators. Despite Amerigroup's repeated pleas, however, on June 19, 2017, TennCare ultimately decided that "[t]he state will be taking no further action into this matter at this time." Until recently, Amerigroup abided by TennCare's direction that TennCare did not interpret the relationship between providers and UAS to violate any requirements of TennCare at least as it applied to providers with whom Amerigroup was not already in a dispute.

72. When TennCare refused to adopt Amerigroup's flawed position, Amerigroup ramped up

its prior failed efforts to convince its competitors to stop reimbursement of primary care physicians offering allergy-related services to their patients. Amerigroup also knew that its efforts, even with the participation of AASC, would not be as effective if Amerigroup's two competitors did not join in the boycott. For one, Amerigroup could not explain its argument that State regulations required the boycott, when the other two MCOs regulated by the State still paid for the services. Moreover, the services were still economically viable in some primary care platforms as long as other MCOs continued to pay. Thus, on September 29, 2017, John Taylor called BCBST, stating that he was aware that BCBST had received information from TennCare on primary care physicians offering allergy testing and allergen immunotherapy and asked what BCBST planned to do regarding reimbursement and investigations. BCBST informed Taylor that at that time BCBST had not yet taken any action.

73. A few days later, Amerigroup again contacted BCBST to try to get them to change their policy to exclude primary care physicians from allergy testing and allergen immunotherapy. On October 3, 2017, a representative from Amerigroup spoke with David Locke, BCBST's Vice President of State Government Relations, asking about BCBST's position on proposed legislation prohibiting insurance carriers from denying payment for preventative and diagnostic services provided by primary care providers or through a provider's supervision of auxiliary personnel (HB 1091/SB 697). The representative apprised Mr. Locke of the legislation and inquired about the source, and Locke responded that an

Amerigroup lobbyist asked Mr. Locke about its investigation and reimbursement policies. Locke described the Amerigroup lobbyists' efforts as "looking for cover."

74. Meanwhile, still working closely with Mahler and Amerigroup regarding its reimbursement policy for 95165 throughout 2017 and 2018, DeLozier also continued to communicate with other MCOs regarding billing for 95165 and "unnecessary services" in the PCP context. In September 2017, for example, DeLozier had a call with Dr. James and other BCBST and BlueCare personnel regarding allergy reimbursement policy and encouraging BlueCare to disallow patients from injecting allergy shots at home. BlueCare stated its initial position that it was not interested in plugging allergy specialists and preferred reimbursing for one visit as opposed to multiple visits as contemplated by the specialist model. Regardless, DeLozier expressed his strong desire for AASC and PME to continue to be a resource for BCBST and BlueCare, and later planned how to convince payors and TennCare that PCPs practicing allergy care generated "waste," despite having no evidence that the specialist model actually resulted in savings to MCOs or the State. DeLozier also expressed frustration that payors like Humana and Cigna were not receptive to AASC's suggestions.

75. Soon thereafter, on January 9, 2018, Amerigroup and its competitors again spoke through the TennCare OPI about provider networks and who would be able to bill for allergy testing and allergen immunotherapy. Jarrod Webb of TennCare participated in the phone conference and encouraged

the MCOs to "provide targeted education" through the provider networks to make sure "that excluded providers are not coming in through the backdoor." Nevertheless, Amerigroup did not take any action at that time because it was then currently engaged in discovery in a case brought against it by a UAS-contracted provider, Dr. Sewell, and it calculated that any action against other providers could result in additional plaintiff and claims in that case. *See C.S. Sewell, M.D. P.C. and Christopher Sewell, M.D. v. Amerigroup Tennessee, Inc.*, Case No. 2:17-cv-00062 (M.D. Tenn. Sept. 22, 2017).

76. Following these discussions, these MCOs met again under the auspices of a "pilot program" in which managed care organizations could meet with each other to discuss the issue. The meeting was held on Monday, May 14, 2018 and included attendees from each managed care organization. From UHC, medical director Joel Bradley, Frances Garner, Ute Strand, Kane Duncan, and Samantha Smith attended. From Amerigroup, medical director Mark Mahler, Carvin Vaughn, and outside lobbyist and attorney Tom Lee attended. From BlueCare and BCBST, Angie Dobbins, Christy Wallace, Amber Casteel, Bridget Gibson, and Cy Huffman attended. At the meeting, representatives from each managed care organization spoke on their current policy of reimbursement for allergy testing and immunotherapy and all attendees compared how best to move forward with reimbursement decisions.

77. After DeLozier was updated on the MCOs' discussions by a "contact" following the meeting, DeLozier again began soliciting meetings with MCOs.

At a meeting with BlueCare and BCBST, DeLozier and the payors discussed crafting a billing and reimbursement policy that would "detect" and "eliminate" claims for reimbursement by non-specialists performing allergy care and immunotherapy. DeLozier had at least two more meetings with BCBST that summer, including a June 2018 meeting attended by Dr. James of BlueCare, a United Healthcare representative, and AASC allergist Dr. Karthik Krishnan, where the parties discussed solutions to "prove the integrity" of specialists like AASC and "show the waste is elsewhere." DeLozier and Dr. Krishnan distributed a handout summarizing these "solutions," which included artificial limits on the amount and timing of units a provider could bill, banning the option of self-administration of injections, imposing prior authorization for skin testing to identify the source of the services, and requiring claims for reimbursement using a certain "modifier" code that would flag the claims to MCOs submitted concerning services originating at primary care clinics.

78. After the meeting, Dr. James circulated DeLozier's handout internally, stating that it would be "helpful" for BlueCare's next internal workgroup meeting. DeLozier and Dr. Krishnan also promised to follow up and provide BlueCare with their additional "opinions" on coding and reimbursement policies to further guide internal discussions. At one point, DeLozier even followed up with BCBST's outside counsel asking to "confirm that BCBST commercial has adopted the GD modifier we discussed." Around the same time, BCBST and BlueCare came up with a plan to put providers billing for allergy

immunotherapy "that are not in allergy specialty practices" on prepayment review.

79. And when DeLozier continued to gather examples of non-board-certified specialists performing allergy skin testing, he was advised to "stay off email" by his lobbyist, Mandy Young. Following these meetings, it was clear to those involved that BCBST, BlueCare and Amerigroup had agreed they would no longer pay for allergy testing and immunotherapy services provided at the primary care level as sought by AASC and would use the discussions they had about guidelines as the basis to move forward and to limit the amount they would pay and thus their collective exposure to price fluctuations. For example, their joint discussions included the Milliman Care Guidelines, practice guidelines of board-certified allergist trade associations, and to either require prior authorizations for immunotherapy or restrict self-administration of immunotherapy. These payors also adopted the GD modifiers to track and set prices on claims. Despite knowing that services provided by Plaintiff and its customers met or exceeded the standard of care, BCBST, BlueCare and Amerigroup determined they could coerce physicians to end their relationships with UAS by sending them threats of recoupment as a method of intimidation or by improperly suggesting that UAS's involvement was somehow not permitted and save money they would otherwise individually pay in the competitive market. And beginning in July 2018, the competitors began to execute on this plan.

80. For example, on July 31, 2018, Amerigroup sent a recoupment letter to a provider contracting

with UAS, Jimmy Cheeks, NP, and his clinic, Mt. Juliet Family Care, accusing Mt. Juliet of entering into a "subcontract" with UAS and requesting repayment of every clean claim that Amerigroup had paid to Mt. Juliet related to allergy care from February 2015 until December 2016—a total of $74,040.99. Mt. Juliet appealed the denial and TennCare did not approve the recoupment. Amerigroup's stated basis for seeking recoupment, the existence of a "subcontract," was ironically suggested by DeLozier even though AASC provides technicians to primary care offices. As the pretextual theory went, if a physician relies on a technician leased by another entity, the lease is a subcontract of the physician's services, which even DeLozier has admitted is false.

81. On August 20, 2018, Amerigroup sent another UAS-contracted clinic, Grace Pediatrics, a recoupment letter stating that its contract with UAS was an unauthorized subcontract in violation of Grace Pediatrics' Provider Service Agreement. The letter also stated that Amerigroup sought and received additional guidance from TennCare about such contracts with UAS and that TennCare "stated definitively that [the UAS] contracts are subcontracts subject to [TennCare] and Amerigroup approval." This statement was clearly false, as TennCare did not require Amerigroup to deny claims submitted by physicians contracting with UAS. On the contrary, when Amerigroup repeatedly sought TennCare's assistance, TennCare refused to take action on this issue. In addition, Amerigroup's rationale is clearly erroneous, as UAS only provides technician services and the Provider Service Agreement's definition of "Contracted Provider" is limited to physicians and

health care providers that offer professional services. Regardless, Amerigroup relied on this false and erroneous pretext in demanding that Grace Pediatrics repay every dollar that Amerigroup had reimbursed for allergy care provided by the clinic's physicians.

82. Amerigroup subsequently sent yet another clinic a similar recoupment letter, stating that Westmoreland Family Clinic's contract with UAS was an unauthorized subcontract in violation of Westmoreland's Participating Provider Agreement and demanding that Westmoreland repay every dollar that Amerigroup had reimbursed Westmoreland for the allergy care provided to patients from January 2015 through April 2018—a total of $46,229.32. Amerigroup's efforts were unsuccessful because Westmoreland appealed the improper denial and Amerigroup could not recoup without TennCare's approval.

83. On August 30, 2018, DeLozier, AASC allergist and TSAAI President Karthik Krishnan, M.D. met with BCBST's medical director and reimbursement policy team to discuss BCBST's policies related specifically to reimbursement of allergy specialists to ensure their ongoing boycott of UAS was continuing.

84. Meanwhile, in November 2018, Amerigroup, BCBST, and BlueCare continued to communicate regarding their ongoing efforts not to pay for services originating from the primary care level and specifically UAS. Part of their ongoing agreement was to coerce the physicians involved out of working with UAS by requiring prior authorization for immunotherapy administered outside of the office, or

self-administration, "based on the practice parameters of the Academy of Allergy, Asthma & Immunology," or the AAAAI. The AAAAI is a trade association that represents the interests of board-certified allergists, like AASC. During their meetings, DeLozier sent Dr. Mahler information from the AAAAI claiming that such information provided the "standard of care" for allergy. Dr. Mahler also stated that the workgroup excluded food allergies, only concentrating on seasonal and perennial allergies—because they were targeting the services involving UAS.

85. In December 2018, BlueCare, Amerigroup, and United met again in order to ensure a "consistent approach" across the three MCOs with respect to limiting reimbursement for home immunotherapy. And as part of that approach, BCBST audited and sent recoupment letters to three primary care clinics contracted with UAS—Cordova Pediatrics PLLC, Putnam County Pediatrics PLC, and Priority Care LLC—all of which serve Tennessee communities. These recoupments amount to thousands of dollars lost per provider, and all result from Mr. DeLozier's and Amerigroup's wrongful attempts to stifle competition and improve their bottom line. That same month, BCBST also sent audit reports falsely stating that such services were not medically necessary per the Milliman Care Guidelines. Though BCBST had never previously mentioned the Milliman Care Guidelines during the years it paid for such claims billed by primary care physicians in contract with UAS, following the workgroup and agreement with Amerigroup, it now relies on an intentional misapplication of these guidelines to restrict allergy care.

86. Further, in January 2019, BCBST continued to send recoupment notices to primary care physicians known to be in contract with UAS, stating that allergy testing and immunotherapy services were being denied and recouped because they were "not medically necessary" as determined by BCBST's Medical Director or that the services were performed by an "ineligible provider" through the allergy technician. These recoupment, overpayment, and audit findings from BCBST concerned over 100 patients in rural Tennessee where allergy testing and immunotherapy services are not otherwise available to these patients.

87. Around the same time, on January 29, 2019, an Amerigroup investigator also contacted Steel Family Medicine Clinic in Pleasant View, Tennessee, stating that the clinic should cease its allergy testing and immunotherapy practice, because UAS is not in contract with Amerigroup, and Amerigroup will not pay any of the claims. In March 2019, BCBST initiated recoupment of the claims for these same primary care physicians. BCBST recouped from one such primary care provider in Livingston, Tennessee, a rural town with only 3,500 residents, for thousands of dollars in allergy services.

88. BCBST also issued a "Blue Alert" notice in March 2019 that included an "Allergy Immunotherapy Reimbursement Update," stating that the commercial health plan reimbursement policy would change as of April 1, 2019 to reimburse an annual limit of up to 160 doses per patient, per year. Previously, immunotherapy was limited to not exceed 30 doses a day—and BCBST changed this policy following the agreement made with Amerigroup and others at the

TennCare workgroup meeting. That same month, Amerigroup denied claims of Dr. Christopher Sewell, a plaintiff in another action against Amerigroup, for allergy testing and immunotherapy claims even after Amerigroup admitted to Dr. Sewell and UAS that its prior pretextual basis for denial—the existence of a supposed "subcontract relationship" between UAS and Dr. Sewell, was not a proper basis to deny claims. Instead, at that time Amerigroup just made up a different basis for denial— that the patient was not a patient of Dr. Sewell's—which Amerigroup knew to be false.

89. Because Amerigroup knew it had to announce something given the bases for its prior denials were disproven and rejected by TennCare, and to further carry out its agreement with Defendants, Amerigroup sent a fax notice to all managed care providers on May 16, 2019 announcing new grounds to use to prohibit claims at the primary care level, including adoption of allergists-only guidelines agreed to with Defendants. Amerigroup felt the need to take this action as its many prior internal discussions regarding reimbursement to PCPs for allergy testing and immunotherapy were admittedly contrary to its own policies, including its handbook on the amount of reimbursement, and its focus on provider specialty was not an appropriate factor. Nevertheless, Amerigroup made this conscious decision to continue with the efforts to refusal to deal with UAS as part of its agreement with the other Defendants because people within Amerigroup believed Defendants needed to stop UAS as soon as possible.

90. The policy Amerigroup thus adopted, which became effective July 1, 2019, states that providers must follow the private allergist practice guidelines of the American College of Allergy, Asthma, and Immunology, Joint Council of Allergy, Asthma, and Immunology, and Joint Task Force on Practice Parameters of the American Academy of Allergy, Asthma, and Immunology as previously discussed and agreed to with AASC, PME, and DeLozier as a basis to exclude providers who are not board-certified allergists and certainly those contracting with UAS. Amerigroup also fixed prices at the reimbursement level of 150 doses/units per member per calendar year with a 3-month supply reimbursement restriction as previously discussed and agreed to with BCBST and BlueCare. Amerigroup's announcement also adopts the Milliman Care Guidelines that Amerigroup, BCBST, and BlueCare agreed they would misuse and misapply to audit and deny claims. And Amerigroup's announcement also explicitly states that "except for rare exceptions," administration of allergen immunotherapy should occur in a medical facility. Amerigroup used this policy as a basis to harass providers acting within the standard of care knowing that self-administration is a more common practice at the primary care level.

91. BCBST, BlueCare, and Amerigroup expressly agreed to implement these recently announced changes over a period of several months in order to fix prices and boycott competition at the primary care level. Internal BCBST documents state that after several years of discussion, the payor Defendants "met together" and "agreed to have consistent policies across MCOs" to be implemented in July 2019. The

same internal notes make clear that these "policies belong to MCOs," and were "not dictated by TennCare." More recently, on a February 14, 2020, BCBST, BlueCare, and Amerigroup met again and discussed implementing a new "modifier" that would automatically deny claims for reimbursement pursuant to Defendants' July 2019 policy changes similar to the previously used GD modifier they had agreed to employ to track claims associated with UAS so they could deny them and set prices.

92. And while these announced changes memorialize Defendants' express agreement, at the time of their implementation Defendants had already used the same justifications to coerce providers to deny relationships with UAS that are necessary to both in the competitive struggle. For example, each of BCBST, BlueCare, and Amerigroup have used these grounds, even before they were announced, as improper bases for audits, prepayment reviews, claims denials, and recoupments because they understand such tactics intimidate providers from further working with UAS. Each of BCBST, BlueCare, and Amerigroup track internally within their investigations departments how much money they expect to save and the investigators are reviewed and compensated based on those calculations and the investigators' effectiveness in deterring claims or denying or recouping reimbursements. Further, Defendants have already agreed if providers continue to work with UAS, Amerigroup, BCBST, and BlueCare will continue to use the private allergist and Milliman Care guidelines discussed above to falsely uphold the denials of claims even though Defendants already know the services meet the standard of care.

Defendants are aware that the cost of appealing and contesting claims denials by Plaintiff and providers often exceed any benefit of doing so and the threat of recoupment and network termination in retaliation has been effective at dissuading providers from working with UAS. To date Amerigroup, BlueCare, and BCBST have already followed through with Defendants' agreement regarding certain providers by repeatedly falsely claiming the services provided do not meet those private guidelines and have plans to harass all primary care providers throughout the State.

93. As a result, providers throughout Tennessee face two of the three MCOs threatening their existence if they do not exit the market, and BCBST's medical director and investigators in particular appear intent on leading the charge that Amerigroup, AASC, PME, and DeLozier have generated. Defendants continue their overt acts in furtherance of their conspiracy to exclude primary care from the market for allergy testing and immunotherapy. Primary care physicians and UAS are being forced out of the market because Defendants want to allow AASC, PME, and DeLozier to offer these services without competition from this class of competitors and permit managed care organizations and BCBST to avoid paying for these additional services.

Defendants' Conduct Damages the Market, UAS's Customers UAS, and Consumers

94. The effect of Defendants' conduct has taken a toll on UAS and the physicians and practices with whom UAS contracts, as those involved in that relationship cannot offer allergy testing or

immunotherapy services at the primary care level for both fear of retaliation and because Amerigroup and BCBST appear primed to accept services but not pay for them. As a result, primary care providers' patient populations, including those of Amerigroup and BCBST patients, have dwindled. Further, these member providers have not been reimbursed for services for which they spent significant resources.

95. Further, Amerigroup's, BCBST's and BlueCare's successful efforts to involve competitors has also threatened primary care providers' practices, as they rely on their reimbursement as well. Without health insurance reimbursement for Medicaid patients, primary care providers could not maintain viable medical practices, and consumers would have no options for all services in the area.

96. UAS has also been harmed as direct result of Defendants' actions. UAS has lost revenue and corresponding profits that it would have generated but for the actions of Defendants. Certain clinics that contract with UAS have terminated their contracts because of Defendants' harassment. UAS has also been forced to expend substantial resources to ensure that those it does business with do not terminate existing agreements, and has also experienced difficulty in entering into business relationships with others because of Defendants' anticompetitive policies excluding them from the market. UAS's lost revenue and profits are determined both by a decrease in services to existing contractual relationships with physicians and a loss of expected revenue and profit from new contracts that did not materialize.

97. In addition to UAS's business, competition and consumers have also been harmed and continue to be harmed. Plaintiff and its contracted primary care practice customers are the only available alternative for certain healthcare necessary services in markets throughout Tennessee for some patients, including allergy testing and immunotherapy. Patients who cannot access these services through the competition Plaintiff provides in the market often have no alternative because any other provider of allergy services is too far away, even though the some of the patients such as asthmatics and severe allergy sufferers, are at high risk of more debilitating consequences from not receiving treatment. As TennCare and CMS regulations observe, travel of more than 25 miles for such primary services is considered outside the bounds of the appropriate area. In any event, requiring patients to travel long distances up to 50 miles to another city cannot be considered reasonable access to care or the reasonable distance in which a consumer can be expected to access these services.

98. For example, Amerigroup, BCBST, and BlueCare's decisions to pay only board-certified allergists' practices renders allergy testing and immunotherapy infeasible to most patients in the relevant geographic market, as many patients do not have allergists in their communities or even surrounding communities. Most consumers will not travel 100-200 miles round trip for these services, especially considering that allergen immunotherapy is an ongoing treatment administered over the course of 3-5 years. The consumers who are able to travel for services face a significant burden in additional costs,

including additional travel distance, wait time for an appointment, wait time in the office, and time off from work and school.

99. While Amerigroup, BCBST, and BlueCare have yet to terminate most UAS customers from their networks as they have threatened, they have effectively used this threat as coercion to run Plaintiff out of the market by causing those customers to cease their relationships with UAS, leaving a void in Tennessee markets for allergy testing and immunotherapy services.

CLAIM ONE - SHERMAN ACT § 1 VIOLATION AGAINST ALL DEFENDANTS

(Against All Defendants)

100. All foregoing paragraphs are incorporated by reference as if fully set forth herein.

101. At all times relevant to the Complaint, Defendants have combined, conspired, or attempted to combine and conspire with their competitors as well as with competitors of Plaintiff, including MCOs and board-certified allergists, to restrict competition for allergy testing and immunotherapy services in local markets within Tennessee, including the following CBSA markets: Athens, Clarksville, Columbia, Cookeville, Crossville, Franklin, Greeneville, Harriman, Hendersonville, Hermitage, Johnson City, Knoxville, Lawrenceburg, Lenoir City, Madisonville, Maryville, McMinnville, Morristown, Mt. Juliet, Oak Ridge, Sevierville, Spring Hill, West Nashville, and White House. Defendants' actions include restricting participation in the market for all allergy testing and immunotherapy services provided by businesses other than those of board-certified allergists. In furtherance

of their conspiracy, Defendants have agreed among themselves to engage in a coordinated campaign to boycott Plaintiff and primary care physicians to drive them from the market. The campaign has included joint decisions among insurance companies, MCOs, and businesses associated with board-certified allergists to restrict payment for allergy skin testing and immunotherapy services at the primary care level, including by falsely suggesting those services are "inappropriate," substandard, or fraudulent. Defendants have also attempted to coerce primary care physicians to refuse to deal with UAS by falsely suggesting UAS is engaged in fraud or substandard care, and have attempted to push governmental investigators into commencing false investigations to increase the appearance of that threat made to UAS customers. In furtherance of their actual and threatened conspiracies and illegal agreements, Defendants have communicated with competitor insurance companies, MCOs, board-certified allergists, and other third parties in an attempt to persuade, entice, or coerce them not to do business with UAS, or to fix prices to competitively disadvantage UAS and its customers to discourage competition in the market.

102. This conduct is considered illegal *per se* because such horizontal agreements threaten to successfully eliminate and restrict sources of output in the relevant market. Amerigroup and BlueCare are horizontal competitors in Tennessee. Moreover, AASC holds a dominant position in the market for allergy testing and immunotherapy services in Tennessee and BCBST holds a dominant position in the insurance markets in Tennessee. Defendants' conspiracy and

attempt at conspiracy employ joint collaborative action to destroy legitimate competition in the market by encouraging a group boycott and fixing prices in an effort to drive UAS, and the class of competitor it represents out of the market. By refusing to pay anything for allergy testing and immunotherapy services and coercing primary care physicians to deny relationships to UAS to shut off output at the primary care level, Defendants seek to deny Plaintiff the ability to compete in the market. Defendants also seek to cut off any technical capabilities of physicians to compete in the relevant market, including access to technical services and relationships necessary for allergy testing and immunotherapy including agreements between primary care physicians and entities such as UAS. There are no plausible arguments that these anticompetitive effects are outweighed by any countervailing procompetitive benefits, so Defendants should not escape a *per se* designation.

103. Strictly in the alternative to a *per se* designation, Defendants' anticompetitive actions support an antitrust action under both a "quick-look" and full rule of reason analysis. The agreements Defendants have sought, entered, maintained, renewed and enforced have had the purpose and effect of eliminating competition for the provision of allergy testing and allergen immunotherapy in the relevant market. As the result of Defendants' conduct, consumers have been deprived of the competition facilitated by UAS's participation in the relevant market, leaving many consumers with less access to care, lower output, and higher prices.

104. Defendants' conspiracy to eliminate UAS from the markets for allergy testing and immunotherapy services has involved numerous acts in furtherance of their antitrust conspiracy, including the joint decisions to deny reimbursement for any and all claims through the present and to seek recoupment for previously paid claims, including claims recently paid and on an ongoing basis.

105. As a direct and proximate result of Defendants' past and continuing violations of the Sherman Act, UAS has suffered injury and damages in an amount to be proved at trial. These actual damages should be trebled under Section 4 of the Clayton Act, 15 U.S.C. § 15.

106. Plaintiff also seeks injunctive relief. The violations set forth above are continuing, are causing irreparable harm, and will continue unless injunctive relief is granted.

107. Plaintiff also seeks recovery of its attorneys' fees and costs under the Clayton Act as a remedy for the costs it has incurred as a result of Defendants' conduct.

CLAIM TWO - SHERMAN ACT § 2 VIOLATION AGAINST ALL DEFENDANTS

(Against AASC for Willful Acquisition and Maintenance of a Monopoly and Attempt to Monopolize in the Relevant Market and Against All Defendants for Conspiracy to Monopolize the Relevant Market in Violation of Sherman Act, Section 2)

108. All foregoing paragraphs are incorporated by reference as if fully set forth herein.

109. AASC has market power in local markets within Tennessee in the allergy testing and immunotherapy services market and monopoly power in certain localized markets. This monopoly power is evidenced by, among other things, AASC being the sole or only non-UAS-contracting provider option for the pertinent allergy services in various CBSAs in Tennessee and its increasing market share as providers in contract with UAS are driven from those markets, and as Plaintiff has been and continues to be by AASC and its co-Defendants' conduct.

110. For example, in certain localized markets, such as Lawrenceburg, AASC is the only source of output of the pertinent allergy skin testing and immunotherapy services. In other localized markets, AASC has a supermajority share of the market. For example, AASC has over 70% market share in Cookeville where UAS and primary care provider Kids Kare jointly offer allergy testing and immunotherapy services in that market in direct competition with AASC, which until recently was the only source of output in that area. But AASC still treats the supermajority of patients in that market, and its efforts complained of herein are designed to increase its monopoly power or attempt to regain that power to the extent competition by Plaintiff has threatened such power.

111. At all times relevant to the Complaint, Defendants have combined and conspired amongst themselves and with competitors of UAS such as AASC to eliminate competition in the markets for allergy skin testing and immunotherapy services for patients in Tennessee. These activities include efforts

at the primary care level to maintain, enhance and solidify AASC's monopoly over the allergy testing and immunotherapy services market in local markets without losing market share to AASC's competitors, such as Plaintiff.

112. Defendants' actions include attempting to restrict and in fact restricting participation in the market for all allergy testing and immunotherapy services provided by businesses other than those of board-certified allergists. In furtherance of their conspiracy, Defendants have agreed among themselves to engage in a coordinated campaign to boycott Plaintiff to drive it from the market. The campaign has included joint decisions with other MCOs and allergists to restrict payment for allergy skin testing and immunotherapy services at the primary care level, including by falsely suggesting those services are "inappropriate," substandard, or fraudulent. Defendants have also attempted to coerce primary care physicians to cause them to refuse to deal with UAS by falsely suggesting UAS is engaged in fraud or substandard care and have attempted to push governmental investigators into false investigations to increase the appearance of that threat. In furtherance of their actual and threatened conspiracies and illegal agreements, Defendants have engaged in contact with competitor insurance companies, MCOs, board-certified allergists, and other third parties in an attempt to persuade, entice, or coerce them not to do business with Plaintiff, or to fix prices to competitively disadvantage Plaintiff to discourage competition in the market.

113. Defendants' conspiracy to eliminate Plaintiff from the markets for allergy testing and immunotherapy services has involved numerous acts in furtherance of their antitrust conspiracy, including Defendants' concerted decision to deny reimbursement for claims by UAS-contracting providers through the present and to seek recoupment for previously paid claims, including recently and on an ongoing basis.

114. Defendants have abused and continue to abuse AASC's monopoly power to maintain and enhance AASC's market dominance by unreasonably restraining trade and output, fixing prices for allergy testing and allergen immunotherapy, and artificially inflating the premiums Amerigroup charged and charges to consumers while providing fewer services than Defendants' actual and potential competitors.

115. Each of the Defendants' conspiracies and agreements has had substantial and unreasonable anticompetitive effects in the relevant markets, including but not limited to maintaining and enlarging AASC's market power through CBSAs in Tennessee; allowing AASC to supra-competitively raise the prices charged to consumers by inflated, unreasonable, anticompetitive amounts; and, depriving Plaintiff and consumers in Tennessee open and free competition for allergy testing and allergen immunotherapy—and for many consumers, depriving them of any ability to receive care at all.

116. In exchange for agreeing on certain reimbursement prices and policies with AASC, Amerigroup has been able to limit its financial exposure to claims and other reimbursement and

benefits it otherwise would be obligated to provide to consumers and primary care providers, and thus pocket money illegally and disrupt the natural flow of output and price that occurs in competition.

117. If it continues to be successful in its anticompetitive efforts, AASC would have a dangerous probability of maintaining or regaining its monopoly power in localized markets as it has and would continue to eliminate the competition and the competition's ability to grow, thereby cementing AASC's monopoly power in markets such as Cookeville and Lawrenceburg. AASC's conduct was undertaken with a specific intent to maintain, enhance, regain, and/or solidify its monopoly in such localized markets, as it is specifically aiming to eliminate its primary competition so it can reap the benefits as a monopolist.

118. Defendants' conduct constitutes unlawful monopolization, attempted monopolization, conspiracy to monopolize, and unlawful anticompetitive conduct in the relevant markets in violation of Section 2 of the Sherman Act, and such violation and the effects thereof are continuing and will continue unless injunctive relief is granted.

119. As a direct and proximate result of the Defendants' continuing violations of Section 2 of the Sherman Act described in this Complaint, Plaintiff, its customers, and consumers have suffered injury and damages in an amount to be proven at trial. UAS seeks money damages from the Defendants for their violations of Section 2 of the Sherman Act. These actual damages should be trebled under Section 4 of the Clayton Act, 15 U.S.C. § 15.

120. Plaintiff also seeks injunctive relief. The violations set forth above are continuing, are causing irreparable harm, and will continue unless injunctive relief is granted.

121. Plaintiff also seeks recovery of its attorneys' fees under the Clayton Act as a remedy for the costs they have incurred as a result of Defendants' conduct.

CLAIM THREE - TORTIOUS INTERFERENCE WITH EXISTING CONTRACTS

(Against All Defendants)

122. All foregoing paragraphs are incorporated by reference as if fully set forth herein.

123. Defendants' conduct described herein constitutes tortious interference with the existing agreements between UAS and its many physicians and practice groups. Defendants' conduct, which was neither justified nor privileged, was intended to cause other MCOs, practice groups, and patients to cease their agreements or doing business with primary care physicians and Plaintiff, and to cause physicians and practice groups to cease or reduce their engagement under agreements with UAS. Defendants' conduct constitutes willful and intentional acts of interference with those agreements and was done with malice and knowledge of the underlying contracts at issue. Such conduct caused injury to UAS by, among other things, reducing business under UAS's agreements with primary care physicians, causing a reduction in revenue and corresponding profits generated from these agreements and making it more difficult for UAS and those with whom it contracts to conduct their operations and business and by causing them to expend considerable resources in order to ensure that

agreements and business arrangements are not terminated as a result of Defendants' actions.

124. Specifically, Plaintiff alleges that Defendants interfered with existing contracts between UAS and the following clinics: Dayton Pediatrics, P.C.; Southern Medical Clinic; Parkway Medical Group; Rhea Medical Physicians Group; Gordon Yukon, M.D., P.C.; Feagins Medical Group, LLC; Alicia A. Hall, MD, Inc.; Bell Family Medical Center, Inc; Dayton Internal Medicine; Jackson Square Family Healthcare; Fred Nordquist, M.D. PC; John A. Taylor, MD; Memorial Drive Family Practice, PC; Cedar Grove Medical Associates, LLC; Sango Internal Medicine & Wellness, LLC; Spring City Pediatrics; Good Health Associates, PLLC; America's Family Doctors, PLLC- Brentwood; America's Family Doctors, PLLC- Smyrna; America's Family Doctors, PLLC- Spring Hill; Rose Family Clinic- Westmoreland; The Children's Clinic; Katherine W. Jones, MD, PLC; UTM - TN Springfield; UTM - TN Murfreesboro; Camden Medical Clinic; Pinnacle Internal Medicine; UTM - TN Dyersburg; Royal Clinic, P.C.; T. Michael Helton, MD, PLLC; The Hatchie Clinic, PC; Tennessee Healthcare Partners, LLC; Mt. Juliet Family Care & Walk-In Clinic, LLC; Oasis Medical Center, LLC; Regents Medical Center PC; Cookeville Medical Clinic, PLLC & Affiliated Entities; Covenant Family Practice - Clarksville; Covenant Family Practice - Erin; Riddle Family Care; Byrdstown Medical Center; Ultimate Health Clinic, PC; New Primecare Clinics, Inc.- Middleton; New Primecare Clinics, Inc.- Bolivar; Advanced Family and Urgent Care; Putnam County Pediatrics, PLC; Ripley Medical Clinic, Inc.; Bethesda Health Services LLC; Priority Care; Cumberland Pediatric Associates;

Scales Nutrition & Wellness Center; Christopher S. Sewell MD, PC; SDG Primary and Immediate Care; Grace Pediatrics, PLLC - Pleasant View; PreventaGenix; Jamestown Internal Medicine; Coleman Family Care Clinic; Grace Pediatrics, PLLC - Smyrna; Hometown Family Care; Premier Pediatrics - Johnson City; Tennessee Pediatric & Adolescent Center; Pulmonary and Sleep Associates; Saint Martin Medical Center, PC; Trinity Pediatrics, P.C.; Indian Path Pediatrics; Appalachian Family Care; Long Hollow Family Practice; Internal Medicine & Pediatric Associates of Bristol, P.C.; Pediatric Physicians, P.C.; Madisonville Primary Care Group; Stacey B. Carlton, MD, PC; Cordova Pediatrics, PLLC; Northcrest Physician Services - Greenbrier; Northcrest Physician Services - Springfield - Dr Rainwater; Ocoee Pediatrics of Cleveland, PC; Northcrest Physician Services - Pleasant View; Northcrest Physician Services - Springfield - Dr. Pennington; Primary Care Associates, PC; Cookeville Medical Clinic - Crossville; Cookeville Medical Clinic - Gainesboro; Easley & Delones Family Medicine; Allied Pediatrics PLLC Ooltewah; Hermitage Family Practice Clinic; Infinity Family Practice; AFC - Harper Medical Group; Thrasher Clinic - Oakland; Thrasher Clinic - Poplar Ave; Hamilton Family Medicine; Comprehensive Medical Associates; Steel Family Medicine; Primehealth Medical Center, PC; People First Urgent & Primary Care; Kids Central Pediatrics Inc.

CLAIM FOUR - TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP OR ADVANTAGE

(Against All Defendants)

125. All foregoing paragraphs are incorporated by reference as if fully set forth herein.

126. Defendants' conduct described herein constitutes tortious interference with the business relationships between UAS and its customers, as well as third parties with whom Defendants know UAS to be in a relationship, including Defendants' competitors. Defendants' conduct, which was neither justified nor privileged, was intended to cause those third parties to cease their agreements with UAS or reduce performance or business with UAS. Defendants' conduct constitutes willful and intentional acts of interference with those relationships and was done with malice and specific knowledge of the underlying relationships and contracts at issue and by improper means. Such conduct caused injury to UAS by, among other things, reducing business under UAS's agreements and business relations causing a reduction in revenue and corresponding profits generated from these agreements and making it more difficult for UAS and its customers to conduct their operations and business.

127. In addition, Defendants' conduct described herein constitutes tortious interference with UAS's existing and prospective business relations. There was a reasonable probability that, absent Defendants' actions, UAS would have maintained existing relationships and entered into additional business

relationships with third parties, including other physicians and practice groups. Defendants intentionally interfered with these relationships by attempting to prevent payment to physicians who are assisted and supported by UAS, to scare physicians and practice groups away from maintaining relationships with or entering into business with UAS. Defendants' conduct constitutes willful and intentional acts of interference and was done with malice and knowledge of UAS's existing and prospective business relationships. Defendants' conduct was independently tortious or unlawful for the reasons described herein, including for violating and encouraging and participating with others in violating antitrust laws, making false, fraudulent, defamatory, and disparaging statements regarding UAS, and participating in a breach of statutory and contractual duties between Amerigroup and individual providers, AAAPC members, and UAS contracting physicians. Defendants' interference proximately caused injury to UAS by, among other things, reducing revenue and corresponding profits from UAS's business relationships and making it more difficult to conduct operations and causing UAS to expend considerable resources in order to further its business.

CLAIM FIVE - CIVIL CONSPIRACY

(against All Defendants)

128. All foregoing paragraphs are incorporated by reference as if fully set forth herein.

129. Defendants' conduct described herein constitutes a civil conspiracy and aiding and abetting each other to violate the Sherman Act and tortiously

interfere with the contracts and current and prospective business relations between UAS and its customers. In furtherance of their conspiracy, Defendants have undertaken efforts to eliminate competition and output of allergy testing and allergen immunotherapy services in which Plaintiff participates and to coerce physicians and UAS to terminate or reduce performance of their contractual agreements and to exit the market. As a direct result of the overt acts taken in furtherance of Defendants' conspiracy, UAS has suffered considerable injury to their businesses and their ability to compete in the marketplace. Defendants are all jointly and severally liable for the actions taken in furtherance of their joint conduct.

APPLICATION FOR INJUNCTIVE RELIEF

(against all Defendants)

130. All foregoing paragraphs are incorporated by reference as if fully set forth herein.

131. UAS, its physician and clinic customers, and their patients will suffer immediate and irreparable injury if Defendants are allowed to continue denying allergy services or allowed to continue their efforts to recoup past payments, including interference with their ongoing treatment of patients. Defendants' actions will cause these boycott victims immediate and irreparable damage for which there is no adequate remedy at law.

132. Plaintiff thus requests that the Court preliminarily and permanently enjoin and restrain Defendants, and their agents, servants, employees and all persons acting under, and in concert with, or for them, from (i) undertaking efforts to restrict

allergy diagnosis, testing, treatment, preparation, and supervision services offered by UAS and its customers; (ii) seeking to recoup any past payments that were made for those services that were provided; and (iii) threatening UAS's customers for providing such services in contract with UAS.

CONDITIONS PRECEDENT

133. All conditions precedent have been performed, have occurred, or have been excused.

JURY DEMAND

134. Plaintiff respectfully requests that all issues of fact in this case be tried to a properly impaneled jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff United Biologics LLC d/b/a United Allergy Services prays for relief as follows:

1. That proper process be issued and Defendants be required to answer or otherwise respond to the Complaint within the time permitted by law.

2. That UAS have and receive a judgment against Defendants for economic and actual damages in an amount to be proved at trial, to be trebled with interest and all exemplary or punitive damages that may be awarded.

3. That the Court issue a preliminary and permanent injunction enjoining Defendants from (i) undertaking efforts to restrict allergy diagnosis, testing, treatment, preparation, and supervision services offered by UAS and its customers; (ii) seeking

to recoup any past payments that were made for those services that were provided; and (iii) threatening UAS's customers for providing such services in contract with UAS.

4. Plaintiff further prays that the Court enter judgment also finding that Defendants are additionally liable to Plaintiff for:

a. Costs of suit;

b. Prejudgment and post-judgment interest;

c. Attorney's fees; and

d. All other relief the Court deems appropriate.

DATED: June 10, 2021 Respectfully submitted,

* * *

Appendix F

RELEVANT STATUTORY PROVISION

15 U.S.C. §15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

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

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

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable

rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

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

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

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

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

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

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

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

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

(c) Definitions

For purposes of this section--

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

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