UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

STEWARD HEALTH CARE SYSTEM LLC, *et al.*, Plaintiffs, v. BLUE CROSS & BLUE SHIELD OF RHODE ISLAND, Defendant.	Case No. 1:13-cv-405 Honorable William E. Smith Magistrate Judge Lincoln Almond

BLUE CROSS & BLUE SHIELD OF RHODE ISLAND'S
PRE-TRIAL MEMORANDUM

In accordance with this Court's April 30, 2014 Standard Pretrial Order, (Doc. 38) and the Court's November 9, 2017 Text Order, Defendant Blue Cross & Blue Shield of Rhode Island ("Blue Cross") respectfully submits the following Pre-Trial Memorandum.

Plaintiffs Steward Health Care System LLC, et al. ("Steward") blame Blue Cross & Blue Shield of Rhode Island for its decision to terminate an Asset Purchase Agreement ("APA") to acquire Landmark Medical Center ("Landmark"). Bringing claims under state and federal antitrust laws and Rhode Island common law, Steward alleges that it walked away from Landmark because Blue Cross would not agree to the reimbursement rates Steward demanded for that hospital. Steward's claims are meritless.

Steward's claims rest almost entirely on a faulty premise: that Blue Cross refused to deal with Steward. To prevail on that claim under the antitrust laws, Steward must prove, among other things, that Blue Cross terminated a profitable prior course of dealing with *Steward*. As the evidence will show, there was never any such course of dealing. Moreover, Blue Cross never

refused to deal with Steward. Rather, Blue Cross negotiated with Steward for a *year*. That Steward did not like Blue Cross' rate proposals is not an antitrust violation. Blue Cross had no duty to buy hospital services from Steward, much less at the high rates Steward demanded.

Furthermore, the evidence will show that: (1) [redacted] which were designed to protect Rhode Islanders from excessive healthcare costs; (2) [redacted]

While these are not the only defects in Steward's case, they are alone sufficient to defeat Steward's claims for monopolization, attempted monopolization, conspiracy in restraint of trade, conspiracy to monopolize, and tortious interference. Steward bears the burden of proof on each of its claims, but it cannot carry that burden on any of them.

1. SUMMARY OF FACTS BLUE CROSS EXPECTS TO PROVE AT TRIAL

At trial, the evidence will show the following:

1. Blue Cross had no prior course of dealing with Steward at Landmark, Blue Cross Statement of Undisputed Facts ("SOUF") (Dkt. 158-5) at ¶ 85, and Blue Cross negotiated with Steward for reimbursement rates at Landmark for a year before Steward withdrew its bid for the hospital. SOUF ¶¶ 86, 117.

2. OHIC regulations limited the maximum annual rate increase that Blue Cross could offer Rhode Island hospitals to 2.7%, with any additional increases tied to quality, SOUF ¶ 6. Notwithstanding the regulatory limits, [redacted]

9. [redacted]

2. ISSUES OF LAW

I. STEWARD CANNOT PROVE ITS ANTITRUST CLAIMS.

A. Monopolization.

Steward sues for monopolization (Counts I, V, IX, and XIII) and attempted monopolization (Counts II, VI, X, and XIV) under Section 2 of the Sherman Act and under the Rhode Island Antitrust Act.[1] To prove unlawful monopolization, a plaintiff must show "(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." *Diaz Aviation Corp. v. Airport Aviation Servs., Inc.*, 716 F.3d 256, 265 (1st Cir. 2013) (quotation omitted).[2] Steward alleges that Blue Cross monopolized, or attempted to monopolize, both the market for the purchase of hospital services and the market for the sale of health insurance. These claims turn on the same alleged

[1] The Rhode Island Antitrust Act must "be construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable." R.I. GEN. LAWS § 6-36-2(b); *ERI Max Entm't, Inc. v. Streisand*, 690 A.2d 1351, 1353 n.1 (R.I. 1997) (per curiam).

[2] The legal standard for attempted monopolization is similar. A plaintiff must show "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Diaz Aviation Corp.*, 716 F.3d at 265 (citation omitted).

conduct: Blue Cross' supposed refusal to deal with Steward at two hospitals, Landmark and Saint Anne's.[3]

Steward's monopolization claims raise four issues for trial. First, Steward must properly define a relevant market. Second, Steward must show that Blue Cross possessed, or had a dangerous probability of possessing, monopoly power in the market it defines. Third, Steward must show that Blue Cross engaged in anticompetitive conduct. And fourth, for its attempted monopolization claims, Steward must show that Blue Cross had the specific intent to monopolize.

1. Market Definition

"The definition of the relevant market is ordinarily a question of fact, and the plaintiff bears the burden of adducing enough evidence to permit a reasonable factfinder to define the relevant market." *Flovac, Inc. v. Airvac, Inc.*, 817 F.3d 849, 853 (1st Cir. 2016) (citation omitted). "The relevant market has two components: the relevant geographic market and the relevant product market." *Id.* (citation omitted). The relevant geographic market is "the area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). The relevant product market is "determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United*

[3] Although Steward alleges separate monopolization and monopsonization claims, the claims challenge the same conduct under the same legal analysis. *See, e.g.*, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320–22 (2007) (finding that "a monopsony is to the buy side of the market what a monopoly is to the sell side," and that monopsony is simply the "mirror image" of monopoly (citations omitted)).

States, 370 U.S. 294, 325 (1962).[4] As in most antitrust cases, the parties seek to admit evidence about the relevant markets through expert testimony. *Flovac*, 817 F.3d at 856 (expert testimony is "common and useful device for establishing" the relevant market).

The definition of the relevant geographic market does not affect the analysis of whether Blue Cross has market power in any relevant market. Am. Compl. ¶ 67; SOUF Ex. 25 (Expert Report of Monica Noether ("Noether Report")) ¶¶ 59, 89 [redacted]. Blue Cross does not dispute that "the market for the sale of commercial health insurance" is a relevant product market. Am. Compl. ¶ 66. Blue Cross does dispute, however, Steward's definition of the relevant product "market for the commercial purchase of hospital services." *Id.*

A relevant product market must include all products that are substitutes or "reasonably interchangeable." *Brown Shoe Co.*, 370 U.S. at 325. When, as here, the allegations concern a buy-side market, defining the market turns on interchangeability from the *seller's* (i.e., the hospital's) perspective. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 12 (2010). At trial, Blue Cross will show that the market for the purchase of hospital services is not limited to hospital services sold to commercial health insurers, as Steward alleges. Am. Compl. ¶ 66. Rather, because hospitals sell services to the government, to

[4] The market definition analysis is the same for monopolization and attempted monopolization. *United States v. Microsoft Corp.*, 253 F.3d 34, 81 (D.C. Cir. 2001) (en banc) (per curiam).

commercial health insurers, and to individuals who self-pay, Blue Cross will show that such sales are "reasonably interchangeable from the [hospital's] perspective" and that Steward cannot prove the product market it alleges. *See Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 597-98 (8th Cir. 2009) (provider market excluding government payors "lacks support in both logic and law"), *cert. denied*, 561 U.S. 1026 (2010); *Marion HealthCare, LLC v. S. Ill. Healthcare*, No. 12-cv-00871, 2013 WL 4510168, at *10-11 (S.D. Ill. Aug. 26, 2013) (same).[5]

2. Market Power

Market power is an essential element of all of Steward's claims. "Market power can be shown through two types of proof. A plaintiff can either show direct evidence of market power (perhaps by showing actual supracompetitive prices and restricted output) or circumstantial evidence of market power." *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 196-97 (1st Cir. 1996) (citation omitted). "Market power may be proved circumstantially by showing that the defendant has a dominant share in a well-defined relevant market and that there are significant barriers to entry in that market and that existing competitors lack the capacity to increase their output in the short run." *Id.* at 197.

A market share of less than 30 percent is insufficient to constitute market power for purposes of a Section 1 claim for conspiracy in restraint of trade. *See, e.g.*, *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988) (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984)). Similarly, one cannot presume monopoly power for purposes of a Section 2 monopolization claim unless "defendant's share of a well-defined market protected by sufficient entry barriers has exceeded 70 or 75 percent for the five years preceding

[5] *Cf. Campfield v. State Farm Mut. Auto Ins. Co.*, 532 F.3d 1111, 1119 (10th Cir. 2008) ("When there are numerous sources of interchangeable demand, the plaintiff cannot circumscribe the market to a few buyers in an effort to manipulate those buyers' market share.") (citation omitted).

the complaint." *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1250 (11th Cir. 2002) (quoting 111A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 801a (2d ed. 2002)). Moreover, where a defendant's market share is less than 50 percent, there is no "dangerous probability of successfully monopolizing a market … as a matter of law" for purposes of a Section 2 attempted monopolization claim. *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 994 (11th Cir. 1993); *see also* Areeda & Hovenkamp, *Antitrust Law* § 807d (requiring 50 percent market share).

Blue Cross does not have sufficient market power for either a Section 1 or Section 2 claim. With respect to the market for the purchase of hospital services, [redacted]

3. Anticompetitive Conduct

The Supreme Court has recognized for over a century that "[a]s a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 448

(2009) (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).[6] A defendant's refusal to deal may be anticompetitive only in limited and unique circumstances. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). But those circumstances rarely exist, and the Supreme Court has since held that "*Aspen Skiing* is at or near the outer boundary of § 2 liability." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004). This Court has summarized the "baseline requirements" of a refusal-to-deal claim as:

- The "unilateral abandonment of a voluntary course of dealing,
- forsaking of short-term profits,
- refusal to transact business with the plaintiff even if compensated at rates set by the defendant, and
- concomitant inability to provide a legitimate business rationale."

Steward Health Care Sys., LLC, v. Blue Cross & Blue Shield of R.I., 997 F. Supp. 2d 142, 153 (D.R.I. 2014).

First, Blue Cross did not abandon a prior voluntary course of dealing with Steward. The Supreme Court has recognized a refusal-to-deal claim only when a monopolist abandons a voluntary (and therefore presumably profitable) prior course of dealing. *Aspen Skiing*, 472 U.S. at 603 (the defendant "elected to make an important change in the *pattern* of distribution that had

[6] The antitrust laws also do not require a defendant to accept every contract term that a plaintiff demands. *See Aerotec Int'l v. Honeywell Int'l*, 836 F.3d 1171, 1184 (9th Cir. 2016) (affirming summary judgment for defendant on refusal to deal claim where the plaintiff "simply did not like the business terms offered by" the defendant); *Loren Data Corp. v. GXS, Inc.*, 501 F. App'x 275, 283 (4th Cir. 2012) (rejecting unilateral refusal-to-deal claim where defendant "proposed terms for a commercial relationship" and plaintiff was simply "not satisfied with its terms"); *cf. SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 841 F.3d 827, 843 (10th Cir. 2016), *pet. for cert. filed* (Apr. 28, 2017) (No. 16-1303) (defendant did not refuse to deal when it refused to grant plaintiff an even larger license than the licensee already had). Nor is it illegal for a defendant to drive a hard bargain; after all, "the antitrust laws aren't designed to be a guide to good manners." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1078 (10th Cir. 2013) (Gorsuch, J.) (citation omitted).

originated in a competitive market and had *persisted for several years*") (emphasis added). The Supreme Court has distinguished these cases from those in which a defendant "merely reject[ed] a novel offer to participate in a cooperative venture that had been proposed by a competitor." *Aspen Skiing*, 472 U.S. at 603.[7]

At trial, [redacted] Blue Cross, therefore, did not make an anticompetitive "change in the character of the market" by failing to reach an agreement with Steward. *See id.* at 604.

[redacted] When a contract ends by its express terms, there is no "abandonment" of a prior course of dealing, and the antitrust laws do not otherwise require a defendant to renew a contract that is set to expire. *See Dealer Computer Servs., Inc. v. Ford Motor Co.*, No. Civ. A. H-06-175, 2006 WL 801033, at *1, *4 (S.D. Tex. Mar. 28, 2006), *aff'd*, 190 F. App'x 396 (5th Cir.

[7] *Accord Trinko*, 540 U.S. at 409 (There was no voluntary prior course of dealing, so the defendant's conduct "sheds no light upon the motivation of its refusal to deal."); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 54 (2d Cir. 2007) (per curiam) (affirming dismissal of refusal-to-deal claim when the complaint failed to allege "that defendants terminated a prior relationship with elevator service providers—a change which … could evince monopolistic motives"); *SmileCare Dental Grp. v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 786 (9th Cir. 1996) (no refusal to deal when insurer refused to permit providers to accept certain co-payments because the defendant "did not discontinue a marketing arrangement" with the plaintiff; rather, the defendant's co-payment plan "pre-existed [the plaintiff's] plan and the parties have never co-operated to supply the market with a new or better product").

2006) (per curiam) (plaintiff failed to show terminated course of dealing when ten-year license "expired by its own terms"). [redacted] shows not "a course of dealing" that was terminated but a single agreement that was renewed.

In any case, Blue Cross will show that it actively negotiated with Steward over the course of a year for reimbursement-rate *increases* at Landmark. Blue Cross will further show that it o[redacted] This was not a refusal to deal but rather a refusal to create a new deal.[8]

Second, Steward cannot show that Blue Cross sacrificed any short-term profits. Steward must prove Blue Cross' "willingness to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition." *See MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132 (9th Cir. 2004); *see also Trinko*, 540 U.S. 409 (refusal to deal in *Aspen Skiing* suggested "a willingness to forsake short-term profits to achieve an anticompetitive end"). [redacted]

[8] Furthermore, for commercial health plans, Blue Cross is still purchasing hospital services from St. Anne's, just under a different contract.

[redacted]

Third, Blue Cross did not refuse to deal with Steward at retail prices. *Trinko* and *Aspen Skiing* require Steward to establish that "Blue Cross offered a product or service for sale to the public at a retail price that it then refused to provide to Steward on the same terms." *Steward*, 997 F. Supp. 2d at 155.[9] There is no refusal to deal when a plaintiff simply wants better terms than the defendant offers; indeed, "a policy of insisting on a supplier's lowest price . . . tends to further competition on the merits and, as a matter of law, is not exclusionary." *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1110-11 (1st Cir. 1989) ("[A] health insurer's unilateral decisions about the prices it will pay providers do not violate the Sherman Act . . . even if the insurer is assumed to have monopoly power in the relevant market. . . . [T]he insurer—like any buyer of goods or services—is lawfully entitled to bargain with its providers for the best price it can get.") (citations omitted).

At trial, Blue Cross will show that hospital services are not bought by and sold to commercial insurers at a retail price. [redacted]

[9] "[I]f the defendant does not already provide the product in an existing market or otherwise make it available to the public, the court will have to delineate the defendant's sharing obligations, and an antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations." *MetroNet*, 383 F.3d at 1133 (citation and internal quotation marks omitted).

[redacted]

Fourth, Blue Cross had a legitimate business rationale for the rates it offered Steward, as well as excluding Steward from its provider network if Steward persisted in demanding higher rates. [redacted]

To the extent Steward's Section 2 claims rest on conduct other than the Landmark negotiations, Blue Cross' actions were consistent with, and mandated by, state regulation. Regulatory requirements, not any supposed anticompetitive intent, prompted Blue Cross' decisions to file a [redacted] *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 265 (3d Cir. 1998) (When a party's conduct is explained by "the realities of the regulatory environment," defendant's conduct is not a legal cause of the plaintiff's injury).

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10 "The ability of health plans to construct networks that include some, but not all, providers (so called 'selective contracting') has long been seen as an important tool to enhance competition and lower costs in markets for health care goods and services." Fed. Trade Comm'n, *Contract Year 2015 Policy & Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs* 1 (Mar. 7, 2014), available at https://www.ftc.gov/system/files/documents/advocacy_documents/federal-trade-commission-staff-comment-centers-medicare-medicaid-services-regarding-proposed-rule/140310cmscomment.pdf.

[redacted]

In addition to the legal arguments outlined above, Blue Cross will show that Steward's theory of liability is unprecedented and has no support in the law, the record, or common sense. To help it purchase a failing hospital, [redacted]. There is no limiting principle to the duty Steward seeks. It would subject Blue Cross to antitrust liability any time it rejected an excessive rate proposal during provider negotiations, and it would have judges and juries oversee which providers should be in Blue Cross' network and what rates those providers should be paid without any objective or administrable standard. Steward's theory, in short, suffers from the fundamental flaw the Supreme Court has cautioned against: it would turn courts into "central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they

[11] [redacted]

are ill suited." *Trinko*, 540 U.S. at 408; *see also Blue Cross & Blue Shield of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995) ("the antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute") (Posner, J.). This sort of formless inquiry is untenable under a statute that aims to free market forces rather than prescribe a given economic outcome.

4. Specific Intent to Monopolize

For its attempted monopolization claims, Steward must prove that Blue Cross had the specific intent to monopolize. The requisite intent is "something more than an intent to compete vigorously." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993). It may be proved directly or circumstantially. As for direct evidence, "the desire to crush a competitor, standing alone is insufficient to make out a violation of the antitrust laws," and if the defendant's "course of conduct was itself legitimate, the fact that some of it executives hoped to see [the plaintiff] disappear is irrelevant." *Ocean State Physicians*, 883 F.2d at 1113; *see generally Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 378-80 (7th Cir. 1986) (discussing role of intent in antitrust and stating that "if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant") (citation omitted). As for circumstantial evidence, specific intent "can be inferred from the defendant's anticompetitive practices or proof of unlawful conduct." *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 802 (8th Cir. 1987) (citation omitted). "[T]here must be some affirmative showing of conduct from which a wrongful intent can be inferred." *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582, 584 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

At trial, Blue Cross will show that there is neither direct nor circumstantial evidence of specific intent to monopolize. [redacted]

[redacted]

for "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993). Steward cannot meet its burden to show specific intent.

B. Conspiracy.

Steward also brings claims for conspiracy in restraint of trade (Counts IV, VIII, XII, and XVI) and conspiracy to monopolize (Counts III, VII, XI, and XV) under Sections 1 and 2 of the Sherman Act and analogous provisions of the Rhode Island Antitrust Act. To prove a conspiracy under either statute, Steward must establish "a meeting of minds in an unlawful arrangement." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). Specifically, "there must be direct or circumstantial evidence that reasonably tends to prove that [the alleged conspirators] had a conscious commitment to a common scheme designed to achieve an unlawful objective."

[redacted]

Id. at 768. If the alleged conspirators' "conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 596-97 (1986) (citation omitted); *see also id.* at 588 ("[A]ntitrust law limits the range of permissible inferences from ambiguous evidence . . . conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.") (citation omitted); *Euromodas, Inc. v. Zanella, Ltd*, 368 F.3d 11, 20 (1st Cir. 2004) ("[B]uilding an antitrust claim on ambiguous evidence" is "a practice that the Supreme Court has forbidden") (citation omitted). In other words, "[t]here must be evidence that tends to exclude the possibility that the [alleged conspirators] were acting independently." *Monsanto Co.*, 465 U.S. at 764; *Am. Steel Erectors, Inc. v. Local Union No. 7*, 815 F.3d 43, 65 (1st Cir. 2016) (rejecting conspiracy because "[t]here [wa]s no evidence that [defendants] relinquished independent, competitive decision-making").

No such evidence exists here. Steward alleges several purported agreements, but there is no evidence (direct or circumstantial) of a "meeting of the minds" or an "unlawful objective" to exclude Steward from Rhode Island. Nor is there any evidence that Blue Cross, Thundermist, or Lifespan acted contrary to their own self-interest.

First, Steward alleges that Blue Cross, Thundermist, and Lifespan agreed to an alternative "treat and transfer" plan[12] for Lifespan to acquire Landmark. Am. Compl. ¶ 33. But this cannot form the basis for a conspiracy because the "treat and transfer" plan *had nothing to do* with Blue Cross. There is no evidence that Blue Cross was part of the plan or that the plan had anything to do with Steward. [redacted]

12 [redacted]

[redacted]

Second, Steward alleges that Lifespan agreed to lower reimbursement rates from Blue Cross in exchange for greater patient volume. Am. Compl. ¶ 34. Not only is there no evidence that this agreement had anything to do with Steward, these types of agreements are commonplace and recognized by courts and the Federal Trade Commission as a means of lowering healthcare costs. *See, e.g., Methodist Health Servs. Corp. v. OSF Healthcare Sys.*, 859 F.3d at 408, 410 (7th Cir. 2017) ("[A]n insurance company may get better rates from a hospital in exchange for agreeing to an exclusive agreement contract, as exclusivity will drive a higher volume of business to the hospital"; *see also supra* n.10. Steward claims that Lifespan effectively paid Blue Cross to keep Landmark from being owned by Steward, but there is no evidence support this conclusion; both Lifespan and Blue Cross deny it; and, of course, and it makes no economic sense. Blue Cross has no *incentive* to reduce potential competition between Lifespan and Steward because, as a buyer of their hospital services, it benefits from competition between them. *See Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 66 (2004) ("[I]t is not in the long-term interest of the [health insurance] company . . . to drive out of business competitors of [its pharmacy suppliers]."). Moreover, the evidence confirms that rate negotiations between Blue Cross and Lifespan were highly contentious, with Blue Cross trying to limit rate increases to Lifespan as much as possible.

Third, and finally, Steward alleges that Thundermist stopped referring obstetric patients to Landmark and rejected a Memorandum of Understanding ("MOU") with Steward as part of a supposed conspiracy to keep Steward out of Rhode Island. Am. Compl. ¶ 39. However, [redacted]

Similarly, [redacted] SOUF Ex. 67 (THUNDMST0014992) at -993.

None of the evidence involving Blue Cross, Lifespan, and Thundermist has anything to do with Steward, much less manifests a meeting of the minds" in an "unlawful objective" to exclude Steward from Rhode Island. Steward cannot prove its conspiracy claims at trial.

C. Harm to Competition.

Steward cannot prove any of its antitrust claims because there is no evidence of harm to competition. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31 (1984) ("Without a showing of actual adverse effect on competition, [the plaintiff] cannot make out a case under the antitrust laws.").

In order to establish harm to competition, a plaintiff must show "*a reduction in output* and an *increase in prices* in the relevant market." *Sterling Merch., Inc. v. Nestle, S.A.*, 656 F.3d 112, 121 (1st Cir. 2011) (quoting *Sullivan v. Nat'l Football League*, 34 F.3d 1091 1097 (1st Cir. 1994)) (emphasis in original). A plaintiff cannot show harm to competition from low prices, because the Sherman Act was enacted to "protect[] consumers against prices that were too *high*, not too low." *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 931 (1st Cir. 1984) (emphasis in original) (citation omitted). Harm to a competitor from a lost business opportunity also is not sufficient. *See SMS Sys. Maint. Servs., Inc. v. Dig. Equip. Corp.*, 188 F.3d 11, 25-26 (1st Cir. 1999) ("That SMS may have lost business . . . is not, in and of itself, a concern of the antitrust laws."). While acquisitions might "produc[e] economic readjustments that adversely affect some persons," it is of no inherent concern to the antitrust laws that one bidder loses out to another, or even that a particular provider is excluded from the market altogether, unless there is actual evidence of anticompetitive effects. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977). Harm to a competitor—unaccompanied by a reduction in output or an increase in price—is never sufficient.

The evidence will show that there was no harm to competition in the market for hospital services because Landmark did not exit the market. [redacted]

[redacted]

[redacted] This is insufficient to prove harm to competition. *See Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 321 (3d Cir. 2007) ("The prospective harm to competition [similarly] must not … be speculative.") (citation omitted); *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1385 (5th Cir.1994) ("[S]peculation about anticompetitive effects is not enough.").

D. Immunity Under the State Action Doctrine.

Steward's antitrust claims are also barred by the state action doctrine because the purportedly "unreasonable" rates offered by Blue Cross were consistent with the maximum allowable rate increases allowed under binding OHIC regulations. Under the state action doctrine, private conduct is immunized from antitrust liability if it is taken pursuant to (1) a "clearly articulated and affirmatively expressed . . . state policy" and (2) "'actively supervise[d]' by the State itself." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citation omitted). To satisfy the first prong, the conduct need only be the "'foreseeable result' of what the statute authorizes." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991) (citation omitted). To satisfy the second prong, the State must have "played a substantial role in determining the specifics of the economic policy." *Fed. Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992). Both conditions are met here.

In negotiating rates with Steward, Blue Cross followed "clearly articulated and affirmatively expressed" state policy, which was "actively supervised" by OHIC. *See DFW Metro Line Servs. v. Sw. Bell Tel., Corp.*, 988 F.2d 601, 606 (5th Cir. 1993), *cert denied*, 510 U.S. 864 (1993) (state agency "actively supervise[d] ratemaking and enforcement" by conducting inquiries into the reasonableness of rates); *Gulf Marine Repair Corp. v. Liberty Mut. Ins. Co.*, No. 92-1576-CIV-T-21A, 1994 WL 805208, *10-11 (M.D. Fla. Jan. 13, 1994), *aff'd mem. sub nom. Gulf Marine v. Liberty Mut.*, 46 F.3d 70 (11th Cir. 1995), *cert denied*, 515 U.S. 1103 (1995) (active state supervision prong satisfied when filed insurance rates were effective only when approved by the designated state agency).

Under Rhode Island law, OHIC is required to "promulgate such rules and regulations as are necessary and proper to carry out the duties assigned to [it]," which include the promotion of

affordable health insurance. [redacted] Blue Cross cannot be held liable under the antitrust laws for offering rates that were consistent with binding OHIC regulations, and were designed to ensure the affordability of health insurance premiums for consumers.

E. Causation.

Under the Sherman Act, a plaintiff must show that its injury was caused "by reason of" the defendant's anticompetitive conduct. 15 U.S.C. § 15(a). Stated differently, a plaintiff must prove that the defendant's antitrust violation was a "material cause" of plaintiff's injury. *Sullivan*, 34 F.3d at 1103 (citation omitted); *see also Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531-33 & nn.24-28 (1983). When, as here, an injury is "attributable to . . . other factors independent of" the challenged conduct, a plaintiff has "not . . . met its burden." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 126-27 (1969) (collecting cases).[14]

[14] This principle is analogous to the common-law "doctrine of superseding cause," which applies when "the [plaintiff's] injury . . . was actually brought about by a later cause of independent origin that was not foreseeable." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837

Steward claims that Blue Cross prevented it from acquiring Landmark, and thereby from establishing a "network" of hospitals and from selling "commercial health insurance" in Rhode Island. But as the evidence will show, [redacted]

(1996) (quotation marks omitted); *see also In re Canadian Import Antitrust Litig.*, 470 F.3d 785, 791-92 (8th Cir. 2006) (quoting 2 P. Areeda & H. Hovenkamp, Antitrust Law § 338 (2d ed. 2000)) (no causation when "a force other than the antitrust violation fully accounts for the plaintiff's injury"); *see also RSA Media, Inc. v. AK Medial Grp, Inc.*, 260 F.3d 10, 15 (1st Cir. 2001) (plaintiff's injury was "unrelated to [defendant's] exclusionary conduct").

[15] Although the APA conditions and OHIC regulations fully explain Steward's alleged injury, the evidence will show that there are also "numerous intervening economic and market factors which . . . may have been the actual cause of the . . . injuries . . ." *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 402 (7th Cir. 1993). For example, [redacted]

[redacted]

Second, and as previously discussed, *see supra* at Part I.A, Steward tries to place blame for its decision to walk away from Landmark on Blue Cross' rate proposal. [redacted]

[redacted]

II. STEWARD CANNOT PROVE ITS STATE LAW TORT CLAIMS.

Steward claims that Blue Cross tortiously interfered with prospective (Count XVII) and existing contractual relationships (Count XVIII), but these claims fail for the same reasons as

Steward's antitrust claims. To prevail on a tortious interference claim,[16] Steward must prove: "(1) the existence of a business relationship or expectancy, (2) knowledge by the interferor of the relationship or expectancy, (3) an intentional act of interference, (4) proof that the interference caused the harm sustained, and (5) damages to the plaintiff." *Roy v. Woonsocket Inst. for Sav.*, 525 A.2d 915, 919 (R.I. 1987). Steward cannot prevail on either claim because Blue Cross (a) did not *improperly interfere* with Steward's potential agreements with Landmark or Thundermist; and (b) Blue Cross' conduct did not *cause* the failure of those agreements.

First, as the evidence will show at trial, Blue Cross did not "intentionally and improperly" interfere with Steward's potential agreements. *Avilla v. Newport Grant Jai Alai LLC*, 935 A2d 91, 98 (R.I. 2007) (citation omitted). There is no evidence that Blue Cross acted with "legal malice" or with the "intent to do harm without justification." *Belliveau Bldg. Corp. v. O'Coin*, 763 A.2d 622, 627 (R.I. 2000) (quotation omitted). To the contrary, Blue Cross at all times acted consistently with its own business interests. *Textron Fin. Corp. v. Ship and Sail, Inc.*, No. 09-617, 2011 WL 344134, *5 (D.R.I. 2011) ("[T]here is no interference where a party asserts 'in good faith . . . that his interest may otherwise be impaired or destroyed.'") (quoting Restatement (Second) of Torts § 773 (Am. Law. Inst. 1979)).

[redacted]

[16] These same elements apply to claims for tortious interference with either prospective or existing contractual relationships. *Mesolella v. City of Providence*, 508 A.2d 661, 670 (R.I. 1986).

[redacted]

Second, Steward cannot show that Blue Cross *caused* Steward's potential agreements with Landmark or Thundermist to fail. *See APG, Inc. v. MCI Telecomms. Corp.*, 436 F.3d 294, 304 (1st Cir. 2006) ("Under Rhode Island law, [the plaintiff] must prove either that 'but for' [the] interference, it would not have suffered injury, or that 'it is reasonably probable that but for the interference' [it would] not have been injured").[17] With respect to Steward's APA to acquire Landmark, [redacted] *See supra* at Part I.B.

[17] To show that injury was "reasonably probable," plaintiff must, in fact, show that injury was "reasonably definite." *APG, Inc.*, 436 F.3d at 304; *see also Mesolella*, 508 A.2d at 671 (plaintiff must show that "but for the [defendant's] interference there would have been a relationship.").

III. STEWARD CANNOT PROVE DAMAGES.

[redacted]

[redacted]

Second, Steward failed to mitigate its damages. Under the antitrust laws, plaintiffs must mitigate their losses. *See, e.g., Golf City, Inc. v. Wilson Sporting Goods, Co.*, 555 F.2d 426, 436 (5th Cir. 1977), including by dealing with defendants when doing so does not create an unreasonable business risk. *See, e.g., Koby v. United States*, 53 Fed. Cl. 493, 496-98 (2002) ("Whether or not the buyer's obligation to mitigate damages [by dealing with the defendant] has been discharged depends on the reasonableness of its conduct.") (citation omitted). Mitigation only constitutes an unreasonable business risk if, for example, the cost of mitigation would exceed the benefit, *see Litton Systems, Inc. v. AT&T Co.*, 700 F.2d 785, 820 (2d Cir. 1983), or when mitigation would have risked "extinguish[ing]" the plaintiff's profit margins or forcing it to breach bid contracts, *Westman Comm'n Co. v. Hobart Corp.*, 541 F. Supp. 307, 310, 314 (D. Colo. 1982). Specifically, antitrust plaintiffs alleging a refusal to deal have a duty to mitigate by finding the next best alternative deal, including a deal with the defendant on less favorable terms.

See, e.g., *Golf City*, at 436 (plaintiff should have mitigated by buying "store-line" equipment from defendants when defendants refused to sell "pro-line" equipment).

[redacted]

3. BLUE CROSS' PENDING MOTIONS *IN LIMINE*

A. Blue Cross & Blue Shield of Rhode Island's Motion to Exclude Certain Speculative Evidence

Blue Cross requests that the Court exclude all testimony related to Steward's speculative claims that: (1) Steward would have developed a hospital network in Rhode Island; (2) Steward would have created insurance products in Rhode Island with insurers other than Blue Cross; and

(3) Steward would have pursued "turnaround" initiatives for Landmark beyond those supported by the record. All such evidence should be excluded under Federal Rule of Evidence 701 because no contemporaneous evidence suggests these events would have transpired, much less that Blue Cross prevented them.

B. Blue Cross & Blue Shield of Rhode Island's Motion to Exclude Argument and Evidence Related to Information Steward Refused to Produce In Discovery

Blue Cross requests that the Court exclude evidence and argument related to topics for which Steward refused to produce information in discovery. Blue Cross requested information regarding the cost of Steward's healthcare services in Massachusetts and competition among health insurers and hospitals in Massachusetts. Steward argued this information was *irrelevant* to the parties' claims and defenses. Having argued that this information was irrelevant to avoid discovery, Steward cannot now introduce the information to support its claims. Federal Rules of Evidence 402 and 403 and the doctrine of judicial estoppel bar Steward from introducing evidence or making argument on topics on which it successfully resisted discovery.

C. Blue Cross & Blue Shield of Rhode Island's Motion In Limine to Exclude Evidence or Argument Regarding Alleged Unreasonable Reimbursement Rates for Landmark

Blue Cross requests that the Court exclude all evidence and argument that Blue Cross' reimbursement rates to Landmark before September 2012 were unreasonably low because the Rhode Island Superior Court approved a settlement of the Special Master's lawsuit against Blue Cross that dismissed the Special Master's claims that Blue Cross' rates were unreasonable, over Steward's objection. Evidence and argument on these reimbursement issues are irrelevant and should be precluded under Federal Rule of Evidence 401. Additionally, evidence and argument

is inadmissible under Federal Rule of Evidence 403 because any potential relevance is substantially outweighed by the danger of unfair prejudice and the potential to confuse the jury.

D. Blue Cross & Blue Shield of Rhode Island's Motion to Exclude Argument and Evidence of Conduct Immune Under the State Action Doctrine

Blue Cross requests that the Court exclude all evidence and argument that reimbursement rate increases at the maximum amount allowed under OHIC regulations are unreasonable because such rates are immune from antitrust liability under the state action doctrine. Evidence and argument on this issue are also barred by Federal Rule of Evidence 403 because they lack probative value and present a substantial danger of unfair prejudice.

E. Blue Cross & Blue Shield of Rhode Island's Motion to Exclude Argument and Evidence of Conduct Immune Under the *Noerr-Pennington* Doctrine

Blue Cross requests that the Court exclude evidence of Blue Cross' government petitioning activities for the purpose of establishing antitrust and tort liability. Specifically, this includes evidence that: (1) Blue Cross applied for a material plan modification; and (2) Blue Cross engaged in lobbying efforts. The *Noerr-Pennington* doctrine immunizes government petitioning efforts from antitrust and tort liability. Evidence of Blue Cross' petitioning activities also lacks probative value and poses a substantial risk of unfair prejudice, making it inadmissible under Federal Rule of Evidence 403.

F. Blue Cross & Blue Shield of Rhode Island's Motion to Exclude Expert Testimony of David Eisenstadt

Blue Cross previously submitted a motion to exclude Dr. Eisenstadt's opinions regarding conspiracy. Mem. of Law in Support of it Mot. to Exclude Expert Testimony of David Eisenstadt (Doc. 164). In addition, this additional motion requests that the Court exclude Dr. Eisenstadt's testimony addressing harm to competition, including Parts IV and V of his report. Dr. Eisenstadt's complex calculations relied entirely on the conclusions of other Steward experts,

and Dr. Eisenstadt never independently verified these conclusions before adopting them. This evidence will not help the trier of fact determine a fact in issue and should therefore be excluded under Federal Rule of Evidence 702. Additionally, unfounded expert testimony should be excluded under Federal Rule of Evidence 403 because it can be both powerful and misleading. The substantial risk of unfair prejudice outweighs the probative value of this evidence.

G. Blue Cross & Blue Shield of Rhode Island's Motion to Exclude Certain Expert Testimony of Leemore Dafny

Blue Cross requests that the Court exclude Professor Dafny's testimony regarding Blue Cross' supposed sacrifice of short-term profits to eliminate competition. In her analysis Professor Dafny [redacted] Professor Dafny's testimony about Blue Cross' profit sacrifices should be excluded under Rule 702 because is not grounded in economic reality and ignores inconvenient facts of the case.

4. EXPECTED LENGTH OF TRIAL

This trial is scheduled to begin January 16, 2018, and is expected to last three to four weeks.

DATED: November 28, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2017, I filed the foregoing Pre-Trial Memorandum through the ECF system and that notice will be sent electronically to the below listed counsel who are registered participants identified on the mailing information for Case No. 13-405-S.

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