UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

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

PLAINTIFFS' PRETRIAL MEMORANDUM

Plaintiffs Steward Health Care System, LLC, Blackstone Medical Center, Inc., and Blackstone Rehabilitation Hospital, Inc. (collectively "Steward") submit the following pretrial memorandum pursuant to the Court's standard pretrial scheduling order [Doc. 38] and as stipulated by the parties [Doc. 236].

I. Statement of What Plaintiffs Plan to Prove in Support of Their Claims

Steward's mission is to advance a different approach to healthcare delivery that strives to improve quality while lowering cost. To that end, the Steward model focuses on prevention, on delivering care in the local community, and on teamwork among the healthcare professionals caring for a particular patient. The Steward model also strives to align the financial incentives for healthcare delivery. Instead of rewarding healthcare professionals for the number of treatments provided, the Steward model rewards high-quality care that reduces or avoids the need for expensive treatment in the first place, by helping patients get healthy and stay healthy.

In 2009–2010, Steward (then doing business as Caritas Christi) had successfully used this model to significantly improve care and reduce the trend of increasing medical expenses in a

group of financially struggling community hospitals in Massachusetts, and hoped to extend its network of hospitals, physicians, and other health care facilities into Rhode Island.

Caritas's Attempted Acquisition of Landmark. Executives identified Landmark Medical Center, an independent community hospital and rehabilitation hospital just across the Rhode Island border, as a promising potential entry point to the state. After initial due diligence, Caritas decided to attempt to acquire Landmark as the first step in expanding into Rhode Island.

Because of its financial difficulties, Landmark operated under the supervision of the Rhode Island Superior Court through a Special Master. Caritas viewed Landmark as a "diamond in the rough," and saw advantage in its location close to Massachusetts and other Steward hospitals. Landmark enjoyed substantial community and political support, in part because it was a large local employer and the only acute care hospital in Northern Rhode Island.

Blue Cross is the dominant seller in the market for the sale of commercial health insurance in Rhode Island. It is also the dominant purchaser in the market for the commercial purchase of hospital services in Rhode Island. Blue Cross therefore has not only market power, but both monopoly and monopsony power.

There were two dominant hospital systems in Rhode Island at the time, Lifespan and Care New England. Blue Cross paid these hospital systems higher reimbursement rates than it paid independent community hospitals, like Landmark, many of which were struggling financially. Thundermist is the largest primary care provider in Woonsocket, where Landmark is located.

Blue Cross, Lifespan, and Thundermist each viewed the entry of Steward (and before Steward, Caritas) into Rhode Island as a competitive threat and sought to block Steward. Blue Cross saw Steward as a threat to its market power in both the health insurance business (selling)

and the hospital services business (buying). Blue Cross recognized that [redacted] And with respect to the purchase of hospital services, Blue Cross feared that [redacted]. Blue Cross also understood that [redacted].

Lifespan, for its part, had benefitted from the financial struggles of Landmark and other community hospitals. The more they struggled, the greater the number of patients who left those hospitals and sought care elsewhere, often at Providence-based Lifespan hospitals. Lifespan therefore [redacted]. In the absence of Steward, Lifespan hoped to drive even more patients to its hospitals by turning Landmark into a "treat-and-transfer" hospital that offered only limited, emergency services and directed virtually all in-patient care to Lifespan hospitals. Blue Cross hoped [redacted].

Thundermist, too, stood to gain from the "treat-and-transfer" plan for Landmark, [redacted]. Thundermist also perceived a different competitive threat from Steward's acquisition of

Landmark. [redacted]

While Blue Cross, Lifespan, and Thundermist all saw Steward's acquisition of Landmark and creation of an accountable-care network in Rhode Island as a competitive threat, [redacted]. Maintaining a full-service hospital in Northern Rhode Island and preserving the jobs at Landmark were issues too much in the public eye.

Caritas had had a successful working relationship with Blue Cross & Blue Shield of Massachusetts, which recognized the value of the payment reform achievable through risk-based contracting. In part for that reason, Caritas expected Blue Cross & Blue Shield of Rhode Island to embrace Caritas's plan to invest in Landmark, revitalize the hospital as a competitor with high-priced systems, and introduce risk-based contracting to the state as a means to lower premiums. Instead, Caritas encountered resistance from the start. When Caritas first met with Blue Cross to negotiate rates in the fall of 2010, [redacted]

Lifespan and Thundermist arranged a meeting with the Superior Court to discuss their alternative model, [redacted] In addressing the Superior Court, Lifespan and Thundermist discredited Caritas's acquisition effort and emphasized Blue Cross's support for the treat-and-transfer plan as an alternative to the Caritas acquisition. Faced with Blue Cross's flat rejection of its rate proposal, Caritas abandoned the acquisition.

Steward's Attempted Acquisition of Landmark in 2011-2012. The following spring, unable to find a satisfactory buyer for the hospital, the Special Master approached Steward, which had since acquired Caritas, and encouraged it to submit a new bid. Steward, now backed by $250 million in capital, did so, promising to invest more than $30 million in Landmark. The Special Master and Steward had expected pursuing the acquisition might be easier this time, since all other prospective purchasers for Landmark had either withdrawn or been rejected. In fact, Blue Cross had gained additional reasons to oppose Steward's entry. Steward's publicized plans to join with other insurance companies to offer lower-cost, limited network products had only further increased its threat to Blue Cross's dominance in the sale of health insurance in Rhode Island. [redacted].

Blue Cross objected to Steward's proposed bid at the outset, and soon further demonstrated its anticompetitive purpose and intent by seeking to block a Steward proposed amendment to the Rhode Island Hospital Conversions Act that would eliminate the three-year

waiting period between for-profit entities' acquisitions of Rhode Island hospitals (a significant barrier to Steward building a successful network in the state).

Thundermist worked with Lifespan and Blue Cross to frustrate the acquisition. When Steward met with Thundermist to secure its support and to learn how a "new" Landmark could better collaborate with Thundermist and serve its patients, Thundermist said one thing and did another. It discussed the changes that needed to be made at Landmark once Steward acquired the hospital, but, then, without notice to Steward, announced the referral of all its OB patients to Women & Infants Hospital in Providence. [redacted] The requested amendment sought to add as conditions on Steward's obligation to close (1) an acceptable memorandum of understanding ("MOU") with Thundermist and (2) an agreement to become the 100% owner of the Southern New England Cancer Center. [redacted] Within weeks Thundermist was poised to sign an

MOU with Steward, having sent Steward a draft that had been approved by the Thundermist board, [redacted], Thundermist dramatically altered course and refused even to sign its own proposed MOU.

Meanwhile, throughout 2011–2012, Blue Cross engaged in rate negotiations with Steward that, in retrospect, were a charade. [redacted]

Throughout the negotiations, [redacted]

[redacted]

Blue Cross exerted additional pressure on the Landmark negotiations by: (1) refusing to extend its rate agreement with Landmark, despite having done so consistently since 2006; (2) sending letters to doctors and its thousands of subscribers telling them that by an unattainably early date, Landmark would be "off contract" and "out of network"; (3) taking the unprecedented step of stopping direct reimbursement of Landmark for services provided to Blue Cross subscribers and instead directing payment to the subscribers; (4) delaying government payments to Landmark for programs administered by Blue Cross; and (5) moving ahead to remove Landmark from its network without approval of its request by the Department of Health.

In taking these actions, Blue Cross sacrificed short-term profits for the longer term benefits of avoiding competition from Steward. [redacted]

Blue Cross's notification to its subscribers in the summer of 2012 that Landmark was going out of network and its decision to stop paying Landmark directly for treatment of Blue Cross members forced the Special Master and Landmark to agree to what the Special Master called a "complete capitulation." Blue Cross agreed to return Landmark to in-network status, but only if the Special Master agreed to (i) drop the lawsuit it had filed against Blue Cross for

underpayment and release all other claims Landmark had against Blue Cross, (ii) accept the continuation of the rates it was then being paid with no increase until the year-end, and (iii) commit that those rates would bind anyone who purchased the hospital for three months after the purchase was completed. The Special Master saw no other option but to accede to Blue Cross's demands, advising the Court: "The Special Master believes that the very survival of Landmark and RHRI is at stake and that he had no alternative but to execute the MOU on the conditions imposed by Blue Cross . . . ." [redacted]

Blue Cross's monopoly power in the commercial insurance market and monopsony power in the market for the commercial purchase of hospital services meant that Steward could not operate successfully in Rhode Island without reaching a deal with Blue Cross about rates. Not only did Blue Cross refuse to offer reasonable rates, it announced publicly in August 2012—in the midst of the negotiations—that it intended to offer "narrow network" products for the first time. Subsequent events—[redacted]—revealed that the announcement was simply part and parcel of Blue Cross's plan to discourage Steward from proceeding with the acquisition. Steward realized that a narrow-network product that excluded Landmark would render useless any rate increase it might negotiate with Blue Cross unless Blue Cross committed to keep Landmark in the narrow network product—[redacted].

By mid-September, after a final failed effort at mediation, it became clear to Steward that Blue Cross would go to any lengths to keep Steward from entering Rhode Island—including cutting off funds to an already bankrupt hospital and taking actions at significant cost to itself. Steward announced that it was abandoning its efforts to acquire Landmark. It did so because

Blue Cross refused to offer reasonable rates and terms, which were the essential building block to Landmark's financial sustainability and the litmus test for whether Steward and Blue Cross could develop the working relationship necessary for successful risk-based contracting and accountable care. Steward did not abandon the acquisition because the conditions relating to Rhode Island Specialty Hospital, Thundermist, or Southern New England Regional Cancer Center had not been satisfied.

Throughout the time when Blue Cross was going through the motions of negotiating with Steward, Blue Cross was negotiating reimbursement rates with Lifespan. [redacted]

[redacted]

Steward had planned, and had the experience, to extend its network of hospitals, physicians, and other health care facilities into Rhode Island by acquiring or affiliating with other hospitals and physician groups. To that end, Steward successfully petitioned to amend Rhode Island's Hospital Conversions Act to remove the restriction on a for-profit entity acquiring multiple hospitals within a three-year period. When that amendment went into effect in June 2012, Steward immediately submitted a letter of interest in acquiring CharterCARE, a hospital system in Rhode Island. Even as Steward faced Blue Cross's intransigence in the negotiations over reimbursement rates for Landmark, Steward remained in communication with CharterCARE about acquiring or affiliating with its hospitals. Steward also explored potential platforms by which it could market and launch limited network products in Rhode Island, including scheduling meetings with Rhode Island businesses to educate them about Steward's products and plans for the future.

The acquisition of Landmark was the first step in Steward's plan to compete in Rhode Island. When Steward abandoned the Landmark acquisition as a result of Blue Cross's refusal to deal, Steward also ceased its efforts to acquire or affiliate with additional hospitals, as well as its efforts to introduce innovative insurance products in Rhode Island. Blue Cross's anticompetitive and tortious conduct denied Steward the opportunity to continue its expansion into Rhode Island, and the opportunity to enter into agreements with physicians, physician groups, and other local

health care providers. As part of the Steward network, hospitals, health care facilities, and physicians would be linked through electronic health records, and would work collaboratively as part of an accountable care organization. In addition, Steward would have looked to partner with insurance companies to offer narrow and/or tiered network insurance products in Rhode Island.

Blue Cross's anticompetitive actions brought substantial harm to consumers and competition in Rhode Island, harm that outweighs any benefit to competition. Landmark and the community it serves would have benefited tremendously from the strategic capital expenditures that Steward had planned, and from integration into the Steward network. The entry of new competition into monopolized and monopsonized markets in Rhode Island would have led to competitive responses from Lifespan and Blue Cross and others in the market, which would have benefitted businesses and consumers in Rhode Island. More broadly, Steward's business model involves the type of approaches and reforms that could have benefitted Rhode Island, in terms of the revitalization of community hospitals; integrated, high-quality care, involving a broad spectrum of health professionals in every patient's care; and moving away from fee-for-service compensation to realign incentives in a way that rewards doctors and hospitals for keeping patients healthy and not simply for making ever greater use of expensive health care resources.

The improvements associated with increased competition have not occurred as a result of Prime's acquisition of Landmark. Prime has not revitalized Landmark in the manner necessary to attract patients with commercial insurance back to Landmark and has continued to operate Landmark as a standalone hospital without the benefits of integration into a healthcare network. Prime's acquisition has not brought the level of competition to other hospitals that Steward would have brought to Rhode Island, and Prime has neither the ability nor the inclination to bring any additional competition to the insurance market, as Steward would have done. Prime's

business does not and has not included risk-based contracting or the development of accountable care organizations or even [redacted] Steward's exclusion from Rhode Island has resulted in higher payments by insurers, higher premiums and lower quality care for consumers, the continuation of Lifespan's domination as a seller of hospital services to Blue Cross, and the continued monopoly domination of the commercial health insurance market.

Blue Cross's anticompetitive conduct, interference with the APA, and interference with prospective agreements or alliances with Rhode Island physicians caused injury to Steward. Had Steward been able to purchase Landmark with a willing partner in Blue Cross and implement its turnaround plan, Landmark would have been generating nearly $20 million a year in earnings before interest, taxes, depreciation, and amortization ("EBITDA") within five years. With a revitalized Landmark able to achieve that level of annual earnings, Blue Cross's prevention of Steward's acquisition of Landmark caused more than $70 million in damages. In addition, the lost opportunity at the Rehabilitation Hospital of Rhode Island caused Steward to suffer an additional $1.5 million of damages, and Steward's damages due to Blue Cross's decision to terminate the St. Anne's Medicare Advantage contract are at least $2.6 million. This approximately $76.5 million damages figure understates what Steward actually lost. It does not include any compensation for the damages Steward lost by not adding Landmark to its overall healthcare network or any compensation for the lost opportunities to acquire, affiliate with, or build additional Rhode Island hospitals, ambulatory surgery centers, other healthcare facilities, or physician relationships ,or the total losses to St. Anne's and Morton Hospitals, and thus understates what Steward actually lost.

II. Memorandum on the Law Applicable to the Case.

A. Monopolization

As the Court has succinctly summarized, "to sustain a claim for monopolization . . . a plaintiff must demonstrate: (1) that the defendant possessed monopoly power in the relevant market; and (2) the defendant's 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." *Steward Health Care System LLC v. Blue Cross & Blue Shield of R.I.*, 997 F. Supp. 2d 142, 151 (D.R.I. 2014).[1]

The heart of the parties' dispute regarding Steward's monopolization claim concerns the second element identified by the Court. Despite Blue Cross's categorical insistence that a monopolist enjoys the right to deal, or refuse to deal, with whomever it likes, it is only in "*the absence of any purpose to create or maintain a monopoly*" that "the Sherman Act . . . does not restrict the long recognized right of [a] trader or manufacturer, engaged in [a purely] private business, freely to exercise his own independent discretion as to [the] parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (emphasis added). The Supreme Court recently reaffirmed this principle, stating that "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2." *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 408 (2004). Although the Court cautioned that the circumstances in which a unilateral refusal is unlawful are limited, it

[1] The plaintiff must also establish standing to bring an antitrust challenge, i.e., that "it has sustained antitrust injury" and that "its alleged damages were caused by the alleged antitrust violation." *Steward*, 997 F. Supp. 2d at 157–59. As the Court has explained "[a]ntitrust injury is injury of the type the antitrust laws were intended to prevent and that flows from that which makes [a] defendant[] acts unlawful," and turns on whether the defendant's conduct served to "increase" or "decrease" competition. *Id.* at 157–58 (internal quotation marks omitted) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

identified the attributes of conduct outside the limits of what Section 2 permits, including the termination of a voluntary (and "thus presumably profitable") course of dealing and the refusal to deal with the plaintiff *even if* compensated at prevailing rates for products that the defendant was already selling to others. *Id*. at 409 (emphasis omitted) (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)). As this Court noted in denying Blue Cross's motion to dismiss the original complaint, "[t]his 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 have evolved to form the baseline requirements of a § 2 refusal to deal claim." *Steward*, 997 F. Supp. 2d at 153 (citing *Creative Copier Services v. Xerox Corp.*, 344 F. Supp. 2d 858, 865–66 (D. Conn. 2004)).

The ultimate touchstone for the Court in *Trinko* was dealings by the monopoly firm, with the plaintiff or with others in the marketplace, that "suggest[] a willingness to forsake short-term profits to achieve an anticompetitive end." *Trinko*, 540 U.S. at 409. Courts since *Trinko* have relied on this touchstone to hold monopolists accountable for anticompetitive refusals-to-deal under Section 2. *See, e.g.*, *Creative Copier*, 344 F. Supp. 2d at 866 (plaintiff's allegation that, despite a history of profitable prior dealing, the defendant suddenly decided "for no apparent reason" to delay shipping, make parts unavailable, raise prices on other parts, and refuse to sell copiers to lessees who wished to use the plaintiff as their service provider, stated a claim for a violation of Section 2); *Tucker v. Apple Computer, Inc.*, 493 F. Supp. 2d 1090, 1101 (N.D. Cal. 2006) (defendant's willingness to forgo profitable sales in order to deter customers from dealing

with its rivals was sufficient to state a Section 2 claim).[2] As the court noted in *Tucker*, *Trinko* demonstrates that it is the search for anticompetitive animus that matters, and not the specific reasons that such animus was found in *Aspen Skiing*:

> In *Trinko*, the Court noted that it had "found significance" in the defendant's decision to cease participation in a prior cooperative venture in Aspen Skiing. *However, the Court did not confine Aspen Skiing to cases in which a prior course of dealing exists.* Rather, it focused on the defendant's prior conduct to "[shed] light upon the motivation of its refusal to deal—upon whether its regulatory lapses were prompted by 'competitive zeal' or 'anticompetitive malice.'"

493 F. Supp. 2d at 1101 (emphasis added) (citations omitted). Consistent with *Tucker* and *Trinko*, Steward is aware of no case in which a court has found a refusal to deal by a monopolist to be lawful under Section 2 when the evidence demonstrated that the monopolist had chosen to "forsake short-term profits in order to achieve an anticompetitive end." *Trinko*, 540 U.S. at 409.

Finally, the courts have recognized that refusal to deal concepts apply in the context of a monopoly buyer or monopsonist, just as they do in the context of a monopoly seller. *See, e.g.*, *New Mexico Oncology and Hematology Consultants, Inc. v. Presbyterian Healthcare Services*, 54 F. Supp. 3d 1189, 1213-14 (D.N.M. 2014) ("Claims involving abuse of existing monopsony power may be based on a variety of activities, including . . . refusals to deal[] . . . . A court may find that a buyer implicitly refused to deal with a supplier if, for example, the buyer refuses to

[2] *See also FTC v. Qualcomm Inc.*, 2017 WL 2774406, at *21–22 (N.D. Cal. June 26, 2017) (allegations *inter alia* that defendant "altered a 'voluntary and profitable course of dealing'" and that it was motivated to do so by "anticompetitive malice" stated a Section 2 claim); *Iris Wireless LLC v. Syniverse Techs.*, 49 F. Supp. 3d 1022, 1029 (M.D. Fla. 2014) (competitor stated a Section 2 claim where the parties "had a long course of dealing through the provision of reciprocal peering services . . . [the defendant] benefitted . . . since its customers were able to send text messages to [the plaintiff's] customers," and the defendant "offered no legitimate procompetitive reason" for its refusal to deal).

purchase except at an unreasonable price." (alteration in original) (internal quotation marks omitted)).

B. Conspiracy

Because Steward's conspiracy allegations involve entities at different levels of the distribution chain (i.e., including a health insurance company and a hospital network), this case involves what is essentially a vertical conspiracy, rather than a horizontal conspiracy among firms competing at the same level of the market. To prevail at trial, Steward must establish by a preponderance of the evidence that (1) Blue Cross engaged in concerted action with either Thundermist or Lifespan (or both) and (2) the conspirators' conduct harmed competition. *Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 17 (1st Cir. 2004).

To meet the requirement of concerted action, Section 1 of the Sherman Act extends to "tacit or express" agreements that restrain trade. *White v. R.M. Packer Co.*, 635 F.3d 571, 575 (1st Cir. 2011); *see also* 15 U.S.C. § 1. A tacit agreement is "one in which only the conspirators' actions, *and not any express communications*, indicate the existence of an agreement," and is often characterized by "'uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision.'" *White*, 635 F.3d at 576 (emphasis added) (quoting *Brown v. Pro Football, Inc.*, 518 U.S. 231, 234 (1996). "'[I]ndependent decisions, even if they lead to the same anticompetitive result as an actual agreement among market actors,' are insufficient to sustain a Section 1 conspiracy claim." *In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34, 56 (1st Cir. 2016) (alteration in original) (quoting *White*, 635 F.3d at 575).

To establish the existence of an agreement, Steward must produce evidence that "tends to exclude the possibility of independent action." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S.

752, 764 (1984). "Such evidence could show 'parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties.'" *White*, 635 F.3d at 577 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 n.4 (2007)). Steward need not eliminate any possible inference of individual action: "[A] finding of conspiracy requires evidence that tends to exclude the possibility that the defendant was acting independently. This requirement, however, [does] not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct; rather, the evidence need only be sufficient to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not." *United States v. Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2015) (internal quotation marks omitted) (second alteration in original). As the Third Circuit has explained, "[i]n defending against summary judgment, [plaintiffs] need not eliminate all possible independent justifications by the manufacturer, [so that] *only* evidence of concerted action would be left in the record. They need, rather, to produce evidence that tends to exclude the possibility of independent action." *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1365 (3d Cir. 1992) (internal quotation marks omitted) (third alteration in original)); *see also Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1302 (11th Cir. 2003) ("The court did not mandate that appellants exclude the possibility of conscious parallelism in order to survive summary judgment, but instead it required them to present some evidence that 'tends to' exclude lawful, synchronous behavior. . . . Nor, in a similar vein, did the district court insist that the existence of a conspiracy be the *sole* inference that a reasonable juror could draw from appellants' evidence.").

The types of evidence that can supply the "something more" than mere parallel action and therefore tend to "exclude the possibility of independent action" are often referred to as

"plus factors," and there are numerous cases and treatises that provide examples of such "plus factors." *See, e.g., White*, 635 F.3d at 580-81. The most commonly recognized "plus factors" are (1) motive to conspire, (2) conduct that would not have sensibly been undertaken if acting independently, and (3) "traditional" or non-economic evidence of conspiracy, which some have described as "'customary indications of traditional conspiracy,' or 'proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.'" *In re Flat Glass Antitrust Litigation*, 385 F.3d 350, 361 (3d Cir. 2004) (quoting Areeda & Hovenkamp, VI Antitrust Law ¶1434b at 243 (2d ed. 2000)).

The analysis of behavior being "consistent with unilateral self-interest" is limited to lawful unilateral behavior in a competitive market. *See id.* at 360–61 ("Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market."). It is no defense to a conspiracy charge that a firm acted consistent with its unilateral self-interest in maintaining its monopoly.

Courts have recognized that the first two plus factors "largely restate the phenomenon of interdependence," and neither factor is "strictly necessary" to proving the existence of an agreement. *Id.* at 360-61 & n.12 (internal quotation marks omitted); *see also White*, 635 F.3d at 581 (citing, among other sources, *Flat Glass* for the proposition that "many so-called plus factors simply demonstrate that a given market is chronically non-competitive" and that "such evidence does not by itself suggest that a defendants' conduct shows agreement"). Therefore, the First Circuit has explained that the third plus factor—traditional evidence of conspiracy—is "[m]ore persuasive." *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 832 F.3d 1, 11 (1st Cir. 2016); *see also Flat Glass* 385 F.3d at 361 ("The most important evidence will generally be non-economic

evidence that there was an actual, manifest agreement not to compete." (internal quotation marks omitted)). Such evidence may include, for example, evidence that the parties sought and provided reassurance about and acquiescence in their "common scheme." *See, e.g.*, *Monsanto*, 465 U.S. at 764 n.9.

C. Tortious Interference

To prove a claim of tortious interference with existing or prospective contractual relations, a plaintiff must establish "(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." *Steward*, 997 F. Supp. 2d at 164 (quoting *Roy v. Woonsocket Inst. for Sav.*, 525 A.2d 915, 919 (R.I. 1987)); *see also Avilla v. Newport Grand Jai Alai LLC*, 935 A.2d 91, 98 (R.I. 2007). Rhode Island courts require that the act of interference be improper or without justification. *Tidewater Realty, LLC v. Rhode Island*, 942 A.2d 986, 993 (R.I. 2008). Whether an act of interference is "improper" or "unjustified" depends on the weighing of several factors[3] and ultimately on the "judgment and choice of values in each situation." *Avilla*, 935 A.2d at 98. The Court has already rejected Blue Cross's argument that Blue Cross's interference with Steward's acquisition of Landmark "and with Steward's arrangements with third parties including Thundermist . . . was privileged by contract or statute." *Steward*, 997 F.2d at 164.

[3] These factors include: (1) the nature of the actor's conduct; (2) the actor's motive; (3) the contractual interest with which the conduct interferes; (4) the interests sought to be advanced by the actor; (5) the balance of the social interests in protecting freedom of action of the actor and the contractual freedom of the putative plaintiff; (6) the proximity of the actor's conduct to the interference complained of; and (7) the parties' relationship. *Belliveau Bldg. Corp. v. O'Coin*, 763 A.2d 622, 628 n.3 (R.I. 2000) (citing Restatement (Second) Torts § 767, at 26–27 (1979)).

What remains therefore is "a fact-intensive inquiry" into "whether Blue Cross'[s] actions were justified" for other reasons. *Id.*

In addition to the above statement, Plaintiffs rely on the following memoranda, which contain the law applicable to the case:

- Plaintiffs' Memorandum of Law in Opposition to Defendant Blue Cross & Blue Shield of Rhode Island's Motion to Dismiss [Doc. 23-1].
- Plaintiffs' Corrected Response in Opposition to Blue Cross & Blue Shield of Rhode Island's Motion For Summary Judgment [Doc. 205]
- Plaintiffs' Opposition to Defendant's Motion to Exclude Damages Testimony of Dr. Keith Ghezzi and Mr. Marc Sherman [Doc. 198]
- Plaintiffs' Opposition to Motion to Exclude Dr. Eisenstadt's Opinions re Blue Cross's Conspiracy to Exclude Steward from Rhode Island [Doc. 192]
- Plaintiffs' Motion in Limine No. 1: To Exclude Evidence and Argument re Certain Alleged Incidents at Landmark Medical Center [Doc. 252]
- Plaintiffs' Motion in Limine No. 2: To Exclude Evidence and Argument That Blue Cross's Refusal to Offer Reasonable Rates Lowered Premiums for Subscribers [Doc. 254]
- Plaintiffs' Motion in Limine No. 3: To Exclude Evidence and Argument That Plaintiffs' Had a Duty to Mitigate By Accepting the August 8, 2012 Offer [Doc. 255]
- Plaintiffs' Motion in Limine No. 4: To Exclude Certain Evidence and Argument Regarding Prime Healthcare Services, Inc.'s Acquisition and Operation of Landmark Hospital [Doc. 256]
- Plaintiffs' Motion in Limine No. 5: To Exclude Evidence and Argument Regarding Joshua Putter's Acquittal on Charges of Knowingly Falsifying a Document to Impede a Federal Investigation [Doc. 238]
- Plaintiffs' Motion in Limine No. 6: To Exclude Certain Evidence and Argument re Steward's Quincy Medical Center [Doc. 257]
- Plaintiffs' Motion in Limine No. 7: To Exclude Argument That Steward's Proposal of a Limited Network Would Have Been Illegal [Doc. 258]
- Plaintiffs' Motion in Limine No. 8: To Exclude Questions and Comment re Steward's Privilege Claims [Doc. 241]

- Plaintiffs' Motion to Exclude Certain Opinions of Blue Cross's Economic Expert Monica Noether [Doc. 259]

- Plaintiffs' Opposition to Blue Cross & Blue Shield of Rhode Island's Motion to Exclude Certain Speculative Evidence [Doc. 281]

- Plaintiffs' Opposition to Blue Cross & Blue Shield of Rhode Island's Motion to Exclude Evidence and Argument Regarding Alleged Unreasonable Reimbursement Rates for Landmark [Doc. 282]

- Plaintiffs' Opposition to Blue Cross & Blue Shield of Rhode Island's Motion to Exclude Argument and Evidence of Conduct Immune Under the *Noerr-Pennington* Doctrine [Doc. 283]

- Plaintiffs' Opposition to Blue Cross & Blue Shield of Rhode Island's Motion to Exclude Argument and Evidence of Conduct Immune Under the State Action Doctrine [Doc. 284]

- Plaintiffs' Opposition to Blue Cross & Blue Shield of Rhode Island's Motion to Exclude Certain Expert Testimony of Leemore Dafny [Doc. 287]

- Plaintiffs' Opposition to Blue Cross & Blue Shield of Rhode Island's Motion to Exclude Certain Expert Testimony of David Eisenstadt [Doc. 304]

- Plaintiffs' Opposition to Blue Cross & Blue Shield of Rhode Island's Motion to Exclude Argument and Evidence Related to Information Steward Refused to Produce in Discovery [Doc. 305]

- Plaintiff's Reply Memorandum in Support of Motion to Exclude Certain Opinions of Blue Cross's Economic Expert Monica Noether (filed November 28, 2017)

III. Statement of Probable Length of Trial

Trial is set to begin on January 16, 2018, with jury selection occurring the week before. Plaintiffs expect that presentation of their case will last three weeks—depending on the length of the cross-examinations—and trial will last between four and five weeks. This estimate assumes the schedule the parties and the Court have discussed, with the jury sitting each day from 9 a.m. to 2 p.m. with two short breaks.

IV. Any Additional Matters for the Court

Due to the length of the trial and the complexity of the applicable law, Plaintiffs propose that the Court provide the jury with preliminary substantive instructions prior to the presentation of evidence. This practice has been followed by a number of courts and is recommended for lengthy trials by the Manual for Complex Litigation. *See* Manual for Complex Litigation, 4th ed. § 12.432 (2004); *see also Dixon v. Int'l Bhd. Of Police Officers*, 504 F.3d 73, 87–89 (1st Cir. 2007).[4] The preliminary substantive instructions would not include all of the substantive instructions that will be given at the end of the presentation of evidence, but rather would include instructions sufficient to convey the basic legal principles, including the elements of the claims and defenses to be proved. To aid the Court and the parties' discussion of this proposal, Plaintiffs will bring to the pre-trial conference examples of the substantive jury instructions that would be candidates for preliminary instruction.

Dated: November 28, 2017

/s/ Robert C. Corrente
Robert C. Corrente (RI Bar No. 2632)
Christopher N. Dawson (RI Bar No. 8508)
WHELAN, CORRENTE, FLANDERS, KINDER & SIKET LLP
100 Westminster Street, Suite 710
Providence, RI 02903
Tel: (401) 270-4500
Fax: (401) 270-3760
rcorrente@whelancorrente.com
cdawson@whelancorrente.com

/s/ Steven R. Kuney
Brendan V. Sullivan, Jr. (RI Bar No. 0789)
Steven R. Kuney (*pro hac vice*)
F. Lane Heard III (*pro hac vice*)
Mark S. Levinstein (*pro hac vice*)

[4] If it would be useful to the Court, Plaintiffs will provide the Court with the additional authority supporting this practice.

WILLIAMS & CONNOLLY LLP
725 12th Street, N.W.
Washington, DC 20005
Tel: (202) 434-5000
Fax: (202) 434-5029
bsullivan@wc.com
skuney@wc.com
lheard@wc.com
mlevinstein@wc.com

Attorneys for Steward Health Care System LLC; Blackstone Medical Center, Inc., f/k/a Steward Medical Holding Subsidiary Four, Inc.; and Blackstone Rehabilitation Hospital, Inc., f/k/a Steward Medical Holding Subsidiary Four Rehab, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2017, a copy of the foregoing document and accompanying exhibits was filed through the Court's ECF system and that notice of that filing also will be sent to the below listed counsel via email:

John A. Tarantino
Patricia K. Rocha
Joseph Avanzato
Leslie D. Parker
Jamie J. Bachant
ADLER POLLOCK & SHEEHAN P.C.
One Citizens Plaza, 8th Floor
Providence, RI 02903
Tel: (401) 274-7200
Fax: (401) 351-4607
jtarantino@apslaw.com
procha@apslaw.com
javanzato@apslaw.com
lparker@apslaw.com
jbachant@apslaw.com

Robert F. Leibenluft
Justin W. Bernick
William L. Monts, III
Kimberly D. Rancour
HOGAN LOVELLS US LLP
555 13th Street NW
Washington, DC 20004
Tel: (202) 637-5600
Fax: (202) 637-5910
robert.leibenluft@hoganlovells.com
justin.bernick@hoganlovells.com
william.monts@hoganlovells.com
kimberly.rancour@hoganlovells.com

N. Thomas Connally, III
Emily M. Yinger
HOGAN LOVELLS US LLP
Park Place II, Ninth Floor
7930 Jones Branch Drive
McLean, VA 22102
Tel: (703) 610-6100
Fax: (703) 610-6200
tom.connally@hoganlovells.com
emily.yinger@hoganlovells.com

/s/ Christopher N. Dawson