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

REPLY IN SUPPORT OF
BLUE CROSS & BLUE SHIELD OF RHODE ISLAND'S
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Steward Health Care System LLC, et al., ("Steward") tries to survive Blue Cross & Blue Shield of Rhode Island's ("Blue Cross") summary judgment motion by citing in its papers as many facts as possible from the substantial record in this case, in many instances *inventing* facts that have no basis in the record at all, all while *ignoring* the case law governing its claims. Steward Resp. in Opp'n to Blue Cross Mot. for Summary Judgment ("Opposition Brief" or "SJ Opp'n") (Dkt. 172-1). That does not get this case to a jury. To survive summary judgment, Steward has the burden to "put forth specific facts to support the conclusion that a triable issue subsists" without resorting to "improbable inferences, conclusory allegations, or rank speculation." *Martinez-Rodriguez v. Guevara*, 597 F.3d 414, 419 (1st Cir. 2010) (quotations omitted). Steward has not carried its burden.

First, for much of its Opposition Brief, Steward does not cite any actual evidence *at all*. Instead, Steward conjures up a story out of whole cloth about a non-profit health insurer that apparently was so intent on preventing a for-profit, out-of-state hospital system from acquiring a failing Rhode Island hospital that it supposedly conspired with one of the highest-cost, in-state hospital systems to eliminate the very competition that might reduce those costs. This story makes no sense. More importantly, there is no evidence that it is true. Steward must come forward with actual evidence of anticompetitive *conduct*. But despite the voluminous amount of document, deposition, and expert discovery in this case, there is *no evidence*:

- That Blue Cross sought to unilaterally derail negotiations with Steward over reimbursement rates at Landmark; or
- That Blue Cross entered into an agreement with Thundermist and/or Lifespan to prevent Steward from entering Rhode Island.

Steward suggests that the *absence* of evidence on these critical points somehow means that the Court should *assume* the worst. While a court may be required to make such an assumption at the motion-to-dismiss stage, that is not the law on summary judgment. Steward cannot satisfy its burden by spinning unsupported theories, particularly with entire paragraphs that have no citation to record evidence *at all*.

Second, Steward is incorrect that the mere existence of some factual dispute is enough to preclude summary judgment. Steward finds disputes *everywhere*, whether there is actual evidence for its position or not. Blue Cross agrees that there are factual disputes between the parties, but none of those disputes are *material* to the issues raised by Blue Cross' motion. Although Blue Cross disputes many facts in Steward's Statement of Additional Undisputed Facts ("SAUF"), none of those facts rebut the *material* facts in Blue Cross' Statement of Undisputed Facts ("SOUF"). Moreover, while Steward's Statement of Disputed Facts ("SDF") purports to "dispute" many of Blue Cross' obviously undisputed facts, a closer look reveals that Steward does not actually *dispute* those facts so much as try to insert *additional*, immaterial information in response. Much ink has been spilled on "facts" that have no bearing on material issues in this case. The essential facts are these:

- Blue Cross had no prior course of dealing with Steward. SJ Opp'n at 13; SDF ¶ 85 (undisputed as to course of dealing at Landmark).
- Blue Cross negotiated with Steward [redacted] before Steward withdrew its bid for the hospital. SDF ¶¶ 86, 117 (undisputed as to length of negotiations and withdrawal).
- Rhode Island Office of the Health Insurance Commissioner ("OHIC") regulations stated that the maximum annual reimbursement rate increase that Blue Cross could offer Rhode Island hospitals was [redacted] SDF ¶ 6.
- In its July 31, 2012 proposal, Steward demanded a [redacted]

[redacted]. SOUF ¶ 86(j); SDF ¶ 86 (undisputed that these were the terms).

- Blue Cross and Prime agreed to [redacted]. SDF ¶ 122(iv)-(v) (undisputed that these were the terms).

- The depositions of Steward's executives,[1] as well as *all* contemporaneous documents and communications, show that [redacted]. SOUF ¶ 112; SDF ¶ 112. [redacted] SJ Opp'n at 82-83.

- Hospital rates are not uniform retail prices, SJ Opp'n at 29, [redacted] *accord* Ex. 29 to SOUF at 249-51, Figs. 44 & 45.

- Blue Cross saved [redacted] SDF ¶ 133(i) (undisputed as to increased costs).

- Had Steward agreed to Blue Cross' proposed rates and bought Landmark, unrebutted expert testimony shows that it would have avoided the vast majority of its purported [redacted]. SDF ¶ 98.

- Steward's damages experts assessed damages for Blue Cross' [redacted] SJ Opp'n at 126-27.

Third, and most importantly, none of the above facts are disputed. Innuendo, speculation, and conspiracy theories do not create factual disputes. The *real* story is not the story Steward spins. The real story, supported by the above material facts, is that Blue Cross worked hard to try to reach a deal with Steward at Landmark, but could not accept Steward's demands for rate

[1] [redacted] is not evidence that can be credited on summary judgment for the reasons set forth in Part III(A), below.

increases that exceeded OHIC regulations. It was Steward that walked away from its planned purchase of Landmark, [redacted] The true story—and Blue Cross' motion—is far simpler than Steward would have the Court believe:

- ***No refusal to deal***. Blue Cross never terminated a prior course of dealing with Steward or Landmark and worked for a year to reach an agreement on rates with Steward. [redacted]

- ***No conspiracy***. Lifespan, Thundermist, and Blue Cross [redacted] no documents or testimony show anything close to an agreement to keep Steward out of Rhode Island. The antitrust laws do not permit juries to infer the existence of a conspiracy from such ambiguous evidence. Indeed, given Steward's primary contention that that Blue Cross had both the unilateral incentive and ability to stop Steward from entering Rhode Island *on its own*, Steward must present direct—not inferential—evidence of the supposed agreement it claims, and there is none.

- ***No causation***. The extent to which a Blue Cross contract was important to Steward is immaterial because at least two superseding causes would have prevented Steward from buying Landmark anyway: (1) [redacted] 2) [redacted]

- ***No harm to competition***. [redacted].

- ***No damages***. Steward's damages claims fail because its experts ignore the facts that Steward could have mitigated the vast bulk of its purported damages and because its experts assess damages for conduct that Steward does not—and cannot—claim is unlawful.

- ***State action doctrine***. [redacted]

- ***No tortious interference***. Steward's tort claims fail for the same reason as its antitrust claims, because there is no other basis to find that Blue Cross' conduct was improper or unlawful.

These are each *independent* arguments, any one of which is sufficient grounds to grant Blue Cross summary judgment.

To permit Steward's claims to survive would turn the antitrust laws on their head. Ever since the Supreme Court established the "outer boundary" of a refusal-to-deal claim in *Trinko*: ***No*** court has imposed a duty to deal without a *prior course of dealing*. ***No*** court has imposed a duty to deal without the *termination* of a prior course of dealing. ***No*** court has imposed a duty to *buy*. ***No*** court has imposed a duty to buy at *higher prices* than the prior course of dealing. ***No*** court has imposed a duty to buy at higher prices that *exceeded state regulations*. ***No*** court has imposed a duty to *participate in an entirely new* [redacted] ***No*** court has imposed a duty to buy at [redacted]

Such a duty would not just *expand* Supreme Court precedent, it would *contradict* it. Rather than the "very cautious" approach the Supreme Court requires, Steward seeks an unprecedented duty of "forced sharing" and "central plann[ing]." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408-09 (2004). Steward asks the Court to replace OHIC regulation and Blue Cross' business decisions ([redacted]) with a jury's decision about who should own Landmark and what rates it should receive, based on nothing more than Steward's speculation regarding the outcomes of competing hospital business models. One can imagine no clearer example of a case to heed the Supreme Court's warning to avoid "chill[ing] the very conduct the antitrust laws are designed to protect." *Id.* at 414 (quotation omitted). The antitrust laws *protect* an economy in which companies are free to bargain and to compete for low prices, an economy of "creative destruction" in which some firms "win" and others "lose," and an economy in which the

decisions of expert regulators are not overturned by judges and juries. The antitrust laws were not designed to require courts to regulate the healthcare industry. They certainly were not designed to allow a jury to turn Steward into the winning bidder for Landmark, and reward it with rates that are higher than the law allows and higher than the rates the current owner is actually charging.

Blue Cross requests that the Court grant its Motion for Summary Judgment against Steward on all claims in its Amended Complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure and LR Cv 56 of the Local Rules of the United States District Court for the District of Rhode Island.

ARGUMENT

I. BLUE CROSS IS ENTITLED TO SUMMARY JUDGMENT ON STEWARD'S MONOPOLIZATION CLAIMS BECAUSE BLUE CROSS DID NOT REFUSE TO DEAL WITH STEWARD.

A. The Court Should Not Impose on a State-Regulated Insurer a Novel Antitrust Duty to Purchase Hospital Services.

The refusal-to-deal legal theory is sparingly invoked and rarely applied.[2] It is a "limited exception" that demands a "very cautious" approach. *Trinko*, 540 U.S. at 408-09. The Supreme Court has twice reversed lower courts for imposing such a duty in recent years. *See id.* at 415-16 (reversing Second Circuit because the Sherman Act "does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition"); *see also Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 450 (2009) (reversing Ninth Circuit because a firm "has no duty to deal under terms and conditions

[2] Steward tries to argue, for the first time, that it is bringing some claim other than a refusal-to-deal claim. SJ Opp'n at 39. But the conduct Steward describes is part and parcel of its refusal-to-deal claim, which Steward cannot repackage under some imaginary new legal theory. Indeed, certain new assertions against Blue Cross (e.g., "introduc[ing] limited network products that would exclude Landmark") are not even alleged in the Amended Complaint. SJ Opp'n at 39.

that [its] rivals find commercially advantageous"). Appellate courts have heard this message loud and clear, holding in no uncertain terms that "the antitrust laws rarely impose on firms—even dominant firms—a duty to deal with their rivals." *See, e.g.*, *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1066 (10th Cir. 2013) (Gorsuch, J.); *see also* Blue Cross Mot. for Summary Judgment ("SJ Mot.") (Dkt. 158-1) at 16 & nn.9-10 (collecting cases affirming dismissal of refusal-to-deal claims).

In its Opposition Brief, Steward simply chose to ignore these cases and their reasoning entirely. Courts rarely impose a duty to deal "because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm." *Trinko*, 540 U.S. at 408. Unless closely circumscribed, such a claim requires judges and juries to "act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited." *Id.*; *accord Aerotec Int'l v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1183 (9th Cir. 2016). There is a high risk of "[m]istaken inferences and … false condemnations" that "chill the very conduct the antitrust laws are designed to protect." *Trinko*, 540 U.S. at 414 (quotation omitted).

Steward says that Blue Cross' duty is simply to "compete on the merits in ways that benefit consumers." SJ Opp'n at 36. But that is *not* the duty Steward asks the Court to recognize. Steward demands that Blue Cross *cooperate*, not compete. To help it purchase a failing hospital, Steward demands that Blue Cross *buy* hospital services from Landmark; [redacted]; and to *evade* binding regulations that prevented Blue Cross from increasing rates any further. Steward also now makes clear that it demands far more than higher rates; it demands a [redacted] something unprecedented not only

for Blue Cross, [redacted] *See, e.g.*, Steward Resp. in Opp'n to Blue Cross Mot. to Exclude Damages Testimony of Keith Ghezzi and Marc Sherman ("A&M Opp'n") (Dkt. 201-1) at 11. And it demands that Blue Cross take all of these steps to benefit Steward, even though Prime ultimately purchased and rescued Landmark by [redacted] shortly after Steward abandoned its bid. If this duty is not "novel," what is?

Steward extolls the virtues of the jury trial, but, as the Supreme Court has recognized, neither judges nor juries are equipped for the daunting task Steward would have them perform: regulating the Rhode Island health insurance industry. *See Trinko*, 540 U.S. at 408. Steward asks the Court to permit the jury to determine the hospitals that Blue Cross should include in its network, to second-guess the rates that Blue Cross should pay those hospitals, and to even n[redacted] with which it had never dealt. Steward thinks that "[t]here is no reason the court should hesitate" to let the jury decide, SJ Opp'n at 36, but that is not what the law instructs. The Supreme Court has told lower courts time and again to exercise caution. *Linkline*, 555 U.S. at 448; *Trinko*, 540 U.S. at 408. As one lower court recognized:

> If the [refusal-to-deal] doctrine fails to capture every nuance, if it must err still to some slight degree, perhaps it is better that it should err on the side of firm independence—given its demonstrated value to the competitive process and consumer welfare—than on the other side where we face the risk of inducing collusion and inviting judicial central planning.

Novell, 731 F.3d at 1076. The record here shows two particularly compelling reasons that counsel against the antitrust "pioneering" Steward's refusal-to-deal claim would require. *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 931 (1st Cir. 1984) (Breyer, J.); *accord id.* at 930 (courts should consider "apply[ing] mainstream antitrust doctrine, which allows a buyer or seller

freedom to bargain for price, [before] … seek[ing] analogies with more unusual cases that do not").

First, 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' provider network and what rates those providers should be paid. But "[n]o court should impose a duty to deal that it cannot explain or adequately supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency." *Trinko*, 540 U.S. at 415 (second alteration in original) (quotation omitted).

Second, and relatedly, Steward's claim would have this federal Court run roughshod over state regulations Rhode Island has worked for more than a decade to calibrate. Steward says that state regulation provides no "immunity," SJ Opp'n at 36, but Supreme Court precedent makes clear that "[j]ust as regulatory context may in other cases serve as a basis for implied immunity, it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2," *Trinko*, 540 U.S. at 412 (citation omitted). As Blue Cross explained in its Motion for Summary Judgment, Blue Cross is regulated by a state agency, OHIC, which reviews the rates that Blue Cross pays hospitals—the very rates Steward challenges. R.I. GEN. LAWS §§ 42-14.5-2; 42-14.5-3; 42-14-17. The Rhode Island General Assembly found that Rhode Islanders needed this agency to address a "competitive imbalance" among healthcare insurers. *Id.* § 42-14.5-1.1(4)-(5). OHIC's authority—including its ability to review and approve rate-increase proposals—was specifically established with these antitrust-related concerns in mind. Even

though "administrative regulation is a highly imperfect process[,] … regulation by judicial decree is not necessarily preferable." *Kartell*, 749 F.2d at 931.

Because of these concerns, the circumstances in which such a claim is recognized are very narrow. Steward tries to obscure the legal test it must satisfy, but a refusal-to-deal claim is *not* governed by the flexible standard Steward's Opposition Brief implies. The claim rests "at or near the outer boundary of § 2 liability." *Trinko*, 540 U.S. at 409 (citation omitted). As this Court held at the motion-to-dismiss stage, *all* of the "baseline requirements" of a rigid test must be satisfied for the claim to move forward: (1) the "unilateral abandonment of a voluntary course of dealing," (2) "forsaking of short-term profits," (3) "refusal to transact business with the plaintiff even if compensated at rates set by the defendant," and (4) "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).

Steward has not shown a fact dispute on *any* of these four required elements, and therefore the Court should grant Blue Cross summary judgment on Steward's unilateral claims (Counts I, II, V, VI, IX, X, XIII, and XIV). At bottom, the undisputed evidence shows that [redacted]

There is no basis for a refusal-to-deal claim under such circumstances.

B. Blue Cross Did Not Terminate a Prior Voluntary Course of Dealing.

1. Blue Cross Had No Prior Course of Dealing With Steward.

Steward concedes, as it must, that Blue Cross and *Steward* had no prior course of dealing at Landmark. SJ Opp'n at 13. Steward points to this Court's ruling on the motion to dismiss that "[w]hile it cannot be said that Steward and Blue Cross had a prior course of dealing with each other with respect to Landmark, the Court is not aware of case law that would preclude

consideration of Blue Cross' own direct prior course of dealing with Landmark." *Steward*, 997 F. Supp. 2d at 154 n.9. That prior ruling is not binding precedent. *Fed. Trade Comm'n v. Tarriff,* 584 F.3d 1088, 1092 (D.C. Cir. 2009) (a "district court decision [is] binding on no court"). The Court is free to reconsider, and respectfully, it should.

The only scenario in which the Supreme Court has recognized a refusal-to-deal claim is when a firm backs out of a prior, voluntary, and profitable joint venture with a competitor. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603 (1985) (the defendant "elected to make an important change in the *pattern* of distribution that had originated in a competitive market and had *persisted for several years*" and was presumably procompetitive as a result) (emphasis added). The Supreme Court has distinguished this type of fact pattern from one in which a defendant "merely reject[ed] a novel offer to participate in a cooperative venture that had been proposed by a competitor." *Id.* at 603.

The record here clearly falls into the latter category. Steward came to Rhode Island proposing a "novel offer" to acquire a failing hospital that had been in mastership proceedings for years, precisely the type of offer the Supreme Court recognized would not impose a duty to deal. *See id*. Indeed, Steward now argues that its offer was novel in the far larger sense that Steward demanded an [redacted] A&M Opp'n at 11. Blue Cross had never before contracted with Steward at Landmark and had never even entered into such a [redacted] with *any* hospital. [redacted] *See SmileCare Dental Grp. v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 786 (9th Cir. 1996) (no refusal to deal where 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").

Unlike in *Aspen Skiing*, the parties' failure to reach an agreement thus "disrupted" no past "pattern of distribution" between Blue Cross and Steward from which a reasonable jury could infer anticompetitive intent. *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."); *accord 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"). And without a prior course of dealing, a court or jury could only speculate about what the terms of dealing should have been. *Novell*, 731 F.3d at 1074-75 ("[P]resumably profitable terms already agreed to by the parties may suggest terms a court can use to fashion a remedial order without having to cook them up on its own.") (citing *Trinko*, 540 U.S. at 407). Citing no case law, Steward would have this court become the *first court ever* to hold that an antitrust plaintiff can sue for treble damages based on a defendant's refusal to deal with *someone else*. If a defendant can be liable to a plaintiff with whom it has never dealt for refusing to deal, then *Aspen Skiing* is no "limited exception." *Trinko*, 540 U.S. at 408-09 (A firm may "freely … exercise [its] own independent discretion as to parties with whom [it] will deal.") (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). To hold for Steward requires this Court to controvert binding and established precedent. It should not do so.

2. Blue Cross Did Not Terminate a Course of Dealing With Landmark.

Even if the Court permits Steward to rely on Blue Cross' prior course of dealing with Landmark (not Steward), Blue Cross did not terminate that prior course of dealing, as the case law requires. Steward does not dispute that the [redacted] Ex. 107 to SOUF at BCBSRI-01486323-24; SDF ¶ 102 (undisputed); Ex. 55 to SOUF at Attachment A; SDF ¶ 110 (undisputed). Nor does Steward dispute that the [redacted] Ex. 55 to SOUF at SHS-00063456; SDF ¶ 110 (undisputed). Put simply, [redacted] does not give rise to a refusal-to-deal claim because the contract was not a terminated course of dealing. [redacted] Indeed, they had "expressly contemplated that their … relationship would end at a definite point." *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. 2006) (per curiam) (plaintiff failed to show terminated course of dealing when ten-year license "expired by its own terms"). T[redacted] *See id.* Steward argues that Blue Cross used [redacted] SJ Opp'n at

12. However, it is undisputed that the [redacted]. SDF ¶ 110 (undisputed). [redacted] But more fundamentally, Steward asks the Court to hold that the reinstatement of B[redacted]—an unprecedented holding that would turn the antitrust laws on their head.

[redacted] Opp'n at 8-13. All of these alleged disputes are irrelevant; they do not show t[redacted] is a basis for a refusal-to-deal claim. Moreover, [redacted]. *Compare id.* at 12 (emphasis in original), *with* SJ Mot. at 39-42; SOUF ¶¶ 102-10. In fact, Steward does not dispute *any* of the material facts Blue Cross submitted [redacted][3]

[3] For example, Steward does not dispute that the letters were required by federal regulations for Medicare Advantage insurers, 42 C.F.R. § 422.111(e), or that they were reviewed and approved by federal regulators before they were sent, SOUF ¶ 106; SDF ¶ 106 (undisputed). As a result, any injuries Steward alleges were caused not by Blue Cross, but by "the realities of the regulatory environment." *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 265 (3d Cir. 1998). Similarly, Steward does not dispute that the Special Master sued to enjoin Blue Cross from sending the letters or that the Rhode Island Superior Court denied the Special Master's motion. SOUF ¶ 107; SDF ¶ 107 (undisputed). This concession means that the alleged "harm [wa]s caused by the decision of a court, even though granted at the request of a private party, [and thus] no private restraint of trade occurs because the intervening government action breaks the causal chain." *Andrx Pharms., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 818 (D.C. Cir. 2001). Finally, Steward does not dispute that Blue Cross compensated its subscribers directly for healthcare services after the Landmark contract expired, which was consistent with guidance from the Rhode Island Department of Health. SOUF ¶ 109; SDF ¶ 109 (undisputed). The result is that Steward's claimed injuries were caused not by Blue Cross, but by "the realities of the regulatory environment." *West Penn Power Co.*, 147 F.3d at 265.

As for Steward's repeated accusation that Blue Cross filed [redacted] SJ Opp'n at 12, 14, t[redacted], R.I. ADMIN. CODE § 31-1-14:21.4(E), and in any event, its filing is immune petitioning activity under the *Noerr-Pennington* doctrine, *Davric Maine Corp. v. Rancourt*, 216 F.3d 143, 147 (1st Cir. 2000) (the First Amendment shields from antitrust liability petitioning activity seeking to "influence government action—even if [taken] to restrain competition or damage competitors," including petitioning administration agencies).[4] Far from having "nothing" to say about the July 2012 letters, Blue Cross has submitted undisputed record evidence showing that, to the extent these events are relevant, they show no fact dispute material to Steward's refusal-to-deal claim.[5]

3. Blue Cross Did Not Terminate a Course of Dealing With Steward.

Just as Blue Cross did not terminate a course of dealing with Landmark, it did not terminate the negotiations with Steward either. Steward purports to dispute Blue Cross' description of the parties' contract negotiations, SJ Opp'n 18-19, but it misses the forest for the trees. [redacted] and Blue Cross provided a summary of those negotiations, SOUF ¶ 86, [redacted], it argues that Blue Cross' [redacted] were so draconian that they were the practical equivalent of Blue Cross refusing to negotiate at all. As a threshold matter, if it were true that Blue Cross was not negotiating in good faith as Steward alleges, SJ Opp'n at 20, there would be at least some contemporaneous email—in the *millions* of

[4] Steward has conceded, as it must, that Blue Cross' petitioning is immune under the *Noerr-Pennington* doctrine. *Steward*, 997 F. Supp. 2d at 163.

[5] Steward also vaguely alludes to Blue Cross's supposed "interference with moneys owed to Landmark under government programs," SJ Opp'n at 11-12, 38, but it provides no citation to facts supporting this claim.

pages of documents produced in discovery—expressing Blue Cross' supposed intent not to reach an agreement with Steward. Steward identifies no such evidence because there is none.

Moreover, the undisputed evidence in the record does not support this theory. It is undisputed that Steward's July 31, 2012 proposal and Blue Cross' August 8, 2012 response *both* sought [redacted]. SJ Opp'n at 18. [redacted] "phony," SJ Opp'n at 20, but Blue Cross offered Steward [redacted] No reasonable jury could find that Blue Cross "practically" refused to deal with Steward [redacted]

Steward responds that Blue Cross' rate increases were illusory because a portion of those increases [redacted]. The OHIC regulations, however, [redacted]. SOUF ¶ 6; SDF ¶ 6 ([redacted]). And unlike Steward, w[redacted] Ex. 84 to SOUF at STEWARD00592932-33, [redacted] Ex. 197 to SDF Prime-Landmark 034809. B[redacted]

[redacted]. SOUF ¶ 98; Ex. 92 to SOUF at 187. No reasonable jury could find that Blue Cross practically refused to deal with Steward by [redacted]

Steward responds by highlighting [redacted] does not mean that Blue Cross refused to deal with Steward.[6] SJ Opp'n at 18-19. It is not enough that Steward "simply did not like the business terms offered by" Blue Cross; the antitrust laws do not require Blue Cross to have accepted every contract term Steward demanded. *See Aerotec Int'l*, 836 F.3d at 1184; *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). Moreover, al[redacted], it is not illegal for Blue Cross to drive a hard bargain; after all, "the antitrust laws aren't designed to be a guide to good manners." *Novell*, 731 F.3d at 1078 (citation omitted). Steward's emphasis on the minutiae of provider contracting illustrates why its refusal-to-deal claim is both novel and unworkable: Steward would have the jury decide how Blue Cross should set hospital-quality metrics or reimbursement base-

[6] As for Steward's claim that Blue Cross should have promised to include Steward in any future narrow-network products, Steward apparently believes that narrow networks, and the selective contracting that accompanies them, are procompetitive and will reform healthcare in Rhode Island—but only if Steward is included. *Compare with* SJ Opp'n at 9 (criticizing selective contracting); *see also Schor v. Abbott Labs.*, 457 F.3d 608, 610 (7th Cir. 2006) (Easterbrook, J.) ("Cooperation is a *problem* in antitrust, not one of its obligations.") (emphasis in original).

rate increases, SJ Opp'n at 18, which it cannot do "without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.).

C. Blue Cross Did Not Act Against Its Business Interests to Harm a Competitor.

That Blue Cross did not act against its business interests is demonstrated by the undisputed fact [redacted] SOUF ¶¶ 86(j), 122-23. Steward's argument that Blue Cross acted against its business interests to harm Steward is based entirely on what Blue Cross supposedly "knew" as it negotiated with Steward in the summer of 2012, even though what Blue Cross supposedly "knew" runs directly contrary to how events actually unfolded before Steward withdrew its bid. Steward's efforts to draw inferences of anticompetitive intent from hypothetical scenarios are speculative, contradicted by the record, and without support in the law.

First, Steward argues that Blue Cross sacrificed short-term profits because Blue Cross supposedly "thought" that the consequence of failing to reach a deal with Steward was either that Landmark would go out of network or would close. Steward builds this entire theory on a *single* document, [redacted]

[redacted]

Critically, [redacted] No reasonable jury could infer that Blue Cross sacrificed short-term profits to harm Steward [redacted] In fact, Blue Cross acted consistently with its short-term business interests by instead reaching a deal with Prime, [redacted] *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132 (9th Cir. 2004) (no refusal to deal where defendant did not forsake "short-term profits by switching" from dealing with one party to another in an attempt "to increase its short-term profits"). Steward's theory that either Landmark's closure or its out-of-network status were the only two possible outcomes if negotiations failed has no support.[7]

Second, Steward focuses on [redacted], but there is no actual evidence that Steward intended and prepared to compete in Rhode Island with Blue Cross, as any potential market entrant must show to have an antitrust claim. *See, e.g.*, *Huron Valley Hosp., Inc. v. City of Pontiac*, 666 F.2d 1029, 1033 (6th Cir. 1981) (describing evidence of preparation and intent necessary for hospital-plaintiff to survive summary judgment, including that plaintiff had bought land, engaged in

[7] Steward tries to support its arguments with testimony from its expert, Dr. Leemore Dafny, but her analysis suffers from the same flaw. [redacted] Ex. 30 to SOUF at 134-35.

feasibility studies, attempted to obtain a certificate-of-need and appealed its denial, and entered into contracts with medical and nursing staff). Steward n[redacted][8] *Id.*

[redacted] ¶¶ 17, 29. Steward blames Blue Cross, but the question is what the evidence shows about how Steward *prepared* to compete. *Huron Valley*, 666 F.2d at 1033; *accord Andrx Pharm.*, 256 F.3d at 807 (requiring "the taking of actual and substantive affirmative steps toward entry, such as the consummation of relevant contracts and procurement of necessary facilities and equipment") (quotation omitted). On this point, [redacted][9] Ex. 1 to SOUF at 98-99 [redacted]; Ex. 15 to SOUF at 155 ([redacted]).

[8] SOUF ¶¶ 18-20; SDF ¶¶ 18(i), 20(ii), (iii) ([redacted].

[9] [redacted] In the emails, [redacted] Exs. 51 and 52 to SDF, but these communications are not enough to create a fact dispute about Steward's preparation and intent. The case law requires "the taking of actual and substantive affirmative steps toward entry," not musings about the mere *possibility* that an entry might one day occur. *Andrx Pharm.*, 256 F.3d at 807; *compare with Huron Valley*, 666 F.2d at 1033 (listing affirmative steps potential entrant took that created fact dispute; "inchoate business enterprise with a mere hope of entry" is not enough).

[redacted] Ex. 14 to SOUF at 287-88. Indeed, this is the entire [redacted]. *See* Blue Cross Mot. to Exclude Testimony of Keith Ghezzi and Marc Sherman (Dkt. 162-1). This makes obvious sense because Blue Cross and Steward *do not compete*—one sells insurance; the other, hospital services. That Steward would like to get a bigger share of the premium dollars Rhode Islanders pay to Blue Cross, SJ Opp'n at 28 (quoting Dr. Mark Girard), does not make them "competitors" or make any threat Steward posed a "competitive" threat to Blue Cross, rather than a threat to Blue Cross' overcharged subscribers. The record does not show that Blue Cross and Steward were "competitors."

Steward attempts to derail this straightforward analysis with lengthy descriptions of [redacted], but it points to no evidence showing or supporting an inference that these analyses affected the Blue Cross' contract negotiations with Steward in any way. SJ Opp'n at 25-29. The record supports the opposite inference; if Blue Cross really wanted to keep Steward from buying Landmark, it would not [redacted]—to try to get the deal done.

D. Blue Cross Did Not Refuse to Sell at Retail Prices.

As a threshold matter, no court has ever recognized a claim for a refusal to *buy* (rather than a refusal to *sell*) and Steward provides no legal authority or justification for such a claim in its Opposition Brief. As in *Aspen Skiing*, a court may be able to infer a "distinctly anticompetitive bent" from a defendant's unwillingness to *sell* commodity products at its retail prices made available to others. *Trinko*, 540 U.S. at 409. But no such inference can be made from a defendant's unwillingness to *buy* highly differentiated hospital services at non-retail prices.

See, e.g., *Raitport v. Gen. Motors Corp.*, 366 F. Supp. 328, 331 (E.D. Pa. 1973) ("[N]othing in the Sherman Act is designed to require a manufacturer to purchase goods from any particular supplier."). Steward asks the Court to become the first to reject this rationale and sustain a refusal to *buy* claim where, again, the Supreme Court has consistently told lower courts to exercise caution.

The Supreme Court's test also asks the related question of whether Blue Cross refused to transact at a *retail* price. Because there is no retail price for hospital services, the inquiry ends, and the refusal-to-deal claim should fail. *See Trinko*, 540 U.S. at 409; *MetroNet*, 383 F.3d at 1133-34. The law imposes this bright-line rule because otherwise, "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 (quotation marks omitted). The retail price requirement is important because it protects courts and defendants from situations precisely like the one Steward advocates, in which the judge and jury would have to second guess the complex terms of dealing between parties and fashion a remedy that creates out of whole cloth the "reasonable" terms of dealing to which the parties must adhere. Steward ignores this missing element of its refusal-to-deal claim altogether.

Instead—*citing no case law*—Steward asserts that the test instead turns on whether "the rates Steward was seeking were less than the average of the rates Blue Cross was already paying to the other Rhode Island hospitals." SJ Opp'n at 30. If this were the antitrust rule, then Blue Cross would have to pay every hospital precisely the same rates for incomparable services. If it did not, then any hospital even slightly below the average could haul Blue Cross into court claiming a unilateral refusal to deal. This is not the law. Nor should it be. As Blue Cross explained in its Motion for Summary Judgment, and as Steward does not dispute, hospital

services are highly differentiated; they bear no resemblance to the kind of commodities the case law describes, such as ski-lift tickets. *Aspen Skiing*, 472 U.S. at 593-94. Steward argues that negotiations between insurers and hospitals often focus solely on the rate of increase, SJ Opp'n at 31-32, but that proves the point: negotiating for a rate increase at a community hospital that sets broken arms is clearly different than negotiating for a rate increase at an academic medical center that performs brain surgery. Indeed, Steward even argues elsewhere in its Opposition Brief that one should not evaluate hospitals' "comparative pricing" because doing so would "ignore what those dollars were going to purchase in terms of the differences in what would be offered." SJ Opp'n at 108-09. The antitrust laws do not require Blue Cross to pay the same rates to every hospital. Nor do they require judges or juries to determine what those rates should be.

While Steward argues that the rates are no "trump card," SJ Opp'n at 31, the law is to the contrary. [redacted]. Even if it does not, the fact that Blue Cross [redacted]. As discussed in greater detail in Blue Cross' Motion, Blue Cross' [redacted] SOUF ¶ 60. That Steward can point to [redacted] does not create a material dispute of fact; rather, it merely underscores the quagmire of judicial rate-setting that the Supreme Court cautions courts to avoid in refusal-to-deal cases. *Trinko*, 540 U.S. at 408.

E. Blue Cross Had a Legitimate Business Rationale.

Steward does not dispute that its [redacted] *id.* at ¶ 55 (explaining details of this incident); or that Rhode Island suffered from excess hospital capacity, *id*. at ¶ 68(ii). Instead, Steward makes much of [redacted] as supposed evidence that Blue Cross sought to exclude Steward. But it shows just the opposite: B[redacted] While Blue Cross had many legitimate reasons to terminate the Landmark contract entirely, discussed in detail in Blue Cross' Motion, *it did not refuse to deal*.

F. Blue Cross Had a Legitimate Business Reason [redacted]

As a threshold matter, Steward never explains how Blue Cross' [redacted] —a *Massachusetts* hospital—has anything to do with a purported conspiracy to keep Steward out of *Rhode Island*.[10] Nevertheless, [redacted] All it disputes is the [redacted] SDF ¶ 133(i). But that does not change the fact that Blue Cross [redacted], and Steward

[10] Steward makes a last-minute reference to Morton Hospital in its summary judgment brief, SJ Opp'n at 14, but mentions Morton nowhere in its amended complaint. Steward cannot amend the operative pleadings on summary judgment, and the claims related to Morton should be dismissed. *See Somascan, Inc. v. Phillips Med. Sys. Nederland, B.V.*, 714 F.3d 62, 64 (1st Cir. 2013) (per curiam).

cites no record evidence to the contrary.[11] Seeking to avoid paying higher prices is not an antitrust violation. It clearly does not constitute a refusal to deal if the plaintiff raises prices and the defendant chooses not to purchase any more. That would be like the plaintiff in *Aspen Skiing* not only demanding to purchase lift tickets from the defendant, but also demanding to purchase them at half price.

Steward's only response is that *after* [redacted]. SJ Opp'n at 15. In other words, Steward's claim with respect to Saint Anne's is not a refusal to deal, but a refusal to create a new deal. This also is not an antitrust claim. Moreover, Steward's proposal was no panacea. As discussed in Blue Cross' Motion, Blue Cross could not verify that Steward's proposed rates were equivalent to the rates it was giving Blue Cross Blue Shield of Massachusetts without costly intermediaries, SOUF ¶ 136, and [redacted] *id*.

II. BLUE CROSS IS ENTITLED TO SUMMARY JUDGMENT ON STEWARD'S CONSPIRACY CLAIMS BECAUSE THERE IS NO EVIDENCE OF AN AGREEMENT WITH THUNDERMIST OR LIFESPAN TO REFUSE TO DEAL WITH STEWARD.

Steward's conspiracy claims (Counts III, IV, VII, VIII, XI, XII, XV, and XVI) do not survive summary judgment because Steward overlooks the flaw underlying all of its claims: there is no evidence of a "meeting of [the] minds in an unlawful arrangement" among Blue Cross, Thundermist, and/or Lifespan to prevent Steward from acquiring Landmark. *Monsanto*

[11] Steward suggests that there is a dispute about whether Steward breached its contract with Blue Cross by [redacted]. SJ Opp'n at 37. While that may be, it has nothing to do with Blue Cross' Motion, which is not based on the *contractual right* of Steward to increase prices but instead on the *undisputed fact* that it did so.

Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984). Steward ignores the case law, discussed in Blue Cross' Motion, which requires Steward to "present evidence that tends to exclude the possibility that the alleged conspirators acted *independently*." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (internal quotation marks omitted) (emphasis added). Contrary to what Steward suggests, mere "evidence showing defendants have a *plausible reason to conspire* does not create a triable issue as to whether there is a conspiracy." *White v. R.M. Packer Co.*, 635 F.3d 571, 582 (1st Cir. 2011) (citation and internal quotation marks omitted) (emphasis added). To the contrary, if the alleged conspirators "had no rational motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Matsushita*, 475 U.S. at 596-90 (citation omitted).[12]

Steward urges that it does not rely on circumstantial evidence of conspiracy, but is instead relying on what it (wrongly) believes to be direct evidence of conspiracy. *See* SJ Opp'n at 72 (characterizing all of its conspiracy claims as "traditional evidence of a conspiracy"). But no documents or testimony in this case—no matter how Steward spins them—shows any direct evidence of a conspiracy involving Blue Cross to exclude Steward from Rhode Island. Indeed,

[12] To be clear, to survive summary judgment, Steward must present sufficient *unambiguous* evidence that tends to exclude the possibility that Blue Cross acted independently. *See Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 19 (1st Cir. 2004) (affirming summary judgment where ambiguous evidence "shows conduct that is as consistent with lawful competition as it is with an illicit conspiracy"); *see also H.L. Hayden Co. of NY, Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1016-17 (2d Cir. 1989) (affirming summary judgment because evidence was "at best, ambiguous, and as consistent with permissible competition as will illegal conspiracy") (citation and internal quotation marks omitted); *Ginzburg v. Mem'l Healthcare Sys., Inc.*, 993 F. Supp. 998, 1024 (S.D. Tex. 1997) (granting summary judgment where plaintiff failed to present evidence "sufficiently unambiguous to permit a trier of fact to find that [the defendants] conspired") (internal quotation omitted); *Package Shop, Inc. v. Anheuser-Busch, Inc.*, 675 F. Supp. 894, 904 (D.N.J. 1987) (granting summary judgment where plaintiff failed to present "sufficient unambiguous evidence from which a rational jury could make such a finding without resorting to rank speculation").

inferring a conspiracy from the ambiguous evidence Steward cites would require pure guesswork and speculation. Controlling Supreme Court precedent requires granting summary judgment for Blue Cross as a result. *See Matsushita*, 475 U.S. 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."); *Monsanto Co.*, 465 U.S. at 764 ("There must be evidence that tends to exclude the possibility that [defendants] were acting independently.").[13]

Steward is incorrect that Blue Cross' argument amounts to an assertion that Section 1 and Section 2 claims cannot coexist in the same case. Rather, Blue Cross argues that Steward cannot survive summary judgment based on an inference of conspiracy from circumstantial evidence because Steward alleges that Blue Cross had the unilateral incentive and ability to engage in the alleged conduct entirely on its own. In this regard, *United States v. Apple, Inc.*, a case cited by Steward, is instructive. 791 F.3d 290 (2d Cir. 2015). There, the alleged conspirators had no ability to impose the agency model on their own, *id.* at 316-17, and therefore an inference of conspiracy from circumstantial evidence might be plausible. Here, by contrast, Steward's entire

[13] Pointing to various communications between Blue Cross, Lifespan, and/or Thundermist gets Steward no closer to showing evidence of a conspiracy. There is no evidence that any of those communications "r[ose] to the level of an agreement, tacit or otherwise." *Valspar Corp. v. EI. Du Pont de Nemours Co.*, 152 F. Supp. 3d 234, 246 (D. Del. 2016) (quotation omitted). And evidence of significant communications are insufficient by themselves to suggest evidence of a conspiracy. *See Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 (11th Cir. 1991) (affirming summary judgment on conspiracy claim because "mere opportunity to conspire among antitrust defendants does not, standing alone, permit the inference of a conspiracy"); *see also City of Moundridge v. Exxon Mobil Corp.*, No. 04-940, 2009 WL 5385975, at *9 (D.D.C. Sept. 30, 2009) (granting summary judgment and noting that a high level of communications "by themselves are not enough to create [the] inference" of conspiracy) (citation omitted); *Holiday Wholesale Grocery Co. v. Philip Morris Inc.*, 231 F. Supp. 2d 1253, 1308 (N.D. Ga. 2002) (granting summary judgment notwithstanding evidence of "regular meetings" because "mere opportunity to conspire among antitrust defendants does not, standing alone, permit the inference of conspiracy") (internal quotation omitted).

unilateral case is predicated on the notion that Blue Cross had the unilateral incentive and ability to keep Steward out of Rhode Island on its own, regardless of what Thundermist and Lifespan did. The Supreme Court does not permit an inference of conspiracy from what is, at best, ambiguous evidence under such circumstances.

Blue Cross' decision to reject Steward's proposed rate increases was clearly in Blue Cross' business interest, providing additional evidence that forecloses a conspiracy theory based on ambiguous, circumstantial evidence. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 566 (2007) ("[T]here is no reason to infer that [defendants] had agreed among themselves to do what was only natural anyway."); *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 832 F.3d 1, 10-13 (1st Cir. 2016) (rejecting conspiracy claim where each defendant would have "incur[red] additional costs" by dealing with plaintiffs). The facts are simple, undisputed, and require no expert analysis.[14] [redacted] as required by OHIC regulations. SOUF ¶ 86(j). [redacted] as required by OHIC regulations. *Id.* at ¶¶ 122-23. [redacted]

[14] As discussed in Blue Cross' Motion, [redacted] This makes no sense. [redacted] *See* Blue Cross Mot. to Exclude Expert Testimony of David Eisenstadt ("Eisenstadt Mot. *in Limine*") (Dkt. 164-1).

[redacted] providing compelling evidence that the challenged conduct was consistent with Blue Cross' independent economic self-interest, not conspiracy.

In its opposition, Steward spins various theories based on ambiguous and circumstantial evidence about why Blue Cross has "plausible reasons to conspire." Not only is this insufficient to survive summary judgment, the common thread in these theories is that Blue Cross, Thundermist, and Lifespan all had "concerns" about Steward—an allegation, though disputed,[15] that is immaterial. Business concerns among separate companies that are independent and unilateral are insufficient to show an antitrust conspiracy. *See Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 19 (1st Cir. 2004) (affirming summary judgment because conduct in response to "complaints" is insufficient to show conspiracy); *see also Monsanto*, 465 U.S. at 763-64 (explaining that "something more than evidence of complaints is needed"). None of the theories conjured up by Steward show that Blue Cross engaged in any conduct that was inconsistent with its own economic interest. Indeed, the "conspiracy" section of Steward's Opposition Brief is an elaborate creative writing exercise, telling a fanciful story about how Blue Cross, Thundermist, and Lifespan supposedly interacted, often without citation to *any* record evidence. Try as it might to create an alternate reality, Steward cannot point to *any actual evidence* that Blue Cross had a

[15] For example, with respect to Blue Cross, Steward contends that [redacted] ." SJ Opp'n at 41. Steward [redacted] This is a rational and independent business concern, [redacted]

"conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co.*, 465 U.S. at 764.[16]

A. Lifespan's [redacted] Is Not Evidence of a Conspiracy to Exclude Steward.

Steward cites evidence suggesting [redacted] as though it were evidence that Blue Cross conspired with Lifespan and Thundermist to exclude Steward. It is not.[17] As demonstrated by the documents cited in Steward's own Opposition Brief—most of which have nothing to do with Blue Cross—Blue Cross was not a part of the [redacted] had nothing to do with Steward. Steward suggests that Blue Cross became aware of the [redacted] *Id.* at 45-46. Moreover,

[16] In Part III of its Opposition Brief, Steward argues that Blue Cross' position is that the "conspiracy to monopolize/monopsonize claims are governed by the same legal standard as [the] monopolization and attempted monopolization claims." SJ Opp'n at 74 (citing SJ Mot. at 42 n.23). That is plainly not what Blue Cross' Motion says. Footnote 23 reiterates a proposition that Steward concedes "is correct," namely, that there is no substantive difference between the monopolization and monopsonization claims. As for Steward's assertion—unsupported by any citation or explanation—that "[c]onspiracy to monopolize has distinct elements that separate it from any of Steward's other Section 2 or Section 1 claims," Steward cannot seriously dispute that conspiracy claims under Section 1 and Section 2 will both fail if, as Blue Cross argues, the record does not show an unlawful agreement. *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 68 (1st Cir. 2002) (conspiracy to monopolize requires "conspiratorial agreement"); *accord NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 139 (1998) ("We do not see, on the basis of the facts alleged, how [the plaintiff] could succeed on this [conspiracy-to-monopolize] claim without prevailing on its [Section] 1 claim.").

[17] Contrary to what Steward suggests, there is no dispute over the [redacted] As Steward itself explains, [redacted] SJ Opp'n at 43-44. [redacted]

Steward does not [redacted] *See* SJ Opp'n at 46 (citing SOUF ¶ 66).

To suggest that the plan was some type of conspiracy, Steward points to an alleged [redacted] SJ Opp'n at 46. [redacted] but there is no evidence to support this theory. *Id.* I[redacted] *d.* at n.118; *see also In re Text Messaging Antitrust Litig.*, 46 F. Supp. 3d 788, 806-07 (N.D. Ill. 2014) (granting summary judgment where "[a]lthough plaintiffs reference the existence of communications involving defendants that are temporally near some [of the alleged conduct], they offer nothing other than speculation about the substance of these talks").

Steward also points to comments made by [redacted]" SJ Opp'n at 47. Blue Cross was not at this meeting. *Id.* This fact is unremarkable because it does not show that [redacted] Even if it did, it does not show that Blue Cross was acting against its own economic interest or acting to prevent Steward from entering Rhode Island. *See Metro. Reg'l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, No. DKC 12-0954, 2015 WL 4597529, *8 (D. Md. July 6, 2015) ("There is nothing unlawful about [one party] supporting [another]" where it is consistent with their

independent self-interest). As a major health insurance company, the acquisition of Landmark by any hospital system would have meaningful implications for its business.

The only other occasions Steward identifies where Blue Cross was even remotely "connected" to the [redacted] *Id.* This email says nothing about [redacted], and it is entirely consistent with [redacted]. It is also a decision that Blue Cross can execute *independently*. Steward also refers to a comment made by [redacted] But this merely shows that [redacted] This does not show that Blue Cross entered into any agreement with Lifespan or Thundermist with the common purpose of excluding Steward from Rhode Island.[18]

Indeed, even if Blue Cross had entered into some agreement with Lifespan and Thundermist [redacted] and there is no evidence of that—it would not violate the law. There must be evidence linking the plan to a common scheme *to exclude Steward from Rhode Island,* and Steward cites no such evidence because it does not exist. *See Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072, 1081 (11th Cir.

[18] Relatedly, Steward tries to draw a connectio [redacted] but this is a fabrication with no support in the record. The one document Steward cites shows that [redacted] as Steward suggests. *See id.*

2016) (finding no conspiracy where defendants entered into collaboration agreement but "never made a conscious commitment to a common scheme to illegally restrain trade") (internal quotation marks omitted). Blue Cross must necessarily enter into numerous agreements with Rhode Island providers, and those agreements do not violate the law simply because other providers are not party to the agreements. Indeed, the fact that one plan for a hospital is "mutually inconsistent" with another, SJ Opp'n at 48, does not mean the participants in one plan conspired against the sponsor of another. *See Suture Express, Inc. v. Cardinal Health 200, LLC*, 963 F. Supp. 2d 1212, 1225 (D. Kan. 2013) ("The fact that defendant could have chosen a different strategy does not produce an inference that the choice of a strategy similar to that of a fellow competitor is a sign of conspiracy."). Put simply, there is no evidence from which a reasonable juror could find that the treat and transfer plan constituted a "meeting of [the] minds in an unlawful arrangement" among Blue Cross, Thundermist, and/or Lifespan to exclude Steward from Rhode Island. *Monsanto*, 465 U.S. at 764.

B. The Rates Blue Cross Pays Lifespan Are Not Evidence of a Conspiracy to Exclude Steward.

Steward alleges no actual facts showing a conspiracy between Lifespan and Blue Cross to exclude Steward that is tied to Lifespan's rates. Steward offers only innuendo—that the rate increases *must* have been part of a *quid pro quo* to exclude Steward because any other explanation is somehow unfathomable. But innuendo is not evidence. *See Hairston v. Pacific-10* Conference, 893 F. Supp. 1495, 1496 (W.D. Was. 1995) (granting summary judgment where plaintiffs "continue to rest their case on nothing but suspicion" that "the penalty was excessive and that, therefore, it must have been the product of an illegal conspiracy"). [redacted]

[redacted]. SOUF ¶ 44. These types of negotiations are not unlawful and are, in fact, procompetitive for reasons recognized by the Federal Trade Commission and Steward's own experts. SOUF ¶¶37-39.

Steward tries to drum up facts to suggest this issue is disputed, but it is not. To the contrary, Steward's factual account confirms that Blue Cross did not conspire with Lifespan. Steward confirms that [redacted] Quite the opposite, it is the purpose of competition and the goal of health insurer contract negotiations with providers. *See Methodist Health Servs. Corp. v. OSF Healthcare Sys.*, 859 F.3d 408, 410 (7th Cir. 2017) (Posner, J.) ("[A]n insurance company may get better rates from a hospital in exchange for agreeing to an exclusive contract, as exclusivity will drive a higher volume of business to the hospital.").

More fundamentally, there is no evidence of a meeting of minds between Lifespan and Blue Cross to *exclude Steward*. Steward offers only speculation based on the outcome of [redacted] Steward tries to get around this problem by suggesting that rate negotiations between Blue Cross and Lifespan were all about Steward, [redacted] SJ Opp'n at 51, says absolutely nothing about a conspiracy or *quid pro quo* to exclude Steward. Although Steward contends that the only way

[redacted], SJ Opp'n at 52, there is no evidence for this theory. But the theory is irrelevant in any event because an independent decision by Blue Cross to exclude Landmark from its network in order to increase Lifespan's volume would indicate nothing about a conspiracy or *quid pro quo* to exclude Steward. *See, e.g.*, *Abraham v. Intermountain Health Care Inc.*, 461 F.3d 1249 (10th Cir. 2006) (no evidence of antitrust conspiracy when a managed health care system's decision to exclude optometrists benefitted ophthalmologists, because it was in the healthcare system's independent interest). Steward's arguments to the contrary are smoke and mirrors, not evidence.

C. Thundermist's Independent Patient Referral and Contracting Decisions Are Not Evidence of a Conspiracy to Exclude Steward.

Relying entirely on speculation and innuendo, Steward provides no actual evidence from which a juror could infer a conspiracy based on Thundermist's independent decisions to move its OB patients elsewhere and to [redacted].

1. There Is No Evidence of a Conspiracy to Shift OB Patients from Landmark.

To paint a picture of a conspiracy that does not exist, Steward ignores the evidence of [redacted]. *See* SOUF ¶¶ 54-56, 72. It was not "irrational," as Steward contends, and no conspiracy was required, for [redacted]. SJ Opp'n at 58. Steward tries to use evidence of supposed [redacted]n—neither of which Steward has sued—as evidence of some sort of agreement involving Blue Cross. *Id*. at 54. It also speculates about the

intentions of Thundermist CEO Chuck Jones. *See, e.g.*, *id.* at 54, 56. But none of this is evidence of a conspiracy.

The only facts Steward alleges are (1) [redacted]. *Id.* at 54-56. The first two facts have nothing to do with Blue Cross. *Id*. The third has nothing to do with conspiracy. Blue Cross routinely communicates with Thundermist and other healthcare providers about matters of mutual concern. *See Monsanto Co.*, 465 U.S. at 762 ("constant communication" among firms that have "legitimate reasons to exchange information" does not mean that a firm is not acting independently); *see also Merck-Medco Managed Care, Inc. v. Rite Aid Corp.*, 22 F. Supp. 2d 447, 469-70 (D. Md. 1998) (rejecting "bursts of interfirm communications" as evidence of conspiracy because "defendants had legitimate business dealings unrelated to the [purported conspiracy]"). Indeed, Steward does not dispute that Mr. Jones had conversations "with just about every . . . health leader in RI" regarding his concerns at Landmark. SOUF ¶ 74.

[redacted]. SJ Opp'n at 57. Ms. Montanaro testified regarding the document and [redacted] they clearly do not show a "meeting of [the] minds in an unlawful arrangement" among Blue Cross and Thundermist to exclude Steward from Rhode Island. *Monsanto Co.*, 465 U.S. at 764; *see also Valley Liquors, Inc. v.*

Renfield Importers, Ltd., No. 81 C 6285, 1986 WL 1019, *8, n.6 (N.D. Ill. Jan. 2, 1986) ("When the Court in *Monsanto* and the post-*Monsanto* courts emphasized co-conspirator communications, obviously they meant communications that would support an inference of ***unity of purpose*** . . . .") (emphasis added).

2. There Is No Evidence of a Conspiracy to Reject an [redacted].

Steward's theory that Blue Cross conspired with Thundermist to prevent it [redacted] is similarly flawed. Steward cannot—and does not—point to any evidence showing that [redacted].[19]

Steward suggests that a conspiracy can be inferred [redacted] *See Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1450 (9th Cir. 1988) (finding that anesthesiologists could not conspire on behalf of hospital where they "were not empowered to act for [the hospital]"); *see also In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 409 (3d Cir. 2015) (refusing to infer price fixing conspiracy based on "sporadic communications among individuals without pricing authority"). Ms. Montanaro had served as CEO of Thundermist for 14 years until

[19] [redacted]

she left the company in 2011. [redacted] who was serving as Thundermist's interim CEO [redacted] d.

Steward also refers to [redacted] *Id.* This is a legitimate business concern that does not mean that Blue Cross and Thundermist conspired to keep Steward out of Rhode Island. *See Euromodas, Inc.*, 368 F.3d at 19 (finding that even if defendant's conduct "was in direct response to Clubman's withdrawal of its patronage, summary judgment would nonetheless be warranted"); *Winn v. Edna Hibel Corp.*, 858 F.2d 1517, 1520 (11th Cir. 1988) ("[A] manufacturer may legitimately respond to pressure from a dealer in order to avoid losing that particular dealer's business" and still act independently.).

Finally, Steward blames T[redacted] on Blue Cross CEO Peter Andruszkewicz, but this is disingenuous. *See* SJ Opp'n at 66. [redacted]

Id. Such communications do not evidence a meeting of minds in an unlawful conspiracy to exclude Steward from Rhode Island.

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Steward spends four pages of its brief arguing that lack of an [redacted] J Opp'n at 45. If Steward is correct, then how are any of the communications regarding these items, on which Steward relies so heavily for its conspiracy claim, probative of some sort of conspiracy to keep Steward out of Rhode Island? There is no evidence that Blue Cross, Lifespan, and/or Thundermist reached any agreement [redacted], but also no theory as to why it would make any difference since Steward's acquisition of Landmark should have proceeded *anyway* and supposedly fell apart only because of Blue Cross' *unilateral* decisions regarding reimbursement rates. There is no direct evidence of an agreement to exclude Steward from Rhode Island, and no basis for a jury to infer the existence of a conspiracy from such contrary evidence.

III. BLUE CROSS IS ENTITLED TO SUMMARY JUDGMENT ON ALL OF STEWARD'S CLAIMS BECAUSE BLUE CROSS DID NOT CAUSE STEWARD'S ALLEGED INJURIES.

Steward's Opposition Brief focuses on how Blue Cross' refusal to accept the increased rates Steward demanded at Landmark supposedly contributed to Steward's decision to walk away from Landmark. Steward misses the point. First, regardless of Blue Cross' conduct, there is no evidence [redacted], unrelated to Blue Cross, that Steward [redacted]. Second, Blue Cross

[redacted]. Nothing in Steward's Opposition Brief can get around these two undisputed facts.

Steward's flawed arguments stem from its failure to address the extensive body of case law on the issue of causation, discussed in Blue Cross' Motion. SJ Mot. at 54-56. It is not sufficient, as Steward posits, for Steward to present evidence that Blue Cross' reimbursement rates were a "material cause" of "Steward's decision to walk away." SJ Opp'n at 77. Instead, when an injury "[i]s attributable to … other factors independent of" the challenged anticompetitive conduct, a plaintiff has "not … met its burden" to show causation. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 126-27 (1969). Cases applying this rule demonstrate that a superseding cause "unrelated to [the defendant's alleged] exclusionary conduct" breaks the causal chain and relieves the defendant of liability. *RSA Media, Inc. v. AK Media Grp., Inc.*, 260 F.3d 10, 15 (1st Cir. 2001); *see also In re Canadian Import Antitrust Litig.*, 470 F.3d 785, 791-92 (8th Cir. 2006); *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 265 (3d Cir. 1998). The leading treatise takes a similar approach. P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 338b (2d ed. 2000) ("[A] force other than the antitrust violation [may] fully account[] for the plaintiff's injury.").

Ignoring this settled law, Steward goes on at length about how important Blue Cross rates were to Steward. [redacted] SJ Opp'n at 77-88. But all of this supposedly disputed evidence is immaterial. Even if there is a fact dispute about how important a role Blue Cross played in the deal's failure, the Sherman Act requires that the defendant's alleged conduct must be both a proximate *and* but-for cause. A defendant is not liable when a plaintiff "would

have suffered the same injury without regard to the allegedly anticompetitive acts" the defendant committed because that conduct was not "a necessary predicate to the[] injury." *Valley Prods. Co. v. Landmark, Div. of Hosp. Franchise Sys., Inc.*, 128 F.3d 398, 403-04 (6th Cir. 1997) (citation and internal quotation marks omitted); *accord RSA Media*, 260 F.3d at 15 (affirming summary judgment when plaintiff's injury was explained by an independent cause "unrelated to [the defendant's] exclusionary conduct"); *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 395 (7th Cir. 1993) (the defendant must be the "cause-in-fact of the injury"). This requirement here turns on whether a superseding and independent cause simultaneously ensured that Steward's Landmark deal would have failed, Blue Cross' conduct notwithstanding. The record shows undisputed evidence of at least two such superseding causes demonstrating that, regardless of Blue Cross' alleged conduct, Steward would not have acquired Landmark anyway.

Steward grudgingly comes around to addressing these points, SJ Opp'n at 88-93, but its arguments are unpersuasive. Steward sees fact disputes everywhere, ignoring Rule 56's limits on the reasonable inferences a court may draw in a plaintiff's favor, particularly in antitrust cases. *Matsushita*, 475 U.S. at 588 ("antitrust law limits the permissible inferences from ambiguous evidence"). It is not enough for Steward to manufacture "metaphysical doubts" by speculating about what the record does *not* say or by proffering testimony that directly contradicts what it does say. *Id.* at 586; *accord Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of facts for purposes of ruling on a motion for summary judgment."); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) ("[T]he mere existence of *some* alleged factual dispute between the parties will

not defeat an otherwise properly supported motion for summary judgment.") (emphasis in original). Moreover, Steward fails to even address Blue Cross' independent argument that, if the [redacted] Steward still cannot show a fact dispute on causation because its injury has many other potential explanations, none of which has anything to do with Blue Cross, and all of which collectively overwhelm any competing causal inference Steward seeks to draw. The Court should grant Blue Cross summary judgment on Steward's antitrust claims for each of these independent reasons.

A. Steward Could Not Satisfy [redacted]

There is no fact dispute about whether causes other than Blue Cross independently prevented Steward's acquisition of Landmark. When Steward announced its decision to withdraw the Landmark bid, t[redacted], unrelated to Blue Cross, [redacted]

[redacted] Ex. 72 to SOUF at ¶ 5(b). [redacted]

[redacted] Ex. 114 to SOUF at STEWARD123619-20.[22]

Steward now hypothesizes that if only it could have reached an agreement with Blue Cross, [redacted] SJ Opp'n at 92. But this is fanciful. *No contemporaneous document actually says*

[21] Steward disputes this statement, noting that it also [redacted] Ex. 119 to SOUF at 27.

[22] As for Steward's claim that the [redacted] SJ Opp'n at 89, that position cannot be taken seriously. Representations to a court of law or to a State's chief law-enforcement officer are not up for "negotiation." And in any event, this argument does not explain the sworn testimony of Steward executives in this case that the [redacted]. *See infra* Part III.A.2.

this, and [redacted]. SOUF ¶ 112. Steward purports to find hidden meaning in the record evidence, but no reasonable jury could draw the inferences Steward seeks.

First, Steward's cites a statement from the [redacted]. SJ Opp'n at 86. [redacted] SDF ¶ 112(iv); Ex. 207 to SDF Prime-Landmark118010 [redacted]. This is not competent summary judgment evidence. *AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 735-36 (2d Cir. 2010) (evidence created during pendency of litigation did not show fact dispute and was contradicted by contemporaneous record).

Second, Steward makes much of the fact that it offered i[redacted] Ex. 118 to SOUF at STEWARD00537716. [redacted] SDF ¶ 114.

Steward asks the Court to infer an unstated intent to close the deal regardless of the [redacted] The letter leaves no room for this creative rewrite. [redacted]

[redacted] Ex. 118 to SOUF at STEWARD00537716.[23] No reasonable jury could find that the "alternative" proposal Steward offered was untethered to [redacted].[24]

Steward believes that these documents "are subject to two interpretations." SJ Opp'n at 93. But "if a motion for summary judgment is to have any office whatever, it is to put an end to … frivolous possibilities when they are the only answer." *Deluca v. Atl. Refining Co.*, 176 F.2d 421, 423 (2d Cir. 1949) (L. Hand, J.). Although Rule 56 entitles a nonmovant plaintiff to reasonable inferences, the court must "ignore conclusory allegations, improbable inferences, and unsupported speculation." *Taylor v. Am. Chem. Council*, 576 F.3d 16, 24 (1st Cir. 2009) (quotation omitted). That is all Steward offers. Steward has constructed an after-the-fact explanation for the deal's failure that is not supported by the plain meaning of the documents it cites.

2. The Testimony Does Not Create a Fact Dispute.

[redacted]

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23 [redacted] *Id.*

24 [redacted] SJ Opp'n at 93, but it has not provided the actual document. And in any event, [redacted]

[redacted] Ex. 27 to SOUF at 80 ([redacted]). [redacted] Ex. 116 to SOUF at STEWARD00547245 (emphasis added).

Against this unambiguous evidence, Steward offers only the self-serving and contradictory testimony of its CEO, Dr. Ralph de la Torre. Ex. 1 to SDF; SDF ¶ 112. As shown above, [redacted] Steward dismisses these contradictions as an improper attack on Dr. de la Torre's credibility, SJ Opp'n at 90 n.260, but it does not address the case law showing that testimony similar to Dr. de la Torre's cannot create the "genuine" fact dispute Rule 56 requires.

The Second Circuit's decision in *Argus, Inc. v. Eastman Kodak Co.*, is instructive. 801 F.2d 38 (2d Cir. 1986). The court affirmed summary judgment for the defendant because the

plaintiff could not show a fact dispute about causation through "conclusory statements by [the] plaintiffs' officers and employees." *Id.* at 45; *accord id.* at 42-43. The Second Circuit explained that deposition testimony "unsupported by documentary or other concrete evidence … is simply not enough to create a genuine issue of fact in light of the evidence to the contrary." *Id.* at 45.[25] Steward rationalizes the lack of record support for Dr. de la Torre's testimony as "hardly surprising" given that "any competent businessperson" would not "publicly announce his negotiating strategy." SJ Opp'n at 91. But Steward has no evidence that Dr. de la Torre *ever* announced this supposed strategy—to the public, the officers of his own company, or to anyone else.

[redacted] Ex. 116 to SOUF at STEWARD00547245 (emphasis added). [redacted] Ex. 115 to SOUF at STEWARD00169799

[25] *See also, e.g.*, *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 714 (11th Cir. 1984) (per curiam) ("Self-serving statements by a plaintiff's corporate officers are not, alone, substantial enough evidence of antitrust injury for a plaintiff to survive a motion for summary judgment."); *Fed. Prescription Serv. Inc. v. Am. Pharm. Ass'n*, 663 F.2d 253, 270 (D.C. Cir. 1981) (requiring more than "the *ipse dixit* of [the plaintiff's executives] to show that there was a causal connection between [the defendant's] participation in [an alleged conspiracy] and injury to [the plaintiff]").

(emphasis added). Steward focuses on hypothetical positions it could have taken, but what matters is the undisputed record evidence about the position Steward *actually* took.[26]

3. Steward's Conduct Does Not Create a Fact Dispute.

Steward says that the [redacted]. SJ Opp'n at 83-84. Undisputed record evidence shows otherwise. [redacted]

[26] Mr. Putter's deposition testimony is unavailing for the same reason as Dr. de la Torre's. In fact, [redacted]. Ex. 9 to SDF at 98. [redacted] *Midwestern Waffles*, 734 F.2d at 714.

Steward also cites deposition testimony from [redacted]

[redacted]

* * *

The record shows that the [redacted] was an independent and superseding cause for Steward's failure to acquire Landmark. The record shows that [redacted] SJ Opp'n at 82-83. Steward's attempt to invent a fact dispute is unsupported by both the record evidence and the law.

4. Judicial Estoppel Applies.

The doctrine of judicial estoppel also precludes Steward's change in positions "according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 750 (quotation omitted). Steward argues that its current position—that "[i]t would close the deal once [redacted]" SJ Opp'n at 94—is not directly inconsistent with the position that it took before Justice Silverstein. As discussed, however, [redacted]. *See supra* Part III.B.1.

[27] Steward further argues that [redacted] Ex. 115 to SOUF at STEWARD00169799.

[redacted] SJ Opp'n at 96. But First Circuit precedent makes clear that "a party need not show that the earlier representation led to a favorable ruling on the merits of the proceeding in which it was made" for judicial estoppel to apply. *Perry v. Blum*, 629 F.3d 1, 11 (1st Cir. 2010).

[redacted] SJ Opp'n at 95. Judicial estoppel is an equitable doctrine that is "not reducible to any general formulation of principle," and it defies "inflexible prerequisites" of the sort Steward seeks to impose. *New Hampshire*, 532 U.S. at 750-51 (quotation omitted). Its ultimate aim is to "protect the integrity of the judicial process." *Id.* at 749-50 (quotation omitted). And that is precisely the concern here. [redacted] Ex. 14 to SOUF at 127-28, 133. Justice Silverstein deserved [redacted], and Steward should be judicially estopped in this action from "carrying out [such] a game of bait and switch." *Alt. Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 35 (1st Cir. 2004).

B. OHIC Regulations [redacted]

Like the [redacted] the OHIC regulations also are a superseding cause that fully explains Steward's injury. Because the OHIC regulations prevented Blue Cross from offering Steward the higher reimbursement rates it demanded, Steward's injury "did not flow from [Blue Cross'] conduct, but, rather, from the realities of the regulated environment in which [the parties]

were actors." *West Penn Power*, 147 F.3d at 265; *see also In re Canadian Import Antitrust Litig.*, 470 F.3d at 791 (plaintiffs' alleged injury was "caused by the federal statutory and regulatory scheme adopted by the United States government, not by the conduct of the defendants").

Steward does not dispute that, if the OHIC regulations applied, [redacted] Rather, Steward argues that Blue Cross should have ignored those regulations. In other words, Steward thinks it violates the law for Blue Cross to abide by binding regulations rather than to evade them. According to Steward, [redacted] SJ Opp'n at 97-98, 116.

Steward's speculative argument fails. Binding First Circuit law—that Steward ignores—states that the mere possibility that an agency may grant exemptions from a regulatory regime is not sufficient to create a fact dispute that can survive a motion for summary judgment. *RSA Media*, 260 F.3d at 14-15. In *RSA Media*, the defendant argued that state regulations independently explained the plaintiff's injuries. The First Circuit observed that "the only specific evidence" the plaintiff cited in response was a single prior variance from regulations that had been granted in the past. *Id.* Affirming summary judgment for the defendant, the appellate court reasoned that the plaintiff had not shown a fact dispute that the defendant's conduct was the but-for cause of its injuries because "[t]his one [past] instance of a variance being granted is not very persuasive evidence" and "it was impossible to assess the likelihood of receiving a variance" in the future. *Id.* at 15 & n.7.

So too here. Steward identifies no evidence that it directly sought an exemption from the OHIC regulations, that it asked Blue Cross to seek such an exemption on its behalf, or that such

an exemption had any probability of being granted. Steward highlights [redacted], SJ Opp'n at 97-98, 116, but this evidence is insufficient, as a matter of law, to create a fact dispute about whether the regulations could have been evaded. *RSA Media*, 260 F.3d at 15. There is no evidence Blue Cross was even *aware* of the exemptions. As in *RSA Media*, it is simply "impossible to assess the likelihood of receiving a variance." *Id.* Steward's claim that Bl[redacted]e [redacted].

Steward argues in the alternative that the OHIC regulations might not have applied in the first place because Steward was "entitled to negotiate rate agreements with Blue Cross (and other insurers) 'from scratch,' just as would a new hospital." SJ Opp'n at 96. Whether Steward and Blue Cross would have negotiated a rate agreement "from scratch" is entirely speculative. Steward cites no evidence that it sought such a contract and Steward and Blue Cross never negotiated from scratch. Indeed, [redacted] SDF ¶ 122(v). Steward fails to identify any record evidence to support its "new contract" theory. This hypothetical possibility that a new contract could have sidestepped compliance with the OHIC regulations has no record support and fails as a matter of law. *See RSA Media*, 260 F.3d at 15.

C. Numerous Other Causal Factors Explain Steward's Claimed Injury.

Steward has no response to Blue Cross' alternative argument that "numerous intervening economic and market factors … may have been the actual cause of [Steward's] injuries" such that the Court should find as a matter of law that Steward "failed to show with a fair degree of certainty that the antitrust violation was a material and substantial factor causing [its] alleged injuries." *See Greater Rockford Energy*, 998 F.2d at 402 (affirming summary judgment for defendant). As Blue Cross explained in its Motion for Summary Judgment, these factors include [redacted] and OHIC conditions described above, in addition to Steward's failure to mitigate its damages, [redacted]. Steward cannot prove that it *could not have purchased* Landmark at the reimbursement rates Blue Cross offered. "Standing alone, one of these alternative causes of [Steward's] injuries might be insufficient to put causation-in-fact in question." *Id.* at 404. But when viewed together—and even in the light most favorable to Steward—these other factors collectively show so many possible explanations for the Steward's failure to acquire Landmark that Blue Cross cannot be liable as a matter of law. This is an independent basis on which the Court should grant summary judgment for Blue Cross. *See id.*

IV. BLUE CROSS IS ENTITLED TO SUMMARY JUDGMENT ON ALL OF STEWARD'S ANTITRUST CLAIMS BECAUSE THERE WAS NO HARM TO COMPETITION.

Steward does not dispute that Prime ultimately bought Landmark a [redacted] SOUF ¶¶ 86(j), 122-23. Steward also does not dispute that there must be actual *evidence*—not speculation—of "a *reduction* in output and an *increase in prices* in the relevant market" in order for Steward to survive summary

judgment. *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)). Instead, Steward's Opposition Brief ignores the law on harm to competition and again tries to muddy the waters with a discussion of numerous immaterial facts. SJ Opp'n at 100-12. But all of Steward's antitrust claims fail for the independent reason that Steward cannot show a reduction in output or an increase in price resulting from Prime's acquisition of Landmark.

"Without a showing of actual adverse effect on competition, [the plaintiff] cannot make out a case under the antitrust laws." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31 (1984), *abrogated on other grounds by Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *accord MacDermid Printing Sols. LLC v. Cortron Corp.*, 833 F.3d 172, 182 (2d Cir. 2016) ("Our cases have always required . . . evidence that the challenged action has *already* had an adverse effect on competition[.]") (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). 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); *accord Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072, 1085 (11th Cir. 2016) (requiring evidence of "actual detrimental effects" to competition).

Without any such evidence, summary judgment is warranted.[28] Steward does not dispute the extensive body of case law cited in Blue Cross' motion on this issue. SJ Mot. at 67-74.

Moreover, Steward does not dispute that [redacted] as required by OHIC regulations. SOUF ¶ 86(j). Steward also does not dispute that [redacted] as required by OHIC regulations. *Id.* at ¶¶ 122-23. These undisputed facts end the matter.[29] [redacted] There is no evidence of harm to competition or consumers.

Because Steward cannot show actual harm to competition, it tries to debate an immaterial issue, namely, whether Steward's business model is better than Prime's business model. For the reasons discussed in Blue Cross' Motion, this is not the proper inquiry because the law requires evidence of *actual harm* to competition from Blue Cross' conduct in the form of increased prices or reduced output, not speculation about whether an alternative course of conduct could have

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[28] *See, e.g.*, *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. All., Inc.*, 123 F.3d 301, 303, 308-311 (5th Cir. 1997) (affirming summary judgment because PPO's switching of one member hospital for another did "not present a threat to competition"); *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assoc.*, 996 F.2d 537, 546 (2d Cir. 1993) (affirming summary judgment where plaintiff failed to adduce "evidence that its exclusion has, in fact, resulted in any decrease in the quality of radiology services"); *Coffey v. Healthtrust, Inc.*, 955 F.2d 1388, 1393 (10th Cir. 1992) (affirming summary judgment because hospital's replacing of an exclusive anesthesiologist provider with another provider did not affect the market).

[29] While ultimately immaterial to this motion—the rate increases speak for themselves—[redacted]. *See* SOUF ¶ 123. [redacted] SJ Opp'n at 109, but her analysis does not somehow change what Steward must show in order to survive summary judgment.

benefited consumers even *more*. *See, e.g.*, SJ Mot. at 73-74*; see also Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1385 (5th Cir. 1994) ("[S]peculation about anticompetitive effects is not enough."). Steward fails to cite a single case for its theory that Blue Cross had a duty to "optimize" competition by choosing Steward over Prime. Indeed, Steward *concedes*, as it must, that "firms do not have to choose the 'most competitive' business strategy from among a range of lawful options." SJ Opp'n at 110.

Harm to competition is not measured by whether the plaintiff can conjure up a more pro-competitive outcome than the one that transpired, but whether the plaintiff can show that existing market conditions were in fact harmed. *See Trinko*, 540 U.S. at 415-416 (The antitrust laws "do[] not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."). Thus, the question is not whether Steward's business model might somehow be better for consumers than Prime's business model. Every disappointed bidder could make that same argument. *See NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 456 (6th Cir. 2007) (plaintiff's assertion "that it provides better service than its competitors" was insufficient show harm to competition). Instead, the question is whether Blue Cross' conduct resulted in increased prices or reduced output, and there is no evidence of that.

Despite its concession on the controlling legal principle, Steward posits that competition in Rhode Island nevertheless was harmed because some hypothetical, alternate universe was not created in which Steward might achieve more than Prime. Indeed, Steward recounts evidence that it [redacted]. SJ Opp'n at 104. In contrast, [redacted]. SJ Mot. at 72-73. Regardless, these facts are not material. Steward cannot win its case

by asking the jury to assume that numerous links in an unrealized chain of events will unfold exactly as it hopes. *Cf. Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 79 (2d Cir. 2013) (plaintiff "offer[ed] no reason why it would have been more certain than [other] entities to win the contracts" or why "its bids—rather than the bids of some other party—would have prevailed"). Courts have rejected far *less* speculative claims of harm to competition as too conjectural.[30] Moreover, even if Steward's impact on the market was not speculative (and it is), *that* would not matter either. As Steward acknowledges, Blue Cross does not have the antitrust duty to "choose the 'most competitive' business strategy from among a range of lawful options," SJ Opp'n at 110, and [redacted]. The Court should grant Blue Cross summary judgment for these reasons alone.

Steward makes various arguments to try to bypass the lack of evidence of harm to competition, but none of them amount to more than a speculative claim that its business model would be better than Prime's business model.

First, the scant—and inapposite—case law cited by Steward for the proposition that its superior business model can be the basis of an antitrust claim reveals just how unprecedented Steward's legal theory actually is. SJ Opp'n at 103. While Steward is right that maverick firms *might* lower prices, here the undisputed evidence shows that [redacted] Steward's citation of *Brooke Group* is particularly puzzling. There, the Supreme Court rejected the plaintiff's claim for precisely the same reason as here: the

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30 *See, e.g., MacDermid*, 833 F.3d at 184 (party's claim that prices would have gone down "amounts to little more than speculation"); *Procaps*, 845 F.3d at 1085-1086 ("the *likely* effect of removing a competitor cannot take the place of presenting specific and concrete facts") (emphasis added); *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (showing that the defendant's acts "could have resulted in *potentially* higher prices, but . . . [not] that prices were *actually* higher" was insufficient) (emphasis in original); *see also* S.J. Mot. at 75 & n.64 (citing additional examples).

plaintiff could not prove harm to competition where the evidence showed that the conduct at issue resulted in lower prices. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.") (citation omitted).

The two merger cases cited by Steward are even further afield. It is certainly true that, as in *Arch Coal* and *H&R Block*, courts and agencies evaluating the *prospective* effects of a proposed merger must consider whether the elimination of the acquired competitor would result in higher prices, but there is no need to do so in non-merger cases where the court has *actual evidence* regarding the effect of the challenged conduct on price. SJ Opp'n at 103 (citing *Fed. Trade Comm'n v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004) and *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 79 (D.D.C. 2011)). Steward is flatly wrong that evaluating harm to competition in this case "requires some estimation and projection." SJ Opp'n at 111. [redacted] Indeed, the record shows that [redacted] SOUF ¶ 34. Moreover, unlike here, a merger case involves the actual *elimination* of a competitor by acquisition, whereas the alleged conduct in this case left the number of competitors entirely unchanged.

Second, Steward points to [redacted]. SJ Opp'n at 103-107. But this immaterial evidence has no bearing on the harm to competition inquiry. Anyone can read about Steward's purported business model on Steward's website. Evidence that certain employees at

[redacted]t—the question is whether there is *actual evidence* that the challenged conduct increased price or reduced output. *See, e.g., Doctor's Hosp. of Jefferson*, 123 F.3d at 310 (rejecting a party's "suspicions" about price effects when "unverified" by actual evidence). Steward cannot convert disputed, immaterial evidence regarding Blue Cross' alleged "motiv[es]" into evidence of actual harm to competition. SJ Opp'n at 106.

Third, Steward tries to rely on the analysis of its expert, [redacted] SOUF ¶ 123. [redacted] SJ Opp'n at 101-02, 112. [redacted] Ex. 25 to SOUF at ¶ 354. It speaks volumes about the lack of evidence of harm to competition that Steward's own experts must go to such great lengths to try to offset the obvious competitive *harm* from Steward's acquisition of Landmark. At bottom, [redacted]. Ex. 2 to Eisenstadt Mot. *in Limine* at 66-67, 69-70, 178-79. But more fundamentally, Dr. Eisenstadt's guesswork is immaterial. His entire [redacted]

[redacted] But antitrust law does not ask judges or juries to engage in this kind of winner-picking or to substitute their judgment for that of the market. What the antitrust laws are concerned with is whether the defendant's conduct has resulted in *actual* evidence of harm to competition, measured by an increase in price or a reduction in output. And that, Dr. Eisenstadt has not shown.

For all these reasons, Steward has failed to adduce facts from which a reasonable jury could find harm to competition, and the Court should grant Blue Cross summary judgment on Steward's antitrust claims.

V. BLUE CROSS IS ENTITLED TO SUMMARY JUDGMENT ON ALL OF STEWARD'S CLAIMS BECAUSE STEWARD HAS NOT MITIGATED ITS DAMAGES AND STEWARD'S DAMAGES MODEL CANNOT DISTINGUISH BETWEEN DAMAGES FROM LAWFUL AND UNLAWFUL CONDUCT.

Steward does not dispute that Blue Cross is entitled to summary judgment on Steward's damages claims if the Court excludes the testimony of its damages experts. SJ Opp'n at 121. As discussed in Blue Cross' Motion to Exclude Damages Testimony of Keith Ghezzi and Marc Sherman, the bulk of Steward's damages experts' testimony should be excluded because:

- [redacted] SOUF ¶ 98; and
- [redacted]

Blue Cross addresses Steward's arguments related to damages in its contemporaneously filed Reply in Support of Blue Cross' Motion to Exclude Damages Testimony of Keith Ghezzi and Marc Sherman, and incorporates those arguments by reference.

VI. BLUE CROSS IS ENTITLED TO SUMMARY JUDGMENT ON ALL OF STEWARD'S ANTITRUST CLAIMS UNDER THE STATE ACTION DOCTRINE.

Steward argues that the state action doctrine does not apply because the "active supervision" requirement is not met and because the OHIC regulations that limited the rate increases that Blue Cross could offer to Landmark are supposedly not binding.

First, the state action doctrine applies because OHIC actively supervises compliance with OHIC regulations when determining whether to approve a health insurer's premiums. Steward's sole argument is that OHIC cannot supervise reimbursement rates because it does not have the authority to regulate providers—only health insurers. SJ Opp'n at 114-15. But this is precisely the point. The issue is not whether OHIC actively supervises Landmark or Steward, but whether OHIC actively supervises *Blue Cross* (and other health insurers) to ensure that OHIC regulations are followed. Blue Cross may not sell health insurance in Rhode Island unless its premiums are approved by OHIC. *Blue Cross & Blue Shield of R.I. v. McConaghy*, No. PC 04-6806, 2005 WL 1633707, at *1 (R.I. Super. Ct. July 11, 2005); R.I. GEN. LAWS § 42-14.5-1 *et seq*. [redacted]. *Id*. at ¶ 93.

Steward's argument that OHIC does not have the power, for example, to approve provider contracts is wrong. Indeed, OHIC has far more sweeping powers "to conduct an examination or issue an order nullifying [particular hospital contract provisions] and ordering [Blue Cross and hospitals] to renegotiate." *See, e.g.*, *Care New England Health System v. R.I. Office of the Health Ins. Comm'r*, No. PC 10-6984, 2011 WL 4542984, (R.I. Sup. Sept. 28, 2011). But, more importantly, Steward misses the point. SJ Opp'n at 114. OHIC's supervision of

Blue Cross' reimbursement rates was so active that [redacted]. *Id*. Instead, the standard is whether OHIC "has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention." *Fed. Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992). Here, OHIC clearly did so by:

[redacted]

See SOUF Ex. 4, Ex. 5. It is difficult to imagine a more active effort to supervise the rates that Blue Cross pays hospitals in Rhode Island.[31] Steward calls it "ironic" that OHIC regulation blocked Steward's entry into Rhode Island, given the purported benefits of Steward's business model. SJ Opp'n at 115-16. But irony does not trump federalism; the state action doctrine prevents plaintiffs from using the antitrust laws to undermine state regulatory judgments precisely like the one OHIC made. *See Cmty. Commc'ns Co. v. City of Boulder*, 455 U. S. 40, 53 (1982) (recognizing that Congress intended to "embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution").

[31] Steward's reliance on *Patrick* is misplaced. As noted in Steward's Opposition Brief, there, the Oregon Health Division lacked the power to "overturn a decision that fails to accord with state policy." *Patrick v. Burget*, 486 U.S. 94, 102 (1988). In contrast, here, OHIC blocked *all* of Blue Cross' proposed hospital rate increases that exceeded clearly-articulated limits imposed by state policy.

Second, Steward falls back on its argument that perhaps the OHIC regulations are not actual regulations at all, but mere suggestions that Blue Cross not only could ignore, but *must* ignore or else be found to have violated the antitrust laws. SJ Opp'n at 116-17. As a threshold matter, this argument is irrelevant because Steward has conceded that the "clear articulation" prong of the state action doctrine test is met—there is no other part of the test to apply. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). Nevertheless, as discussed in Part III above, OHIC regulations are legally binding on Blue Cross, regardless of the rare exceptions granted to other health insurers in other contexts. The fact that OHIC might grant exceptions to its regulations under certain circumstances is not legal grounds to refuse to apply the state action doctrine. Steward cites no legal authority for this proposition because there is none. Such an exception would swallow the rule and force all regulated entities (not just Blue Cross) to violate state regulations whenever they might not be enforced or else risk federal antitrust liability. This is not the law. There also is no legal obligation for Blue Cross to "find out" if OHIC might ignore its own regulations. SJ Opp'n at 116. Nor is whether Blue Cross favored the OHIC regulations (or would prefer *not* to have an exception) relevant. *Id*. at 117. Whether the "clearly articulated" and "actively supervised" OHIC regulations could be evaded has no bearing on Blue Cross' state action defense, and therefore the Court should find that Steward's claims challenging Blue Cross' proposed reimbursement rates fail under the state action doctrine.

VII. BLUE CROSS IS ENTITLED TO SUMMARY JUDGMENT ON STEWARD'S STATE-LAW TORT CLAIMS.

Steward's Opposition Brief argues that the same factual disputes it has concocted to try to defeat summary judgment on Steward's antitrust claims to also defeat summary judgment on Steward's tort claims (Counts XVII and XVIII). SJ Opp'n at 117-20. Blue Cross will not repeat

its rejoinder to Steward's arguments here, except to note that, for the reasons set forth above, the undisputed evidence on the handful of material facts shows that Steward cannot satisfy the essential elements of its antitrust claims. Steward's claims rise and fall together, and Steward cannot survive summary judgment by repackaging those flawed antitrust claims as tort claims.

Although Steward's only legal argument appears to be that the elements of its antitrust and tort claims do not overlap, it ignores the elements of its tort claims entirely. One of those elements is that Steward must show that Blue Cross' conduct was "improper," meaning that it was motivated by "legal malice" or the "intent to do harm without justification." *See Belliveau Bldg. Corp. v. O'Coin*, 763 A.2d 622, 627-28 (R.I. 2000) (quotation omitted). In its Complaint, Steward's tort claims simply recount Blue Cross' same purported antitrust violation as the "improper" conduct. *See* Am. Compl. ¶¶ 166, 171. A case cited by Steward acknowledges that where, as here, conduct is "not illegal under the antitrust laws" and the plaintiff "set[s] forth no facts showing any other independent basis for finding the defendants' acts wrongful or tortious under state law," then the plaintiff also "cannot prove" the elements of its tort claim. *Metzler v. Bear Auto. Serv. Equip. Co.*, 19 F. Supp. 2d 1345, 1364 (S.D. Fla. 1998) (applying Florida law). The *Metzler* court cites numerous courts that have reached the same result. Indeed, Steward does not appear to dispute the point that where, as here, the putative antitrust violation is the *same conduct* alleged in support of the tort claims, "antitrust law provides the best available barometer—*indeed the only available barometer*—of whether or not [the defendant's] conduct can be found to be 'wrongful' or 'illegitimate'—and hence, tortious." *Ocean State Physicians*

Health Plan, Inc. v. Blue Cross & Blue Shield of R.I., 883 F.2d 1101, 1114 (1st Cir. 1989) (quotation marks in original) (emphasis added).[32]

Moreover, Steward's argument that the elements of its tort and antitrust claims do not overlap misses the point.[33] *All* antitrust claims have antitrust injury and harm to competition elements. The issue in *Ocean State*, *Metzler*, and the numerous other cases that have considered the issue is whether the *conduct* is the same—not the legal elements. *Ocean State*, 883 F.2d at 1114. Steward's Opposition Brief does not—and cannot—identify how Steward could satisfy the "improper" element of its tort claims without proving an antitrust violation. Because Steward "fails to allege any tortious activity other than precisely the same 'anticompetitive' behavior alleged in its antitrust claim[s]," Steward's tort claims fail for the same reasons as its antitrust claims, as a matter of law. *Ocean State*, 883 F.3d at 1114 (holding that "[f]or the same reasons . . . [the defendant] did not violate the Sherman Act, we hold that [the same conduct] could not as a matter of law constitute tortious interference with plaintiffs' contractual relationships").

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[32] Although Steward cites *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922 (1st Cir. 1984), the plaintiff in *Kartell* did not bring a tort claim in conjunction with antitrust claims. Instead, in *dicta*, the Court merely pondered the possibility that the conduct at issue "*might* amount to minor business torts, which lie beyond the purview of the antitrust laws." *Id.* at 933-34 (emphasis added) (citation omitted).

[33] Steward argues that proof of antitrust injury or harm to competition would not be necessary to prove its tort claims. But Steward misstates First Circuit law on this issue. In *A.D.M. Corp v. Sigma Instruments, Inc.*, 628 F.2d 753 (1st Cir. 1980), the court did *not* hold that plaintiffs could state a tort claim without satisfying the antitrust injury or harm to competition requirements. In fact, as with *Kartel*, the plaintiffs did not even *bring* tort claims. Instead, the Court held the exact converse of what Steward claims it held: not that an antitrust claim *can* be repackaged as a tort claim without antitrust injury, but that a tort claim *cannot* be repackaged as an antitrust claim without antitrust injury. *Id.* at 754 ("[T]he transmutation of these state law torts into federal antitrust violations would have to be based upon a finding that the injuries for which compensation is sought have an unreasonable effect on competition, as well as on a particular competitor.").

CONCLUSION

For the reasons set forth above and in the Memorandum of Law in Support of Blue Cross' Motion for Summary Judgment, Blue Cross respectfully requests that the Court grant its Motion for Summary Judgment and enter judgment against Steward on all claims in its Amended Complaint.

DATED: August 25, 2017

/s/ Patricia K. Rocha
John A. Tarantino (#2586)
Patricia K. Rocha (#2793)
Joseph Avanzato (#4774)
Leslie D. Parker (#8348)
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

N. Thomas Connally, III (*Pro Hac Vice*)
Emily M. Yinger (*Pro Hac Vice*)
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

Robert F. Leibenluft (*Pro Hac Vice*)
Justin W. Bernick (*Pro Hac Vice*)
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

Attorneys for Blue Cross & Blue Shield of Rhode Island

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2017, I filed the foregoing Reply in Support of Blue Cross & Blue Shield of Rhode Island's Motion for Summary Judgment 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.

Robert C. Corrente, Esq.
Christopher Dawson, Esq.
Joseph Cooper, Esq.
Whelan, Corrente, Flanders,
Kinder & Siket LLP
100 Westminster St., #710
Providence, RI 02903
rcorrente@wckslaw.com
cdawson@wckslaw.com
jcooper@wckslaw.com

Brendan V. Sullivan, Jr., Esq.
Steven R. Kuney, Esq.
Kevin Hardy, Esq.
Mark S. Levinstein, Esq.
Daniel W. Bell, Esq.
Matthew P. Mooney, Esq.
Frank Lane Heard, III, Esq.
Williams & Connolly LLP
725 12th Street, N.W.
Washington, DC 20005
bsullivan@wc.com
skuney@wc.com
khardy@wc.com
mlevinstein@wc.com
dbell@wc.com
mmooney@wc.com
lheard@wc.com

/s/ Patricia K. Rocha