IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SCHUYLKILL HEALTH SYSTEM, on behalf of itself and all others similarly situated, Plaintiff,	)	
v.	)	Civil Action No. 2:12-cv-07065-JS
CARDINAL HEALTH, INC., CARDINAL HEALTH 200, LLC., OWENS & MINOR, INC., and OWENS & MINOR DISTRIBUTION, INC. Defendants.	)	Hon. Juan R. Sánchez

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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INTRODUCTION

Plaintiff Schuylkill Health System ("Plaintiff") challenges certain contractual practices of Defendants even though Plaintiff's allegations affirmatively establish that it has never been subject to those practices. All of its claims must therefore be dismissed.

Plaintiff operates acute care providers (hospitals), and buys medical and surgical product distribution services from distributors like Defendants Cardinal Health 200, LLC ("Cardinal") and Owens & Minor Distribution, Inc. ("O&M").[1] Suture Express, one of Defendants' competitors, brought the same claims in the District of Kansas that Plaintiff pursues here—all but two of which were dismissed for failure to state a claim on which relief could be granted. *Suture Express, Inc. v. Cardinal Health 200, LLC*, Case No. 12-2760-RDR, 2013 WL 3991798, at *11 (D. Kan. Aug. 5, 2013). The attorney who represented Plaintiff when its complaint was first filed admitted he prepared the lawsuit "based on [his] review of the Kansas suit."[2] But the Kansas case was brought by a competitor who claimed that Defendants' contracting practices were preventing it from making sales.

Here, Plaintiff is a customer of distribution services that has never entered into the challenged contractual provisions, and thus can offer only a tortured and speculative theory of injury that is defeated by Plaintiff's own allegations. The facts Plaintiff does plead only defeat

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[1] Plaintiff has entered into a Stipulation Dismissing Defendants Owens & Minor, Inc. and Cardinal Health, Inc. Without Prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1). Owens & Minor, Inc. and Cardinal Health, Inc. do not engage in the distribution business at issue here and do no business in Pennsylvania.

[2] Dan Packel, Pa. Hospital Hits Cardinal, Owens & Minor With Antitrust Suit, Law 360, Dec. 19, 2012, http://www.law360.com/articles/402950/print?section=health, attached as Ex. A to the Request for Judicial Notice filed on January 1, 2013. (Dkt. 13.)

its claims, and Plaintiff otherwise fails to plausibly plead the required elements of its causes of action. These failings are fatal, and require dismissal of Plaintiff's Complaint in its entirety.

SUMMARY OF THE ALLEGATIONS

The Amended Class Action Complaint ("Complaint") alleges a world in which multiple distributors of medical and surgical products compete to provide domestic acute care providers with the supplies they need to treat patients. The competitors in this industry allegedly include Defendants O&M and Cardinal; Medline Industries, Inc., another national full-line distributor of medical and surgical ("Med-Surg") products (Compl. ¶ 81); Suture Express, Inc., a specialty distributor of sutures and endomechanical ("sutures and endo") products (*id.* ¶ 34); a number of regional and local distributors of Med-Surg products (*id.* ¶ 81); and the product manufacturers themselves (*id.* ¶ 20).

O&M, Cardinal, Medline, and other regional distributors are "full-line" distributors that offer customers the ability to purchase the full line of Med-Surg products. Plaintiff acknowledges that acute care providers often prefer to deal with full-line distributors because "acute care providers . . . require a wide range of Med-Surg products" and prefer to buy those products from one source rather than "enter into costly and time-consuming arrangements with individual manufacturers." (*Id.* ¶ 20.) O&M and Cardinal allegedly both offer the option to take advantage of deeper discounts on all Med-Surg products if customers agree to buy 90 percent of their sutures and endo product needs from the Defendant with whom they contract. (*Id.* ¶ 63.) Suture Express allegedly succeeded through a different business model; it claims it "focus[es]" *only* on sutures and endo products rather than the full line of Med-Surg products. (*Id.* ¶ 32.)

Plaintiff alleges that it is an acute care provider that "directly pays one or more Defendants for the distribution of sutures and endo products." (Compl. ¶¶ 3, 25.) It does not allege that it has contracted with either Defendant, nor that it was prevented from buying sutures

and endo products from any of Defendants' rivals if it so chose. Plaintiff is silent on whether it buys sutures and endo distribution services from Suture Express and does not explain why it could not if it does not. Although Defendants' deep discounts are alleged to make their prices so attractively low that customers feel they cannot go elsewhere, Plaintiff also alleges (inconsistently) that Defendants charge "supracompetitive prices" for sutures and endo distribution services. (*Id.* ¶¶ 38, 41.)

PLEADING STANDARD

I. Plaintiff Must Allege Facts Showing Antitrust Standing.

To pursue antitrust claims, a plaintiff must adequately plead both Article III and antitrust standing. It must allege, among other things, injury with a sufficiently direct causal connection to the challenged conduct. Antitrust standing is not simply Article III standing. It requires more. As the Supreme Court has explained, only injuries that are "of the type the antitrust laws were intended to prevent and that flow[] from that which makes defendants' acts unlawful" suffice for antitrust standing. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Further, "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Associated Gen. Contractors Of Cal., Inc. v. Cal. State Council Of Carpenters*, 459 U.S. 519, 534 (1983) ("*AGC*") (citations omitted). To have standing to bring its antitrust claims, Plaintiff must therefore demonstrate that it is "a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act," using the five factors set forth in *AGC* and discussed below.

II. Plaintiff Must Allege Plausible Facts Supporting Its Causes of Action.

Recognizing the burdens particularly associated with discovery in antitrust cases, the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), held that "a plaintiff's

obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, [or] a formulaic recitation of the elements of a cause of action." *Id.* at 555 (internal quotation marks omitted). Rather, the complaint must contain factual allegations that "raise a right to relief above the speculative level." *Id.* Thus, an antitrust complaint can survive a motion to dismiss only where it "state[s] a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

To clear the "plausibility" hurdle, an antitrust complaint must do more than demonstrate "a sheer *possibility* that a defendant has acted unlawfully," *Iqbal*, 556 U.S. at 679 (emphasis added); it must contain factual allegations that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. Where instead factual allegations are "merely consistent with" misconduct, a complaint fails to state a plausible claim to relief. *Id.* Unilateral or independent action, regardless of the motivation, *never* violates Section 1. *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 221 (3d Cir. 2011) (citation omitted).

ARGUMENT

I. Plaintiff's Allegations Establish It Lacks Standing To Bring Its Claims.

Plaintiff's entire lawsuit should be dismissed because it lacks both Article III and antitrust standing, essential predicates to its claims. Article III standing requires plaintiff to establish an "injury in fact" and "a causal connection between the injury and the conduct complained of." *N.J. Physicians, Inc. v. President of United States*, 653 F.3d 234, 238 (3d Cir. 2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). Similarly, antitrust standing demands a "causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm." *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 264 (3d Cir. 1998). The alleged injury also must be "of the type for which the antitrust laws were intended to provide redress." *Id.* (citations omitted).

Plaintiff cannot satisfy these prerequisites. Its allegations establish it has not suffered an injury in fact, and that any injury it alleges was not directly caused by Defendants' conduct it contends was anticompetitive. Plaintiff's claims should therefore be dismissed in their entirety. *See Camden County Bd. Of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 256 (3d Cir. 2000) (court lacks subject matter jurisdiction if plaintiff does not have Article III standing); *West Penn Power Co.*, 147 F.3d at 264 (citing *AGC*, 459 U.S. at 537–45) (affirming dismissal of antitrust claims where plaintiff failed to establish antitrust standing).

A. Plaintiff Does Not Allege Injury in Fact or Antitrust Injury.

There is a profound, and dispositive, disconnect between Plaintiff's claims and its own alleged experience. Plaintiff challenges certain of Defendants' contracting practices as anticompetitive, but does not allege that it ever became subject to the challenged provisions by *contracting* with Defendants.

Plaintiff claims that Defendants have employed "contract provisions that impede and effectively preclude Plaintiff's and the class members' ability to purchase sutures and endo distribution services from Defendants' competitors." (Compl. ¶ 4.) In particular, Defendants "market a bundle of Med-Surg products that include sutures and endo products with a so-called discounted distribution services fee. The discount is lost when a customer removes sutures and endo products from the bundle." (*Id.* ¶ 63.) Specifically, Plaintiff contends that "if an acute care provider wants to purchase Med-Surg products excluding sutures and endo products, the customer will be forced to pay a penalty in the form of enhanced distribution fee on the remainder of the Med-Surg basket." (*Id.* ¶ 56.) And, it asserts that the "distribution services penalty is economically prohibitive because the savings an acute care provider realizes by purchasing distribution services for sutures and endo products from Defendants' rival are

overwhelmed by the distribution services penalty the acute care provider must pay on the other twenty-eight categories of Med-Surg products." (*Id.* ¶ 58.)

Thus, the core of Plaintiff's case is that the ability of certain acute care providers to buy sutures and endo products from one of Defendants' competitors is limited because the discount (or penalty) Defendants purportedly use to incentivize customers to purchase a bundle of Med-Surg products (including sutures and endo products) from them is just too enticing. These allegations form the basis of every one of Plaintiff's claims—it contends that Defendants' so-called bundling practices have permitted Defendants to maintain a monopoly, constitute unlawful tying and exclusive dealing, and are the grounds for an illicit conspiracy.[3]

Yet, Plaintiff never alleges that it was subject to these challenged contract provisions, or that it contracted with either Defendant at all. It alleges only that it "directly pays one or more Defendants for the distribution of sutures and [endo] products." (Compl. ¶ 3.) Plaintiff does not allege that it purchased other Med-Surg products from either Defendant, or that it received a discount for doing so. It does not allege that it purchased sutures and endo products from one of Defendants' competitors and as a result was assessed a penalty on its purchases from Defendants. It does not allege that it wanted to purchase sutures and endo products from one of Defendant's competitors but was prevented from doing so by virtue of its contract with one of Defendants.

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[3] Count I: "Defendants imposed exclusive contractual terms . . . that severely penalized customers" for buying sutures and endo products from rivals." (Compl. ¶ 111.) Count II: Defendants leveraged "monopoly power over distribution services for Med-Surg products" to enforce exclusionary contracts. (*Id*. ¶ 117.) Count III: Defendants "employed functionally identical contractual terms that prevent their customers" from purchasing sutures and endo products from competitors. (*Id*. ¶ 125.) Count IV: the "bundling" of sutures and endo products with Med-Surg products. (*Id*. ¶ 129.) Count V: Defendants condition sales of sutures and endo products on sales of Med-Surg products. (*Id*. ¶ 132.) Count VI: "Defendants have tied Med-Surg distribution services" to the purchase of sutures and endo products. (*Id*. ¶ 136.)

At bottom, Plaintiff does not allege that it was subject in any way to the conduct that it contends was anticompetitive. It has therefore failed to allege injury in fact or antitrust injury, and its claims should be dismissed. *Brunswick*, 429 U.S. at 489; *AGC*, 459 U.S. at 545-46.

(1) Plaintiff Has Not Alleged Injury In Fact Because It Does Not Allege It Was Forced To Agree To The Contract Terms It Complains Of.

Although its claims hinge entirely on whether certain contractual provisions are lawful, Plaintiff never once alleges that it was in fact subject to the challenged provisions. Absent allegations that it was subject to the supposed wrongs, Plaintiff does not plausibly plead the requisite injury in fact and its claims do not pass go.

Plaintiff attempts to circumvent this inevitable result by alleging that it paid "supracompetitive" prices for sutures and endo products. But that conclusory allegation is not plausible in the context of Plaintiff's own allegations; it is, in fact, belied by them. The thrust of Plaintiff's allegations is that Defendants' purported practices of bundling lead to *lower* prices for customers—it is such lower prices that Plaintiff contends coerce customers to do business with Defendants and not their competitors. Lower prices are not "supracompetitive."

Plaintiff also alleges that Suture Express "compet[es] with Defendants to meet the suture and endo distribution services needs of acute care providers," and that Suture Express offers "lower distribution prices." (Compl. ¶¶ 34–35.) If (contrary to Plaintiff's other allegations) Defendants' prices for distribution of sutures and endo products were in fact supracompetitive, why did Plaintiff not buy from Suture Express instead? Since it does not allege that it was contractually prevented from buying from Suture Express (or any other distributor), Plaintiff had that option and surely would have exercised it in the face of supposedly supracompetitive prices from either Defendant. Plaintiff offers no explanation as to how to reconcile these irreconcilable

allegations. The label "supracompetitive" falls far short of satisfying Plaintiff's pleading obligation to allege standing.

(2) Plaintiff Has Also Failed To Allege That Its Claimed Injury Is Of A Type The Antitrust Laws Were Designed To Prevent.

Additionally, any supposed injury Plaintiff alleges to have suffered cannot qualify as antitrust injury, which itself is dispositive of its claims. Plaintiff must prove "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick,* 429 U.S. at 489. Despite Plaintiff's invocation of the label "supracompetitive," the prices it pays are not—by its own allegations—the result of any alleged antitrust violation and, hence, not antitrust injury. Plaintiff neither alleges that it was forced to buy sutures and endo products from Defendants because of its need to contract with Defendants for Med-Surg products, nor that either Defendant penalized it for buying the products from a competitor. Instead, Plaintiff's complaint is simply that it wanted to pay less for sutures and endo products than it paid, but that is not antitrust injury.

B. Plaintiff Alleges No Causal Connection Sufficient To Establish Standing.

Unable to allege any direct injury as a result of being subjected to an alleged tie, exclusive dealing, or any of the other conduct it attacks, Plaintiff alleges at best a tangential and convoluted causal chain between the supposedly illegal conduct and some injury that is too attenuated to support standing. Moreover, Plaintiff's own allegations defeat the necessary links in the chain.

Plaintiff starts with the premise that Defendants engaged in tying, exclusive dealing, and other conduct with respect to "at least a majority" of acute care providers, but not Plaintiff. (Compl. ¶ 54.) This conduct, it claims, could have forced specialty distributors to match Defendants' discounts (but they did not), and that having to match the discounts (lower prices) of

the full-line distributors would somehow raise the specialty distributors' costs. (*Id.* ¶ 91.) The raised costs would in turn raise those rivals' prices, thus enabling Defendants to raise their prices. (*Id.*) Alternatively, Plaintiff might theorize that the specialty distributor might eventually be forced out of the market, thus allowing Defendants to raise their prices.

Plaintiff's allegations, however, defeat these theories of injury. The first theory—that specialty suppliers' costs would rise, causing them to charge higher prices—makes no sense. Plaintiff alleges that "[t]here is no way" a specialty distributor could, in fact, afford to match Defendants' discounts, thus contradicting its allegation that the rivals would lower prices. (*Id.* ¶ 59; *see also id.* ¶ 89.) And if rivals could lower prices in response to Defendants, that would not raise their costs—the two are not connected. Moreover, a distributor cannot both offer deep discounts and increase its prices simultaneously, as Plaintiff's allegations would seem to suggest. If the specialty distributors do not raise prices (because they are offering discounts), nothing enables Defendants to raise prices. That is particularly true here in light of Plaintiff's acknowledgement of the existence of other full-line distributors such as Medline and other regional distributors, who could have matched Defendants' discounts on the full line of Med-Surg products and thus would not have been subjected to the alleged cost-raising conduct. (*See id.* ¶ 81.)

Plaintiff's second theory—that Defendants' alleged conduct might eventually drive specialty suppliers like Suture Express out of the market—fares no better. *First*, by Plaintiff's own allegations, Suture Express remains a competitor that offers lower prices (*id.* ¶ 32), and Plaintiff alleges nothing as to how Defendants could successfully charge supracompetitive prices in the face of such competition. *Second*, as with its first theory, Plaintiff's allegations regarding other competitive full-line distributors further render implausible the notion that Defendants

could charge supracompetitive prices. (Compl. ¶ 81.) *Third*, a theory that relies on what might happen in the marketplace, and whatever harm might flow therefrom, cannot support Plaintiff's effort to pursue damages today. *See In re McNeil Consumer Healthcare, et al., Mktg.& Sales Practices Litig.*, 877 F. Supp. 2d 254, 269 (E.D. Pa. 2012) (dismissing, finding no standing when plaintiff alleged only "abstract or conjectural or hypothetical" injury).

Because Plaintiff has failed to allege any causal connection between the conduct it challenges in Counts I–VI and its alleged injury, it lacks standing to sue, and its claims should be dismissed in their entirety.

II. Plaintiff's Allegations Preclude It From Stating A Claim For Monopolization, Attempted Monopolization, Or Conspiracy to Monopolize.

Counts I and IV should be dismissed on the additional and independent ground that Plaintiff's allegations defeat its claims of monopolization, attempted monopolization, and conspiracy to monopolize, as set forth below.

A. Plaintiff's Allegations Are Insufficient to Show that Either Defendant Has Sufficient Market Power to Support Its Monopoly Claims.

Plaintiff's monopolization claims depend on each Defendant's possession of "monopoly" power sufficient to raise prices and exclude competition. But Plaintiff's allegations establish the contrary—as the District of Kansas found in dismissing monopolization claims after evaluating nearly identical allegations involving the same Defendants. *See Suture Express*, 2013 WL 3991798, at *11. The same result is required under Third Circuit law; thus, the Court should dismiss Counts I and IV here.

(1) Plaintiff's Claim For "Shared" Monopoly Fails As A Matter Of Law.

Plaintiff has pled itself out of court for its claims under Section 2 of the Sherman Act by asserting that Defendants are individually, but simultaneously, monopolizing, attempting to, or conspiring to, monopolize the same alleged market. (*See* Compl. ¶¶ 111, 113.) "To pose a threat

of monopolization, *one firm alone* must have the power to control market output and exclude competition." *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1443 (9th Cir. 1995) (emphasis added).[4] Accordingly, courts have roundly rejected joint or shared monopoly theories. *See, e.g.*, *Suture Express*, 2013 WL 3991798, at *11 ("[I]t appears that most courts have rejected shared or joint monopoly arguments when analyzing § 2 claims"); *In re Mushroom Direct Purchaser Antitrust Litig.*, 514 F. Supp. 2d 683, 700–02 (E.D. Pa. 2007) (dismissing § 2 claims after rejecting "concerted monopolization" theory aggregating monopoly power).

(2) Neither Defendant Possesses Monopoly Power.

In addition, the shares of the alleged market that Plaintiff attributes to each Defendant, if proven, would preclude a finding of monopolization or attempted monopoly. Market share is the "primary determinant of whether monopoly power exists." *Pa. Dental Ass'n v. Med. Serv. Ass'n of Pa.*, 745 F.2d 248, 260 (3d Cir. 1984). It also is the "most significant" factor in proving a dangerous probability of achieving monopoly power for purposes of an attempt claim. *Synthes, Inc. v. Emerge Med., Inc.*, No. 11-1566, 2012 WL 4473228, at *11 (E.D. Pa. Sept. 28, 2012). Here, Plaintiff alleges that each "monopolist" is alleged to have less than 40 percent of the alleged markets for domestic distribution of sutures and endo products to acute care providers. That share is simply too small to plead the requisite monopoly power. *See, e.g.*, *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 201 (3d Cir. 1992) ("As a matter of law, absent

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[4] *See also, e.g.*, *Midwest Gas Servs., Inc. v. Ind. Gas Co.*, 317 F.3d 703, 713 (7th Cir. 2003) ("[A] § 2 claim can only accuse one firm of being a monopolist . . . ."); *Suture Express*, 2013 WL 3991798, at *11 ("[Shared or joint monopoly claims] contradict the basic concept that a monopoly is the domination of a market by a single firm"); *ID Sec. Sys. Canada, Inc. v. Checkpoint Sys., Inc.*, 249 F. Supp. 2d 622, 649 (E.D. Pa. 2003) ("[T]hose courts that have squarely addressed the issue have determined that §2 of the Sherman Act applies to the conduct of single firms only, rather than to the conduct of a small number of firms engaged in tacit collusion, as in cases involving oligopoly, shared monopoly, or, as here, duopoly.").

other relevant factors, a 55 percent market share will not prove the existence of monopoly power."); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 749 (3d Cir. 1996) (47 percent market share insufficient to prove monopoly power); *Only v. Ascent Media Grp., LLC*, Civ. No. 06-2123, 2006 WL 2865492, at *5 (D.N.J. Oct. 5, 2006) ("Courts generally do not find that a defendant . . . has monopoly power if it controls less than 50 percent of the given market.").

Plaintiff's claim for attempted monopolization is precluded by Plaintiff's allegations that each of the Defendants has less than a 40 percent share of the alleged market and that other competitors account for 28 percent of that market. *See Brunson Commc'ns, Inc. v. Arbitron, Inc.*, 239 F. Supp. 2d 550, 571 (E.D. Pa. 2002) (dismissing attempt claim, citing "presumption that attempt does not occur in the absence of a rather significant market share"); *Suture Express*, 2013 WL 3991798, at *10–11 (dismissing attempted monopolization claim against Cardinal and O&M based on the same allegations). Here, "the substantial market share that each defendant possesses is a factor which undermines a claim that either defendant possesses monopoly power or a dangerous potential to attain such power." *Suture Express*, 2013 WL 3991798, at *11; *see also Bayer Schering Pharma AG v. Sandoz, Inc.*, 813 F. Supp. 2d 569, 580 (S.D.N.Y. 2011) (dismissing monopolization claim: the "presence of other large competitors in the market undermines [the plaintiff's] claim"). The Complaint, in fact, acknowledges the existence of many other competitors in the alleged relevant markets, all of which vie for the same customers and provide a check on each competitor's power. (*See* Compl. ¶¶ 16, 17, 81.) That direct competitive pressure further underscores the lack of market power here. *See Bayer*, 813 F. Supp. 2d at 580.

B. Plaintiff's Allegations Do Not Support a Conspiracy To Monopolize.

In addition to other deficiencies explained below in Section III, Plaintiff's conspiracy to monopolize claim fails because Plaintiff does not allege that Defendants agreed to confer a monopoly on a single firm, as required for this cause of action. *See Sun Dun. Inc. v. Coca-Cola Co.*, 740 F. Supp. 381, 392 (D. Md. 1990) ("When . . . two or more competitors conspire to create a market environment in which competition and market entry is improperly restricted, but in which market power continues to be shared among these otherwise unrelated entities . . . there is no conspiracy to monopolize claim[.]") Moreover, it defies logic to assert that either Defendant would conspire to give the other Defendant monopoly power. *See Suture Express*, 2013 WL 3991798, at *11; *see also TV Commc'ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1026–27 (10th Cir. 1992) ("Because the [competitor defendants] would have no rational motive to create such an environment," it is "implausible" that the either defendant would conspire "to aid [the other] in its efforts to acquire or maintain" its *own* monopoly).

III. Plaintiff Fails To Allege A Plausible Antitrust Conspiracy.

Plaintiff's attempt to bring claims under Section 1 of the Sherman Act, which bars agreements in unreasonable restraint of trade, fails because the Complaint does not allege facts that plausibly show an unlawful agreement. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 315 (3d Cir. 2010) (a Section 1 claim requires a plaintiff to allege *facts* showing Defendants engaged in "some form of concerted action," meaning "a unity of purpose or a common design and understanding or a meeting of minds or a conscious commitment to a common scheme").[5]

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[5] Concerted action is also an essential element of Plaintiff's claim for conspiracy to monopolize under Section 2. *See, e.g., Twombly*, 550 U.S. at 556.

Instead, as discussed below, Plaintiff's allegations fall into two categories: (1) legal conclusions and (2) factual allegations that are legally insufficient to establish a conspiracy. Counts III and IV must therefore be dismissed.

A. Plaintiff's Conclusory Allegations Should Be Disregarded.

Plaintiff liberally peppers the Complaint with the word "scheme" and other similar buzzwords, and makes unadorned statements such as that Defendants "entered into and engaged in a conspiracy" (Compl. ¶ 124) and "conspired" and acted "in concert" (*id.* ¶¶ 128–129). These are precisely the kinds of labels and legal conclusions that the law requires the Court to disregard. *Twombly*, 550 U.S. at 555. As the Supreme Court has explained, "a bare assertion of conspiracy will not suffice." *Id.* at 556. *See also Iqbal*, 556 U.S. at 678–79 (warning against "unlock[ing] the doors of discovery for a plaintiff armed with nothing more than conclusions"); *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 224–25 (3d Cir. 2011) (allegations claiming defendants "acted in concert," input policies "at approximately the same time," and "reached illegal agreements" were conclusory and "not entitled to assumptions of truth").

B. Plaintiff's Mere Allegations Of Parallel Conduct Do Not Plead Conspiracy.

Like the Kansas plaintiff in *Suture Express*, 2013 WL 3991798, Plaintiff here asserts that "[t]he exclusionary practices employed by Defendants are strikingly similar." (*Compare* Compl. ¶ 66 *with Suture Express*, Case No. 2:12-cv-2760 (D. Kan.), Dkt. 19 ¶ 51 (hereinafter "*Suture Express* Complaint") ([T]he exclusionary practices directed at [plaintiff] and employed by [defendants] are strikingly similar.").) It is well established, however, that alleging parallel conduct does not allege conspiracy, because parallel conduct is usually fully consistent with unilateral, lawful conduct. *Iqbal,* 556 U.S. at 680 (even "well-pleaded" factual allegations of "parallel conduct, accepted as true, d[o] not plausibly suggest an unlawful agreement"; a complaint alleging only parallel conduct "*must* be dismissed."). As the District of Kansas

recognized, an allegation of "strikingly similar" conduct is insufficient because "conscious parallelism is not uncommon or unlawful in certain circumstances." *Suture Express*, 2013 WL 3991798, at *9 (quoting *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 321 n.19). In fact, drawing "mistaken inferences" of conspiracy from such allegations of mere parallel conduct—particularly where, as here, inferred from "price-cutting activities"—are "especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co, Ltd.. v. Zenith Radio Corp*., 475 U.S. 574, 594 (1986).

Thus, Plaintiff's reliance on allegations of parallel conduct is insufficient without more. Yet Plaintiff offers nothing more. "Plaintiffs relying on parallel conduct must allege" the existence of "plus factors" that tend to demonstrate the existence of an agreement rather than independent choice. *Ins. Brokerage,* 618 F.3d at 323. Such plus factors include: "(1) evidence that the defendant had a motive to enter into a . . . conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy." *Burtch*, 662 F.3d at 227 (quoting *Ins. Brokerage*, 618 F.3d at 321–322).

Plaintiff nowhere plausibly alleges *any* plus factor. As to the first plus factor, although Plaintiff asserts the conclusion that Defendants acted improperly, it pleads no *facts* demonstrating that Defendants possessed any anticompetitive "motive" (much less acted) to conspire. Plaintiff merely insinuates that Defendants possessed such a motive because one of their rivals, Suture Express, experienced success in the marketplace. (Compl. ¶¶ 36, 51.) But allegations of a desire to increase profits in light of challenges from competitors are insufficient to establish the first plus factor. *Burtch*, 662 F.3d at 229 (the "motive to increase profits . . . without a scintilla of evidence of concerted, collusive conduct . . . does not on its own constitute evidence of a plus factor.") (internal quotations and citations omitted).

Nor does Plaintiff adequately plead that either Defendant acted inconsistently with its independent self-interest. In an effort to allege this plus factor, Plaintiff essentially copied an allegation from the *Suture Express* complaint that failed there—and should fail here as well. Plaintiff's version is that Defendants' conduct "defies the logic of independent economic actors" because "following Cardinal's imposition of contractual penalties against acute care providers that . . . purchase sutures and endo distribution services from a rival, if O&M was acting independently, it would offer the products without penalty to increase its market share."[6]

But as the *Suture Express* court explained, "[t]he fact that a 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." *Suture Express*, 2013 WL 3991798, at *9; *see also Ins. Brokerage*, 618 F.3d at 327 ("mere fact that each insurer entered into a similar contingent commission agreement" did not plausibly infer conspiracy because "the obvious explanation for each insurer's decision . . . was that each insurer independently calculated that it would be more profitable to be within the pool than without"). Indeed, if they were prohibited from requesting that customers commit to a loyalty requirement in exchange for discounts, broad-based distributors like Defendants would find it difficult to respond to customer demand for lower prices. *Cf.* Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law: Analysis of Antitrust Principles and Their Application* § 1807b2 (3d ed. 2012) (in general, quantity and loyalty discount programs are "undoubtedly designed to reflect the reduced costs of larger transactions;"

[6] Suture Express's version was similar: Defendants' conduct "defies each distributor's independent economic interests," because in response to "Cardinal's imposition of contractual penalties on acute care providers who seek to purchase from Suture Express," O&M, if acting independently, "would seek these customers' business by offering Med-Surg products without the penalty." (*Suture Express* Complaint ¶ 52.)

thus, "antitrust should encourage them"). Conduct that lowers prices is encouraged and cannot be deemed contrary to a firm's unilateral self-interest.

The Complaint is also entirely bereft of allegations regarding actual conspiratorial conduct sufficient to satisfy the third plus factor. That's why Plaintiff relies on inadequate allegations of parallel conduct in the first place. Plaintiff's allegations of mere parallel conduct do not come close to pleading "an actual, manifest agreement not to compete" or "proof that the defendants got together and exchanged assurances of common action." *Burtch*, 662 F.3d at 227. Plaintiff simply alleges that Defendants' actions were "strikingly similar" and employed "in unison," not that Defendants actually agreed with each other to put their respective pricing policies in place. (Compl. ¶¶ 66, 67.) As a matter of law, that is not enough. *Iqbal,* 556 U.S. at 680.

C. Plaintiff's Allegations Of Opportunities To Conspire Are Insufficient.

Plaintiff's allegations that Defendants are members of a trade association that hosts a number of annual conferences also fail to transform the merely "strikingly similar" conduct into an antitrust conspiracy. (Compl. ¶¶ 66, 67, 69, 70.) Trade association membership is common, legitimate conduct that does not in itself establish a conspiracy. *See In re Processed Egg Prods. Antitrust Litig.*, 821 F. Supp. 2d 709, 722 (E.D. Pa. 2011) ("participation in a trade group association and/or attending trade group meetings, even those meetings where key facets of the conspiracy allegedly were adopted or advanced, are not enough on their own to give rise to the inference of agreement to the conspiracy."); *Twombly*, 550 U.S. at 567 n.12 (dismissing the Dissent's argument that membership in trade associations suggests defendants conspired). And Plaintiff does not even allege that Defendants attended any of the same conferences, let alone that representatives with responsibility for the challenged practices attended and engaged in illicit exchanges. (*See* Compl. ¶¶ 71–76.) At best, Plaintiff's allegations amount to nothing

more than possible opportunities to conspire, which are legally insufficient to support a viable conspiracy claim. *See Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1242 n.15 (3d Cir. 1993); *Ins. Brokerage*, 618 F.3d at 349.

IV. Plaintiff Fails To Plead Essential Elements of Its Tying Claims.

The Complaint also fails to allege a tying violation pursuant to Section 1 of the Sherman Act. "Many tying arrangements . . . are fully consistent with a free, competitive market." *Ill. Tool Works Inc. v. Indep. Ink. Inc.*, 547 U.S. 28, 45 (2006); *see also Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 11-12 (1984), *overruled on other grounds*, *Ill. Tool Works Inc. v. Indep. Ink*, 547 U.S. 28 (2006). The "essential" characteristic of an unlawful tying agreement is "the seller's exploitation of its control over the tying product [here, Med-Surg distribution services] to force the buyer into the purchase of a tied product [here, sutures and endo distribution services] that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish*, 466 U.S. at 12; *see also Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 476 (3d Cir. 1992). This control over the tying product is required because without it, a seller cannot "force" customers to purchase products that they otherwise would not want. *Town Sound*, 959 F.2d at 478. In this Circuit, tying claims can be analyzed under two different standards: (1) per se, and (2) rule of reason. *See id.* at 475–85. Counts II and VI fail under both.

A. Because Plaintiff Did Not Plead Sufficient Market Power In The Tying Market, Its Per Se Tying Claim Fails.

For its per se tying claim to survive Rule 12, Plaintiff must, but did not, allege that either Defendant has market power in the tying product market. Low market share is a strong indication that a party does not have market power, and the Third Circuit has held that low market share "provides unrefuted evidence that [the defendant] lacks power in the tying market."

Town Sound, 959 F.2d at 481 (citing *Times-Picayune Publ'g. Co. v. U.S.*, 345 U.S. 594, 612–13 (1953), for the holding that 33–40 percent market share was "insufficient to invoke 'per se' rule")). Plaintiff alleges that the tying market here is Med-Surg distribution services to acute care providers, of which Cardinal has about a 33 percent share, and O&M has approximately a 39 percent share.

These market shares fall below the requisite threshold for market power. *See Jefferson Parish*, 466 U.S.at 26–29 (1984) (30% marketshare insufficient to demonstrate an illegal tying arrangement); *Med Alert Ambulance, Inc. v. Atlantic Health Sys., Inc.*, Civ. No. 04-1615 (JAG), 2007 WL 2297335, at *9–10 (D.N.J. Aug. 6, 2007) (31% market share insufficient to show defendant "dominant" for purposes of per se tying); *Gordon v. Lewistown Hosp.*, 272 F. Supp. 2d 393, 433 (M.D. Pa. 2003) ("39% market share is legally deficient to establish market power;" and noting existence of several competitors "located in close proximity to Plaintiff [ ] who could provide substitute service"); *Greene County Mem'l Park v. Behm Funeral Homes, Inc.*, 797 F. Supp. 1276, 1287–88 (W.D. Pa. 1992), *aff'd*, 993 F.2d 876 (3d Cir. 1993) (largest competitor's market share of 33–43% insufficient as a matter of law to assert a per se tying claim). As well-regarded antitrust scholars have noted, there is "substantial merit in a presumption that market shares below 50 or 60 percent do not imply [appreciable economic] power." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: Analysis of Antitrust Principles and Their Application*, § 1736e1 (3d ed. 2012).

Plaintiff's allegations regarding competition in the alleged tying product market further underscore each Defendant's lack of market power: O&M and Cardinal compete not only with each other, *but with several others* to provide Med-Surg products to acute care customers, and those other competitors—including Medline and a number of regional and local distributors—

have won nearly 30 percent of the tying product market. (Compl. ¶¶ 16–17, 81.) The presence of other strong competitors who can act as a check on anticompetitive behavior negates any claim that either Defendant possesses substantial power. Similar to monopolization, where a second large competitor prevents the first from charging monopoly prices, one competitor cannot subject customers to an unwanted tie when a second large competitor exists in the market. *Cf. Suture Express*, 2013 WL 3991798, at *11 (citing *Bayer*, 813 F. Supp. 2d at 580); *See In re Wireless Tel. Servs. Antitrust Litig.*, No. 02 Civ. 2637 (DLC), 2003 WL 21912603, at *7 (S.D.N.Y. Aug. 12, 2003) (presence of other major competitors in market undermined idea that any defendant had the ability to exploit its dominance in the tying product market). That is because customers who are displeased with either Defendant's sales practices can turn to other vendors to satisfy their needs; none are "forced" to buy from either Defendant on any terms (*cf.* Compl. ¶¶ 16–17, 81). The *Suture Express* court dismissed the identical per se tying claim because Defendants lacked market power. *Suture Express*, 2013 WL 3991798, at *4. The same result is warranted here.

B. Plaintiff's Rule Of Reason Tying Claims Also Should Be Dismissed.

The fact that neither Defendant possesses market power is also dispositive of Plaintiff's rule of reason tying claim. The Supreme Court has made clear that every tying claim requires proof or market power in the tying market: "[I]n *all* cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." *Ill. Tool Works*, 547 U.S. at 46 (emphasis added).

But even under the standards enunciated in *Town Sound*, a Third Circuit case pre-dating *Illinois Tool Works*, the rule of reason claim still fails. As an initial matter, the *Town Sound* court recognized that market power *is* required for a tying claim based on a leveraging theory—i.e., using power in one market to gain an advantage in another—even under a rule of reason

analysis. 959 F.2d at 486. The court explained that "if forced sales and other anticompetitive effects are occurring," the cause could not be the defendant's dominance in the marketplace where the defendant had a small share of the market. *Id.* at 486. Thus, the court insisted that the plaintiffs "tell us what else: they must state *some* plausible theory of antitrust harm that does not depend implicitly on power leveraging." *Id.*

Here, however, Plaintiff's allegations of market shares for each Defendant, and the shares of other competitors, preclude any showing of dominance by either Defendant in the tying market, so no leveraging theory of injury is available, and Plaintiff alleges no other plausible theory of injury. Plaintiff does not even allege the "forced sales" that tying requires because Plaintiff does not allege that *it* was forced to buy a package of products from either Defendant. (*Cf.* Compl. ¶¶ 3, 56.) "[W]here the buyer is free to take either product by itself[,] there is no tying problem even though the seller may also offer the two items as a unit at a single price." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 6 n.4 (1958). Because Plaintiff's allegations demonstrate that it, and presumably many other customers, were fully capable of purchasing sutures and endo products separately, there can be no "unreasonable restraint on competition." (Compl. ¶¶ 16, 17.)

Nor can the alleged discounts constitute the necessary coercion for a tying claim. In *Warren Gen. Hosp. v. Amgen, Inc.*, No. 09-4935, 2010 WL 2326254 (D.N.J. June 7, 2010), *aff'd*, 643 F.3d 77 (3d Cir. 2011), a drug manufacturer was alleged to have tied sales of its products in one drug market to sales of its products in a second market. *Id.* at *7. But "the alleged coercion and improper leveraging . . . occurred in the form of setting target purchase amounts to earn rebates[.]" *Id.* Because the hospital "neither expressly charge[d] nor inferentially allege[d]" that the drug manufacturer "*will not sell* WBCCGF unless a buyer also purchases Aranesp," and

defendant had merely "created a pricing and discount scheme that a buyer may take advantage of if it buys both Amgen products," tying was not pled. *Id.* (emphasis added). *See also Broadcom Corp. v. Qualcomm Inc.*, No. Civ. A 05-3350 MLC, 2006 WL 2528545, at *15 (D.N.J. Aug. 31, 2006), *rev'd in part on other grounds*, 501 F.3d 297 (3d Cir. 2007) (no tie because discounting only "strongly discourage[d]" purchase of non-branded chipsets; it did not foreclose customer's ability to get a license from patentee without buying a branded chipset). Similarly here, Plaintiff has not alleged that either Defendant *refuses* to sell customers its other Med-Surg products unless those customers also purchase sutures and endo products. Rather, its pleading implies that the products *are* available from either Defendant separately—just not at the same discounted price. (*Cf.* Compl. ¶¶ 56–57.)

Although the District of Kansas permitted Suture Express's rule of reason claims to survive, its reasoning on that issue does not apply here. There, the court held that to allege a viable rule of reason tying claim, a plaintiff must allege facts showing that the agreement "had a substantially adverse effect on competition in general," *Suture Express*, 2013 WL 3991798, at *5. It found that Suture Express met this requirement in two ways: by alleging that "numerous hospitals and other acute care providers that would prefer to purchase sutures and endo products from [Suture Express] are prohibited from doing so," and by alleging that "the tying activity deprives numerous purchasers' access to a more comprehensive product line, superior service and lower distribution fees." *Suture Express*, 2013 WL 3991798, at *5. Here, however, Plaintiff does *not* allege that it has been prevented from purchasing sutures and endo products from suppliers other than Defendants, and thus it cannot allege that it has been "prohibited" or deprived" of the opportunity to do so. Nor does Plaintiff allege that it would prefer to purchase

products from Suture Express (and, indeed, it may have done so). Plaintiff's rule of reason tying claim, like its per se claim, should be dismissed.

V. Plaintiff's Allegations Defeat Its Exclusive Dealing Claim.

"Exclusive dealing arrangements . . . generally pose little threat to competition" because they "are often entered into for entirely procompetitive reasons." *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012). That is because exclusive dealing arrangements can "assure supply, price stability, outlets, investment, best efforts or the like—and pose no competitive threat at all." *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 76 (3d Cir. 2010) (quoting *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc.*, 357 F.3d 1, 8 (1st Cir. 2004)). Exclusive dealing agreements "pose a threat to competition *only* in very discrete circumstances." *E. Food Servs.*, 357 F.3d at 8 (emphasis added). Plaintiff has not alleged such circumstances, and Count V should be dismissed.

A. Plaintiff's Allegations Demonstrate That Defendants' Agreements Do Not Have The Potential To Foreclose Competition.

Plaintiff's own alleged experience highlights the fallacy of its exclusive dealing claim. It does not allege that *it* entered into any "exclusionary" contract with either Defendant. Plaintiff states only that it "directly pays one or more Defendants for the distribution of" sutures and endo products. (Compl. ¶ 3.) Plaintiff thus concedes it is free to purchase its sutures and endo products—and any of its other Med-Surg requirements—from any of Defendants' rivals, including Suture Express (*id.* ¶ 32), Medline, or one or more of the regional or local distributors alleged to exist. (*Id.* ¶ 81.) Plaintiff is itself proof that Defendants' alleged practices do not amount to the kind of broad-based forcing that would have the potential to foreclose a substantial sector of the alleged market—an essential aspect to any cognizable exclusive dealing claim. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). That some

customers *choose* to enter into discount contracts with Defendants, even though, like Plaintiff, they could purchase sutures and endo products without one, suggests only that some customers view the terms of the exclusive contracts as desirable. In other words, the fact that customers willingly chose to enter the contracts confirms both that they are pro-competitive and that they are not sufficiently exclusionary to support an antitrust claim.

Indeed, Plaintiff does not state that the contracts it challenges here require customers to purchase *any* quantity of products from either Defendant for *any* period of time. (*See* Compl. ¶¶ 53–54, 11, 117, 131–34.) Because Plaintiff does not allege that Defendants' agreements "contractually obligate[] . . . customers to purchase anything," customers "could choose at any time to forego the discount offered by [O&M] and purchase from a . . . competitor"—as Plaintiff itself could do. *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 997 (9th Cir. 2010); *see also Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059 (8th Cir. 2000) (defendant's discount programs were not "exclusive" because they "did not require the boat builders to commit to Brunswick for any specific period of time" and customers "were free to walk away from the discounts at any time").

And customers allegedly have many competitors to choose from, including Medline, any regional distributors, any local distributors (Compl. ¶ 81), or Suture Express. (*Id.* ¶ 32). That *choice* in the marketplace means that customers cannot be constrained by any allegedly anticompetitive conduct, because if any one distributor's terms are perceived to be unfavorable or unduly restrictive, customers easily can (and will) take their business elsewhere. For this reason, the alleged agreements can have no foreclosure effect.

B. Plaintiff's Allegations Do Not Show Substantial Foreclosure.

What Plaintiff pleads establishes that Defendants' alleged practices *qualitatively* do not substantially foreclose competition. What Plaintiff does not plead establishes that Plaintiff has

failed to sufficiently allege *quantitative* foreclosure. Plaintiff merely asserts the factually vague conclusion that Defendants have entered into the challenged contracts "with at least a majority of acute care providers." (Compl. ¶ 54.) But a majority could be as little as 51 percent, with a nearly identical percentage of the market—49 percent—*not* foreclosed to rivals by Defendants' contracts. And even where exclusive contracts foreclose competition in a substantial part of the market, "there will normally be no serious effects in certain conditions," such as, for example, when "the contracts are for short terms." *E. Food Servs.*, 357 F.3d at 8. Plaintiff conclusorily pleads that Defendants' contracts are difficult to terminate, but asserts no *facts* in support of this conclusion as required by *Twombly*. (*See* Compl. ¶¶ 111, 117.)

CONCLUSION

For the foregoing reasons, Defendants Owens & Minor Distribution, Inc., and Cardinal Health 200, LLC, request that the Court dismiss all of Plaintiff's claims.

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Respectfully submitted,

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