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. CARDINAL HEALTH, INC., CARDINAL HEALTH 200, LLC, OWENS & MINOR, INC., and OWENS & MINOR DISTRIBUTION, INC., Defendants.	)	No. 12-cv-07065-JS Honorable Juan R. Sánchez

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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INTRODUCTION

Defendants Cardinal Health 200, LLC ("Cardinal") and Owens & Minor Distribution, Inc. ("O&M") engaged in unlawful, anticompetitive conduct that stifled competition in the sutures and endomechanical products ("endos") distribution market, and caused **all** of Defendants' hospital and acute care provider customers, including Plaintiff Schuylkill Health System, to pay overcharges for the products necessary to treat their patients. When faced with competition from Suture Express, a smaller company that offered a better selection of sutures and endos at lower prices with superior service, Cardinal and O&M—with a combined 72% share of the sutures and endos distribution market—could have competed by lowering their own prices. Instead, both Cardinal and O&M responded by imposing contractual terms that punish customers who chose to purchase from Suture Express, by charging steep penalty prices on **twenty-eight other** product lines that Suture Express did not sell. As a result, Suture Express was foreclosed from a significant portion of the market, and all of Defendants' customers—whether or not their own contracts provided for such penalties—paid more for sutures and endos than they would have paid in a market featuring vibrant competition from Suture Express.

This Court should reject Defendants' effort to escape liability for the damage their anticompetitive distortion of the market caused to hospitals and acute care providers. As a direct purchaser in a restrained market alleging that it paid higher prices as a result of Defendants' scheme, Plaintiff has standing. And Plaintiff's complaint sufficiently and plausibly alleges antitrust claims for bundling, tying, exclusive dealing, conspiracy, and monopolization.

FACTUAL BACKGROUND

Defendants are the dominant distributors of medical and surgical ("med-surg") products to acute care providers in the nation, jointly accounting for 72% of the industry's $22 billion in

annual revenue. Am. Class Action Compl. ("Compl.") ¶¶ 16-17, 21, 23, ECF No. 38.[1] They are the only major national distributors in this concentrated market,[2] which is characterized by significant barriers to entry, including high fixed costs, economies of scale, and compliance with burdensome federal, state, and local government regulations. *Id*. ¶¶ 37, 43-46, 81. To artificially preserve their incumbency, Defendants have employed a web of exclusionary contracts that condition the realization of purported "discounts" upon their customers' refusals to deal with their competitors—a practice that has insulated Defendants from competition and entrenched their already substantial market positions. *Id*. ¶¶ 5, 41, 47, 50-64, 66-80.

In order to care for their patients, hospitals and other acute care providers require a variety of sutures and endos, dependent on their particular medical need, surgical application, and individual practitioners' preferences. *Id*. ¶ 30. As such, all else equal, providers prefer distributors that offer the largest selection of sutures and endos at the lowest prices. *Id*. ¶ 31. Until 2008, a specialty distributor called Suture Express succeeded by offering just that—the largest selection of sutures and endos with lower prices, higher order fill rates, superior delivery service, and no restocking fees. *Id*. ¶¶ 32-36. Beginning in 2008, however, Defendants implemented contracting strategies that condition customers' pricing on all thirty med-surg product categories on their purchases of sutures and endos, *id*. ¶¶ 22, 57-59, with the aim of forcing rivals such as Suture Express to compete across either **all** med-surg product lines, or else **none**, *id*. ¶ 33.[3] The contracts provide that if customers purchase even small quantities of sutures

[1] Cardinal accounts for 33% of this total and O&M for 39%. Compl. ¶ 16.

[2] Since 2004, Defendants have acquired a number of their competitors, further concentrating the market. Compl. ¶¶ 78-82.

[3] Entry by a distributor along all product lines is substantially more expensive and burdensome than entry along one or a few, and thus such entry is substantially less likely. Compl. ¶ 33.

and endos from one of Defendants' rivals, they pay a penalty in the form of higher prices on all twenty-eight unrelated med-surg products. *Id*. ¶¶ 53, 56-59, 62.

Because the aggregate penalty on all med-surg product lines **exceeds** the cost for sutures and endos, an equally efficient rival with a less diverse product line cannot compensate purchasers who "break the bundle" **even if they give away the products for free**. *Id*. ¶¶ 59, 68, 85-89, 91. The consequence of this penalty program is to deter the majority of Defendants' customers from dealing with lower-cost rivals. *Id*. ¶¶ 36, 46, 54-65, 90, 93, 97. This scheme injures all direct purchasers **regardless** of whether they themselves are subject to the contractual restraints, because the aggregate effect of the restraints forecloses competitors from the market, which lessens price competition and allows Defendants to charge higher prices than would be possible under competitive conditions. *Id*. ¶¶ 36, 90, 93-94, 97-108.

ARGUMENT

On a motion to dismiss, the "question is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims." *Dorsey v. Daub*, No. 09-CV-3879, 2011 WL 322887, at *3 (E.D. Pa. Feb. 2, 2011) (internal citation omitted); *accord Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 318 (3d Cir. 2008).[4] The Court "must accept as true all well-pleaded allegations and draw all reasonable inferences in favor of the nonmoving party." *Nat'l Educ. Fin. Servs., Inc. v. U.S. Bank, Nat'l Ass'n*, No. 12-6651, 2013 WL 6228979, at *2 (E.D. Pa. Dec. 2, 2013) (internal citation omitted). Plaintiff's allegations need only be "plausible"—there is no "heightened pleading standard" for antitrust cases. *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 98 (3d Cir. 2010). Plaintiff's complaint satisfies this pleading standard:

[4] *See also Cummings v. Smith*, No. 09-0335, 2013 WL 5377376, at *2 (E.D. Pa. Sept. 25, 2013) ("factual issues [ ] are not properly resolved on a motion to dismiss").

- As a customer alleging that it paid higher prices as a result of Defendants' anticompetitive conduct, Plaintiff has standing to pursue its claims. Paying higher prices is a quintessential form of antitrust injury and Defendants' characterization of their price penalties as "discounts" does not change the economic reality that harmed their customers. And as numerous courts have recognized, damages from bundling are not limited to customers that were subject to the anticompetitive contracts themselves, but rather extend to **all** customers in a distorted market.

- Apart from their meritless standing argument, Defendants do not challenge Plaintiff's claim of anticompetitive bundling in violation of Section 1 of the Sherman Act (Count II). This claim, which was not asserted in the competitor suit brought by Suture Express, is based on a legal theory distinct from the tying claim challenged by Defendants in their motion.

- Defendants' attack on Plaintiff's tying claim (Count VI) also fails, just as it did in the District of Kansas. *See Suture Exp., Inc. v. Cardinal Health 200, LLC*, No. 12-2760-RDR, 2013 WL 3991798, at *5-7 (D. Kan. Aug. 5, 2013).

- Similarly, the Court should reject Defendants' arguments concerning Plaintiff's claim for exclusive dealing under Section 3 of the Clayton Act (Count V), which claim was upheld in Kansas. *See id.* at *11-13.

- Plaintiff plausibly pleads a horizontal conspiracy between Cardinal and O&M (Count III), with additional and more detailed allegations concerning "plus factors" not included in the Suture Express complaint.

- Plaintiff's monopolization claims (Counts I and IV) are sufficiently pleaded. Defendants' market shares are properly aggregated where, as here, a conspiracy is alleged. And in any event, economic theory supports aggregation of their shares regardless of the existence of a conspiracy.

I. Plaintiff Has Standing to Pursue Its Claims

A. Customers in The Restrained Market Have Standing, Not Just Competitors

Contrary to Defendants' suggestion, standing in antitrust cases is not limited to injured competitors. Defs.' Mem. at 1 (attempting to distinguish the Kansas case because it "was brought by a competitor who claimed that Defendants' contracting practices were preventing it from making sales"). Rather, antitrust injury is suffered by both "consumers **and** competitors in the restrained market." *SigmaPharm, Inc. v. Mut. Pharm. Co., Inc.*, 772 F. Supp. 2d 660, 673 (E.D. Pa. 2011) (emphasis added), *aff'd,* 454 F. App'x 64 (3d Cir. 2011), *cert. denied,* 133 S. Ct. 110

(2012). This is because purchasers of a product are "directly injured" by anticompetitive conduct when they pay the "inflated prices" that result. *Id.* at 676. As the Third Circuit has explained, "[w]hen the plaintiff's injury is linked to the injury inflicted upon the market, such as when consumers **pay higher prices because of a market monopoly** or when a competitor is forced out of the market, the compensation of the injured party promotes the designated purpose of the antitrust law—the preservation of competition." *W. Penn.*, 627 F.3d at 101 (emphasis added) (quoting *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 597 (7th Cir. 1995)).

B. Defendants' Bundling Results in Overcharges to Customers

Plaintiff alleges that Defendants' anticompetitive contract provisions resulted in higher prices for all of Defendants' customers, including Plaintiff. As the District of Kansas found, Suture Express adequately pleaded antitrust injury flowing from this same conduct, based on allegations that Defendants' bundling "reduce[d] the level of competition in the distribution of sutures and endo products." *Suture Exp.*, 2013 WL 3991798, at * 7. With such reduced competition, "higher prices are almost inevitable." *Bon-Ton Stores, Inc. v May Dep't Stores Co.*, 881 F. Supp. 860, 862 (W.D.N.Y. 1994); *see also LePage's Inc. v. 3M*, 324 F.3d 141, 159 (3d Cir. 2003) (en banc) ("[E]ven the foreclosure of one significant competitor from the market may lead to higher prices and reduced output.") (internal citation omitted).[5]

It is of no significance that Defendants prefer to characterize what they are doing as providing "discounts" to loyal customers. Defs.' Mem. at 9. In reality, Defendants' contracts

[5] Defendants' assertion that Plaintiff has no claim because Suture Express remains in the market, Defs.' Mem. at 9-10, is wrong as a matter of law. *See U.S. v. Dentsply Int'l, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005) ("[I]t is not necessary that all competition be removed from the market. The test is not total foreclosure[.]"); *see also LePage's*, 324 F.3d at 175 (the excluded competitor "LePage's had 67% of the private label business at the time of trial"); *Bradburn Parent/Teacher Store, Inc. v. 3M*, No. 02-7676, 2000 WL 34003597, at *4 (E.D. Pa. July 25, 2003) (conduct in *LePage's* gave rise to direct purchaser claims for overcharge damages).

threaten customers with severe price **penalties** on a range of twenty-eight other products if they choose to purchase less expensive sutures and endos from Suture Express. Compl. ¶¶ 32, 35, 56-57. If these threatened penalties did not foreclose Suture Express from a significant portion of the market, then Suture Express and Defendants would compete with one another on price, driving down prices for all hospitals and acute care providers. *Id.* ¶¶ 42-43, 51, 56, 58, 96-98.

Consider a hospital subject to one of Defendants' anticompetitive contracts that wishes to purchase sutures and endos from Suture Express but continue to purchase the other twenty-eight products in the bundle from Cardinal or O&M, since Suture Express does not sell those other products. Compl. ¶¶ 32, 35, 56. Although the sutures and endos themselves would be less expensive, Defendants would punish the hospital for its defection by increasing its prices on the full range of twenty-eight other products. *Id*. ¶¶ 35, 56-58. Because Suture Express—or any less diverse but equally or more efficient rival—would be unable to compensate the customer for the massive penalties assessed by Defendants, even if the competitor **gave the product away for free**, the customer would likely remain with Defendants, and Suture Express would be foreclosed. *Id*. ¶¶ 56-59, 68, 85-85, 91, 94, 96-97. As a result, Defendants avoid the need to compete through offering lower prices, and prices charged to all hospitals and acute care providers—by Cardinal, O&M, **and** Suture Express—would remain higher than in a world featuring vigorous competition among all three. *Id*.. ¶¶ 42-43, 51, 56, 58, 96-98.

As an official from the U.S. Department of Justice has explained, "the loyalty discount functions like a tax on purchases from the rival. Thus the incumbent can make it more expensive for its rivals and its customers to trade with each other, and drive sales to its own product." Fiona Scott-Morton, *Contracts That Reference Rivals*, Speech at Georgetown University Law Center (Apr. 5, 2012) (transcript available at http://www.justice.gov/atr/public/speeches/281965.pdf).

Indeed, "[c]alling such pricing a bundled 'discount' is actually misleading . . . because it wrongly implies that there is a true discount from the but-for price (that is, the price that would have been charged 'but for' the bundling)." Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 402 (2009).

> Unfortunately, the rhetoric of the word 'discounts' has beguiled many into mistakenly assuming that bundled discounts must lower prices to buyers and thus should be deemed 'presumptively procompetitive.' However, all a bundled 'discount' means is that the defendant charges higher prices to buyers who won't comply with a bundling condition than to buyers who will. . . . If the unbundled price charged to noncompliant buyers exceeds the but-for level, then the program in fact imposes a price **penalty** on buyers who refuse the bundle.

Id. at 450 (emphasis added).

Defendants' notion that "[a] distributor cannot offer both deep discounts and increase its prices simultaneously" therefore misses the mark. Defs.' Mem. at 7. There are no true "deep discounts" here, only threatened penalties that succeed in keeping suture and endo prices artificially high. *See* Elhague, 123 HARV. L. REV. at 450 ("[T]he defendant can set the noncompliant prices at whatever level it wishes . . . . There is no warrant for presuming that noncompliant prices equal but-for prices, and thus no justifiable grounds for assuming that 'discounts' from noncompliant prices reflect true discounts from but-for levels.").

The proper inquiry is whether the Defendants' prices for sutures and endos distribution services, accounting for any discounts, are nonetheless higher than the prices that would have prevailed but for the exclusionary bundling (i.e., under competitive conditions). *See* 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 783 (7th ed. 2012) ("Thus, damages are to be calculated by determining what the plaintiff's experience would have been 'but for' the antitrust violation, and then comparing that to its experience in the actual world."); *accord Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 374 (3d Cir. 2005);

see also Bradburn, 2000 WL 34003597, at *4 (plausible bundling claim alleging that "the prices that plaintiff paid . . . would have decreased to the point where they were less than the price Plaintiff actually paid . . . during the damages period, even after any rebates or discounts provided by Defendant are taken into account"). This is the scenario Plaintiff has pleaded.

C. Defendants' Conduct Harms All Customers, Not Only Those Subject to the Anticompetitive Contracts

Because Defendants' conduct resulted in overcharges to all customers, standing is not limited to those hospitals and acute care providers that were themselves subject to anticompetitive contracts. This is because a direct purchaser need not allege that it was directly implicated in the exclusionary conduct, only that the "injury claimed result[ed] from the anticompetitive **outcomes** of the alleged conduct." *SigmaPharm*, 772 F. Supp. 2d at 672 (emphasis added). The question is whether the alleged conduct stifles competition, which allows Defendants to impose higher prices on direct purchasers than would be possible in a more competitive market.[6]

The same argument advanced by Defendants was recently rejected by another court in this Circuit, which found it irrelevant to the plaintiffs' bundling claim that there was no allegation that the plaintiffs themselves were subject to the anticompetitive contracts:

> Plaintiffs' claims are not based on that single contract; they are based on the effect of a 'web of contracts' and other activities; it is the cumulative impact of the contracts and actions that is at the heart of Plaintiffs' claims[,] not any particular contract in isolation. . . . [Defendant] points out that Plaintiffs 'do not allege they were members of a PBG or were participants in any [of Defendant's] PBG Agreement[s].' While such pleading would have added more factual clarity, the

[6] For similar reasons, antitrust plaintiffs have cognizable claims where a defendant fraudulently obtains patents to block a rival from coming to market, *see In re Neurontin Antitrust Litig.*, MDL No. 1479, 2009 WL 2751029, at *4-6, 10-12 (D.N.J. Aug. 28, 2009), or uses sham product innovations to block efficient means of rival entry, *see In re Tricor Direct Purchaser Antitrust Litig.*, 432 F. Supp. 2d 408, 423-24, 434 (D. Del. 2006), even though neither scheme involves the direct purchasers themselves.

> Court does not find this omission significant for purposes of this motion. Plaintiffs' claims are not based on a particular PBG contract nor are they limited to damages flowing from membership in a PBG. Plaintiffs assert that they are purchasers of pediatric meningococcal vaccines and that all purchasers, whether members of PBGs or not, were forced to pay artificially inflated prices as a result of [Defendant's] actions. . . .

Adriana Castro, M.D., P.A. v. Sanofi Pasteur Inc., No. 2:11-cv-07178-JLL-MAH, Op. at 8, 13 n.6 (D.N.J. Aug. 6, 2012) (internal citations omitted).[7]

Similarly, here the aggregate effect of Defendants' conduct forecloses rivals such as Suture Express, depriving customers of the benefit of a competitive market and resulting in higher prices. Compl. ¶¶ 36, 46, 54-65, 90, 93, 96-98. This harms all market participants, whether or not their own contracts included anticompetitive terms. *See, e.g.*, *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Ltd.*, 262 F.R.D. 58, 70 (D. Mass. 2008) ("As a matter of general antitrust law, injury to competition, and thus higher prices, can be inferred where plaintiff demonstrates a prima facie case of exclusive dealing and a substantial foreclosure to the market."); *Palmyra Park Hosp., Inc. v. Phoebe Putney Mem'l Hosp.*, 604 F.3d 1291, 1303 (11th Cir. 2010) ("This prevents [plaintiff] from competing . . . in the market for the tied products. As a result, there is less competition for the tied products, which means higher prices and fewer choices for consumers.").[8]

Because direct purchasers' injury flows from the harm to price competition, courts in bundled-loyalty cases have certified classes of **all** direct purchasers, even though some—or even

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[7] Attached as Exhibit 1 to Plaintiff's concurrently filed Request for Judicial Notice. The court also noted that even if a plaintiff had purchased "from Novartis," Sanofi's foreclosed rival, "they [have] paid more for the vaccines than they would have absent Sanofi's anticompetitive behavior" and suffered "quintessential antitrust injuries." Op. at 11.

[8] Ultimately, the precise economic impact of Defendants' conduct on the prices paid by purchasers in the market involves a highly fact-specific inquiry that will be dependent on expert testimony and is therefore inappropriate for resolution on a motion to dismiss. *See Cummings*, 2013 WL 5377376, at *2.

many—are not themselves subject to the bundled contracts. *See, e.g.*, *Bradburn Parent/Teacher Stores, Inc. v. 3M*, No. 02-7676, 2004 WL 1842987, at *7, 19 (E.D. Pa. Aug. 18, 2004) (certifying class of direct purchasers where bundled-discounting caused "every member of the proposed class [to] pa[y] too much for 3M branded tape, **regardless of whether they received any bundled rebates** from 3M") (emphasis added);[9] *Natchitoches*, 262 F.R.D. at 59, 66, 70 (certifying class and finding that the plaintiffs had made a "persuasive case of a harm to competition caused by exclusive dealing arrangements which likely affected the price range for **all** direct purchasers," even though between only 50.19 to 73.29% of the defendants' sales were foreclosed by bundling contracts) (emphasis added);[10] *In re Hypodermic Prod. Antitrust Litig.*, No. 2:05-cv-01602-JLL-MAH, Op. at 9, 12 (D.N.J. Nov. 16, 2012) (certifying settlement class of all direct purchasers, numbering approximately 1600, even though 26% of the defendant's sales were "non-contract sales" not subject to a bundling condition).[11]

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[9] *Bradburn* excluded some purchasers from the class on the basis of a purported conflict, 2004 WL 1842987, at *2-3, but the excluded purchasers were subsequently certified as an independent class in *Meijer, Inc. v. 3M*, No. 04-5871, 2006 WL 2382718, at *5 (E.D. Pa. Aug. 14, 2006).

[10] *See also Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l., Ltd.*, 247 F.R.D. 253, 255-56 (D. Mass. 2008) ("By definition, the proposed class contains only direct purchasers of Tyco's sharps containers in the relevant market during the proposed class period, and thus **all class members have standing** . . . .") (emphasis added).

[11] Attached as Exhibit 2 to Plaintiff's concurrently filed Request for Judicial Notice. *See also generally In re Hypodermic Prod. Antitrust Litig.*, No. 2:05-cv-01602-JLL/CCC, 2007 WL 1959224 (D.N.J. June 29, 2007) (discussing factual allegations and denying motion to dismiss bundling claims). Notably, in the *Hypodermic* case, it was the direct purchasers' customers—not the direct purchasers themselves—that entered into the anticompetitive contracts at issue; the direct purchasers had standing despite the fact that they were not parties to the contracts. *In re Hypodermic Prod. Direct Purchaser Antitrust Litig.*, No. 2:05-cv-1602 JLL/RJH, 2006 WL 6907107, at *10 (D.N.J. Sept. 7, 2006) ("Plaintiffs contend that those downstream purchasers negotiated their contracts through agents and Defendant.").

Likewise, to have standing to bring a tying claim, a plaintiff need not allege that it purchased both the tying and tied products—status as a direct purchaser of just the tied product is sufficient. *See Heartland Payment Sys., Inc. v. MICROS Sys., Inc.*, No. 3:07-cv-5629-FLW, 2008 WL 4510260, at *13 (D.N.J. Sept. 29, 2008) (holding that the plaintiff had standing to bring a tying

As in *Castro* and the other cases discussed above, it is irrelevant whether or not Plaintiff itself was subject to one of Defendants' anticompetitive contracts. As a direct purchaser in the restrained market, Plaintiff has standing to bring these claims because the impact from Defendants' web of contracts, in the form of higher prices, was felt by **all** of their customers.[12]

II. Defendants Do Not Otherwise Challenge Plaintiff's Bundling Claim Under Section 1 of the Sherman Act (Count II)

Plaintiff asserts a claim that Defendants violated Section 1 of the Sherman Act by entering into anticompetitive bundling contracts. This claim was not included in the competitor complaint filed by Suture Express in the District of Kansas, and Defendants all but ignore it in their motion to dismiss. Apart from Defendants' meritless arguments on standing, the only mention of Count II in Defendants' brief is in the section on **tying**, which is based on a distinct legal theory. Defs.' Mem. at 18.[13]

While tying is one type of Section 1 violation, it is not the only one. Section 1 of the Sherman Act prohibits "[e]very **contract**, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . ." 15 U.S.C. § 1 (emphasis added).[14] Courts in

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claim even though it purchased only the tied product from the defendant, because "antitrust injury reflects an activity's anti-competitive effect on the competitive market" and the plaintiff's "injury of paying a supracompetitive gateway fee is precisely the kind of injury that motivates the Sherman Act's concern with tying arrangements").

[12] Even if, contrary to the legal authority discussed above, only those customers themselves subject to one of the anticompetitive contracts could have standing, Plaintiff would request leave to amend its complaint to join one or more additional direct purchasers that satisfy this criterion.

[13] Indeed, Plaintiff's original complaint did not include a tying claim, which was first included in Plaintiff's Amended Complaint as Count VI. *Compare* ECF No. 1 with ECF No. 38.

[14] While "[u]nilateral action . . . is not a violation of Section 1[,]" *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 221 (3d Cir. 2011) (internal citation omitted), it is well-settled that contracts between a defendant and its purchasers (e.g., bundling and tying contracts) satisfy Section 1's contract, combination, or conspiracy requirement, *see, e.g.*, C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182, 1245 n.262 (2013) ("In a tying case, agreement may be established by the contract between the seller and the purchaser."); *F.B. Leopold Co. v. Roberts*

this Circuit have recognized that bundling is a Section 1 claim separate and distinct from tying and have upheld Section 1 bundling claims in the absence of a tying claim. *See, e.g., LePage's Inc. v. 3M*, No. 97-3983, 1997 WL 734005, at *7 (E.D. Pa. Nov. 14, 1997) (denying motion to dismiss Section 1 bundling claim despite plaintiff withdrawing its Section 1 tying claim and "conceding" it could not plead the elements of a tying claim); *Castro*, Op. at 10-11, 21 (denying motion to dismiss Section 1 bundling claim predicated on "inapposite tying cases," observing that the defendant "misunderstands the injury Plaintiffs allege; it is not that Plaintiffs did not want a product that they purchased or definitely would have chosen a different product" absent the bundling, but that the bundling "reduc[ed] Novartis's ability to fairly compete in the pediatric meningococcal vaccine market and artificially inflat[ed] prices for these vaccines").

Because Defendants did not raise any challenge to Plaintiff's Section 1 bundling claim, apart from standing, in their opening brief, they should not be permitted to do so in reply.[15] But to the extent Defendants claim that there are pro-competitive justifications for their conduct, that dispute is not appropriate for resolution on a motion to dismiss. *See In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 533 (D.N.J. 2004) (on a motion to dismiss, the court must consider the defendants' pro-competitive justification as unproven) (internal citation omitted).

Filter Mfg. Co., 882 F. Supp. 433, 445 (W.D. Pa. 1995) ("The term 'concerted action' is often used as a shorthand for any form of activity meeting the section 1 'contract, combination, or conspiracy.'") (internal citation omitted) *aff'd*, 119 F.3d 15 (Fed. Cir. 1997); *Bogosian v. Gulf Oil Corp.*, 393 F. Supp. 1046, 1048 n.3 (E.D. Pa. 1975) ("As an example, this concerted action could take the form of a vertical tie-in contract between a buyer and seller[.]"), *vacated on other grounds*, 561 F.2d 434 (3d Cir. 1977); *LePage's*, 1997 WL 734005, at *7 (bundling claim against sole defendant under § 1); *Castro*, Op. at 21 (same).

[15] *See, e.g., Bright v. First Sr. Fin. Grp.*, No. 12-360, 2013 WL 3196392, at *11 n.23 (E.D. Pa. June 24, 2013) (Sánchez, J.) ("A Court does not need to consider arguments or issues first raised in a reply brief."); *Chainey v. St.*, No. 03-6248, 2005 WL 696883, at *1 (E.D. Pa. Mar. 22, 2005) ("[I]t would be unfair to allow a party to sneak substantive legal argument into a [r]eply brief, when the exact same argument could have (and should have) been raised in the [initial] brief.").

III. Defendants' Attempt to Dismiss Plaintiff's Tying and Exclusive Dealing Claims (Counts V and VI), Previously Rejected in the District of Kansas, Fails Here as Well

A. Plaintiff Has Sufficiently Pleaded Its Tying Claim (Count VI)

Ruling on the tying claim brought by Suture Express, the District of Kansas denied Defendants' motion to dismiss, finding the claim plausible where "each defendant is offering discounts on the sale of med-surg supplies if 90% of the purchaser's sutures and endo products needs are purchased from the defendant." *Suture Exp.*, 2013 WL 3991798, at *5. While Defendants attempt to distinguish the Kansas opinion on standing grounds, they concede that the ruling was premised on sufficient allegations of "a substantially adverse effect **on competition in general**." Defs.' Mem. at 22 (quoting *Suture Exp.*, 2013 WL 3991798, at *5) (emphasis added). In other words, the claim is not about effect on one or another specific customer or competitor, but on competition overall. As set out above, that harm to competition resulted in higher prices for all customers, whether or not they were themselves subject to the contracts.

1. Defendants' Contractual Provisions Are Coercive Economic Penalties

The Kansas court already has rejected Defendants' argument that "coercion" is absent here. *Suture Exp.*, 2013 WL 3991798, at *5 ("The question is not so much whether the alleged arrangement is a 'tying agreement' as 'whether there is a possibility that . . . competition on the merits [has been foreclosed] in a product market distinct from the market for the alleged tying item.'") (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 21 (1984)). Courts throughout the nation have held that economic penalties are sufficient coercion. *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 914-15 (9th Cir. 2007) (reversing summary judgment on tying claim, "there is no doubt that [defendant's] practice of giving a larger discount to insurers who dealt with it as an exclusive [ ] provider may have coerced some insurers to purchase primary and secondary services from [defendant] rather than" its rival); *Monument Builders of*

Greater Kan. City v. Am. Cemetery Ass'n of Kan., 891 F.2d 1473, 1476 (10th Cir. 1989) (tying claim based on "prohibitively expensive surcharges"); *Compuware Corp. v. Int'l Bus. Machs.*, 366 F. Supp. 2d 475, 480 (E.D. Mich. 2005) ("Forcing can exist when tying is 'economic,' i.e., when the products are available separately, but only at significant economic disadvantage.").[16] Plaintiff's allegations that Defendants condition discounts on twenty-eight med-surg product lines on consumers' purchases of distribution services for separate and distinct sutures and endos product lines, and penalize non-complaint consumers who buy from Defendants' rivals, satisfy the coercion element. *See* Compl. ¶¶ 5, 41, 47, 50-64, 66-80.[17]

2. Plaintiffs' Allegations About Market Power, to the Extent Necessary, Are Sufficient for a Tying Claim

Tying claims can be evaluated either as *per se* violations of the antitrust laws or under the "rule of reason." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 482

[16] *See also* PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW ¶ 1711e (4th ed. 2012) ("[T]he language of 'coercion,' 'forcing,' and 'voluntariness' should be understood as inviting a specific factual inquiry about whether the defendant has illegitimately constrained buyer choices."); IX PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 1700i (3d ed. 2011) ("[A] transaction may be voluntary in the sense that a buyer can obtain the first product separately from a supplier and yet be a tie-in when the buyer's choice to purchase the second product from that supplier is substantially influenced by the terms under which the two products are sold together."); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466-67 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.").

[17] Defendants' reliance on *Warren Gen. Hosp. v. Amgen, Inc.*, No. 09-4935 (SRC), 2010 WL 2326254 (D.N.J. June 7, 2010) (unpublished), *aff'd*, 643 F.3d 77 (3d Cir. 2011), is misplaced. In that case, the **district court**—citing to dicta—concluded that because the complaint failed to allege that "Amgen will not sell [its product A] unless a buyer also purchases [its product B]," there could be no tie. *Id.* at *7 (citing *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1061 n.3 (3d Cir. 1978)). But on appeal, the Third Circuit was "sympathetic to [plaintiff's] complaints regarding the [defendant's] rebate program," affirming dismissal solely on the separate ground that plaintiff was an indirect purchaser barred from recovering under the *Illinois Brick* doctrine. 643 F.3d at 96; *see also, e.g.*, *Kickflip, Inc. v. Facebook, Inc.*, No. 12-1369-LPS, 2013 WL 5410719, at * 7 (D. Del. Sept. 27, 2013) (post-*Warren General* decision upholding tying claim and rejecting argument that dismissal was required because "users can access Facebook's [product A] without using Facebook['s product B]").

(3d Cir. 1992) (en banc). At this stage of the litigation, the Court need not determine which standard will apply to the tying claims in this case. Because market power is an element **only** of a *per se* tying claim—and not of a "rule of reason" tying claim—it is unnecessary for the Court to determine whether market power has been sufficiently alleged for the tying claim to survive a motion to dismiss. In *Town Sound*, the Third Circuit made clear that market power is **not** an element of a rule of reason tying claim. *Id.* at 482-84. To be sure, a plaintiff must "come up with evidence of injury to competition, not simply to the plaintiffs themselves," *id.* at 486, but that is no more than the Kansas court already found satisfied, *Suture Exp.*, 2013 WL 3991798, at *5.[18]

In any event, under Third Circuit precedent, Plaintiff's allegations of market power are sufficient even to support a *per se* claim. Defendants focus on their individual market shares, but proving market share is just a surrogate for proving market power, defined as "the power to control prices and exclude competition," *see Babyage.com, Inc. v. Toys "R" Us, Inc.*, 558 F. Supp. 2d 575, 585 (E.D. Pa. 2008) (internal citation omitted), or more precisely, "the ability to raise prices above those that would prevail in a competitive market," *Toledo Mack Sales & Serv.*,

[18] *Ill. Tool Works, Inc. v. Indep. Ink., Inc.*, 547 U.S. 28 (2006), is not to the contrary. That case concerned only the limited question of whether a **presumption** of market power in tying cases involving **patents** was justified, and abrogated only those tying cases recognizing such a presumption. *Id*. at 31 ("The question presented to us today is whether the presumption of market power in a patented product should survive as a matter of antitrust law despite its demise in patent law. We conclude that the mere fact that a tying product is patented does not support such a presumption."). Nowhere in *Ill. Tool* did the Court discuss the rule of reason analysis or its elements. *See generally id*.; *see also id*. at 40 ("This process has ultimately led to today's reexamination of the presumption of ***per se*** illegality of a tying arrangement involving a patented product[.]") (emphasis added). Post-*Ill. Tool* cases in this Circuit have reaffirmed the continued validity of *Town Sound*'s holding that market power is not an element of rule of reason tying claims. *See, e.g.*, *Marchese v. Cablevision Sys. Corp.*, No. 10-2190 JLL, 2012 WL 78205, at *21 (D.N.J. Jan. 9, 2012) ("[r]ule of reason claims are still available to plaintiffs who do not succeed in their *per se* tying claims" solely upon a showing of "causation of antitrust injury and rebutting procompetitive justifications") (citing *Town Sound*, 959 F.2d at 482-94); *Heartland*, 2008 WL 4510260, at *6 n.6 (rule of reason claim available "[w]here appreciable tying market power cannot be shown") (citing *Town Sound*, 959 F.2d at 477).

Inc. v. Mack Trucks, Inc., 530 F.3d 204, 226 (3d Cir. 2008) (internal citation omitted); *see also Allen-Myland, Inc. v. Int'l Bus. Machs. Corp.*, 33 F.3d 194, 209 (3d Cir. 1994) ("Market share, of course, is only one type of evidence that may prove the defendant has sufficient market power to impose per se antitrust liability. . . . [E]ntry barriers[,] . . . [meaning] the ease or difficulty with which competitors enter the market[,] is [also] an important factor in determining whether the defendant has true market power[.]"). Plaintiff has plausibly pleaded this power over prices, as well as substantial entry barriers.

Plaintiff alleges that Defendants' bundled loyalty provisions exclude a substantial rival, allowing them to raise prices above competitive levels. Compl. ¶¶ 36, 46, 54-65, 68, 85-90, 93, 97. This is enough to plead market power. *See Eastman Kodak*, 504 U.S. at 477 ("It is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition . . . , since respondents offer direct evidence that Kodak did so."); *see also Suture Exp.*, 2013 WL 3991798, at *6 ("it is plausible to infer that each defendant has sufficient market power in the tying products to coerce buyers to accept the alleged tying arrangement"). [19] And Plaintiff also pleads significant barriers to entry, including high fixed costs, economies of scale, and substantial regulatory hurdles, such that there "are very rarely new Med-Surg distributors." Compl. ¶¶ 43-45, 47, 77-82, 93-94.[20]

[19] *See also Bradburn Parent Teacher Store, Inc. v. 3M*, No. 02-7676, 2005 WL 736629, at *10 (E.D. Pa. Mar. 30, 2005) ("It is equally apparent that the ability to exclude competition necessarily results in the ability to control prices."); *In re Comp. of Managerial, Prof'l, & Technical Employees Antitrust Litig.*, MDL No. 1471, 2006 WL 361383, at *2 (D.N.J. Feb. 15, 2006) ("'an actual adverse effect on competition . . . is more direct evidence of market power than calculations of [ ] market share'") (internal citation omitted, alterations in original).

[20] Defendants' anticompetitive bundling is itself an entry barrier. Compl. ¶¶ 93-94. Many of Plaintiff's allegations as to entry barriers, including the increasing concentration of the market via Defendants' acquisitions, are unique to this case and were not pleaded by Suture Express in the Kansas action. *See id.* ¶¶ 43-45, 47, 77-82; *cf.* Req. for Judicial Notice in Supp. of Def. Owens & Minor, Inc.'s Mot. to Transfer Venue, Ex. B., ECF No. 13.

B. Plaintiff Has Sufficiently Pleaded an Exclusive Dealing Claim (Count V)

As the District of Kansas held, Defendants' conduct also gives rise to a plausible exclusive dealing claim under Section 3 of the Clayton Act. *Suture Exp.*, 2013 WL 3991798, at *11-13; *see also Warren Gen.*, 643 F.3d at 80 ("Section 1 of the Sherman Act and Section 3 of the Clayton Act[both] proscribe tying schemes"); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 282 (3d Cir. 2012), *cert. denied,* 133 S. Ct. 2025 (2013) (noting that "bundled rebates and discounts" can "operate as exclusive dealing arrangements") (citing *LePage's*, 324 F.3d at 157-58).[21] Defendants' arguments in opposition to this claim are without merit.

First, it is immaterial that the contracts do not expressly require any purchases. "[T]he law is clear than an express exclusivity requirement is not necessary because *de facto* exclusive dealing may be unlawful." *ZF Meritor*, 696 F.3d at 282. For example, in *Dentsply*, 399 F.3d at 193, Section 3 was violated where the underlying "agreement" wasn't an agreement at all: the relationship was "at-will," and "only a series of independent sales." *Id*. "Nevertheless, the economic elements involved" rendered the scheme "as effective as th[at] in written contracts." *Id*.; *see also ZF Meritor*, 696 F.3d at 282 (same for anticompetitive discounting).

Second, even if the contracts were easily terminable—and Plaintiff alleges they are not, Compl. ¶ 111— they would nonetheless violate Section 3 "in spite of the legal ease with which the relationship can be terminated, [because] the [purchasers] have a strong economic incentive to continue" the relationship, as less diverse competitors "simply [can] not match the discounts." *Dentsply*, 399 F.3d at 193-94 (citing *LePage's*, 324 F.3d at 162).[22]

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[21] *ZF Meritor* found that "a conditional rebate provision, under which [purchasers] would only receive rebates if [they] purchased a specified percentage of [their] requirements from Eaton" violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. 696 F.3d at 263, 265, 282; *cf*. Compl. ¶¶ 57, 62 (discounts conditioned on purchases of specified percentages).

[22] *See also* Elhauge, 123 HARV. L. REV. at 456-57 ("[E]xternality problems give buyers an

Third, Plaintiff has alleged substantial foreclosure. *See Suture Exp.*, 2013 WL 3991798, at *12 ("[T]he court finds that defendants' arguments regarding the level of market foreclosure do not warrant the dismissal of plaintiff's exclusive dealing claim."). Plaintiff has alleged that Defendants have entered into anticompetitive contracts "with at least a majority of acute care providers." Compl. ¶ 54. Defendants improperly ask the Court to draw all inferences in **their** favor and assume the lowest possible majority of 51%, when in fact the percentage of affected commerce is likely much higher. Defs.' Mem. at 25. But even applying this faulty assumption to each Defendant's market share results in market foreclosure of at least 16.83% for Cardinal and 19.89% for O&M, for a combined foreclosure of **at least** 36.72%, and likely much higher. Although proper foreclosure analysis would require combining these foreclosure shares,[23] even individually they are sufficient to state an exclusive dealing claim. *See Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1252 (3d Cir. 1975) (foreclosure of 14.7% "may well offend the limitations which the Clayton Act places on exclusive contracts").[24]

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incentive to agree to anticompetitive foreclosing agreements that produce large marketwide price increases in exchange for a nominal individual discount, even [though] the result of all of them agreeing is that [ ] rivals are impaired and the buyers then pay higher prices than they otherwise would have paid . . . . It does not matter if bundled discount contracts periodically come up for termination because the same externalities that give buyers incentives to agree (despite the collective marketwide harm) also give buyers incentives not to terminate the contracts.").

[23] *See* Elhauge, 123 HARV. L. REV. at 475 ("[I]f two significant firms are engaged in bundling, then their cumulative foreclosure of the linked market is even greater, producing an even greater foreclosure share effect on other rivals. If those other rivals are driven from the market, bundling could create or preserve a duopoly where otherwise a competitive market could have existed. [ ] Hovenkamp himself acknowledges that if a seller and a few rivals engage in exclusionary agreements, courts should aggregate their foreclosure shares when assessing them under antitrust law.") (citing IX AREEDA & HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶1709, at 78, 87, ¶1729, at 328, 337 (2d ed. 2004)).

[24] Further, as the Kansas court noted, this type of analysis is usually done at the summary judgment stage, not the pleading stage. *Suture Exp.*, 2013 WL 3991798, at *11-13 ("given the number of other factors which may be relevant to a rule of reason analysis, the court shall not decide at the pleading stage that plaintiff has failed to plead adequate foreclosure levels to go forward with" its exclusive dealing claim).

IV. Plaintiff Has Sufficiently Pleaded a Plausible Horizontal Conspiracy (Count III)

Under Third Circuit law, and based upon unique allegations in Plaintiff's complaint not pleaded by Suture Express, Plaintiff has sufficiently alleged a plausible horizontal conspiracy between Cardinal and O&M. While the Kansas court—considering less extensive factual allegations—found the competitor's allegations wanting, there is ample reason for this Court to permit Plaintiff's conspiracy claim to proceed to discovery.

In this Circuit, concerted action can be proven through circumstantial evidence. *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 465 (3d Cir. 1998) ("While direct evidence, the proverbial 'smoking gun,' is generally the most compelling means by which a plaintiff can make out his or her claim, it is also frequently difficult for antitrust plaintiffs to come by. Thus, plaintiffs have been permitted to rely solely on circumstantial evidence (and the reasonable inferences that may be drawn therefrom) to prove a conspiracy."). Therefore, plaintiffs "basing a claim of collusion on inferences from consciously parallel behavior [must] show that certain 'plus factors' also exist." *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004) ("the factors serve as proxies for direct evidence of an agreement"). While there is no litmus test for what constitutes a plus factor, generally three are advanced: "(a) 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.'" *Id.* (internal citation omitted). To survive a motion to dismiss, a plaintiff relying on parallel conduct need only allege facts establishing **one** plus factor, s*ee In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323 (3d Cir. 2010), at which point a "rebuttable presumption of conspiracy arises[,]" *see In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999).[25] Here, Plaintiff has alleged facts substantiating every plus factor.

[25] *Accord Deborah Heart & Lung Ctr. v. Penn Presbyterian Med. Ctr.*, No. 11-1290 RMB

A. Defendants Had a Motive to Conspire in an Industry Susceptible to Collusion

"Evidence that the defendant had a motive to enter into a [ ] conspiracy means evidence that the industry is conducive to oligopolistic [collusion], either interdependently or through a more express form of collusion. In other words, it is 'evidence that the structure of the market was such as to make secret [collusion] feasible.'" *Flat Glass*, 385 F.3d at 360-61 (quoting *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002)).

This factor is pleaded, for example, where products or services are offered "in a concentrated market with high barriers to entry and 'huge' fixed costs of production." *In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d 38, 54 (E.D. Pa. 2007) ("These were textbook conditions for illegal collusion."). This is precisely what Plaintiff has pleaded. Plaintiff alleges high barriers to entry, including compliance with burdensome federal, state, and local regulations and substantial economies of scale. Compl. ¶¶ 43-45, 47, 77-82. In the same vein, Defendants' bundling practices themselves constitute a barrier to entry, because they force would-be entrants to compete across all thirty med-surg product lines, rather than more economically feasible entry across one or a few lines. *Id*. ¶¶ 33, 45. The market is characterized by high fixed costs and risk of failure of entry, *id*. ¶¶ 43-47, and is highly concentrated (and growing more so), *id*. ¶¶ 78-83.

B. Defendants Acted Against Their Independent Self-Interests By Declining to Capture Customers of a Major Competitor

"'Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated within a competitive market. In a competitive industry, for example, a firm would cut its price with the hope of increasing its

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KMW, 2012 WL 1390249, at *3 (D.N.J. Apr. 19, 2012) ("These factors, however, are not exhaustive and a plaintiff must only establish one 'plus factor.'"); *TruePosition, Inc. v. LM Ericsson Tel. Co.*, No. 11-4574, 2012 WL 3584626, at *7 (E.D. Pa. Aug. 21, 2012) (plausible conspiracy where plaintiff did not allege first two factors, but did allege indicia of a traditional conspiracy in the form of opportunities to conspire at association meetings).

market share if its competitors were setting prices above marginal costs.'" *Linerboard*, 504 F. Supp. 2d at 52 (quoting *Flat Glass*, 385 F.3d at 360-61).

If each Defendant were acting in its own self-interest, and its main competitor imposed a bundle that prevented customers from purchasing sutures and endos from Suture Express, it would be rational to respond by offering customers an alternative purchasing option **without** a restrictive bundling condition. This is because customers that wish to buy sutures and endos from Suture Express will choose to buy **the other twenty-eight product categories** from whichever of Defendants allows them to do so without penalty. A rational company acting in its self-interest would want to take that market share from its main competitor on 93% of product categories even if it meant allowing customers to buy from Suture Express on just 7% of product categories. This is a variant of the classic Prisoner's Dilemma:

	O&M Bundles	**O&M Does Not Bundle**
Cardinal Bundles	Both Cardinal and O&M maintain market shares as Suture Express is foreclosed; customers pay higher prices for sutures and endos	O&M gains market share as Cardinal customers switch to Suture Express for sutures and endos and O&M for everything else; customers pay lower prices
Cardinal Does Not Bundle	Cardinal gains market share as O&M customers switch to Suture Express for sutures and endos and Cardinal for everything else; customers pay lower prices	Competitive market in which Cardinal, O&M, and Suture Express compete by offering lower prices for sutures and endos

Game theory teaches that in a Prisoner's Dilemma, a player acting in its self-interest will choose to "cheat" by capturing new customers. *See, e.g.*, John Shepard Wiley Jr., *Reciprocal Altruism As A Felony: Antitrust and the Prisoner's Dilemma*, 86 Mich. L. Rev. 1906, 1917 (1988); Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 Tex. L. Rev. 515, 524-26 (2004). Through their agreement to **jointly** impose the same bundling strategy—against their **independent** self-interests to maximize their market shares—both Cardinal and O&M could be

assured that each would be safe from the other's desire to steal customers that prefer to buy sutures and endos through Suture Express. Plaintiff's allegation that Defendants conspired in this manner is therefore plausible as a matter of economic theory. *See Alexander v. Phoenix Bond & Indem. Co.*, 149 F. Supp. 2d 989, 1007 (N.D. Ill. 2001) (denying motion for summary judgment when defendant bidders were in "a classic prisoner's dilemma scenario" and "the speed by which all the bidders changed from a highly competitive posture to a highly cooperative posture is difficult to reconcile with the idea of independent conduct"); *In re Simon II Litig.*, 211 F.R.D. 86, 125 (E.D.N.Y. 2002), *vacated and remanded on other grounds*, 407 F.3d 125 (2d Cir. 2005) (describing alleged conspiracy to refrain from developing a less harmful cigarette that arose from "a variant of the classic prisoner's dilemma" when "the major tobacco manufacturers arguably opted to maintain the scheme, aided in part by the highly concentrated industry market structure," even though "any company, by being the first to produce such a cigarette, stood to gain substantial market share").

C. Defendants Had Opportunities to Conspire at Trade Association Meetings

The third plus factor, evidence implying a traditional conspiracy, generally includes non-economic evidence that "defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though **no meetings, conversations, or exchanged documents are shown**." *Flat Glass*, 385 F.3d at 361 (emphasis added, internal citation omitted). Such evidence includes opportunities to conspire through trade associations or standard setting organizations. *See TruePosition*, 2012 WL 3584626, at *7.

Plaintiff alleges that Defendants are members of the Health Industry Distributors Association, Compl. ¶ 69, and that at least since 2007 they have been afforded "unsurpassed" opportunities to collude at annual med-surg conferences, *id*. ¶¶ 70-76. Plaintiff need not plead

direct evidence of a conspiracy such as specific "meetings, conversations, or exchanged documents." *Flat Glass*, 385 F.3d at 361. While Defendants contend that these opportunities to conspire are not sufficient in-and-of themselves to plead a conspiracy, Defs.' Mem. at 17-18, they cannot dispute that such opportunities to conspire are **relevant** under the caselaw, and they are not pleaded by themselves, but rather in the context of allegations substantiating the first two plus factors. *Linerboard*, 504 F. Supp. 2d at 54 ("The Court does 'not tightly compartmentalize the evidence put forward by [plaintiffs], but instead analyze[s] it as a whole to see if together it supports an inference of concerted action.'") (internal citation omitted, alterations in original).

Discovery "may reveal the smoking gun or bring to light additional circumstantial evidence that further tilt the balance in favor of liability," *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010), but for purposes of this motion to dismiss, Plaintiff's allegations, independently and as a whole, are sufficient to state a claim for relief.[26]

V. Plaintiff Has Adequately Pleaded Its Monopolization Claims (Counts I and IV)

Defendants insist that, taken individually, neither Defendant has sufficient market share to violate Section 2 of the Sherman Act. But when, as in this case, a plaintiff plausibly alleges a **conspiracy** to monopolize, the defendants' market shares must be combined. Indeed, this is the

[26] In *Suture Express*, the "[p]laintiff d[id] not allege any circumstances, aside from the alleged action against interest, which supposedly supply a factual context to support an inference" of conspiracy. 2013 WL 3991798, at *9. The Kansas court held that "in the absence of any other contextual support," there would be no inference of conspiracy. *Id*. The court, however, had no occasion to consider the structure of the industry or Defendants' opportunities to conspire at trade association meetings, because Suture Express did not provide the court with the factual allegations necessary to do so. *Id*. at *11 (only alleging that "high capital costs are an entry barrier"). Plaintiff has alleged additional contextual support. Compl. ¶¶ 43-45, 47, 70-76, 77-82. And with respect to Defendants' actions against self-interest, Suture Express failed to "explain why it would be more lucrative for defendant O&M to challenge defendant Cardinal instead of taking the approach that O&M allegedly has taken." *Suture Exp.*, 2013 WL 3991798, at *9. In contrast, Plaintiff has set forth above, as a matter of economics, why it would have been in each Defendant's independent self-interest to capture market share from a competitor imposing anticompetitive contracts on its customers.

lesson of one of the principal cases cited by **Defendants** in their brief. *See Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995) ("The aggregation of market shares of several rivals is justified if the rivals are alleged to have conspired to monopolize.") (citing *U.S. v. Am. Airlines, Inc.*, 743 F.2d 1114, 1122 (5th Cir. 1984) (airline's unsuccessful attempt to fix prices with rival required aggregation of both firms' shares in attempt-to-monopolize claim)). Once aggregated, Defendants' collective market share is more than sufficient to impose Section 2 liability. *See Houser v. Fox Theatres Mgmt. Corp.*, 845 F.2d 1225, 1230 (3d Cir. 1988) (68% to 71% of market creates inference of monopoly power). And contrary to Defendants' argument, conspiracies to monopolize need not have the object of creating a single monopolist; instead, they can be aimed at concentrating monopoly power in multiple entities.[27]

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[27] *See, e.g., Carpet Grp. Int'l v. Oriental Rug Imps. Ass'n, Inc.*, 256 F. Supp. 2d 249, 259, 283 (D.N.J. 2003) (plausible conspiracy to monopolize claim against trade association members who sought to exclude non-members from the market, noting "individuals who are incapable themselves of monopolizing a market, may be found liable for intentionally joining others to do so") (internal citation omitted); *Marian Bank v. Elec. Payment Servs, Inc.*, No. 95-614-SLR, 1997 WL 367332, at *1, 4 (D. Del. Feb. 5, 1997) (plausible conspiracy to monopolize where three sizeable defendant banks—Corestates, PNC, and Banc One—conspired to monopolize ATM markets and **all** "defendants [ ] used their market power" to preclude sales to "independent data process[ors]" so that each could "charge supracompetitive prices for ATM" services); *Boyer v. LeHigh Valley Hosp. Ctr., Inc.*, No. 89-7315, 1990 WL 94038, at *1, 5-6 (E.D. Pa. July 2, 1990) (plausible claim that two competitor hospitals conspired to jointly monopolize the Allentown cardiology market); *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 855 F. Supp. 108, 109-11, (E.D. Pa. 1994) (plausible conspiracy to monopolize where "an employers' trade association conspire[ed] to raise wages paid to its members' employees" and exclude competitors from the market for legal education, to the benefit of all accredited law schools).

Defendants' citation to *TV Commc'ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1026-27 (10th Cir. 1992), is misleading. Defs.' Mem. at 13. Defendants alter the quotation to suggest that the case concerned "competitor defendants," when in fact it concerned an alleged conspiracy between TNT and "cable operators" (who purchased TNT services), to bestow a monopoly on TNT. The co-conspirators were not horizontal competitors, but a **producer** of a service and **consumers** of that service. The court reasoned that the conspiracy was implausible because "in such a monopolistic environment, TNT would have the power and the incentive to charge the cable operators supercompetitive prices for the TNT service," and "the cable operators would have no rational motive to create such an environment." *Id*. The case has no bearing where, as here, the conspiracy concerns horizontal competitors, who would **both** benefit

While the Kansas court dismissed the monopolization claims, this was the result of two factors not present here. *First*, the court relied heavily on the failings of the Section 1 conspiracy as a basis for dismissing the Section 2 conspiracy. 2013 WL 3991798, at *10-11. Plaintiff's is plausibly pled. *Second*, the court opined that "most courts have rejected shared or joint monopoly arguments when analyzing § 2 claims[.]" *Id.* at *11. But this statement was made in the context of market share aggregation **absent** a conspiracy. Courts in the Eastern District of Pennsylvania and elsewhere in the Third Circuit do recognize conspiracies to jointly monopolize. *See, e.g.*, *In re Mushroom Direct Purchaser Antitrust Litig.*, 514 F. Supp. 2d 683, 699-702 (E.D. Pa. 2007) (dismissing **individual** monopolization claim based on concerted monopolization theory, but recognizing that "section 2's **conspiracy** to monopolize claim [does] target[] concerted action") (emphasis added, internal citation omitted); *Carpet Grp.*, 256 F. Supp. 2d at 259, 283; *Marian Bank*, 1997 WL 367332, at *1, 4; *Boyer*, 1990 WL 94038, at *1, 5-6; *Mass.*, 855 F. Supp. at 109-11; *cf. Rebel Oil*., 51 F.3d at 1448.[28]

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to dismiss.

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from being able to charge supracompetitive prices to their respective consumers.

[28] Even absent the conspiracy allegations, it would be appropriate to combine Defendants' market shares when analyzing monopolization or attempted monopolization under Section 2. The economic reality is that the harm caused by Defendants' collective bundling practices does not hinge on the presence or absence of agreement: the anticompetitive outcome is the same with or without a conspiracy. While some courts have declined to adopt this view, the Third Circuit has never addressed it and commentators explain that "at a minimum, the collective effect of foreclosure ought to be a standard part of how we think about these cases and that, **if courts are being misled into an outcome in which they're looking at each alleged excluder in isolation** without understanding the synergy between them they're going to head down the wrong path. . . . This is an area in which law is significantly lagging behind economic understandings of how multiple excluders can have a substantial collective effect." *See* C. Scott Hemphill, *Parallel Exclusion: Is it time for a Theory of Shared Monopoly?*, American Bar Association Section of Antitrust Law Panel Discussion (Sept. 18, 2013) (audio available with membership at http://www.americanbar.org/content/dam/aba/multimedia/antitrust_law/20130918_at13818_mo.authcheckdam.mp3) (emphasis added); *see generally* Hemphill & Wu, 122 YALE L.J. 1182.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2014, I caused a true and correct copy of the foregoing and the attached proposed order to be filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by email to all parties by operation of the Court's CM/ECF system.

/s/ Brent W. Landau

Attorney for Schuylkill Health System