IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

McKENZIE-WILLAMETTE HOSPITAL, an Oregon nonprofit corporation,

Plaintiff,

v.

PEACEHEALTH , a Washington State nonprofit corporation,

Defendant.

Civil No. 02-6032-HA

OPINION AND ORDER

Nancy M. Erfle
Becky A. Johnson
Kelly T. Hagan
Brien J. Flanigan
Thomas M. Triplett
Schwabe Williamson & Wyatt
1211 S.W. Fifth Avenue, Suite 1900

Portland, Oregon 97205

Win Calkins
Calkins & Calkins
101 E. 14th Avenue
Eugene, Oregon 97401
Attorneys for Plaintiff

Jeffrey M. Edelson
Linda M. Holleran
Peter Glade
Markowitz Herbold Glade & Mehlhaf
1211 S.W. Fifth Avenue, Suite 3000
Portland, Oregon 97204

James H. Sneed
McDermott Will & Emery
600 Thirteenth Street, NW
Washington, D.C. 2005

Saralisa C. Brau
McDermott Will & Emery, New York
50 Rockefeller Plaza
New York, New York 10020
Attorneys for Defendants.

HAGGERTY, Chief Judge:

This case is an action brought under Sections 4 and 16 of the Clayton Act, alleging violations of Sections 1 and 2 of the Sherman Act, as amended (15 U.S.C. § § 1 and 2). In August, 2002, this court summarily denied defendant's Motion to Dismiss plaintiff's "tying" claims. In March, 2003, plaintiff filed a First Amended Complaint, and defendant subsequently filed a Motion for Summary Judgment. Plaintiff has also filed a Motion to Strike Portions of the Declarations of Maria Isabelita,

James R. Barnhart, Tom Allen Jefferson, Phillip Dwight Jackson and Wayne Pinney. Oral argument regarding the summary judgment motion was heard on July 17, 2003.

BACKGROUND

Plaintiff McKenzie-Willamette Hospital is a 114-bed community hospital in Springfield, Oregon. It has sustained significant financial losses over the last two years and is attempting to remain open by seeking an affiliation with Triad Hospitals, Inc., one of the largest for-profit hospital chains in the country. If affiliated, plaintiff hopes to add high level cardiovascular services to the general acute hospital care it presently offers.

Defendant PeaceHealth is a non-profit healthcare organization headquartered in Bellevue, Washington. Defendant operates hospitals in Lane County that compete with plaintiff by providing general acute hospital care. Additionally, defendant's hospitals provide invasive cardiovascular surgery and intensive ("Levels III-VI") neonatal care.

Plaintiff alleges that defendant has acquired illegal "monopoly power" at various levels in markets including acute hospital care, intensive neonatal care, and cardiovascular surgery and related care. Plaintiff alleges that defendant obtained and maintains this monopoly power in part through hospital acquisitions, physician practice acquisitions, manipulating health insurance products and deploying pricing strategies. Plaintiff sues defendant under the federal antitrust laws for tying, exclusive dealing, conspiracy to monopolize, attempted monopolization, and monopolization, and asserts state claims for price discrimination and tortious interference.

Defendant operates six hospitals in Alaska, Washington and Oregon. It operates three hospitals in Lane County, Oregon, and employs physicians associated with each hospital. The three are Sacred Heart Medical Center in Eugene (425 beds), Peace Harbor Hospital in Florence (21 beds), and Cottage Grove Community Hospital in Cottage Grove (11 beds).

Defendant seeks summary judgment in this action on several grounds. It argues first that plaintiff cannot prove that it suffered injury "by reason of" defendant's allegedly wrongful conduct. Such injury is a prerequisite to an antitrust lawsuit. Defendant also alternatively argues for summary judgment on plaintiff's federal claims for tying, exclusive dealing, conspiracy to monopolize, and monopolization, and on plaintiff's state claims for price discrimination and tortious interference. Finally, defendant seeks to dismiss plaintiff's claim for punitive damages.

STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is not proper if material factual issues exist for trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324. Assuming that there has been sufficient time

for discovery, summary judgment should be entered against a "party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id*. at 322.

Special rules of construction apply to evaluating summary judgment motions: 1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; 2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party; and 3) the court must assume the truth of direct evidence set forth by the nonmoving party if it conflicts with direct evidence produced by the moving party. *T.W. Elec. Serv. v. Pacific Elec. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987). When different ultimate inferences can be reached, summary judgment is not appropriate. *Sankovich v. Life Ins. Co. of N. America*, 638 F.2d 136, 140 (9th Cir. 1981).

The issue of material fact Rule 56 requires allow a party to proceed to trial need not be resolved conclusively in favor of the party asserting its existence; all that is required is sufficient evidence supporting the claimed factual dispute to require a jury or judge to resolve the parties' differing versions of the truth at trial. *Id*. At this stage of the litigation, the judge does not weigh conflicting evidence or make credibility determinations. These determinations are the province of the fact finder at trial. *Id., see also Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 410 (9th Cir. 1996) (on a motion for summary judgment, the court is not to weigh the evidence or determine the truth of the matter, but only determine whether there is a genuine issue for trial).

STANDARDS FOR ANTITRUST CLAIMS

The early rise of monopolies and other anti-competitive business combinations led to the enactment of the Sherman Antitrust Act in 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7). Sections 1 and 2 of the Act, 15 U.S.C. §§ 1- 2, provide in pertinent part:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . .
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

Section 1 and Section 2 of the Sherman Act proscribe two separate and distinct statutory offenses: Section 1 prohibits restraints of trade and Section 2 prohibits monopoly. *Amarel v. Connell*, 102 F.3d 1494, 1521 (9th Cir. 1996). Section 1 prohibits concerted action that "unreasonably" restrains trade, and is construed to encompass a variety of anti-competitive practices, including horizontal and vertical price fixing; horizontal and vertical restraints on non-price factors such as territories and customers; tying agreements; and exclusive dealing agreements. *Id.*

To establish a violation of Section 1 (restraint of trade) of the Sherman Act, "a plaintiff must demonstrate three elements: (1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged (i.e., an 'antitrust injury')." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir. 1988).

> Unlike Section 2 claims, Section 1 restraint of trade claims need not establish the threshold showing of monopoly control over a relevant market. To show a violation of Section 1, a plaintiff must establish a contract, conspiracy or combination intended to restrain competition and which actually has an anticompetitive effect.

Amarel, 102 F.3d at 1522; *see also T.W. Elec. Serv. v. Pacific Elec. Contractors Assoc.*, 809 F.2d 626, 632-33 (9th Cir. 1987) (to establish a claim under Section 1, a plaintiff must show that: 1) there was a contract, combination, or conspiracy; 2) the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and 3) the restraint affected interstate commerce).

Section 1 also differs from Section 2 actions by failing to reach unilateral actions of individuals acting alone, and requiring an actual concert of action between at least two legally separate persons or entities. *See Fisher v. City of Berkeley*, 475 U.S. 260 (1986) (series of unilateral actions mandated by a municipal ordinance were not "concerted" action proscribed by Section 1).

Section 2 claims encompass a more narrow range of anti-competitive behaviors defined as monopolization and attempts to monopolize. Claims for violation of Section 2 must allege two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power. *Id*. at 1521, citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

A private party seeking damages under Section 2 must establish that the defendant caused it antitrust injury. To satisfy this requirement, the plaintiff is required to show that (1) it suffered an injury in fact, (2) the injury was caused by an antitrust violation and (3) the injury was of the type the

antitrust laws were intended to prevent. *Metronet Services Corp. v. U.S. West Communications*, 329 F.3d 986, 1008 (9th Cir. 2003), quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *see also Rebel Oil, Inc. v. Atl. Richfield Co.,* 51 F.3d 1421, 1433 (9th Cir. 1995).

"Summary judgment is disfavored in antitrust cases." *High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987, 989 (9th Cir. 1993); *see also Metronet*, 329 F.3d at 1000 (such disfavor is particularly appropriate in "complex antitrust litigation where motive and intent are important, proof is largely in the hands of the alleged conspirators, and relevant information is controlled by hostile witnesses"), quoting *Toscano v. Prof'l Golfers Ass'n*, 258 F.3d 978, 982 (9th Cir. 2001).

ANALYSIS

Defendant presents a series of arguments supporting its Motion for Summary Judgment. Defendant begins by asserting that plaintiff cannot establish a "causal nexus" between defendant's conduct and plaintiff's alleged harm, primarily because plaintiff cannot show that defendant's conduct was the material cause of any injury plaintiff suffered.

Next, defendant argues in the alternative that summary judgment should be granted against plaintiff's First Claim for Relief alleging improper "tying," plaintiff's Second Claim for "exclusive dealing," as well as plaintiff's subsequent claim for conspiracy to monopolize. Defendant's Motion then focuses upon plaintiff's claims for monopolization and attempted monopolization under Section 2

of the Sherman Act, plaintiff's state law claims, and plaintiff's prayer for punitive damages. These are addressed in turn.

1. Causation and Injury

Defendant argues first for summary judgment against all of plaintiff's antitrust claims on grounds that plaintiff cannot meet the causation/injury requirement. This requirement mandates that the plaintiff show (1) that it suffered an injury in fact, (2) that the injury was caused by an antitrust violation and (3) that the injury was of the type the antitrust laws were intended to prevent. Stated differently, establishing an "antitrust injury" requires an injury-in-fact (constituting conduct by defendant that injured plaintiff), a showing that the harm flowed from conduct that was antithetical to the market-wide competition, and a court-conducted examination of whether the harm suffered by the plaintiff was the kind of injury that the antitrust laws were intended to protect against. *See Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1036 (9th Cir. 2001).

Defendant interprets plaintiff's allegations about its injury and the testimony of its officers as assertions that defendant's conduct began adversely affecting plaintiff only after mid-2000. Specifically, defendant contends that plaintiff's profitability fluctuated greatly over recent years. Defendant argues that since its own conduct has been unchanged for five to fifteen years, the problems plaintiff experienced starting in mid-2000 must stem from a different source, and that plaintiff cannot establish a connection between its injuries and any alleged antitrust violations committed by defendant.

Defendant suggests that the difficulties plaintiff began experiencing in 2000 were common among small independent community hospitals nationwide at that time. The causes included national reductions in Medicare and Medicaid funding, skyrocketing cost increases in pharmaceuticals, surgical supplies and insurance premiums, and higher labor costs, especially in the nursing profession.

For the purposes of deciding this Motion, this court concludes that plaintiff's claims – which include factual assertions regarding defendant's relationships over recent years with insurers in the area, Regence Blue Cross Blue Shield of Oregon ("Regence") and Providence Plan Partners ("Providence"), and regarding injury possibly arising from defendant's alleged monopolistic position, market power and conduct causing the exclusion of plaintiff from the "preferred products" offered by Regence and Providence, reasonably present a causal nexus between defendant's conduct and plaintiff's damages regardless of the patterns of plaintiff's recent annual profits. This court concludes that factual questions preclude accepting as a matter of law defendant's assertions that there is no nexus between plaintiff's alleged injuries and defendant's possible antitrust violations.

2. Plaintiff's Tying Claims

Plaintiff's First Claim For Relief asserts that defendant improperly "tied" two distinguishable hospital services – tertiary cardiac and tertiary neonatal services with primary and secondary acute care services.

"A tying arrangement is a device used by a competitor with market power in one market to extend its market power to an entirely distinct market. To accomplish this objective, the competitor agrees 'to sell one product (the tying product) but only on the condition that the buyer also purchase

a different product (the tied product), or at least agrees that he will not purchase the tied product from any other supplier.'" *Paladin Assoc., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1159 (9th Cir. 2003), quoting *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461 (1992).

In *Fortner Enter., Inc. v. United States Steel Corp.*, 394 U.S. 495, 512-14, (1969), Justice White explained why tying arrangements are harmful to competition:

> the fundamental restraint against which the tying proscription is meant to guard is the use of power over one product to attain power over another, or otherwise to distort freedom of trade and competition in the second product. This distortion injures the buyers of the second product, who because of their preference for the seller's brand of the first are artificially forced to make a less than optimal choice in the second. And even if the customer is indifferent among brands of the second product and therefore loses nothing by agreeing to use the seller's brand of the second in order to get his brand of the first, such tying agreements may work significant restraints on competition in the tied product. The tying seller may be working toward a monopoly position in the tied product and, even if he is not, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market. They must be prepared not only to match existing sellers of the tied product in price and quality, but to offset the attraction of the tying product itself. Even if this is possible through simultaneous entry into production of the tying product, entry into both markets is significantly more expensive than simple entry into the tied market, and shifting buying habits in the tied product is considerably more cumbersome and less responsive to variations in competitive offers. In addition to these anticompetitive effects in the tied product, tying arrangement may be used to evade price control in the tying product through clandestine transfer of the profit to the tied product; they may be used as a counting device to effect price discrimination; and they may be used to force a full line of products on the customer so as to extract more easily from him a monopoly return on one unique product in the line.

A plaintiff must prove three elements to prevail on an illegal tying claim: (1) that there exist two distinct products or services in different markets whose sales are tied together; (2) that the seller possesses appreciable economic power in the tying product market sufficient to coerce acceptance of the tied product; and (3) that the tying arrangement affects a "not insubstantial volume of

commerce" in the tied product market. *See Kodak*, 504 U.S. at 461-62; *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1423-26 (9th Cir. 1995).

Plaintiff's "tying" claim is construed to allege that defendant tied two distinct products: defendant's tertiary cardiac and tertiary neonatal services on one hand, and defendant's primary and secondary acute care services on the other. Plaintiff alleges that defendant bundled the tertiary services in a pricing structure and tied it with the other acute care services to obtain the status of sole preferred provider with Regence. The contractual pricing terms therefore tied two distinguishable services.

Plaintiff asserts the coercive element of the tying claim is met because defendant did not negotiate to sell its secondary products separately – allegedly, the insurers Providence and Regence were compelled to purchase non-tertiary hospital services from defendant in order to obtain defendant's tertiary cardiac and tertiary neonatal services, which are not otherwise available in the region. Plaintiff asserts that the insurers Providence and Regence had no economically viable option but to purchase non-tertiary acute care services from defendant and not from plaintiff.

Defendant argues for summary judgment because plaintiff cannot show that the insurers Providence and Regence were coerced into buying something it did not want. When a "company is simply sold what it wishes to buy, there can be no tying problem." *Sports Form, Inc., v. United Press Int'l, inc.*, 686 F.2d 750 754 (9th Cir. 1982). In part, defendant relies upon the testimony of Ms. Farzenah Whyte, the contract negotiator for Regence, who explicitly denies any coercion and

asserts that Regence was willing to enter into the contractual relationship that existed between it and defendant.

Plaintiff argues that this testimony is controverted because Whyte also acknowledged that defendant's "price demands" if defendant lost exclusivity would have a "large impact" upon Regence, and because plaintiff's Chief Financial Officer, Karen Francis, testified that Whyte told her that Regence was "held hostage" by defendant. Plaintiff also relies upon expert testimony that Regence's decision to continue an exclusive relationship with defendant makes no sense unless there was coercion.

Under Ninth Circuit law, a plaintiff must establish the requisite coercive element of its tying claim. *See Paladin Assoc.*, 328 F.3d at 1159 (recognizing that proof that the seller *coerced* a buyer to purchase the tied product is "essential" to the second element of a tying claim) (emphasis in original).

In a concurrence in a Supreme Court ruling, Justice O'Connor describes an "invalid tying arrangement" similarly:

> [t]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 (1984) (O'Connor, J., concurring).

Plaintiff fails to sufficiently establish the existence of the requisite coercive element. Whyte's testimony establishes beyond serious dispute that Regence freely purchased services it wanted from defendant. This court has examined plaintiff's interpretations of the testimony elicited from its Chief

Financial Officer Francis and finds no grounds to consider Whyte's testimony as controverted. Summary judgment is granted to defendant on plaintiff's tying claim.

3. Plaintiff's "Exclusive Dealing" Claim

Plaintiff's Second Claim asserts that defendant has suppressed competition in the relevant market by excluding plaintiff from Regence's preferred provider panel. Plaintiff contends that defendant's exclusive payor contracts under the Sherman Act are a restraint of trade under the Act's Section 1.

Exclusive dealing relationships require a buyer to deal only with a particular seller. They are considered unlawful when the anti-competitive effects outweigh the pro-competitive effects. *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997). Conversely, exclusive dealing contracts are lawful unless their "probable effect is to 'foreclose competition in a substantial share of the line of commerce affected.'" *Id.*, quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). Exclusive contracts that are of short duration and easily terminable generally do not harm competition. *Id.* at 1163-64.

A common element to exclusive dealing claims is a showing of a substantial foreclosure of competition in the relevant market. Plaintiff alleges that defendant entered into exclusive dealing contracts that have significantly constrained plaintiff's access to the local healthcare market and likewise will prevent other caregivers from entering the market. Specifically, plaintiff asserts that defendant coerced Regence into participating in a combination of services that suppresses

competition in the relevant market of Lane County and that defendant and Regence enjoy sufficient market power together to continue suppressing such competition.

According to largely uncontested statements of fact by the parties, Regence provides health insurance to approximately 70,000 Lane County residents, about 35 percent of the county's insureds. A large majority of the 70,000 is enrolled in Regence's "preferred provider" health insurance products.

Plaintiff alleges that where defendant competes with plaintiff in primary and secondary care services, defendant prices its services below its cost. For tertiary services, for which defendant has no competition, plaintiff alleges that defendant's prices are substantially in excess of cost. Plaintiff contends that defendant negotiated with Regence to secure defendant's Sacred Heart Hospital as the sole preferred provider of acute care hospital services in the Eugene-Springfield area, and in exchange for this exclusivity, tertiary cardiovascular and neonatal services are provided at unreasonably and unfairly low rates.

Plaintiff alleges that as a result of being excluded from Regence's preferred provider panel, Regence's insureds have to pay substantially more out-of-pocket expenses for inpatient services obtained from plaintiff. Accordingly, the financial disincentive to use plaintiff's services that has resulted from defendant's exclusive dealing with Regence has restrained the choices for Lane County's consumers regarding acute care hospital providers.

Defendant seeks summary judgment on plaintiff's "exclusive dealing" claim on grounds that its preferred provider contracts forecloses plaintiff from only nine to 15 percent of the commercially

insured lives in Lane County. Defendant says this is minimal restraint, and refers to the Ninth Circuit's decision in *Omega*, which affirmed a court's decision to grant summary judgment to a defendant in a case in which that defendant foreclosed up to 38 percent of the relevant market. Defendant also relies upon the fact that its exclusive contracts are short-term and easy to terminate.

However, in *Twin City Sportservice Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1302-03 (9th Cir. 1982), the Ninth Circuit approved of the district court's consideration of the "overall effects of a defendant's conduct in the relevant market" and the defendant's "aggregate pattern of conduct in the relevant market":

> a narrow focus on the volume of commerce foreclosed by the particular contract or contracts in suit would not be appropriate in this context. As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition.

Id. at 1302-03.

Plaintiff's claim emphasizes that defendant already enjoys a 75 percent share of the secondary hospital market, and the "effect of excluding [plaintiff] from the most significant commercial insurance programs in the market is therefore magnified . . . ." Plaintiff's Amended Response at 38. The cumulative effect of defendant's exclusionary conduct is allegedly "overwhelming," and plaintiff asserts that being excluded from the preferred provider plans contributes significantly to the decline in plaintiff's commercially insured patients. These assertions and the evidence presented thus far raise genuine issues of material fact precluding summary judgment.

Moreover, viewing defendant's exclusionary agreements as short-term and easily terminated may be misleading in light of defendant's pre-existing market dominance. In *Oltz v. Saint Peter's Community Hospital*, 861 F.2d 1440, 1448-49 (9th Cir. 1988), the Ninth Circuit discussed the termination terms of exclusivity contracts and emphasized that "[t]he rule of reason requires evaluation of each challenged restraint in light of the special circumstances involved" and that "the analysis will differ from case to case." *Id*. Defendant's position in Lane County undeniably is a factor that magnifies the effect of plaintiff's foreclosure from the specialized market. Although the *Omega* decision recognizes that not all exclusive contracts harm competition, under the circumstances presented in this case, this court is unable to conclude now, as a matter of law, that defendant's contracts with Regence do not unfairly harm competition.

4. Plaintiff's Monopolization and Attempt to Monopolize Claims

Plaintiff's Third and Fourth Claims assert allegations of Monopolization and Attempted Monopolization, which are prohibited by Section 2 of the Sherman Act, 15 U.S.C. § 2. To make out a claim of monopolization, plaintiff must allege: (1) defendant's possession of "monopoly power" in the relevant market; (2) defendant's willful acquisition or maintenance of that power through exclusionary conduct; and (3) causal antitrust injury. *American Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publications, Inc.*, 108 F.3d 1147, 1151 (9th Cir. 1997); *see also Grinnell Corp.*, 384 U.S. at 570-71. Any person "injured in his business or property" by such monopolization may bring suit for treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15(a).

To prove attempted monopolization, a plaintiff must show: "(1) that the defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

"Because willful acquisition or maintenance of monopoly power for purposes of monopolization requires proof that the defendant engaged in predatory conduct, proof of such conduct is an element common to both monopolization and attempted monopolization." *See Willamette Dental Group, P.C. v. Oregon Dental Serv. Corp.*, 882 P.2d 637, 641 (Or. App. 1994), citing *Transamerica Computer Co., Inc. v. IBM Corp.*, 698 F.2d 1377, 1382 (9th Cir. 1983).

Predatory conduct is "behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n. 32 (1985). To determine whether a defendant's conduct meets this definition, courts assess the impact of that conduct on (1) the defendant, (2) the defendant's competitors, and (3) consumers. *Id.* at 605.

Courts examine the alleged predatory conduct in terms of "economic efficiency," and if a defendant seeks to exclude rivals on a basis other than efficiency, then the behavior is characterized as predatory. *Id.* at 605; *see also Pacific Exp., Inc. v. United Airlines, Inc.*, 959 F.2d 814, 818 (9th Cir. 1992).

Monopoly power, commonly referred to as market power, is defined as "the power to control prices or exclude competition." *Grinnell Corp.*, 384 U.S. at 571. Because direct evidence of the power to control prices or exclude competitors is rarely available, courts generally rely on circumstantial evidence of market power. *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001).

In order to establish a defendant's market power by circumstantial evidence, a plaintiff must "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and . . . that existing competitors lack the capacity to increase their output in the short run." *Rebel Oil, Inc.*, 51 F.3d at 1434; *see also Western Parcel Exp. v. United Parcel Service of America, Inc.*, 190 F.3d 974, 975 (9th Cir. 1999).

Generally, a plaintiff may establish a prima facie case of market power by showing that the defendant has a 65 percent or greater market share. *Am. Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946). However, in cases involving regulated industries, "[r]eliance on statistical market share . . . is downright folly where . . . the predominant market share is the result of regulation." *Metro Mobile CTS, Inc. v. NewVector Communications, Inc.*, 892 F.2d 62, 63 (9th Cir. 1989); *see also S. Pac. Communications Co. v. AT & T*, 740 F.2d 980, 1000 (D.C. Cir. 1984) ("Reliance on statistical market share is a questionable approach in cases involving regulated industries . . . . A predominant market share may merely be the result of regulation, and regulatory control may preclude the exercise of monopoly power;" "in such cases market share should be at

most a point of departure in determining whether monopoly power exists," and ultimately "a court should focus directly upon the ability of the regulated firm to control prices or exclude competition"); *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 366 (9th Cir. 1988) (a high market share may raise an inference of monopoly power, but an inference of monopoly power from a high market share is inappropriate where there is evidence of the defendant's inability to control prices or exclude competitors).

As reviewed above, to make out a claim of *attempted* monopolization in violation of 15 U.S.C. § 2, a plaintiff must allege: (1) defendant's specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct directed at accomplishing that purpose; (3) a dangerous probability of defendant achieving monopoly power; and (4) causal antitrust injury. *Rebel Oil Co.*, 51 F.3d at 1432-33 (citing *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir. 1988)); *see also Spectrum Sports, Inc*, 506 U.S. at 456 (to demonstrate attempted monopolization plaintiff must show "(1) that [defendant] engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power").

Neither monopoly power nor a dangerous probability of achieving monopoly power can exist absent barriers to new entry or expansion. *American Prof'l Testing*, 108 F.3d at 1154; *Rebel Oil*, 51 F.3d at 1439. The main sources of entry barriers are: (1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preference for established brands; (4) capital market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of scale. *American Prof'l Testing*, 108 F.3d at 1154.

Defendant seeks summary judgment on plaintiff's monopolization and attempted monopolization claims. This court has examined the evidence and arguments presented, and concludes that questions of fact remain regarding whether defendant's conduct has unfairly diminished or excluded competition. There are issues of fact arising from alleged exclusionary dealings that enable defendant to be a sole preferred provider, evidence of possible conspiracy between defendant and Regence, and the evidence presented regarding plaintiff's allegations about defendant's employment of doctors who limit referrals to plaintiff's hospital. These questions of fact preclude summary judgment on the monopolization and attempted monopolization claims.

For the following reasons, plaintiff will be permitted to present evidence at trial on monopolization and attempted monopolization claims based upon allegations of exclusionary dealings, possible conspiracy, allegations of predatory pricing, and physician hirings. Plaintiff, however, fails to establish a sound basis for admitting evidence as to defendant's hospital acquisitions or regarding its tying allegations.

A. Predatory Pricing

To show predatory pricing a plaintiff generally must prove (1) that the low prices complained of are below an appropriate measure of its rival's costs and (2) that the competitor has (under the Robinson-Patman Act) a reasonable possibility, or (under the Sherman Act) a dangerous probability, of recouping its investment in the below-cost prices. *Beech-Nut Nutrition Corp. v. Gerber Products Co.*, 2003 WL 21317277, 1 (9th Cir. 2003), citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993).

In order to successfully recoup losses through higher-than-competitive prices, an entity must have the power to control prices and have sufficient staying power to be able to charge those prices for long enough to make up its losses. *Brooke Group*, 509 U.S. at 225; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 590-91 (1986).

To state a valid claim under Section 2 of the Sherman Antitrust Act for predatory pricing, plaintiff must demonstrate that defendant has sufficient market power. *See Rebel Oil Co.*, 51 F.3d at 1434.

Plaintiff claims that defendant unfairly discounted the prices of its services for newborn care and other services with which plaintiff is a competitor so as to draw patients away from plaintiff. Defendant disregards plaintiff's complaints about defendant's pricing of its services, asserting that low prices are the essence of price competition. Moreover, defendant claims its prices are above its average total cost, and above the average variable cost, and so should be construed as a matter of law as legal. *See Brooke Group*, 509 U.S. at 222, n.1; *Rebel Oil*, 146 F.3d at 1092; *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1035-36 (9th Cir. 1981).

The Second Circuit has analyzed *Brooke Group*, and has reasoned that nothing in the opinion suggests that the theory regarding the legality of the above-cost pricing applies "to a monopolist with its unconstrained market power." *See Lepage's v. 3M*, 324 F.3d 141, 151 (2nd Cir. 2003). The court recognized that a monopolist's bundling of products to reward buyers with discounts for purchasing multiple products could reasonably be viewed as improper. "The principal anticompetitive effect of bundled rebates . . . is that when offered by a monopolist they may foreclose

portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer." *Id*. at 155.

Defendant does not dispute the existence of some below-cost pricing, but contends that such pricing occurred in only a tiny percentage (less than 0.6 percent) of defendant's net revenues). Plaintiff's claim, however, pertains to the exclusionary effect of defendant's pricing, which falls upon 14 percent of *plaintiff's* inpatient net revenues, a possibly critical impact upon a hospital struggling to remain viable. While defendant's below average variable cost pricing of newborn services might be construed as "vigorous competition," a factual question rises about whether, if defendant has monopoly power, such pricing is an unfair attempt to drive out competition through predation and later recoup its investment. Defendant fails to establish an absence of questions of fact regarding whether defendant's pricing was predatory. Accordingly, summary judgment to defendant on this issue as it pertains to plaintiff's monopolization and attempted monopolization claims is inappropriate.

B. Defendant's Status as the sole Preferred Provider of Hospital Services

Defendant suggests that the limited number and nature of defendant's preferred provider arrangements should preclude liability, since defendant only holds one current contract with Regence where it is the sole preferred provider, and has only held three others – two lasting nine months (with Monaco Coach and Weyerhaeuser) and one that was terminable in 60 days (Providence). This argument for summary judgment is rejected because, as determined above, issues of fact exist precluding summary judgment to defendant on the question of whether defendant's agreements with Regence possibly violate the antitrust laws.

C. Defendant's Employment/Steering of Physicians

Plaintiff also asserts defendant is increasing its share of employed physicians in Lane County, and then requiring these physicians to refer business only to defendant's hospitals. Defendant says this is not improper and should be construed as a form of proper competition. Defendant also vigorously disputes that its physicians "steer" patients away from plaintiff, and noting that its doctors pay for privileges with plaintiff and that the admissions from defendant-employed physicians to plaintiff have increased over 240 percent since 1998. Even if defendant's doctors were steering patients away from plaintiff, defendant argues that such conduct is not objectionable unless the employees were hired for the sole reason of keeping them from a rival.

Plaintiff suggests that the 240 percent increase in referrals from defendant is not dispositive because it is merely a result of pediatrician referrals, who would lose their patients if they missed the childbirths occurring at plaintiff's hospital. In 2002, 97 percent of the referrals were by pediatricians. Moreover, while there may be authority for declaring that there is no general duty to cooperate with a competitor, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), the Supreme Court reasoned that the refusal to cooperate may not be exercised with an intent to create or maintain a monopoly and that such refusals were relevant to the question of whether there was exclusionary or anti-competitive conduct. "The question whether [the monopolist's] conduct may be properly characterized as exclusionary cannot be answered by simply considering its effect on [its competitor]. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way." *Id.* at 605.

Plaintiff presents sufficient evidence of possible compromised patient care, higher costs to plaintiff because of defendant's control of referrals, and other consequences of defendant's alleged attempts to drive plaintiff out of business, to preclude defendant from obtaining summary judgment at this juncture. Plaintiff will be permitted at trial to support these claims by presenting evidence of defendant's alleged hiring of physicians for purposes of controlling hospital admissions.

D. Defendant's Acquisition of Cottage Grove and Peace Harbor Hospitals and Expansion of the Cottage Grove and Sacred Heart Hospitals

Plaintiff also contends that defendant's acquisition of area hospitals and its expansion of some of them reduces referrals plaintiff may receive and further excludes plaintiff. Plaintiff alleges that once acquired, these hospitals controlled their physicians' referrals and excluded plaintiff.

Defendant seeks summary judgment on this claim on several grounds. Defendant argues that new construction and expansion is pro-competitive and pro-community. Second, defendant says the statute of limitations has expired on the acquisition of the Peace Harbor Hospital in Florence, which defendant acquired in 1989. This is beyond the four years allowed for a cause of action under 15 U.S.C. § 15b. Third, defendant argues that the Cottage Grove acquisition did not harm plaintiff because it occurred after the hospital declared bankruptcy (and after plaintiff refused entreaties to assist in keeping it open). When a competitor acquires another failing competitor, competition is increased, not decreased, and no antitrust injury results from such an acquisition. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977).

Plaintiff acknowledges that expansion and new construction can be pro-competitive but alleges that defendant's conduct is unfairly anti-competitive because a monopolist (defendant) is

purposefully bracketing itself around a failing hospital, siphoning off patients, and attaching restrictive covenants to properties to preclude plaintiff from expanding. Plaintiff also contends that the statute of limitations should not apply against the Peace Harbor acquisition in Florence because the ongoing referrals there continue to harm plaintiff.

This court agrees with defendant that an action against the Peace Harbor acquisition is time-barred and that plaintiff errs by confusing defendant's acquisition of the Peace Harbor Hospital with the development of the Health Associates of Peace Harbor physician group there (which occurred in 1992 and was not an acquired asset when Peace Harbor was purchased).

While plaintiff will be permitted to refer to the acquisitions in the context of the totality of defendant's conduct at trial, this court concludes that the acquisitions themselves are insufficient to independently support a monopolization claim.

5. Plaintiff's Conspiracy to Monopolize Claim

Plaintiff also alleges the existence of a conspiracy to monopolize the market for support services. To prevail on a conspiracy claim, plaintiff must show the existence of a "specific intent to monopolize and anti-competitive acts designed to effect that intent." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1154 (9th Cir. 2003), quoting *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir. 1980). Unlike monopolization or attempted monopolization claims, "no particular level of market power or 'dangerous probability of success' has to be alleged or proved . . . where the specific intent to monopolize is otherwise apparent from the character of the actions taken." *Id.*

Plaintiff argues that defendant has an agreement with Regence that grants preferred status to defendant. Although the agreement expressly disclaims exclusivity, plaintiff asserts the agreement was exclusive. Moreover, renewal of the agreement was "expressly conditioned upon continued exclusivity." Plaintiff's Amended Response at 41. The agreement and related conduct allegedly starved plaintiff of needed patients and is forcing plaintiff from the market.

While the evidence of an agreement between two parties, without more, will not suffice as proof of unlawful activity, such agreements may provide, or lead to, evidence of exclusionary purpose or intent. *Syufy Enters. v. Am. Multicinema, Inc.*, 793 F.2d 990, 1001 (9th Cir. 1986). However, at the minimum, proof of a conspiracy to monopolize requires a showing that more than one of the alleged co-conspirators had some awareness that the underlying conduct was anti-competitive or monopolistic. *Id*.

Defendant seeks summary judgment on grounds that there is no showing that Regence was involved with defendant's negotiations with self-insured employers, or that Regence was involved with the employment of physicians, or that defendant and Regence consciously committed themselves to a common scheme designed to achieve an unlawful objective. A court's discretion to infer the existence of conspiracies from circumstantial evidence is limited, "particularly when such inferences are implausible." *Matsushita*, 475 U.S. at 593.

While defendant argues that plaintiff's conspiracy theory is implausible and economically irrational, this court cannot conclude as a matter of law at this time that this is so. Plaintiff presents circumstantial evidence, much of it collected from the corporate officers involved, suggesting that

defendant and Regence entered into an agreement that they privately understood was intended to grant defendant exclusive preferred status. This inference arises from, in part, the appearance of patients being channeled to defendant, Regence's refusal to unbundle its purchases of services so that it might select plaintiff's lower-cost acute hospital care, and Regence's unwillingness to grant at least equal provider status to plaintiff. While defendant responds to this by presenting contradictory testimony from payors, this response underscores that granting summary judgment to defendant on this claim is inappropriate.

6. Plaintiff's State Law Claims

In addition to defendant's challenge of plaintiff's federal claims, defendant seeks summary judgment on plaintiff's state claims for (1) price discrimination under O.R.S. § 646.040 and (2) tortious interference with plaintiff's relationship with Regence. These arguments are reviewed in turn below.

A. Price Discrimination

Plaintiff asserts a claim under Oregon's Anti-Price Discrimination Law, which was modeled after federal law. Defendant reiterates its arguments that federal law only allows claims for predatory pricing when the seller sells at below-cost prices, and asserts that it has not engaged in below-cost pricing.

In light of the evidence that defendant may be a monopolist who has bundled products to exploit its monopoly power, and who may have engaged in other conduct to limit or extinguish

plaintiff's market access, and in accordance with this court's ruling regarding plaintiff's federal predatory pricing claim, defendant's motion for summary judgment on this issue is denied.

B. Tortious Interference

Defendant argues that a plaintiff cannot assert an independent tortious interference claim after or while asserting an unsuccessful federal antitrust claim. *See Willamette Dental Group*, 882 P.2d at 644 (concluding that summary judgment against the plaintiffs' tort claims was proper, recognizing that punishing competitive conduct permitted under the antitrust laws as tortious interference would be common law "back dooring" and would "subvert the function of antitrust law in defining, and regulating, the boundary between permissible and impermissible competitive conduct").

Obviously, this argument against the state interference claim is premised upon a finding that plaintiff fails to assert a viable federal antitrust claim. Since the court has concluded that awarding defendant summary judgment on plaintiff's federal antitrust claim is inappropriate, summary judgment for defendant on this claim is inappropriate as well. *See Beech-Nut Nutrition Corp. v. Gerber Products Co.*, 2003 WL 21317277 (9th Cir. 2003).

7. Plaintiff's Demand of Punitive Damages

Defendant argues that plaintiff has improperly sought punitive damages in the amount of $20,000,000 in addition to the treble damages permitted under the federal antitrust laws. Defendant cites to numerous cases indicating that a plaintiff must elect between recovering punitive damages under tort law, or under its antitrust claim with its treble damages. *See, e.g., Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171, 218 (3rd Cir. 1992).

Plaintiff does not disagree, but merely asserts that a plaintiff enjoys the right to *elect* between an antitrust remedy and a state remedy. In *SuperTurf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1284 (8th Cir. 1981), the Eighth Circuit concluded that a trial court erred in refusing the plaintiff's request to submit a special verdict form that would have required the jury to state whether the defendant had violated the antitrust laws, what plaintiff's resulting damages were, whether the defendant had interfered with plaintiff's business relations, and what (if any) punitive damages should be awarded as a result of defendant's tortious conduct. Had it done so, the court could have eliminated any duplicative aspects of the verdict by molding it, "while preserving for review the jury's determination on both liability theories." *Id*.

While treble damages and punitive damages are duplicative, plaintiff need not make a choice between the two at the summary judgment stage. This court denies defendant's motion for summary judgment attempting to compel plaintiff's election of either treble damages under federal antitrust law or punitive damages under Oregon tort law at this point in the litigation.

8. Defendant's Petitioning Activities

This court has also examined the parties' supplemental briefing regarding defendant's submissions of comments to the Oregon Attorney General concerning plaintiff's proposed affiliation with Triad. This court concludes that the comments in dispute fall within the scope of immunity established by what is known as the *Noerr-Pennington* Doctrine. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137, 139-44 (1961) (petitioning activity on issues in which the parties are financially interested is generally immune from

antitrust laws unless the petitioning was a sham or amounted to an attempt to use the governmental process as an anti-competitive weapon). Defendant's conduct regarding plaintiff's pursuit of approval for an affiliation with Triad has not fallen outside the scope of this doctrine.

CONCLUSION

For the reasons provided, defendant's Motion for Summary Judgment (doc. 85) is granted in part and denied in part. Plaintiff's Motion to Strike Portions of the Declarations of Maria Isabelita, James R. Barnhart, Tom Allen Jefferson, Phillip Dwight Jackson and Wayne Pinney is denied, but may be renewed as a pretrial matter if necessary.

IT IS SO ORDERED.

Dated this 15 day of August 2003.

/s/Ancer L.Haggerty
Ancer L. Haggerty
United States District Judge