Davis v. HCA Healthcare, Inc., 2023 NCBC 32.

STATE OF NORTH CAROLINA
BUNCOMBE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 3276

WILLIAM ALAN DAVIS; LORRAINE NASH, as Administrator of the Estate of RICHARD NASH; JONATHAN POWELL; FAITH C. COOK, Psy.D.; and KATHERINE BUTTON, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

v.

HCA HEALTHCARE, INC.; HCA MANAGEMENT SERVICES, LP; HCA, INC.; MH MASTER HOLDINGS, LLLP; MH HOSPITAL MANAGER, LLC; MH MISSION HOSPITAL, LLLP; ANC HEALTHCARE, INC. F/K/A MISSION HEALTH SYSTEM, INC.; and MISSION HOSPITAL, INC.,

Defendants.

ORDER AND OPINION ON DEFENDANTS' MOTION TO DISMISS FIRST AMENDED CLASS ACTION COMPLAINT

THIS MATTER comes before the Court on Defendants' Motion to Dismiss First Amended Class Action Complaint ("Motion to Dismiss" or "Motion," ECF No. 64).

THE COURT, having considered the Motion, the briefs of the parties, the relevant pleadings, and the arguments of counsel, **CONCLUDES**, for the reasons set forth below, that the Motion should be **GRANTED**, in part, and **DENIED**, in part.

Wallace and Graham, P.A., by Mona Lisa Wallace, John Hughes, and Olivia B. Smith, and Fairmark Partners LLP, by Jamie Crooks and Rucha A. Desai, for Plaintiffs William Alan Davis, Lorraine Nash, as Administrator of the Estate of Richard Nash, Jonathan Powell, Faith C. Cook, Psy.D., and Katherine Button, on their own behalf and on behalf of all others similarly situated.

Roberts & Stevens, P.A., by Phillip T. Jackson, John Noor, and David Hawisher, and Simpson Thacher & Bartlett LLP, by Sara Razi, Abram Ellis, Laurel E. Fresquez, and John A. Robinson, for Defendants HCA Healthcare, Inc., HCA Management Services, LP, HCA, Inc., MH Master Holdings, LLLP, MH Hospital Manager, LLC, and MH Mission Hospital, LLLP.

Bradley Arant Boult Cummings LLP, by Dana C. Lumsden, Anna-Bryce Hobson, and Hanna E. Eickmeier, and Faegre Drinker Biddle & Reath LLP, by Kenneth M. Vorrasi, Jonathan H. Todt, Alison M. Agnew, and Paul H. Saint-Antoine, for Defendants ANC Healthcare, Inc. f/k/a Mission Health System Inc. and Mission Hospital, Inc.

Davis, Judge.

INTRODUCTION

1. In this antitrust action involving the market for healthcare services, Plaintiffs' initial Complaint alleged that Defendants possessed a monopoly with regard to the provision of inpatient medical services in certain counties within western North Carolina through its flagship hospital—Mission Hospital-Asheville. Plaintiffs further asserted that by virtue of their negotiating power to insist upon the inclusion of certain anticompetitive contractual restraints in their contracts with commercial health insurers, Defendants were able to extend their monopoly to other markets within western North Carolina in violation of applicable antitrust law. In its 19 September 2022 Order and Opinion ("September 19 Opinion," ECF No. 55) on Defendants' motion to dismiss Plaintiffs' original Complaint, the Court dismissed without prejudice Plaintiffs' monopoly claims but ruled that Plaintiffs had stated a valid claim for relief on their accompanying claim for restraint of trade.

2. Following the Court's ruling, Plaintiffs filed a First Amended Complaint containing additional allegations in an attempt to remedy the defects identified by

the Court with regard to their monopoly claims as originally pled. Defendants have now filed a new motion to dismiss in which they contend that Plaintiffs' amended monopoly claims are still subject to dismissal as a matter of law. Therefore, the issue presently before the Court is whether Plaintiffs' new allegations are sufficient to state valid claims for relief on a monopolization theory.

FACTUAL AND PROCEDURAL BACKGROUND

3. The Court does not make findings of fact on a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and instead recites those facts contained in the complaint (and in documents attached to, referred to, or incorporated by reference in the complaint) that are relevant to the Court's determination of the motion. *See, e.g., Concrete Serv. Corp. v. Inv'rs Grp., Inc.*, 79 N.C. App. 678, 681 (1986); *Window World of Baton Rouge, LLC v. Window World, Inc.*, 2017 NCBC LEXIS 60, at *11 (N.C. Super. Ct. July 12, 2017).

4. A complete summary of the factual history of this case is unnecessary, as this Court has previously provided a detailed factual background in its September 19 Opinion, and the factual underpinnings of this case have not changed. Instead, the Court has set out below a brief overview of the most pertinent factual allegations.

5. Plaintiffs in this case are citizens of western North Carolina who claim they have been forced to pay higher premiums for their health insurance due to Defendants' alleged anticompetitive acts. (First Am. Class Action Compl. ["Am. Compl."], ECF No. 61, ¶¶ 15–20.)

6. Defendants HCA Healthcare, Inc.; HCA Management Services, LP; HCA, Inc.; MH Master Holdings, LLLP; MH Hospital Manager, LLC; and MH Mission Hospital, LLLP (collectively, the "HCA Defendants" or "HCA") operate as a for-profit hospital chain. (Am. Compl. ¶¶ 21–41.) HCA currently operates a hospital system in the Asheville area and surrounding western North Carolina region (the "Mission Health System" or the "System"). (Am. Compl. ¶¶ 21–41.)

7. HCA purchased the Mission Health System from Defendants ANC Healthcare, Inc. f/k/a Mission Health System, Inc. and Mission Hospital, Inc. (the "ANC Defendants") following the execution of an Asset Purchase Agreement on 30 August 2018. (Am. Compl. ¶¶ 48, 86.)[1]

8. Prior to HCA's purchase of the Mission Health System, the ANC Defendants operated the System with the benefit of a Certificate of Public Advantage ("COPA") law that provided Mission's hospitals legislative protection from antitrust scrutiny in exchange for their agreement to be subject to certain types of governmental oversight. (Am. Compl. ¶ 59.) Plaintiffs allege that the ANC Defendants abused the protection afforded by the COPA by acquiring and eliminating healthcare practice groups in the area, pressuring smaller hospitals to become part of the System, and buying up other hospitals—resulting in huge growth for the Mission Health System. (Am. Compl. ¶¶ 70–75.) After several subsequent amendments to the COPA law, the ANC Defendants successfully lobbied for the law's ultimate repeal, which formally terminated state oversight of the Mission Health

[1] For ease of reading, throughout this Opinion all of the entities Plaintiffs have sued in this action are often referred to collectively as "Defendants."

System. (Am. Compl. ¶ 59–81.) At the time of the COPA's repeal, Mission had a 93% market share for inpatient general acute care in Buncombe and Madison Counties, where Defendants served patients through Mission Hospital-Asheville. (Am. Compl. ¶¶ 69–71.) Thus, Plaintiffs allege that the COPA law enabled Defendants to obtain a monopoly with regard to inpatient healthcare services in Buncombe and Madison Counties. Plaintiffs contend in this lawsuit that Defendants have misused this monopoly power in violation of applicable law.

9. In the Amended Complaint, Plaintiffs allege that Defendants used their market power to coerce commercial health insurers to include provisions in their health insurance contracts favorable to Defendants. Plaintiffs contend that Defendants then used these contractual restraints to extend their monopoly power to additional healthcare markets in western North Carolina as well as to maintain their monopoly regarding inpatient services in Buncombe and Madison Counties.

10. Plaintiffs first allege that Defendants engaged in an unlawful "tying scheme." Plaintiffs assert that Defendants exploited the fact that no insurance plan in western North Carolina would be viable if Mission Hospital-Asheville was not included in-network. Defendants did so, Plaintiffs contend, by forcing insurers to also include in-network *other* less desirable Mission Health System facilities along with Mission Hospital-Asheville—regardless of whether the insurer actually wanted to include those other facilities in-network. (Am. Compl. ¶¶ 222–25.) Plaintiffs allege that Defendants used this tying scheme to gain monopoly-level power in the markets for outpatient services in the Asheville region (which is comprised of Buncombe and

Madison Counties), as well as in the markets for both inpatient services and outpatient services in the "Outlying Regions," which consist of Macon, McDowell, Mitchell, Transylvania, and Yancey Counties. (Am. Compl. ¶¶ 130, 222–44.)

11. Second, Plaintiffs assert that Defendants have insisted on "anti-steering" language in their contracts with health insurers as a result of which insurers were contractually barred from steering patients away from Defendants' facilities and toward competitor facilities offering lower prices and/or higher quality of care. Plaintiffs similarly contend that these contractual provisions also contained "anti-tiering" language, which prevented insurers from creating cost-saving "tiers" in their health insurance plans. (Am. Compl. ¶¶ 245–53.) Finally, Plaintiffs allege that Defendants insisted on other contractual provisions such as "gag clauses" that prevented insurers from revealing the terms of their contracts with Defendants, thereby inhibiting competition. (Am. Compl. ¶ 254–57.)

12. Plaintiffs argue that as a result of these contractual restraints, residents of western North Carolina pay significantly more for health insurance than residents in other parts of the State. (Am. Compl. ¶¶ 258–64.)

13. Plaintiffs initiated this lawsuit on 10 August 2021 by filing a Complaint in Buncombe County Superior Court containing claims under North Carolina law based on theories of monopoly acquisition, monopoly maintenance, monopoly leveraging, attempted monopolization, and restraint of trade. (ECF No. 3.)

14. Defendants moved to dismiss Plaintiffs' original Complaint on 13 October 2021. (ECF No. 27.) In its September 19 Opinion, the Court granted, in part,

and denied, in part, Defendants' Motion to Dismiss. (September 19 Opinion, ECF No. 55, at pp. 42–43.) Specifically, as noted above, the Court concluded that Plaintiffs had alleged a valid restraint of trade claim but dismissed Plaintiffs' claims for monopolization and attempted monopolization.[2] (September 19 Opinion, at pp. 42–43.)

15. On 31 October 2022, Plaintiffs filed their Amended Complaint in which they reasserted all of the claims contained in their original Complaint except for the monopolization claim under the North Carolina Constitution. (Am. Compl ¶¶ 323–63.) As in the original Complaint, all claims asserted in the Amended Complaint are based exclusively upon North Carolina law, and the markets defined to support their monopoly-based claims are the same as in the original Complaint: (1) the market for inpatient services in the Asheville Region; (2) the market for outpatient services in the Asheville Region; (3) the market for inpatient services in the Outlying Regions; and (4) the market for outpatient services in the Outlying Regions. (Am. Compl. ¶¶ 114–35.)

16. On 5 December 2022, Defendants filed the present Motion to Dismiss. (ECF No. 64.) In the Motion, Defendants seek dismissal of all of the monopolization and attempted monopolization claims contained in the Amended Complaint. (ECF No. 64.)

[2] The Court dismissed all of the monopolization and attempted monopolization claims without prejudice except for a claim under the North Carolina Constitution, which Plaintiffs conceded was not viable. (September 19 Opinion, at pp. 42–43.)

17. This matter came before the Court for a hearing on 27 March 2023. The Motion is now ripe for decision.

LEGAL STANDARD

18. "It is well-established that dismissal pursuant to Rule 12(b)(6) is proper when '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' " *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166 (2002)). The Court may also "reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint." *Laster v. Francis*, 199 N.C. App. 572, 577 (2009) (cleaned up).

19. This Court has previously noted that

> "[t]he general standard for civil pleadings in North Carolina is notice pleading." *Murdock v. Chatham Cty.*, 198 N.C. App. 309, 316, 679 S.E.2d 850, 855 (2009) (citing N.C. Gen. Stat. § 1A-1, Rule 8(a)(1)). "Under this 'notice pleading' standard, 'a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought.' " *Tillery Envtl. LLC v. A&D Holdings, Inc.*, No. 17 CVS 6525, 2018 NCBC LEXIS 13, at *78 (N.C. Super. Ct. Feb. 9, 2018) (quoting *Wake Cty. v. Hotels.com, L.P.*, 235 N.C. App. 633, 646, 762 S.E.2d 477, 486 (2014)).
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> However, even if a pleading provides proper notice of "the nature and basis" of a claim sufficient to formulate an answer, the Court must still, under a Rule 12(b)(6) motion, "address the legal sufficiency" of each pleaded claim. *Kingsdown, Inc. v. Hinshaw*, No. 14 CVS 1701, 2015 NCBC LEXIS 30, at *14, *15 (N.C. Super. Ct. Mar. 25, 2015). A pleading that satisfies Rule 8's notice requirement may still be subject to Rule 12(b)(6) dismissal. *Id.* at *13–45 (holding that a counterclaim-plaintiff's

> claims did not violate Rule 8 and then dismissing with prejudice many of those claims under Rule 12(b)(6)).

Sykes v. Health Network Sols., Inc., 2018 NCBC LEXIS 29, at **9–10 (N.C. Super Ct. April 5, 2018).

20. In evaluating the validity of antitrust claims asserted under North Carolina law at the pleadings stage, this Court has stated the following:

> The Motion [to Dismiss] must be decided as a matter of state law; however, it is proper for the Court to consult federal case law. *See Rose v. Vulcan Materials Co.*, 282 N.C. 643, 656-57, 194 S.E.2d 521, 530-31 (1973) (consulting federal decisions to inform the court's restraint-of-trade analysis). The Court is fully cognizant that the Motion [to Dismiss] must be resolved under North Carolina's lenient Rule 12(b)(6) standard rather than the more exacting federal plausibility standard that governs the federal antitrust precedents that the parties cite in their briefs.

Sitelink Software, LLC v. Red Nova Labs, Inc., 2016 NCBC LEXIS 45, at **17 (N.C. Super Ct. June 14, 2016); *see also Dicesare v. Charlotte-Mecklenburg Hosp. Auth.*, 376 N.C. 63, 70 (2020) (applying North Carolina's Rule 12 standard in reviewing antitrust claims brought under North Carolina law).

21. "Dismissal of an antitrust claim 'at the pre-discovery, pleading stage [is] . . . generally limited to certain types of glaring deficiencies.' " *Se. Anesthesiology Consultants, PLLC v. Rose*, 2019 NCBC LEXIS 63, at *25 (N.C. Super. Ct. Oct. 10, 2019) (quoting *Dicesare v. Charlotte-Mecklenburg Hosp. Auth.*, 2017 NCBC LEXIS 33, at *46 (N.C. Super Ct. April 11, 2017)). Nevertheless, "even North Carolina's lenient pleading standard does not allow for an antitrust claim to continue when there are insufficient or conclusory allegations of market power." *Id.* (citing *Sitelink*, 2016 NCBC LEXIS 45, at *29–30).

ANALYSIS

22. Defendants contend that dismissal of each of the monopolization and attempted monopolization claims contained in the Amended Complaint is appropriate because none of the various theories relied upon by Plaintiffs are adequately supported by their allegations.

23. Our General Statutes provide that

> [i]t is unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of trade or commerce in the State of North Carolina.

N.C.G.S. § 75-2.1 (2021).

24. As an initial matter, the Court notes that Plaintiffs were originally advancing a claim that Defendants had *acquired* their alleged monopoly on inpatient services in the Asheville Region unlawfully. In its September 19 Opinion, the Court dismissed Plaintiffs' monopoly acquisition claim without prejudice. In their brief in opposition to Defendants' present Motion, Plaintiffs acknowledged that they have abandoned this theory. Accordingly, the monopoly acquisition claim is **DISMISSED** with prejudice.

25. Although each of Plaintiffs' remaining monopolization theories are distinct, they all require the following elements: "(1) the possession of monopoly power in the relevant market and (2) willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *See Sykes v. Health Network Sols., Inc.*, 2017 NCBC LEXIS 73, at *60 (N.C. Super. Ct. Aug. 18, 2017) (cleaned up).

26. Our Supreme Court has articulated the following principles regarding monopolies under North Carolina law:

> A monopoly results from ownership or control of so large a portion of the market for a certain commodity that competition is stifled, freedom of commerce is restricted, and control of prices ensues. It denotes an organization or entity so magnified that it suppresses competition and acquires a dominance in the market. The result is public harm through the control of prices of a given commodity. *State v. Atlantic Ice & Coal Co.*, 210 N.C. 742, 747-48, 188 S.E. 412, 415 (1936) . . . .
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> The distinctive characteristics of a monopoly are, then, (1) control of so large a portion of the market of a certain commodity that (2) competition is stifled, (3) freedom of commerce is restricted and (4) the monopolist controls prices . . . .
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> . . .
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> In order to monopolize, one must control a consumer's access to new goods by being the only reasonably available source of those goods. A consumer must be without reasonable recourse to elude the monopolizer's reach. Logically, then, the market encompasses geographically at least all areas within reasonable proximity of potential customers.
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> . . .
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> More than a mere adverse effect on competition must arise before a restraint of trade becomes monopolistic.

American Motors Sales Corp. v. Peters, 311 N.C. 311, 315–17 (1984).

27. This Court has previously discussed how to properly assess monopoly power for purposes of Chapter 75.

> "Monopoly power is the power to control prices or exclude competition. A defendant possesses monopoly power in the relevant market if it is truly predominant in the market." *Kolon Indus. Inc. v. E.I. Dupont de Nemours & Co.*, 748 F.3d 160, 173-74 (4th Cir. 2014) (citations omitted) (internal quotation marks omitted). In determining whether monopoly power exists, courts look at defendant's market share, the durability of defendant's market power, and whether there are significant barriers to

> entry. *Id.* at 174; *Bepco, Inc.*, 106 F. Supp. 2d at 830. Market share, while highly relevant to monopoly power, is not conclusive. *Kolon Indus. Inc.*, 748 F.3d at 174 ("[T]here is no fixed percentage market share that conclusively resolves whether monopoly power exists . . . ."); *Broadway Delivery Corp. v. United Parcel Serv.*, Inc., 651 F.2d 122, 128 (2d Cir. 1981) ("The trend of guidance from the Supreme Court and the practice of most courts endeavoring to follow that guidance has been to give only weight and not conclusiveness to market share evidence."); *see also Sitelink Software, LLC*, 2016 NCBC LEXIS 45, at *29-31 (stating that courts often apply certain presumptions for measuring market power, but a determination of market power turns on a fact-specific inquiry and an antitrust plaintiff must "demonstrate some minimal set of well-grounded factual allegations to support an assertion of market power").

Dicesare, 2017 NCBC LEXIS 33, at *54–55.

28. Plaintiffs' monopolization claims here are best framed as claims for monopoly maintenance and monopoly leveraging and can be summarized as follows: First, Plaintiffs argue that Defendants have used anticompetitive means (namely, the above-described contractual restraints) to *maintain* the monopoly they possess on inpatient services in the Asheville Region. Second, they contend that Defendants have used these same anticompetitive acts to *leverage* their existing monopoly regarding inpatient services in the Asheville Region into new monopolies for outpatient services in the Asheville Region as well as for both inpatient and outpatient services in the Outlying Regions.

29. Our Supreme Court has not yet had occasion to fully address claims for monopoly maintenance or monopoly leveraging. Therefore, as noted above, although Plaintiffs' claims are based solely on North Carolina law, it is appropriate for this Court to consider relevant case law from other jurisdictions for guidance. *See Sitelink,* 2016 NCBC LEXIS 45, at **17.

30. The Court will address each of Plaintiffs' theories in turn.

A. Monopoly Maintenance

31. A monopoly maintenance claim "has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful . . . maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *New York v. Facebook, Inc.*, 549 F. Supp. 3d. 6, 23–24 (D.D.C. 2021) (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 50 (D.C. Cir. 2001)).

32. In support of this claim, Plaintiffs assert that even assuming Defendants obtained their monopoly over the inpatient services market in the Asheville Region lawfully (largely, due to the COPA), they have unlawfully used the above-described contractual restraints to maintain that monopoly. (Am. Compl. ¶ 169.)

33. The Court previously dismissed Plaintiffs' monopoly maintenance claim based on its conclusion that "all, or virtually all, of Plaintiffs' allegations concerning the contractual restrictions utilized by Defendants relate to markets *other than* the Asheville Region Inpatient Services market." (September 19 Opinion ¶ 80.) In other words, the Court determined that Plaintiffs' allegations in the original Complaint focused solely on Defendants' attempt to *leverage* their existing Asheville-based monopoly for inpatient services into other markets as opposed to any attempt to *preserve* that existing monopoly.

34. The Amended Complaint attempts to bolster Plaintiffs' monopoly maintenance theory by adding new allegations directly relating to this claim. In particular, Plaintiffs assert that a specific purpose of the anticompetitive contractual provisions—primarily, the anti-steering provision—that Defendants have coerced commercial health insurers into including has been to maintain Defendants' monopoly in the Asheville Region Inpatient Services Market. Plaintiffs allege that absent these anti-steering provisions, the insurers would be able to steer patients within the service area of Mission Hospital-Asheville to nearby competitor hospitals such as AdventHealth Hendersonville and Pardee UNC Healthcare, who could offer higher quality care at a lower cost. (*See, e,g.*, Am. Compl. ¶¶ 169–72.)

35. Despite Defendants' arguments to the contrary, the Court is satisfied that these new allegations in the Amended Complaint are sufficient to state a valid claim for monopolization on a theory of monopoly maintenance. Simply put, Plaintiffs have now alleged that one purpose of the same contractual restraints that the Court has already held to be potentially anticompetitive was to enable Defendants to maintain their current monopoly as to the Asheville Region Inpatient Services Market. As with all of Plaintiffs' claims in this action that the Court is allowing to go forward, it remains to be seen whether Plaintiffs will be able to move past the summary judgment stage on this claim (much less ultimately prevail at trial). But based on the Court's application of North Carolina's standard for evaluating claims at the Rule 12 stage, the Court concludes that the Amended Complaint adequately pleads a monopoly maintenance claim under North Carolina law.

36. Therefore, the Court **DENIES** Defendants' Motion to Dismiss Plaintiffs' monopoly maintenance claim.

B. Monopoly Leveraging

37. Plaintiffs also attempt to reassert their monopoly claims based on a theory of monopoly leveraging.

38. "A monopoly leveraging claim is a . . . monopolization claim or attempted monopolization claim involving conduct in more than one market. To succeed, a plaintiff must demonstrate 'that a party has a monopoly in one area, uses unlawful acts to leverage that monopoly into another area, and achieves or is likely to achieve that second monopoly.' " *Simon & Simon, PC v. Align Tech., Inc., No. 19-506 (LPS)*, 2020 U.S. Dist. LEXIS 72499, at *23 (D. Del. Apr. 24, 2020) (quoting *IQVIA Inc. v. Veeva Systems, Inc.*, 2018 U.S. Dist. LEXIS 171456, at *4 (D.N.J. Oct. 3, 2018)).

39. Thus, a plaintiff asserting a claim under this theory must allege either that the defendant actually possesses monopoly power in the secondary market or that the monopolist has a "dangerous probability of success" of monopolization of the secondary market. *Unigestion Holding, S.A. v. UPM Tech., Inc.,* 305 F. Supp. 3d. 1134, 1150 (D. Ore. 2018) (quoting *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 415 n.4 (2004)).

40. Here, Plaintiffs allege that Defendants have used their preexisting monopoly in the Asheville Region Inpatient Services Market to acquire additional monopolies in the Asheville Region Outpatient Services Market and the Outlying

Regions Inpatient and Outpatient Services Markets. In its September 19 Opinion, the Court dismissed Plaintiffs' monopoly leveraging claims as pled in their original Complaint because Plaintiffs had failed to adequately allege monopoly power in these additional regions—either through allegations based on market share data or through allegations of their ability to control prices.

41. Although Defendants do not challenge the validity of Plaintiffs' allegations that Defendants possess existing monopoly power in the primary market—that is, the Asheville Region Inpatient Services Market—Defendants argue that the new allegations in the Amended Complaint do not cure the pleading deficiencies previously identified by the Court on Plaintiffs' monopoly leveraging claims. The Court must therefore analyze the adequacy of these new allegations as to each of the relevant markets with regard to Plaintiffs' monopoly leveraging theory.

i. Outlying Regions Inpatient Services Market

42. As noted above, the Outlying Regions Inpatient Services Market consists of inpatient healthcare services offered to patients in Macon, McDowell, Mitchell, Transylvania, and Yancey Counties. In its September 19 Opinion, the Court ruled that Plaintiffs' allegations as to Defendants' market share for inpatient services in these regions were impermissibly based on Medicare data, which the Court concluded was legally insufficient given that this lawsuit concerns the private insurance market rather than the sale of services to government payors. (September 19 Opinion ¶¶ 87–92.)

43. Plaintiffs' Amended Complaint has cured this deficiency by listing Defendants' "total inpatient market share—including all commercial discharges—as calculated by four different sources of data[.]" (Am. Comp. ¶ 178.) For each of the counties that make up the Outlying Regions, Plaintiffs allege that Defendants possess a market share well in excess of 70%. *See Se. Anesthesiology*, 2019 NCBC LEXIS 63, at *33 ("Generally, seventy percent (70%) to seventy-five percent (75%) market share is necessary to sustain a monopolization claim[.]") (citations omitted).

44. Moreover, Plaintiffs have alleged that Defendants were able to obtain monopolies in these counties by "requir[ing commercial health] insurers to include all of their hospitals in-network through their all-or-nothing contracting" and that Defendants "prevented insurers from steering patients to competitors in the Outlying Regions through the use of anti-steering provisions." (Am. Compl. ¶ 177.) The Amended Complaint further asserts that "[a]bsent these restraints, Defendants would not have monopolized these markets." (Am. Compl. ¶ 177.)

45. Defendants do not seriously challenge Plaintiffs' new market share allegations for inpatient services in the Outlying Regions. Instead, they contend, the Amended Complaint concedes that these high market shares are attributable not to monopolistic conduct on Defendants' part, but rather to the fact that these counties are rural in nature such that Defendants' facilities are in some places "the only viable option within driving distance." (Mem. of Law in Support of Mot. to Dismiss First Am. Class Action Compl. ["Defs.' Brief in Support], ECF No. 65, p. 23.)

46. It is true that the Amended Complaint alludes to this phenomenon. (*See* Am. Compl. ¶ 180.) Nevertheless, a contextual reading of the allegations as a whole in the light most favorable to Plaintiffs reveals that a sufficient causal nexus has been alleged between Defendants' anticompetitive acts and their ability to leverage their existing Asheville-based monopoly for inpatient services into a new monopoly for inpatient services in the Outlying Regions. As a result, while Defendants will no doubt renew this argument at the summary judgment stage (at which time the Court will have the benefit of a fully developed factual record), the Court declines to accept the argument as a basis to dismiss this claim at the present time.

47. Accordingly, because Plaintiffs have properly alleged a monopoly leveraging claim as to the Outlying Regions Inpatient Services Market under North Carolina law, the Court **DENIES** Defendants' Motion to Dismiss as to this claim.

ii. Outpatient Services Markets in Asheville Region and Outlying Regions

48. The Court reaches a different result, however, with regard to Plaintiffs' monopoly leveraging claims based on outpatient services—both in the Asheville Region and in the Outlying Regions.

49. In its September 19 Opinion, the Court dismissed Plaintiffs' monopoly leveraging claims regarding outpatient services in all regions for two reasons. First, Plaintiffs did not make any allegations in the original Complaint as to Defendants' market share in any relevant region regarding the provision of such services. Second, the allegations Plaintiffs made as to Defendants' ability to control prices for such outpatient services were too conclusory. (September 19 Opinion ¶¶ 92, 94.)

50. In their Amended Complaint, Plaintiffs have once again failed to allege any market share held by Defendants in any of the regions at issue regarding the provision of outpatient services. Instead, Plaintiffs' new allegations primarily allege that Defendants have obtained monopoly power over outpatient services in these regions through their "control" over various medical practices, facilities, and equipment in these areas. The Court agrees with Defendants that these allegations are simply not enough to state a valid claim for monopolization of these markets as to outpatient services *as a whole*.

51. Plaintiffs correctly contend that monopoly power may be properly alleged through facts that show an antitrust defendant has the ability to control prices or exclude competition in the relevant antitrust market—meaning that allegations of a defendant's market share are not necessarily required. *See*, *e.g.*, *Tops Mkt., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97–98 (2nd Cir. 1998) ("[Monopoly power] may be proven directly by evidence of the control of prices or the exclusion of competition, *or* it may be inferred from one firm's large percentage share of the relevant market.") (emphasis added). The Court observes, however, that neither the parties' briefs nor the Court's own research has disclosed any case in which our Supreme Court has allowed a monopolization claim to survive the pleadings stage where the complaint lacked *any* allegations regarding the defendant's market share in the relevant antitrust market.

52. That is not to say that such a scenario could never occur. The Court finds our Supreme Court's decision in *Dicesare* to be instructive. In that case, the

plaintiffs alleged that the defendant hospital authority had an approximate market share in the relevant market of 50%. The Supreme Court stated that it was "skeptical of monopoly claims that, like plaintiffs['], assert that a monopoly exists when an entity, like the Hospital Authority, has a market share of fifty percent or less." *Dicesare*, 376 N.C. at 98. The Supreme Court held that, as a result, the "monopolization claim cannot survive unless the other allegations in the . . . complaint show that the Hospital Authority has the ability to control prices in the Charlotte market in spite of the fact that it only has a fifty percent market share." *Id.* Based on its analysis of the complaint in that case, the Supreme Court concluded that it was "unable to agree with the trial court's determination that plaintiffs adequately pleaded that the Hospital Authority controlled 'so large a portion of the market' that it not only stifled competition and restricted freedom of commerce, but also controlled prices." *Id.* at 97.

53. In the new allegations in their Amended Complaint, Plaintiffs largely assert that Defendants control certain types of physician practices and facilities in both Asheville and the Outlying Regions and that Defendants' facilities offer highly sought equipment and medical devices that Defendants' competitors lack.

54. However, Plaintiffs' allegations as to both the Asheville Region and the Outlying Regions fail to sufficiently allege in a non-conclusory fashion that Defendants control prices in the relevant product market, which Plaintiffs have defined to include *all* outpatient services in both their original Complaint and their Amended Complaint. As Defendants note in their briefs, physician services and

outpatient services constitute "different antitrust product markets . . . . Plaintiffs have not alleged that Defendants monopolized or attempted to monopolize any markets for physician services." (Defs.' Brief in Support p. 18.) Nor do Plaintiffs attempt to differentiate between the inpatient services and the outpatient services provided by the physician groups that are the subject of their allegations. Moreover, assertions as to Defendants' mere ownership of certain types of medical equipment or devices at their facilities is likewise insufficient to allege monopoly power.

55. Finally, Plaintiffs' arguments regarding Defendants' alleged ability to control prices for outpatient services essentially rehash contentions that the Court previously rejected in its September 19 Opinion. For all of these reasons, the Court concludes, as in *Dicesare*, that these claims fail as a matter of law. *See Dicesare*, 376 N.C. at 97.

56. Accordingly, the Court **GRANTS** Defendants' Motion to Dismiss as to Plaintiffs' monopoly leveraging claims based on outpatient services in the Asheville Region and in the Outlying Regions, and those claims are **DISMISSED** with prejudice.

C. Attempted Monopolization

57. Finally, Plaintiffs contend that their attempted monopolization claims pass muster based on the new allegations in their Amended Complaint. The Court concludes that these claims should be **GRANTED**, in part, and **DENIED**, in part, as set out below.

58. "To demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Doctors Making Housecalls-Internal Med., P.A. v. Onsite Care, PLLC*, 2019 NCBC LEXIS 6, at *13 (N.C. Super. Ct. Jan. 16, 2019) (cleaned up). This Court has stated that "[g]enerally . . . thirty percent (30%) to fifty (50%) [market share] is presumed necessary to sustain a claim for attempted monopolization." *Se Anesthesiology*, 2019 NCBC LEXIS 63, at *32 (citations omitted).

59. Plaintiffs have asserted attempted monopolization claims as to the Outlying Regions Inpatient Services Market, the Outlying Regions Outpatient Services Market, and the Asheville Region Outpatient Services Market.

60. With regard to Plaintiffs' attempted monopolization claim for the Outlying Regions Inpatient Services Market, the Court concludes that Defendants' Motion to Dismiss should be **DENIED** for the same reasons that the Court has denied the actual monopolization claim for that market. *See Kolon,* 637 F.3d at 453 ("Given that we held above that [plaintiff] adequately pled actual monopolization, we can reach no conclusion other than that [plaintiff] adequately pled a dangerous probability of success as to [defendant's] attempted monopolization.").

61. However, as to the outpatient services markets in the Asheville Region and in the Outlying Regions, the same deficiencies underlying the monopolization claims for those markets subject their attempted monopolization claims to dismissal. For the reasons set out above, just as Plaintiffs have not adequately alleged that

Defendants possess monopoly power in those markets, they have likewise failed to sufficiently allege that there is a dangerous probability of Defendants actually achieving monopoly power.

62. The Court therefore **GRANTS** Defendants' Motion to Dismiss Plaintiffs' attempted monopolization claims as to the Asheville Region Outpatient Services Market and the Outlying Regions Outpatient Services Market, and these claims are **DISMISSED** with prejudice.

CONCLUSION

THEREFORE, IT IS ORDERED that Defendants' Motion to Dismiss is **GRANTED**, in part, and **DENIED**, in part, as follows:

1. Defendants' Motion to Dismiss Plaintiffs' monopoly acquisition claim is **GRANTED**, and that claim is **DISMISSED** with prejudice.
2. Defendants' Motion to Dismiss Plaintiffs' monopoly maintenance claim is **DENIED**.
3. Defendants' Motion to Dismiss Plaintiffs' monopoly leveraging claim as to the Outlying Regions Inpatient Services Market is **DENIED**.
4. Defendants' Motion to Dismiss Plaintiffs' monopoly leveraging claim as to the Asheville Region Outpatient Services Market and the Outlying Regions Outpatient Services Market is **GRANTED**, and those claims are **DISMISSED** with prejudice.
5. Defendants' Motion to Dismiss Plaintiffs' attempted monopolization claim as to the Outlying Regions Inpatient Services Market is **DENIED**.

6. Defendants' Motion to Dismiss Plaintiffs' attempted monopolization claims as to the Asheville Region Outpatient Services Market and as to the Outlying Regions Outpatient Services Market is **GRANTED**, and those claims are **DISMISSED** with prejudice.

SO ORDERED, this the 27th day of April, 2023.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge for
Complex Business Cases