IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ROBERT GOLD, ARSHAD KHAN, JORGE A. SALAZAR, MENG C. VANG, and SCOTT WILLIAMS,	)	
Plaintiffs,	)	
v.	)	**No. 06-2329**
METHODIST HEALTHCARE MEMPHIS HOSPITALS and MEMPHIS RADIOLOGICAL P.C.,	)	
Defendants.	)	

ORDER ON DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs Robert Gold, Arshad Khan, Jorge A. Salazar, Meng C. Vang, and J. Scott Williams (collectively "Plaintiffs"), bring this action against Defendants Methodist Healthcare Memphis Hospitals ("Methodist") and Memphis Radiological Professional Corporation ("MRPC," collectively "Defendants"). Plaintiffs sue under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a) and 26. They allege restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1; conspiracy in restraint of trade in violation of the Sherman Act, 15 U.S.C. §§ 1, 2, and 26; and illegal tying. Plaintiffs also bring state law claims for attempted monopolization in violation of the Tennessee Trade Practices Act, T.C.A. §§ 47-25-101 et seq.,

interference with business relationship, breach of oral contract, conspiracy in violation of Tennessee law, and intentional interference with patient rights.

Methodist filed a motion to dismiss on October 2, 2006, and MRPC filed a motion to dismiss on October 3, 2006. Both motions seek dismissal of Plaintiffs' federal antitrust claims and pendent state law claims. Plaintiffs responded to both motions on November 6, 2006. Defendants' motions relied in part on NicSand, Inc. v. 3M, Co. 457 F.3d 534 (6th Cir. 2006), which was vacated for rehearing en banc on November 22, 2006. By order of August 20, 2007, this case was stayed and closed administratively pending release of the en banc opinion. On October 17, 2007, the Sixth Circuit affirmed its earlier decision. NicSand, Inc. v. 3M, Co. 2007 WL 3010426 (6th Cir. 2007) (en banc).

By order entered October 23, 2007, this court reopened the case and directed the parties to file memoranda addressing the effect of NicSand on their respective positions. On November 21, 2007, Plaintiffs and Defendants filed NicSand memoranda.[1] On December 11, 2007, Plaintiffs and Defendants filed reply memoranda.[2]

[1] Methodist's NicSand memorandum was joined by MRPC and is therefore referred to as "Defendants'" memorandum.
[2] MRPC formally joined in Methodist's response, which is therefore referred to as "Defenants'" reply.

For the following reasons, Defendants' motions to dismiss Plaintiffs' federal antitrust claims are GRANTED, and Plaintiffs' remaining state law claims are DISMISSED WITHOUT PREJUDICE.

I. Jurisdiction

The court has jurisdiction over Plaintiffs' federal claims under 28 U.S.C. § 1331 and 28 U.S.C. § 1337(a). The court has supplemental jurisdiction over Plaintiffs' state law claims under 28 U.S.C. § 1367.

II. Background

Plaintiffs are physicians specializing in interventional radiology in Memphis, Tennessee. (Am. Compl. ¶ 1.) Plaintiffs Gold, Khan, Vang, and Williams are board certified in the specialty of radiology. Plaintiff Salazar is board eligible. (Id. ¶ 10.) Plaintiffs teach at the University of Tennessee Medical School and are employed by the University of Tennessee Medical Group ("UTMG"). (Id. ¶ 2.) They also provide patient care at the Regional Medical Center, LeBonheur Children's Medical Center, Veterans Affairs Medical Center Memphis, and St. Jude Children's Research Hospital. (Id.)

Defendant MRPC is a Tennessee professional corporation which provides radiological services. (Id. ¶ 5.) Defendant Methodist is a Tennessee corporation operating a system of

hospitals located in the metropolitan Memphis, Tennessee area. (Id. ¶ 4.)

MRPC and Methodist have a contract under which MRPC is the exclusive provider of radiological services for Methodist patients. (Id. ¶ 8.) MRPC also provides the chairman of Methodist-University Hospital's Department of Radiology. (Id. ¶ 9.) One of the chairman's duties is to approve applications for hospital privileges submitted by radiologists. (Id.)

The competent practice of interventional radiology requires training beyond that required for the specialty of radiology. (Id. ¶ 10.) Plaintiffs possess the types of skills offered by MRPC radiologists as well as skills and capabilities not offered by MRPC, including skills related to interventional procedures. (Id. ¶ 11.) For example, Plaintiffs are proficient in the intravascular use of liquid embolic materials, intra-arterial chemoinfusion techniques, venous reconstruction, laser therapy of varicose veins, percutaneous gastronomy, percutaneous radio frequency ablation of neoplasm, and cryo-oblation therapy of neoplasms. (Id.) Some skills possessed by Plaintiffs, but not by MRPC radiologists, permit the use of non-invasive surgical technologies. (Id.)

Plaintiffs' interventional procedures constitute products superior to those offered by MRPC radiologists. (Id.) In contrast to MRPC radiologists, Plaintiffs, as interventional

radiologists, exercise active staff admitting privileges and provide for the care of hospitalized patients. (Id.)

Plaintiffs are well-qualified and meet all objective criteria for radiologists seeking privileges at Methodist. (Id. ¶ 13.) Plaintiffs have privileges at the Regional Medical Center, Veterans Affairs Medical Center Memphis, and St. Jude Children's Research Hospital. (Id. ¶ 14.) Plaintiffs also have privileges at a Methodist System hospital, LeBonheur Children's Medical Center, where they are the sole physicians providing pediatric interventional radiological services. (Id. ¶ 15.)

Each of the hospitals at which Plaintiffs have privileges is a specialty hospital serving only a narrow segment of the Memphis population. (Id. ¶ 16.) The Regional Medical Center is a public hospital with a mission to serve primarily indigent members of the Memphis community and has an extremely limited capacity for elective admissions. (Id.) The Veterans Affairs Medical Center Memphis serves only veterans. (Id.) St. Jude Children's Research Hospital serves the limited population of patients requiring pediatric oncology. (Id.) LeBonheur Children's Medical Center serves only children. (Id.) There is no non-specialty hospital in Memphis to which Plaintiffs may admit an adult patient requiring their care. (Id. ¶ 17.)

Before January 1, 2000, Plaintiffs opened discussions with Methodist President and CEO Gary Shorb about obtaining

privileges at Methodist. (Id. ¶ 18.) Before July 1, 2004, Plaintiffs made written application for privileges at Methodist. (Id. ¶ 19.) Shorb represented to Plaintiffs and UTMG that Plaintiffs would be granted privileges to practice at Methodist effective July 1, 2004. (Id. ¶ 20.) When that did not occur, Shorb represented that Plaintiffs would be granted privileges beginning on November 1, 2004. (Id.) Shorb assured Plaintiffs that, if MRPC did not allow Plaintiffs to obtain privileges at Methodist, Methodist would terminate its exclusive contract with MRPC. (Id.) Notwithstanding these representations, on June 1, 2005, and subsequent occasions thereafter, Methodist unequivocally denied Plaintiffs privileges. (Id.) In so doing, Methodist cited an exclusivity provision in its contract with MRPC. (Id. ¶ 21.)

At one point prior to denial, Shorb told Plaintiffs that Methodist would allow them to practice interventional radiology in the Cardiology suite and discussed equipment purchases with them. (Id. ¶ 22.) Methodist gave Plaintiffs Hospital Identification Cards and parking passes, arranged meetings with Methodist staff to facilitate Plaintiffs' transition, and made plans to order certain equipment not previously available at Methodist to accommodate Plaintiffs' unique practice. (Id.)

While Plaintiffs' applications for privileges at Methodist were pending, MRPC, knowing of Plaintiffs' discussions with

Methodist, renegotiated and revised its contract with Methodist to preclude Methodist from granting privileges to Plaintiffs. (Id. ¶ 23.) MRPC interfered with Plaintiffs' attempt to secure privileges by, among other things, pressuring Methodist employees involved in the approval process (including members of Methodist's Board, Credentials Committee, and Medical Executive Committee) to deny Plaintiffs' applications for privileges. (Id. ¶ 24.) MRPC also invoked the exclusivity provision in its contract with Methodist, despite having previously chosen to waive the provision on certain occasions.[3] (Id. ¶¶ 24, 25.)

MRPC was motivated to interfere with Plaintiffs' efforts because it gains additional revenue by being the exclusive provider of radiology services at Methodist. (Id. ¶ 26.) Methodist and MRPC partially divide fees earned from patients who receive MRPC's radiology services at Methodist. (Id. ¶ 56.)

As a result of Methodist's denial of privileges to Plaintiffs, its patients are deprived of Plaintiffs' services, denied the benefit of ongoing relationships with their physicians, denied competitive conditions in the market for radiological services in Memphis, and are prevented from obtaining interventional radiological services. (Id. ¶ 27.) The barriers to entry into the market for radiology services in

[3] It is unclear whether Plaintiffs allege that MRPC has waived the exclusivity provision in its contract with Methodist in the past or that MRPC has waived similar provisions in contracts with other hospitals.

Memphis effectively prevent Plaintiffs from practicing radiology in the relevant market. (Id. ¶ 28.) Plaintiffs have been deprived of their right to practice interventional radiology at Methodist and have been effectively foreclosed from providing their specialized services in Memphis. (Id.) Plaintiffs are the only UTMG physicians without privileges at Methodist. (Id. ¶ 29.) Plaintiffs have been damaged economically because they have been unable to serve patients who require their services. (Id.)

Methodist controls approximately forty percent of the market for all radiological services in the relevant geographical market, Memphis, Tennessee. (Id. ¶¶ 32, 39.) Methodist holds itself out to the public as the second largest hospital in the United States. (Id. ¶ 35.)

The Baptist Hospital System ("Baptist") in Memphis has entered into an exclusivity contract for radiology services with Mid-South Imaging and Therapeutics, thus preventing Plaintiffs from practicing at Baptist hospitals. (Id. ¶ 31.) St. Francis Hospital ("St. Francis") has entered into an exclusivity contract with a separate radiological group, thus preventing Plaintiffs from practicing at St. Francis Hospital. (Id. ¶ 31.)

Together, Methodist, Baptist, and St. Francis control over eighty-eight percent of the non-specialty hospital market for medical/surgical beds. (Id. ¶ 33.) Each has executed an

exclusive dealing contract with a radiology group with the intent to harm competition and erect barriers to other radiologists hoping to enter the market. (Id. ¶¶ 33, 34.) These contracts effectively prevent Plaintiffs from practicing their specialty in over eighty-eight percent of the relevant market.[4] (Id. ¶ 34.) The contracts also deny Plaintiffs' unique services to more than eighty-eight percent of the adult population in Memphis. (Id. ¶ 35.)

III. Standard for Dismissal Under Rule 12(b)(6)

In addressing a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the court "must construe the complaint in the light most favorable to plaintiff[], accept all well-pled factual allegations as true and determine whether plaintiff[] undoubtedly can prove no set of facts consistent with [his] allegations that would entitle [him] to relief." League of United Latin American Citizens v. Bredesen, 2007 WL 2416474, at *2 (6th Cir. 2007) (citing Kottmyer v. Maas, 436 F.3d 684, 688 (6th Cir. 2006)). This standard requires more than bare assertions of legal conclusions. Bovee v. Coopers & Lybrand C.P.A., 272 F.3d 356, 361 (6th Cir. 2001). A plaintiff must provide the grounds for his entitlement to relief and this "requires more than labels

[4] In their complaint, Plaintiffs appear to use the term "relevant market" inconsistently, to apply both to the market for all radiology services and the market for non-specialty hospital radiology services. Here, Plaintiffs appear to refer to the market for non-specialty hospital radiology services.

and conclusions, and a formulaic recitation of the elements of a cause of action." Bell Atlantic Corp. v. Twombly, ___ U.S. ___, 127 S.Ct. 1955, 1964-65 (2007). "The factual allegations, assumed to be true, must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief." Bredesen, 2007 WL 2416474, at *2 (citing Twombly, 127 S.Ct. at 1965). To state a valid claim, "a complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory." Id. (citing Twombly, 127 S.Ct. at 1969).

IV. Analysis

A. Federal Antitrust Claims

Plaintiffs' amended complaint raises three claims under the federal antitrust laws. Count One alleges that Defendants unreasonably restrained trade.[5] (Am. Compl. ¶¶ 37-46.) Count Two alleges that Defendants conspired to unreasonably restrain trade. (Id. ¶¶ 47-54.) Count Three alleges that Defendants unlawfully tied the use of Methodist radiological facilities to MRPC radiological services. (Id. ¶¶ 55-58.) Although Defendants deny these claims on the merits, they principally

[5] Plaintiffs premise the claim of unreasonable restraint of trade on the following: tying the use of radiology facilities at Methodist to the purchase of MRPC radiology services, attempting to monopolize the market, refusing Plaintiffs access to Methodist radiology facilities, interfering with patients' choice of doctor, and raising barriers to competition. (Am. Compl. ¶¶ 37-46.)

argue that, as a threshold matter, Plaintiffs lack the antitrust standing necessary to pursue them.

Reduced to its essence, Plaintiffs' complaint challenges the legality of the contract by which MRPC is the sole provider of radiological services at Methodist. To find that Plaintiffs, a competing group of radiologists, have antitrust standing to pursue this claim would require the court to ignore extensive precedent to the contrary.[6]

For the following reasons, the court finds that Plaintiffs lack the requisite antitrust standing to pursue their claims. Specifically, Plaintiffs have not alleged a cognizable antitrust injury and would not be efficient enforcers of the antitrust laws.

1. Antitrust Standing

Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a) and 26, provide for the private enforcement of the antitrust laws. To sue under either provision, plaintiffs must first

[6] See, e.g., Park Ave. Radiology Assocs. v. Methodist Healthsystems, Inc., 1999 WL 1045098 (6th Cir. 1999) (no antitrust standing for doctor to challenge exclusive agreement between competing doctors and hospital); Balaklaw v. Lovell, 14 F.3d 793 (2d Cir. 1994) (same); Leak v. Grant Med. Ctr., 893 F.Supp. 757 (S.D. Ohio 1995) (same). See also Oksanen v. Page Memorial Hosp., 945 F.2d 696 (4th Cir. 1991) (no antitrust standing to challenge denial of privileges); Todorov v. DCH Healthcare Auth., 921 F.2d 1428, 1449 (11th Cir. 1991) (no antitrust injury in hospital's denial of privileges); BCB Anesthesia Care, Ltd. v. Passavant Mem. Hosp. Assoc., 36 F.3d 664, 667 (7th Cir. 1994) (citing cases and noting, "[t]he cases involving staffing at a single hospital are legion….[and] almost always come to the same conclusion: the staffing decision at a single hospital was not a violation of section 1 of the Sherman Act."). Cf. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 29-31 (1984) (upholding exclusive contract between doctors and hospital).

establish that they have antitrust standing. See Cargill, Inc. v. Monfort of Colo. Inc., 479 U.S. 104, 110-13 (1986). Antitrust standing "ensures that a plaintiff can recover only if the loss stems from the competition-*reducing* aspect or effect of the defendant's behavior," Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344 (1990), and it is therefore "the glue that cements each suit with the purposes of antitrust laws, and prevents abuse of those laws." HyPoint Tech., Inc. v. Hewlett-Packard Co., 949 F.2d 874, 877 (6th Cir. 1991).

As a matter of law, courts "must reject claims under Rule 12(b)(6) when antitrust standing is missing." NicSand, Inc. v. 3M Co., ___ F3d ___, 2007 WL 3010426, at *3 (6th Cir. 2007). To that end "the federal courts have been 'reasonably aggressive' in weeding out meritless antitrust claims at the pleading stage." Id. at *4 (quoting in part Valley Prods. Co. v. Landmark, 128 F.3d 398, 403 (6th Cir. 1997)). These efforts have been repeatedly affirmed on appeal by the Sixth Circuit and the United States Supreme Court. NicSand, 2007 WL 3010426, at *4.

A two-pronged test has emerged to determine whether a plaintiff has antitrust standing:

> As a necessary first step, courts must determine whether the plaintiff suffered an antitrust injury. If the answer to that question is yes, they must then determine whether any of the other factors, largely relating to the directness and

> identifiability of the plaintiff's injury, prevent the plaintiff from being an efficient enforcer of the antitrust laws.

Balaklaw, 14 F.3d at 797 n.9 (citing Todorov, 921 F.2d at 1449, and Cargill, 479 U.S. at 110 n.5); see also Leak, 893 F.Supp. at 762-63 ("[T]o have antitrust standing, a plaintiff must show: (1) antitrust injury, and (2) under the [Southaven factors, infra], that the directness of the injury was such that he would be an efficient enforcer of the antitrust laws.").

2. Antitrust Injury

The first prong, antitrust injury, is a "necessary, but not always sufficient" condition of antitrust standing. Cargill, 479 U.S. at 110 n.5. Antitrust injury is distinct from simple economic injury. Valley Prods., 128 F.3d at 402. It is understood as the "type [of injury] the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." Brunkswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). Alleging an injury that is merely linked to the alleged antitrust violation is insufficient. Plaintiffs must instead allege "that the illegal antitrust conduct was a necessary predicate to their injury." Hodges v. WSM, Inc., 26 F.3d 36, 38-9 (6th Cir. 1994). In practice, this amounts to a "heightened standard" of pleading. Indeck Energy Servs., Inc. v. Consumers Energy Co., 250 F.3d 972, 976 (6th Cir. 2000).

The heightened standard avoids "overdeterrence resulting from the use of the somewhat draconian treble-damage award; by restricting the availability of private antitrust actions to certain parties, [courts] ensure that suits inapposite to the goals of antitrust laws are not litigated and that persons operating in the market do not restrict procompetitive behavior because of a fear of antitrust liability." Todorov, 921 F.2d at 1449; see also HyPoint, 949 F.2d at 877 (requirement ensures that "antitrust litigants use the laws to prevent anti-competitive action and makes certain that they will not be able to recover under the antitrust laws when the action challenged would tend to produce competition in the economic sense."), Expert Masonry, Inc. v. Boone County, 440 F.3d 336, 346 (E.D. Tenn. 2006) (same).

The United States Supreme Court has repeatedly stated the twin axioms of antitrust standing. First, the antitrust laws were promulgated to protect competition, not competitors. See Brunswick, 429 U.S. at 488. Second, the Sherman Act was enacted to assure consumers the benefit of price competition. See Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 (1983). Courts must therefore analyze the question of antitrust injury from the viewpoint of the consumer of the product or service at issue. Where plaintiffs and consumers have divergent interests, the finding

of antitrust injury poses a potential problem. See Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1334 (7th Cir. 1986). The risk that plaintiffs and consumers have divergent interests is especially great where, as here, Plaintiffs and Defendants are horizontal rivals. Id.

In the instant case, Plaintiffs do not allege the type of injury falling within the protection of the antitrust laws. Whether their claim be unlawful restraint of trade, conspiracy in restraint of trade, unlawful exclusive contract, attempted monopolization, illegal tying, or unreasonable barrier to entry, the underlying injury remains the same: lost profits. Plaintiffs have not alleged that Defendants' actions have decreased competition for radiological services in the Memphis market. Indeed, Plaintiffs concede that Methodist controls only forty percent of that market and nowhere allege that Defendants' actions bar them from practicing at hospitals which serve the remaining sixty percent of the Memphis market for radiological services.

Antitrust injury requires that Plaintiffs' injuries "result from a decrease in…competition rather than from some other consequence of the defendant's actions." Tennessean Truckstop, Inc. v. NTC, Inc., 875 F.2d 86, 88 (6th Cir. 1989). In this case, Plaintiffs' loss of business is attributable to Methodist's decision to deny them practice privileges. Claims

of anticompetitive behavior are unrelated. That is, Plaintiffs' claims of illegal tying, attempted monopolization, conspiracy, and unreasonable exclusive dealing are not necessary predicates to their alleged injury: lost profits from the denial of privileges at Methodist. Therefore, theirs is not an antitrust injury. Two cases are helpful in illustrating this point.

In Valley Prods. a hotel chose one soap vendor over another to supply soap for its chain. 128 F.3d 398. The losing vendor sued the hotel and the successful vendor, alleging that the hotel illegally tied its lodging service to the purchase of its competitor's soap. Id. The Sixth Circuit affirmed dismissal of the action, finding that there was no antitrust injury. Id. at 404. The Court explained, "[t]he loss of…sales suffered by [Plaintiff]…would have been suffered as a result of the [lost sale] whether or not [Defendants] had entered into the alleged tying arrangements." Id. (citing Hodges, 26 F.3d 36, for the proposition that "the alleged antitrust violation was simply not a necessary predicate to the plaintiff's injury.").

In CTUnify, Inc. v. Nortel Networks, Inc., a company that offered training for a specific telephone system sued the telephone system producer and a competitor training company when the producer gave exclusive training rights to its competitor. 115 Fed.Appx. 831 (6th Cir. 2004). In affirming dismissal of the complaint, the Sixth Circuit noted its practice of

"dismissing cases where the injury to the plaintiff 'although linked to an alleged violation of the antitrust laws, flows directly from conduct that is not itself an antitrust violation.'" Id. at 836 (quoting in part Valley Prods., 128 F.3d at 403). The court found that Plaintiff's "injuries flow from the fact that it was not chosen to be a preferred vendor and not from any alleged tying arrangement…. Thus, [plaintiff] has not alleged a cognizable antitrust injury." CTUnify, 115 Fed.Appx. at 836.

Plaintiffs' loss of profits resulting from Methodist's exclusive grant of privileges to MRPC is not an antitrust injury. See also Park Ave., 1999 WL 1045098, Balaklaw, 14 F.3d at 801-02, Oksanen, 945 F.2d at 709, Leak, 893 F.Supp. 757. Nevertheless, antitrust injury may result where "exclusion of the competitor from the marketplace results in the elimination of a superior product or a lower-cost alternative." Indeck, 250 F.3d at 977.

Plaintiffs allege that their interventional radiological services are superior to MRPC's conventional radiological services. Therefore, were Plaintiffs completely foreclosed from competing in the relevant market, an antitrust injury might be found. Based on the amended complaint, however, no such finding is possible.

The complaint states that Plaintiffs have privileges at four area hospitals: the Regional Medical Center, LeBonheur Children's Medical Center, the Veterans Affairs Medical Center Memphis, and St. Jude Children's Research Hospital. (Am. Compl. ¶ 2.) Each of those hospitals is a specialty hospital, and together they control twelve percent of the Memphis market. (Id. ¶¶ 16, 32-34.) Methodist accounts for forty percent of the Memphis market. (Id. ¶ 32.) Baptist and St. Francis together control the remaining forty-eight percent. (Id. ¶ 33.) Although Plaintiffs complain that "[t]here is no non-speciality hospital in [Memphis] at which Plaintiffs may admit an adult patient requiring their care," that exclusion does not follow from the arrangement between Methodist and MRPC. (Id. ¶ 17.) The arrangement does not affect Plaintiffs' ability to practice at Baptist or St. Francis, and they nowhere allege otherwise.

Plaintiffs already have access to twelve percent of the Memphis market for radiological services, and the arrangement between Methodist and MRPC does not exclude them from the remaining forty-eight percent of the market. It is therefore impossible to conclude that Defendants' actions have excluded Plaintiffs, and their allegedly superior product, from the marketplace.[7]

[7] Other courts found that an exclusive contract similar to the one at issue in this case can have *pro*-competitive effects "because the incumbent and other, competing [practice] groups have a strong incentive continually to

Plaintiffs do not allege any harm which the antitrust laws were designed to protect. They therefore lack a necessary component of antitrust standing.

3. Efficient Enforcer

The second prong, efficient enforcement, "involves an analysis of 'other factors in addition to antitrust injury'…to determine whether a particular plaintiff is an efficient enforcer of the antitrust laws." Todorov, 921 F.2d at 1450 (quoting in part Cargill, 470 U.S. at 111 n.6). The "other factors" were established by the Supreme Court in Associated Gen., 459 U.S. at 545, and later summarized by the Sixth Circuit in, Southaven Land Co., Inc. v. Malone & Hyde, Inc., 715 F.2d 1079, 1085 (6th Cir. 1983). They include:

> (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation.

Id. No single factor is determinative. All five must be balanced. See Peck v. General Motors Corp., 894 F.2d 844, 846 (6th Cir. 1990).

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improve the care and prices they offer in order to secure the exclusive positions." Balaklaw, 14 F.3d at 799. See also Leak, 893 F.Supp. at 963-64.

The casual connection between the alleged antitrust violations and the injury is weak because Plaintiffs alleged injury is not the necessary consequence of the alleged anticompetitive behavior. Plaintiffs' real complaint appears to be that they do not have admitting privileges for their radiological services at any Memphis-area general hospitals, but the named Defendants control less than half of the general hospital market for radiological services. Therefore, it cannot be said that Defendants' actions are responsible for the purported exclusion from the market. This factor militates against a finding that Plaintiffs are efficient enforcers of the antitrust laws in this matter.

As previously noted, the nature of Plaintiffs' injury is more appropriately understood as an economic injury than as a uniquely antitrust injury. Plaintiffs also allegedly suffer in their capacity as competitors in the relevant market, not as consumers. The nature of the injury therefore does not suggest that Plaintiffs would be efficient enforcers. Park Ave., 1999 WL 1045098, at *4-5 ("Plaintiffs are competitors in this action, not consumers and, accordingly, Plaintiffs have failed to sufficiently allege antitrust injury.").

To the extent Plaintiffs have been injured, that injury is indirect. As noted by other courts in cases like this one, the

most direct victims of anticompetitive behavior are patients and the third-party insurance plans that must pay their bills.

In Park Ave., Plaintiffs claimed that they were injured by an arrangement in which a health plan referred its clients to an exclusive set of doctors. 1999 WL 1045098. In affirming dismissal of the action, the Sixth Circuit found that Plaintiffs, who were competing doctors, were not the most direct victims of this scheme. Rather:

> [T]he parties directly harmed due to the alleged violations are the healthcare consumers…and their third-party providers. Although Plaintiffs may ultimately suffer from a loss of patients and profits, their lost profits are derivative of the alleged harmed inflicted on the third parties, the harm is not sufficiently causally related to the violation.

1999 WL 1045098, at *6 (citing Associated Gen., 459 U.S. at 451-52). See also Todorov, 921 F.2d at 1455 ("Dr Todorov is simply looking to increase his profits, like any competitor. As such, Dr Todorov is a particularly poor representative of the patients").

That Plaintiffs' injury, if any, is merely derivative of the baseline injury to patients, insurers, and the government renders Plaintiffs' injury indirect. In this respect, Plaintiffs are not efficient enforcers of the antitrust laws.

If Plaintiffs allegations are true, potential patients, their health care providers, and the government would all be

more direct victims and have causes of action. See Leak, 893 F.Supp. at 764, Park Ave., 1999 WL 1045098, at *7. This creates the potential for "duplicative recovery" and "complex apportionment of damages" if Plaintiffs are allowed to proceed. Id.; see also Todorov, 921 F.2d at 1455 ("If the radiologists or [hospital] are acting anti-competitively…then the patients, their insurers or the government, all of whom are interested in ensuring that consumers pay a competitive price, may bring an action to enjoin such practice."). These considerations counsel against a finding that Plaintiffs are efficient enforcers.

In this case the primary injury "is directed to the patients." Park Ave., 1999 WL 1045098, at *7. As consumers in the field of radiology, patients (and perhaps their insurance providers) are the preferred plaintiffs. Id. at *5. This factor weighs against finding that Plaintiffs are efficient enforcers.

The Southaven factors uniformly suggest that Plaintiffs are not the preferred enforcers of antitrust laws for these particular claims. Therefore, even if Plaintiffs had suffered antitrust injury, they would lack antitrust standing because they do not appear to be "efficient enforcer[s] of the antitrust laws." Todorov, 921 F.2d at 1450. For this reason also, Defendants' motions to dismiss Plaintiffs' federal antitrust claims must be granted.

B. State Law Claims

In addition to federal antitrust claims, Plaintiffs advance various state law claims for attempted monopolization in violation of the Tennessee Trade Practices Act, T.C.A. §§ 47-25-101 et seq., interference with business relationship, breach of oral contract, conspiracy in violation of Tennessee law, and intentional interference with patient rights.

Section 1367(c) of Title 28 of the United States Code provides, in pertinent part, that "[t]he district courts may decline to exercise supplemental jurisdiction over a claim ... if ... the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3); see also United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Province v. Cleveland Press Publ'g Co., 787 F.2d 1047, 1055 (6th Cir.1986) ("[D]istrict courts have minimal discretion to decide pendent state law claims on the merits once the basis for federal jurisdiction is dismissed before trial."); Wright, Federal Practice and Procedure: Civil 2d § 3523.1 ("In Section 1367(c), Congress affirmed that the exercise of ancillary and pendent jurisdiction is discretionary.").

Plaintiffs' federal antitrust claims have been dismissed for lack of standing. The court is therefore divested of its basis for original jurisdiction, and the exercise of supplemental jurisdiction is discretionary. See Clemens Trust

v. Morgan Stanley DW, Inc., 485 F.3d 840, 853 (6th Cir. 2007) (citing Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988)). The Supreme Court has held that "in the usual case in which all federal law claims are eliminated before trial, the balance of factors to be considered…point[s] toward declining to exercise jurisdiction over the remaining state-law claims." Id.

The courts of Tennessee are a better forum for addressing the issues of Tennessee law in this case. Therefore, under § 1367(c)(3), the court declines to exercise supplemental jurisdiction over the remaining state law claims, and they are DISMISSED WITHOUT PREJUDICE.

V. Conclusion

For the foregoing reasons, Defendants' motions to dismiss Plaintiffs' federal antitrust claims are GRANTED, and Plaintiffs' remaining state law claims are DISMISSED WITHOUT PREJUDICE.

So ordered this 15th day of January, 2008.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE