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# [***Methodist Health Servs. Corp. v. OSF Healthcare Sys.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KV1-5XW1-F04D-7227-00000-00&context=)

United States District Court for the Central District of Illinois, Peoria Division

September 30, 2016, Decided; September 30, 2016, E-Filed

No. 1:13-cv-01054-SLD-JEH

**Reporter**

2016 U.S. Dist. LEXIS 136478 \*; 2017-1 Trade Cas. (CCH) P80,023

METHODIST HEALTH SERVICES CORPORATION, Plaintiff, v. OSF HEALTHCARE SYSTEM, an Illinois not-for-profit corporation d/b/a SAINT FRANCIS MEDICAL CENTER, Defendant.

**Subsequent History:** Affirmed by [*Methodist Health Servs. Corp. v. OSF Healthcare Sys., 2017 U.S. App. LEXIS 10275 (7th Cir. Ill., June 9, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NRP-W1V1-F04K-R095-00000-00&context=)

**Prior History:** [*Methodist Health Servs. Corp. v. OSF Healthcare Sys., 2014 U.S. Dist. LEXIS 55425 (C.D. Ill., Apr. 22, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5C1T-64M1-F04D-70HS-00000-00&context=)

**Core Terms**

REDACTED, network, patients, provider, foreclosure, contracts, foreclosed, Peoria, hospitals, services, insured, exclusive contract, in-network, compete, matching, payors, health plan, rates, outpatient, competitors, employees, calculation, prices, relevant market, inpatient, ***antitrust***, Healthcare, customers, Fig, summary judgment

**Counsel:** **[\*1]**For OSF HEALTHCARE SYSTEM, an Illinois not-for-profit corporation d/b/a SAINT FRANCIS MEDICAL CENTER, Defendant: Barbara Sicalides (Lead Counsel), Barak A. Bassman, Frank H. Griffin, IV, PEPPER HAMILTON LLP, Philadelphia, PA; L. Lee Smith, HINSHAW & CULBERTSON LLP, Peoria, IL.

**Judges:** SARA DARROW, UNITED STATES DISTRICT JUDGE.

**Opinion by:** SARA DARROW

**Opinion**

ORDER

Two hospitals dominate the market for inpatient medical services in Peoria, Illinois. One, St. Francis, is about twice as big as the other, Methodist.[[1]](#footnote-0)1 St. Francis offers many high-end services that neither Methodist nor any other hospital in Peoria offer, such as sophisticated pediatric care and solid organ transplants. Methodist sued St. Francis because St. Francis has entered into contracts with some commercial health insurance companies that require those insurers to exclude Methodist from the insurers' provider networks. St. Francis' exclusive contracts violate federal ***antitrust*** law, Methodist has alleged, because they unreasonably restrain trade by substantially foreclosing Methodist's ability to compete for commercially insured patients' business, which is far more profitable for a hospital than business from publicly insured patients. St. Francis has**[\*2]** moved for summary judgment on all claims. The motion is GRANTED.[[2]](#footnote-1)2

BACKGROUND

**1. Facts**

**a. General overview of healthcare delivery and payment**

This is an ***antitrust*** case about the provision of healthcare by and payment to various hospitals in Peoria. Some background on the way health insurance works, broadly speaking, is necessary to understand the legal claims asserted and this motion's resolution. The hospitals are called providers**[\*3]** and the entities that pay for the healthcare, usually either private or public insurers, are called payers.

At the most general level, providers recoup their costs in one of three ways—they bill the government if the patient is covered by public insurance (Medicare or Medicaid, for example); they bill an insurance company if the patient is covered by private insurance; or they bill the patient directly if he is not insured. More people are covered by government health insurance than by commercial health insurance, and uninsured people make up a very small slice of the overall market.[[3]](#footnote-2)3

The evidence in the record suggests that patients covered by government insurance are not profitable for hospitals; several executives testified that payment for services provided to those**[\*4]** patients do not cover the hospitals' costs. The ratio of patients covered by government insurance to patients covered by commercial insurance is called a payer mix. Providers strongly prefer a payer mix that includes a higher proportion of commercially insured patients.

Commercial insurance companies, typically large national firms, sell managed care plans to employers or individual consumers. Those plans can take several forms, but in this case the only two kinds that matter are called preferred provider organizations ("PPO") and health maintenance organizations ("HMO"). The major differences are that HMOs are usually cheaper but more restrictive to the end user. PPOs can be further classified into two broad groups: self-insured and fully funded. In a fully funded insurance plan, the payer (the commercial insurer) administers the plan and also bears the cost of the healthcare provided to the insureds. In a self-insured plan, also called an administrative services only plan ("ASO"), an employer, usually a large one, contracts with the payer to deal with the providers but bears the cost of healthcare provided to the plan's members.

The content of a health insurance plan is dictated by**[\*5]** contracts made between providers and payers. Those parties dicker over terms such as duration and price of services. Another important term addresses the provider network. From a patient's point of view, a provider network lists the providers they can visit and receive lower prices for medical services, as compared to prices charged by out-of-network providers. The fight in this case arises out of terms dealing with network exclusivity. Network exclusivity in a health insurance plan refers to the network's breadth. A plan has a broad, or open, network if a patient can visit many different providers and still receive a favorable rate. A plan has a narrow network if a patient may receive favorable rates at only one or few providers. The use of networks creates obvious incentives for commercial insurers to funnel their insureds (via other incentives, like deductibles and co-pays) toward in-network providers.

A simple exclusivity clause might look like this: in return for a lower rate on services at hospital X, payer Y may not include hospital Z in its plans' networks. Providers generally offer payers lower rates in return for network exclusivity. Conversely, if a payer wants to offer a**[\*6]** broader network to its customers (that is, employers or individual purchasers of health insurance), it typically must agree to pay higher rates to providers. The parties and literature refer to the pricing difference between broad and narrow networks as an open-network premium. Providers want narrow networks because even though the prices they charge to commercially insured patients will be relatively lower, the incentives created by the network pricing structure will increase commercially insured patient volume. Payers usually seek broader networks, as long as the prices are not too high, because their customers value flexibility when making decisions regarding healthcare.

In this case, the evidence tends to show that St. Francis strongly favors exclusivity when bargaining with payers. Exclusivity has many benefits to a provider, and the evidence suggests St. Francis thought that predictability of commercial inpatient volume was very important given several of its long term capital investments. In particular, it does not want payers to include Methodist in any network that also includes St. Francis, other things being equal. Methodist also has several exclusive contracts, but they**[\*7]** are all many times smaller than St. Francis' largest exclusive contract. Both hospitals' networks will be discussed in greater detail below.

**b. The healthcare market in Peoria**

There are six hospitals in the geographic area relevant to this case.[[4]](#footnote-3)4 St. Francis is the biggest, it has 616 beds. Methodist is the second largest, it has 330 beds. Proctor hospital is third largest with 220 beds.[[5]](#footnote-4)5 There are three other hospitals in the area: Pekin (107 beds); Eureka (25 beds); and Hopedale (25 beds). Methodist and St. Francis are located very close to one another—they are separated by less than a quarter mile.

In addition to being the largest, St. Francis is by far the most advanced hospital in the area. It is the only Peoria hospital that can perform solid organ transplants; it is the only Peoria hospital that has the highest level of trauma care; it is the only Peoria hospital with a neonatal intensive care unit; and its pediatric unit is far more extensive and advanced**[\*8]** than the other hospitals'. That pediatric unit includes the Children's Hospital of Illinois, and it amounts to 136 of St. Francis' beds. St. Francis is also a teaching hospital (generally a boon for physician recruitment). According to Methodist's expert's report, "18.3% of [St. Francis'] commercial inpatient days are attributable to inpatient services for which" St. Francis is the exclusive or near-exclusive provider. *See* Capps Report ¶¶ 105-108, MSJ Ex. 74, ECF No. 146-14. Beyond those services for which St. Francis is the exclusive provider in the geographic region St. Francis and Methodist are relatively fungible, although some of the evidence suggests Methodist has higher quality of care metrics than St. Francis. The evidence also shows that, other things equal, people prefer to get medical care locally; if a cardiac patient from Peoria can undergo the same procedure in Peoria as in Chicago, she will likely get it done in Peoria.

Many of the familiar major national health insurance companies offer products in the Peoria market. They include Blue Cross Blue Shield; Humana; Coventry; Aetna; and some others. Peoria's commercial health care market has a quirk—the second largest source**[\*9]** of commercially insured patients is Caterpillar, the area's largest employer, rather than from a health insurer. Caterpillar employees primarily use an ASO PPO.

**c. St. Francis' exclusive contracts**

This litigation arises out of several contracts that have exclusivity provisions that favor St. Francis. The first three are between St. Francis and different commercial insurers and the last dealt with the health care for Caterpillar employees.

**1. Blue Cross Blue Shield**

Blue Cross Blue Shield ("BCBS") is the largest and most important commercial insurer in the market. It offers two products relevant to this case: a PPO and an HMO. The PPO has been exclusive to St. Francis since 2002. The HMO is exclusive to Methodist.[[6]](#footnote-5)6

The BCBS PPO is roughly twenty times larger than the BCBS HMO. Capps Report ¶ 118. The BCBS PPO accounted for 32 percent of all admissions and 34 percent of all payments at St. Francis and Methodist, combined, in 2012. Capps Report 54 Fig. 17.[[7]](#footnote-6)7 The BCBS PPO is by far the largest commercial plan in the market. The same figures for the BCBS HMO are 1.6 and 2.1 percent.**[\*10]** St. Francis derives 39 percent of its commercial inpatient revenue from the BCBS PPO.

A contract from 1982 between Methodist and BCBS governs the out-of-network pricing for BCBS PPO plan members who are treated at Methodist; when Methodist treats BCBS PPO plan members, it is reimbursed by BCBS under the terms of the 1982 contract. Methodist has since 2006 operated a matching program, pursuant to which it waives all charges to out-of-network commercially insured patients above what those patients would pay if they received the same services at St. Francis. *See* Capps Report ¶ 545. The effect of the matching program is that care received out of network at Methodist is not more expensive to BCBS PPO insureds than care received in network at St. Francis—in theory it removes the patient's incentive to visit St. Francis at the expense of Methodist. Methodist actively marketed its matching program. Methodist's revenues from BCBS PPO patients grew steadily (between 5 and 10 percent per year) since the program's implementation, and in**[\*11]** 2010 resulted in $40 million in revenue. To put that figure into perspective, Methodist's total operating revenue for 2013 was $380 million.

**2. Humana**

Humana is the second largest commercial insurer in the area—it accounted for 13 percent of commercial admissions and 10 percent of commercial payments in 2012. Humana's network does not include Methodist.

Humana became a major player in the Peoria market when it acquired what used to be OSF's commercial health insurance business. OSF (St. Francis' parent) conditioned the transaction on Humana keeping St. Francis as the exclusive in-network provider. A shade under 20 percent of the Humana covered lives, about 20,000 at the time of the 2008 acquisition, are OSF employees (OSF is the second largest Peoria area employer). In return for exclusivity, Humana receives favorable rates—it is the beneficiary of what in the industry is known as "most favored nation" status (MFN).

**3. Health Alliance**

Health Alliance Medical Plans ("HAMP") accounts for 5 percent of commercial inpatient admissions and 6 percent of commercial payments in the market. The relevant HAMP plan is an HMO. HAMP used to be affiliated with a standalone regional clinic called the Carle**[\*12]** Clinic Association. In 2009, OSF purchased one of the Carle Clinic locations (in Bloomington, Illinois), and in connection with that transaction HAMP agreed to an exclusive provider agreement with St. Francis. Before the acquisition, OSF was not an in-network provider for HAMP, but Methodist was.

HAMP and Carle Clinic have a strong link—"30 or 40" percent of the clinic's patients were insured by HAMP. The overwhelming majority of HAMP patients had Carle physicians as their primary care physician, with the remainder assigned to Methodist physicians. Once OSF bought the clinic, a conflict emerged from St. Francis' point of view: most of the doctors at the clinic were aligned with an insurer that dealt with Methodist. Further, OSF brought the Carle doctors into its physician group in fall of 2009.

Methodist contends that HAMP signed an exclusive contract with St. Francis under coercion from St. Francis. St. Francis argues that the reason HAMP switched providers is that Methodist failed to accept a risk sharing clause as part of a renewed contract, but that St. Francis did, in fact, agree to the risk-sharing aspect of the contract. The evidence is disputed on the point, that is, a jury could**[\*13]** conclude HAMP entered the exclusive contract under pressure from St. Francis or due to Methodist's failure to accept a share of HAMP's risk.

**4. Other St. Francis exclusive payers**

The lone remaining exclusive payer in this case is Aetna. Aetna only amounts to a little over 1 percent of the market.

**d. Caterpillar**[[8]](#footnote-7)8

Caterpillar's health plans have changed significantly over the past several years, though they have been mostly self-insured for all the years relevant to this litigation. Up until 2010, Caterpillar offered its employees a self-insured**[\*14]** PPO administered by United. The PPO was a St. Francis exclusive network, and had been since at least 2001 pursuant to a long term contract. In 2009, Caterpillar also began to offer its employees a fully-insured HMO from HAMP. The HMO was a Methodist exclusive. The PPO was far more popular with Caterpillar workers.

In 2010, Caterpillar decided to move away from exclusive networks. Following what the evidence suggests were protracted negotiations, Caterpillar decoupled the services that only St. Francis could provide with those that overlapped with Methodist's capabilities, and opened its PPO network up to include both hospitals. In 2011, the Caterpillar HMO network opened up to include both hospitals as well. For the years 2005 through 2009, for every one Caterpillar insured admitted to Methodist, 44 were admitted to St. Francis. Following the opening of the network, that is, for the years 2010 through 2013, for every Caterpillar inpatient admitted to Methodist there were 5.4 admitted to St. Francis. (For example, in 2012 there were 1,737 Caterpillar patients at St. Francis and 351 Caterpillar patients at Methodist. In 2008 the numbers were 2,986 and 79.)

Caterpillar paid to open the**[\*15]** networks. That is, it lost the discount it enjoyed when St. Francis was the exclusive provider for the PPO. There was a 38 percent price increase of St. Francis' unique-to-Peoria services (the so-called tertiary services), and a general 3.7 percent price increase for non-tertiary inpatient services.[[9]](#footnote-8)9

**e. Market foreclosure**

Methodist**[\*16]** hired an economist named Cory Capps to write a report showing that St. Francis' exclusive contracts have substantially foreclosed Methodist from competing in the market for commercially insured patients in and around Peoria. Among other things, Capps' report offers a quantification of the total percentage foreclosure for two years, 2009 and 2012.

In 2009, according to Capps, 54 percent of the market was foreclosed by three commercial plans that excluded Methodist from their provider network: the BCBS PPO; the Caterpillar PPO; and the Humana plan (formerly OSF's plan). And in 2012, Capps' figure was similar: 52 percent, based on the exclusivity found in the BCBS PPO; the Humana plan; the HAMP plan; and the very small Aetna plan (Caterpillar had by then opened its network).

**2. Methodist's legal claims**

Methodist filed a nine-count complaint against St. Francis that alleges three federal ***antitrust*** claims and six claims arising under Illinois law. The ***antitrust*** claims assert violations of both sections of the Sherman Act. They contend that St. Francis' exclusive dealing has unreasonably restrained trade; that St. Francis has unlawfully maintained monopoly power; and that St. Francis has sought**[\*17]** monopoly power through unlawful means.

The basis of Methodist's claims is St. Francis' exclusive contracts. Methodist alleged that St. Francis wielded market power because it is the only area hospital that provides certain essential services and was therefore what is known in the healthcare industry as a must-have hospital. It used that market power, according to Methodist, to coerce commercial payers into excluding Methodist from their provider networks and to pay greater than competitive rates by threatening to withdraw from the payers networks, thus making the payers' products less competitive in their marketplace. *See* Compl. ¶¶ 58-63, ECF No. 1.

**3. St. Francis' motion for summary judgment and Methodist's response**

St. Francis has filed a motion for summary judgment on all claims. As to the federal ***antitrust*** claims, St. Francis contends that its exclusive contracts with commercial payers do not substantially foreclose Methodist from competing for commercial patients and because, as explained in greater detail below, substantial foreclosure of competition in the market is one of the major legal issues in this case, the ***antitrust*** claims fail as a matter of law. St. Francis concedes that**[\*18]** it exercises market power for purposes of its summary judgment motion, and makes several related arguments that directly address Methodist's Sherman Act claims.

First, it contends Methodist was not substantially foreclosed from the market for commercially insured patients in Peoria because, in essence, the market was functioning properly. In support of this first argument, St. Francis (1) highlights Methodist's "alternative distribution channels," including the commercial health plans for which Methodist was in network; and (2) points out that many Peoria employers offer their employees a choice between a St. Francis exclusive plan and a Methodist exclusive plan, meaning the exclusive contracts do not prevent employees from choosing Methodist. Next, St. Francis highlights Methodist's match program. If a BCBS PPO member had a choice between the two hospitals and price was not a factor, then the exclusive contract could not have unfairly foreclosed competition, according to St. Francis.[[10]](#footnote-9)10 Finally, St. Francis makes what is in essence an embedded *Daubert* motion; it goes through Capps' report line by line and identifies purported errors in his calculation of the rate of foreclosure. The assault**[\*19]** on Capps' arithmetic is made up of five distinct points, which the Court will address in turn below. As a throwaway argument (subheading "6"), St. Francis claims no foreclosure exists because Methodist has been able to compete for all the relevant exclusive contracts.

St. Francis' foreclosure arguments, therefore, are distinct but related—first it contends that Methodist is able to compete at some level for every commercially insured patient in the market, but even if it is not able to compete, Capps' foreclosure calculation falls far below the threshold established by case law to make out substantial foreclosure. The summary judgment motion then focuses on the outpatient market claim. St. Francis states that there is an "obvious failure of proof" because Capps did not perform a separate analysis for the outpatient market; instead he assumed the market dynamics were identical as those for the inpatient market.

Separate from its arguments related to substantial foreclosure, St. Francis asserts that Methodist cannot prove an ***antitrust*** injury. ***Antitrust* [\*20]** injury is injury to competition, like higher prices or poorer quality, injury to a competitor does not satisfy the requirement. Because ***antitrust*** injury is an essential component of a Sherman Act claim, summary judgment is appropriate. Finally, St. Francis argues that the product market in this case (a threshold inquiry in any ***antitrust*** case) should encompass both commercial and government patients. If the evidence supports such a broad product market, as opposed to one that includes only commercial payments, then the claims fail.

Methodist disagrees. First, Methodist addresses the arguments related to substantial foreclosure. It asserts that it was not, in fact, able to compete for the BCBS PPO contract because of St. Francis' exercise of market power. It argues that the alternative distribution channels identified by St. Francis are not, in fact, adequate. And it finally responds to the attack on Capps' report. Methodist also points to several facts that it contends are sufficient to prove ***antitrust*** injury, and concludes by arguing that St. Francis' conception of the relevant product market is too narrow.

ANALYSIS

**I. Plaintiff's *Antitrust* Claims**

**1. Legal standards**

**a.** [***Rule 56***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=)

[*Federal Rule of Civil Procedure 56*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=) states that a "court**[\*21]** shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." [*Fed. R. Civ. P. 56(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=); [*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7P90-0039-N51W-00000-00&context=).

**b. The Sherman Act**

*Section 1* of the Sherman Act "prohibits '[e]very contract . . . in restraint of trade or commerce.'" [*Omnicare, Inc. v. UnitedHealth Group, Inc., 629 F.3d 697, 705 (7th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51X9-8W91-F04K-R0F7-00000-00&context=) (quoting *15 U.S.C. § 1*). Courts have interpreted the statute, however, to bar only those agreements that unreasonably restrain trade. *Id.* (citing [*State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RFP-CVB0-004C-3005-00000-00&context=). A *§ 1* claim comprises three elements: "(1) that defendants had a contract, combination, or conspiracy ('an agreement'); (2) that as a result, trade in the relevant market was unreasonably restrained; and (3) that [the plaintiff was] injured." [*Id*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51X9-8W91-F04K-R0F7-00000-00&context=)*.*

The Sherman Act's second section proscribes monopolization and attempted monopolization. *See* *15 U.S.C. § 2*. *Section 2* does not make monopolies, or even monopolistic pricing, illegal. *E.g.,* [*Verizon Commcn's Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BFM-T0F0-004C-001J-00000-00&context=) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system."); *see also* [*Am. Academic Suppliers, Inc. v. Beckley-Cardy, Inc., 922 F.2d 1317, 1320 (7th Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GXN0-008H-V0N3-00000-00&context=) ("To have a monopoly and to monopolize are two separate things."). Instead, it forbids the exercise or pursuit of monopoly power through improper means. [*Mercatus Group, LLC v. Lake Forest Hosp., 641 F.3d 834, 854 (7th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:52Y8-X3K1-F04K-R0J2-00000-00&context=) (citing [*Am. Academic Suppliers, Inc., 922 F.2d at 1320*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GXN0-008H-V0N3-00000-00&context=), and [*State of Ill. ex rel. Burris v. Panhandle E. Pipe Line Co., 935 F.2d 1469, 1481 (7th Cir. 1991))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CGV0-008H-V12V-00000-00&context=). Exclusive dealing may amount**[\*22]** to improper means of maintaining or pursuing a monopoly. *See* [*United States v. Microsoft, 253 F.3d 34, 58, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43CK-3HW0-0038-X4RT-00000-00&context=) (citing [*United States v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G490-003B-S2W3-00000-00&context=) and [*United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4XC0-003B-027W-00000-00&context=).

To prevail on a *§ 2* monopolization claim, a plaintiff must show "(1) that the [defendant] possessed monopoly power in that market; and (2) that the [defendant] willfully acquired or maintained that power by means other than the quality of its product, its business acumen, or historical accident." [*Mercatus Group, 641 F.3d at 854*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:52Y8-X3K1-F04K-R0J2-00000-00&context=) (citing [*Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427, 430 (7th Cir. 1980))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KKW0-0039-W0CY-00000-00&context=). The elements of an attempted monopolization claim are: "(1) the [defendant's] specific intent to achieve monopoly power in a relevant market; (2) predatory or anticompetitive conduct directed to accomplishing this purpose; and (3) a dangerous probability that the attempt at monopolization will succeed." [*Id*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:52Y8-X3K1-F04K-R0J2-00000-00&context=)*.* (citing [*Lektro-Vend Corp v. The Vendo Co., 660 F.2d 255, 270 (7th Cir. 1981))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0310-0039-W4C9-00000-00&context=).

Exclusive dealing claims under *§ 1* are analyzed under the so-called rule of reason. [*Roland Machinery Co. v. Dresser Indus., Inc., 749 F.2d 380, 393 (7th Cir. 1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VWT0-003B-G00F-00000-00&context=) ("[Exclusive dealing] agreements, whether challenged under [*section 3 of the Clayton Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GT11-NRF4-4341-00000-00&context=) or *section 1* of the Sherman Act, will be judged . . . under the Rule of Reason, and thus condemned only if found to restrain trade unreasonably." (citing [*Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 333-35, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HKK0-003B-S3Y4-00000-00&context=). Whether exclusive dealing unreasonably restrains trade depends on whether the contracts result in substantial foreclosure of competition, that is, whether its "probable effect is to substantially**[\*23]** lessen competition in the relevant market." [*ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 268 (3d Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56P1-2KG1-F04K-K1YW-00000-00&context=) (citing [*Tampa Elec., 365 U.S. at 327-29*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HKK0-003B-S3Y4-00000-00&context=)); *see also* [*Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3HK0-003B-S4MG-00000-00&context=) (O'Connor, J., concurring) ("Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal.").

The substantial foreclosure analysis typically has a quantitative and a qualitative dimension. [*Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 68 (1st Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CPF-49N0-0038-X3XG-00000-00&context=) ("[L]ow numbers make dismissal easy, high numbers do not automatically condemn, but only encourage closer scrutiny . . . ."); *see also* [*United States v. Microsoft, 253 F.3d 34, 69-70, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43CK-3HW0-0038-X4RT-00000-00&context=) (labeling threshold quantitative requirement as "prudential"). Courts typically require a plaintiff to make an initial showing of foreclosure from competing in at least 30 to 40 percent of a market to proceed with a claim. *E.g.*, [*Stop & Shop, 373 F.3d at 68*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CPF-49N0-0038-X3XG-00000-00&context=) ("For exclusive dealing, foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent."). In addition to the share of the market foreclosed by any exclusive contracts, courts consider factors like the duration of the contracts (longer duration tends to foreclose competition more) and whether a firm can reach the market through alternative channels of distribution (existence of alternative means of distribution lessens any anticompetitive effect). *See,****[\*24]*** *e.g.,* [*Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163-64 (9th Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHD-RB00-0038-X2V2-00000-00&context=); *CDC Techs., Inc. v. IDEXX Labs., Inc., 7 F. Supp. 2d 119, 121 (D. Conn. 1998)*, *aff'd*, [*186 F.3d 74 (2d Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3X0S-S4Y0-0038-X1H5-00000-00&context=).

Exclusive dealing claims brought under *§ 2* are analyzed in much the same way as *§ 1* claims—that is, an exclusive contract is illegal only if it substantially forecloses competition in the relevant market.[[11]](#footnote-10)11 *See* [*United States v. Dentsply Intern., Inc., 399 F.3d 181, 191 (3d Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=) ("Under *[§ 2*], it is not necessary that all competition be removed from the market. The test is . . . whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit."). Although both *§ 1* and *§ 2* require a plaintiff to prove substantial foreclosure, the threshold quantitative showing may be lower for a *§ 2* claim. [*Microsoft, 253 F.3d at 70*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43CK-3HW0-0038-X4RT-00000-00&context=) ("[A] monopolist's use of exclusive contracts, in certain circumstances, may give rise to a *§ 2* violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a *§ 1* violation."). In a *§ 2* monopolization claim, the focus shifts away from the raw total foreclosure and onto the impact of the exclusive contracts on the defendant's ability to maintain or grow its market share. *See* [*Dentsply, 399 F.3d at 187*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=).

It is true that some exclusive contracts may be predatory in the sense that a firm with market power uses its competitive advantage unfairly to prevent rivals from entering or competing in a market. Yet many promote, rather than foreclose, competition. On one side of the line are those contracts described by the Seventh Circuit in [*Paddock Publications, Inc. v. Chicago Tribune Co., 103 F.3d 42, 45 (7th Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YB50-006F-M134-00000-00&context=). There, the court wrote: "[c]ompetition-for-the-contract is a form of competition that ***antitrust*** laws protect rather than proscribe, and it is common." *Id.* (hypothesizing a year-long contract to exclusively supply an automobile manufacturer with tires). On the other side of the line are the kinds of exclusive contracts featured in cases like [*Dentsply*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=), where a monopolist defendant, as a matter of formal corporate policy, deploys exclusive contracts to limit completely their competitors' ability to access the market.

**2. Discussion**

**a. The relevant market**

A threshold, and often dispositive, issue in any ***antitrust*** case requires the plaintiff to prove a market in which trade is allegedly restrained. [*Little Rock Cardiology Clinic PA v. Baptist Health, 591 F.3d 591, 596 (8th Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XDY-BF40-YB0V-M007-00000-00&context=) ("Without a well-defined relevant market, a court cannot determine the effect that an allegedly illegal act has on competition."); *see also* [*Kaiser Aluminum & Chem. Corp. v. F.T.C., 652 F.2d 1324, 1329 (7th Cir. 1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0SJ0-0039-W123-00000-00&context=). The relevant**[\*26]** market has both a geographic dimension and a product dimension. [*Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H870-003B-S01T-00000-00&context=); [*Little Rock, 591 F.3d at 596*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XDY-BF40-YB0V-M007-00000-00&context=). To determine the relevant product market, federal courts focus on whether two products are reasonable substitutes for one another—if they are then they should be included in the same market for the purpose of ***antitrust*** analysis. [*Brown Shoe, 370 U.S. at 325*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H870-003B-S01T-00000-00&context=); *see also* [*United States v. Rockford Mem'l Corp., 898 F.2d 1278, 1283 (7th Cir. 1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6480-003B-53B2-00000-00&context=).

In a run-of-the-mill ***antitrust*** action, a product market is based on the cross-elasticity[[12]](#footnote-11)12 of demand from the point of view of the consumer. *See* [*Kaiser Aluminum, 652 F.2d at 1330*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0SJ0-0039-W123-00000-00&context=) ("Perhaps the clearest indication that products should be included in the same market is if they are actually used by consumers in a readily interchangeable manner."). In a case like this, however, the analysis turns on the substitutability of a buyer from the perspective of the seller; that is, are commercially insured patients reasonably interchangeable with government patients from the providers' point of view. *See* [*Little Rock, 591 F.3d at 596-97*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XDY-BF40-YB0V-M007-00000-00&context=); *see also* [*Stop & Shop, 373 F.3d at 67*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CPF-49N0-0038-X3XG-00000-00&context=) (stating in an analysis of the product market: "the concern in an ordinary exclusive dealing claim by a shut-out supplier is with the available market *for the supplier*").

St. Francis contends**[\*27]** the product market in this case should include both commercial and government payers. Methodist protests that the evidence shows the two are not interchangeable from the perspective of a hospital. The Court agrees with Methodist for two reasons.

First, St. Francis admitted in its answer that government payers pay significantly less than commercial payers and that "patients covered by government plans are not adequate substitutes for commercially insured patients." Answer ¶¶ 93-94, ECF No. 12. Second, the evidence cited by Methodist tends to show that payments from government insurers do not cover the providers' costs. A jury could conclude that no provider would consider a government payer's insured a reasonable substitute for a commercial payer's insured. Thus the market in this case is correctly defined as commercial payers.

To the extent St. Francis relies on the [*Little Rock*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XDY-BF40-YB0V-M007-00000-00&context=) case, it is easily distinguished. That case arose on a motion to dismiss, and the opinion nowhere mentions allegations that government payers reimburse at substantially different rates than commercial payers. In fact, the Eighth Circuit explicitly treated the two sources of revenue as fungible. *See* [*591 F.3d at 597*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XDY-BF40-YB0V-M007-00000-00&context=) ("Patients**[\*28]** able to pay their medical bill, regardless of the method of payment, are reasonably interchangeable from the cardiologist's perspective—the correct perspective from which to analyze the issue in this case."). Here, the record suggests that the medical bills charged to commercial payers and public payers are markedly different. Accordingly, the product market excludes government insurers.[[13]](#footnote-12)13

**b. Substantial foreclosure**

The contrast between [*Paddock Publications*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YB50-006F-M134-00000-00&context=) and [*Dentsply*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=), and what it means generally to be unlawfully foreclosed from competition, is central to this case. The parties implicitly disagree over the meaning of foreclosure from competition. Methodist seems to argue that if a contract excludes Methodist from a provider network then it has been foreclosed from competing for all the patients covered by that plan, full stop. The undisputed facts of this case suggest that analysis is not correct. Here, there are several layers of competition: the hospitals compete with each other for payer contracts; payers compete vigorously with other payers to sell their health insurance plans to**[\*29]** their customers (usually and most importantly employers), and at the retail level hospitals compete against each other to attract individual patients, often through aggressive marketing. Market dynamics at each level impact the ultimate inquiry of whether a provider is foreclosed from competing for a commercially insured patient's business. Accordingly, whether Methodist was foreclosed from competition must be analyzed at each level in the distribution chain—its ability to compete to be included in a payer's network, the ability of end users to choose among plans that feature each hospital, and also the hospitals' ability to reach retail customers notwithstanding out-of-network status. *See* [*Omega Environmental, 127 F.3d at 1162-64*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHD-RB00-0038-X2V2-00000-00&context=).

A jury would not be permitted to conclude, from the evidence in the record, that St. Francis' exclusive contracts have substantially foreclosed competition in the Peoria inpatient healthcare market. St. Francis contends in the main that Methodist is not substantially foreclosed because it can compete for those same exclusive contracts every year or two when they are up for renegotiation and it can attract commercially insured patient flow through adequate alternative channels, including matching**[\*30]** in network rates for out-of-network patients and directly marketing BCBS PPO ASO plans to area employers. Methodist argues that its opportunity to steal away exclusive contracts when they expire every year or two from St. Francis is illusory because of St. Francis' market power (a result of its "must have" status) and that the alternative channels cited by St. Francis are, in fact, not adequate as ***antitrust*** case law applies that concept in light of the market realities of health insurance.

As an initial matter, it is not at all clear that the conduct at issue in this litigation is actionable—that is, it could be construed as closer to the *Paddock Publications* kind of exclusive dealing. The complaint alleged that St. Francis locked BCBS into an exclusive network through threats to withdraw from BCBS's provider network if BCBS added Methodist to its network. The evidence does not show any threats of that kind. At most, it shows BCBS executives acknowledged that St. Francis' threat of withdrawal from their network may have been a negotiating tactic, but the possibility of St. Francis following through was either remote or nonexistent. Indeed, such a move would not have been rational for**[\*31]** St. Francis, given BCBS's dominant position in the Peoria market.

In the end, however, whether Methodist had an opportunity to compete for any individual insurer's contract goes directly to whether it was substantially foreclosed from the market. And even if there is a dispute whether Methodist could in fact have competed for a particular exclusive contract (the wholesale level of competition), there remains an additional question whether it was foreclosed from accessing patients at intermediate and retail levels.

**1. The foreclosure calculations**

Capps' report concludes that in 2009, St. Francis' exclusive contracts foreclosed 54 percent of the market for commercial inpatients and 52 percent of the market for 2012. The 54 percent number includes three contracts: the BCBS PPO (29 percent); the Caterpillar PPO (12 percent); and the Humana plan (13 percent). The 52 percent number includes four contracts: the BCBS PPO (34 percent); the Humana plan (10 percent); the HAMP plan (6 percent); and the small Aetna plan (1 percent). St. Francis has challenged Capps' foreclosure calculation on several grounds. MSJ 57-70. As to the 2009 calculation, St. Francis contends that it overshoots the true figure**[\*32]** because: (1) it includes as foreclosed patients who were actually treated at Methodist on an out-of-network basis; (2) it includes as foreclosed to Methodist BCBS PPO ASO covered lives—and Methodist could compete to be in network for ASO plans if it chose to market that option to employers; (3) it includes as foreclosed those members of the Humana plan who work for OSF; and (4) Methodist did not plead a Caterpillar "claim" so it may not include the exclusive Caterpillar contract in its foreclosure calculation. As to the 2012 foreclosure calculation, St. Francis makes the same arguments to the extent they remain relevant based on the different exclusive contracts in effect at the time, and also contends that the foreclosure figure should not include HAMP covered lives because Methodist had the same opportunity as did St. Francis to contract with HAMP but rejected HAMP's terms (which St. Francis agreed to). Methodist argues that any dispute about the data underlying Capps' figures is factual in nature—that is, whether certain classes of commercial patients were actually foreclosed to

Methodist is an issue that must be decided by a jury. Not so. It is the Court's duty to ensure only legally**[\*33]** relevant testimony reaches a jury. *See* [*Fed. R. Evid. 401*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-11X6-00000-00&context=) and [*702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=). If Capps' figures includes patients who, as a matter of law, are not foreclosed from Methodist based on undisputed facts, then the jury may not consider them foreclosed. The principle applies equally at summary judgment.

**A. 2009 Foreclosure**

*i. Patients actually treated at Methodist*

First, patients that were actually treated at Methodist were not foreclosed to Methodist, no matter how foreclosure is defined. Methodist does not make any reasoned challenge on the point. *See* Resp. 129-30, ECF No. 153-1. Even if it were to contend that out-of-network payments were somehow lower than in-network payments, it has not pointed to any evidence to support that argument. Accordingly, the foreclosure figure for 2009 cannot include patients actually treated at Methodist.

*ii. Patients covered by BCBS PPO ASO plans*

Next, patients covered by a BCBS PPO ASO plan were not foreclosed to Methodist. The contract between St. Francis and BCBS permits employers to include Methodist in their provider network if they use an ASO plan. It is true that BCBS was directed by St. Francis not to market that option to customers. But there was nothing standing in Methodist's path**[\*34]** to convince employers to add it to their provider networks. If an employer so elected, the evidence suggests BCBS would have accommodated the request. Although the contract required BCBS to "notify" St. Francis if an employer added Methodist to its network, there is no evidence that St. Francis could or would have vetoed the request.

At least three area employers took advantage of the ASO network flexibility and added Methodist as an in-network provider, and Methodist tried to sell the option to another of the area's largest employers. That employer, Peoria's public school system, did not choose to add Methodist, but it was not because it did not have the opportunity to do so. Perhaps it would rather have maintained the lower prices to which a narrower network entitled it—the reason does not matter, what matters is that St. Francis did not prevent the employer from implementing a broad network for its self-insured employee benefit plan.

Methodist's major argument in opposition, that all BCBS PPO ASO insureds are foreclosed from Methodist, is that because BCBS would not actively market the option of adding Methodist to the network, then Methodist could not "truly compete" for those patients'**[\*35]** business because of transaction costs associated with individual bargaining. Resp. 130-33. Methodist's point is well-taken at a certain level, but is belied by the record. The evidence shows that several employers did, in fact, open their ASO plan's provider network to include Methodist. It also shows that narrower networks enjoy lower prices, so even if an employer has the option to make its network broad it may not wish to do so based on price. Moreover, the evidence suggests that Methodist failed to pursue the option of marketing itself to self-insured employers. Methodist's failure to vigorously go after potential business is not St. Francis' fault.

Methodist was able to compete to be in the provider network for BCBS PPO ASO plans. The ***antitrust*** laws do not require more. Accordingly, those patients are not foreclosed from Methodist, and may not be included in the foreclosure calculation.

*iii. OSF employees covered by Humana*

OSF employees are not unlawfully foreclosed from Methodist. St. Francis is correct that OSF has no legal duty to compete with itself—that is, the federal ***antitrust*** laws do not assign liability for excluding Methodist from the provider network used by its employees.**[\*36]** *See* [*Schor v. Abbott Labs., 457 F.3d 608, 610 (7th Cir. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4KGY-X2W0-0038-X1PY-00000-00&context=) ("[A]ntitrust law does not require monopolists to cooperate with rivals . . . .").

When OSF sold its health plan to Humana, it required Humana to maintain St. Francis exclusivity (in return for favorable pricing). A large portion of the covered lives under the Humana plan have remained OSF employees. Methodist contends that OSF employees should be excluded entirely from the market and any foreclosure calculation. That is not correct; this case is about unlawful foreclosure. The relevant product market is commercially insured inpatient services, therefore the foreclosure calculation is based on the total Peoria area commercially insured patients. The numerator—what matters in this case—is the number of unlawfully foreclosed patients.[[14]](#footnote-13)14 That some of the market is lawfully foreclosed does not diminish the overall scope of the product market.

Accordingly, the OSF employees**[\*37]** covered by the exclusive Humana plan must be excluded from the foreclosure calculation.

*iv. Caterpillar employees*

Finally, although the Caterpillar PPO was a St. Francis exclusive in 2009, Caterpillar's contracting history shows that, as a matter of law, those patients were not unlawfully foreclosed from Methodist. The way in which Caterpillar has bargained for its employees' health insurance shows the market is competitive, and competitive markets are protected by the ***antitrust*** laws.

Caterpillar for several years offered its employees two products, the far more popular one was a PPO exclusive to St. Francis. Motivated by dissatisfaction with St. Francis' pricing and quality, Caterpillar revamped its plans' networks effective in 2010. Its goal was unambiguously to offer its employees a choice between the hospitals in an effort to promote competition between St. Francis and Methodist. As a result of the new plans' structure, detailed above, prices for the services only St. Francis could provide went up dramatically, and the prices for services which Methodist could also provide went up a little bit.

This shows that Methodist was able to compete for Caterpillar business. Caterpillar is a**[\*38]** much different animal than BCBS in this case. It does not need to package a product to sell at retail—it only worries about what is best for its employees. Where the evidence may show that BCBS "must have" St. Francis in network to sell the products it thinks makes it competitive (although the evidence shows that several other insurance companies do not think that is the case), Caterpillar does not operate under the same constraint. At all times relevant to this case, if it wanted a St. Francis exclusive contract it was because that represented the best combination of price and network breadth from Caterpillar's perspective. When it wanted to move to a broader network, it did so, and paid for it. Accordingly, Methodist was never unlawfully foreclosed by St. Francis from competing for Caterpillar's business.

All told, the undisputed evidence shows that Methodist was only foreclosed from at most the BCBS PPO patients that were members in non-ASO plans. As described above, it had ways to compete for BCBS ASO business, and the Caterpillar business represented the kind of competition-for-the-contract that the Seventh Circuit has held lawful in the past. Accordingly, the total foreclosure**[\*39]** figure for 2009 is less than 20 percent of the market.[[15]](#footnote-14)15

**B. 2012 Foreclosure**

The 2012 foreclosure calculation does not include Caterpillar, its network had by then been opened up. The major difference in the analysis is whether or not to include patients covered by HAMP. St. Francis argues that Methodist had a chance to get the HAMP exclusive contract but balked at HAMP's terms. That St. Francis subsequently made a deal with HAMP on materially similar terms that HAMP sought from Methodist but Methodist rejected cannot be considered unlawful foreclosure, according to St. Francis. Methodist argues that the HAMP exclusive came part and parcel with the Carle Clinic acquisition, detailed above, so HAMP covered lives are foreclosed from Methodist.

The evidence behind the true reason for HAMP's switch from a Methodist exclusive to a St. Francis exclusive is disputed. It may be because Methodist did not meet the terms HAMP sought or it may be because of St. Francis' pressure. For 2012, therefore, the foreclosure**[\*40]** figure is slightly higher than for 2009, it was at most approximately 22 percent.[[16]](#footnote-15)16

**C. Additional factors impacting foreclosure**

In addition to the raw numbers discussed in the preceding section, two other factors identified as relevant by the case law impact the foreclosure analysis. First, none of the contracts in this litigation were for very long durations; most lasted one or two years. While Methodist points to evidence that suggests that employers are loath to switch plans from year to year, that evidence does not suggest that Methodist was foreclosed from competing on a yearly basis each time the contract came up for renewal. Even if it is disputed whether Methodist ever had a real shot at the BCBS PPO product, there are several equally likely explanations for that result—chief among them that St. Francis may simply be a more desirable hospital among Peoria residents, especially those with children.

Finally, and although it overlaps with the analysis above, Methodist had at its disposal several alternative means by which it could reach commercial patients.**[\*41]** First is the match program. Methodist contends that the match program was not competition, it was instead only mitigation. That is wordplay. The program resulted in significant revenues. Second, Methodist had its own exclusive BCBS product, which BCBS executives pointed out was not well-received by the commercial marketplace because, in part, it was too expensive to compete with the BCBS PPO product. This, of course, was in addition to the other plans for which Methodist was an in-network provider. The evidence shows that many employers could have chosen a Methodist exclusive plan but opted not to. Taken together, these two factors only operate to decrease the total foreclosure number.

Neither of Capps' foreclosure calculations, especially when combined with the other factors detailed above, could support a jury's conclusion that Methodist was substantially foreclosed from the inpatient market as a matter of law. Accordingly, the Sherman Act claims must fail.

As a final note, it is worth distinguishing the [*Dentsply*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=) case on which Methodist so heavily relies. That case dealt with the nationwide market for false teeth, in which manufacturers sold teeth to dealers that sold teeth to laboratories**[\*42]** that sold teeth to dentists. *See* [*399 F.3d at 184-85*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=). A manufacturing firm called Dentsply that sold 75 to 80 percent of artificial teeth in the United States prevented, pursuant to written corporate policy, the dealers it distributed through from selling any of its competitors' teeth, with one narrow exception. [*Id. at 185*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=). The district court determined after a trial that Dentsply's corporate policy did not violate *§ 2* because other manufacturers had alternative channels of distribution—they could sell directly to labs. The Third Circuit reversed. It held that the alternative channels were not in fact adequate because the dealers played a crucial role in sales and service to labs and dentists. [*Id. at 191-93*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=). Further, the corporate policy at issue was a "solid pillar of harm to competition" because it had a "significant effect" at preserving Dentsply's monopoly. *See id.* The next largest competitor in the market had about 5 percent market share, [*id. at 184*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=), and "dealers ha[d] a controlling degree of access the laboratories," [*id. at 193*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=).

[*Dentsply*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=) held far more sway over the relevant market than does St. Francis, and its exclusive dealing *completely* foreclosed the distributors to its competitors, other than those competitors who may have been grandfathered**[\*43]** in. As shown above, that's just not the case here—Methodist has not been significantly foreclosed from competing for commercially insured inpatient business because, at a minimum (1) Methodist can compete for insurers' contracts at the wholesale level; (2) employers and often employees can select a Methodist-based plan over a St. Francis-based plan; and (3) any patient covered by Methodist's match program, and the record suggests that program applies to at least the BCBS PPO, may choose to be treated at Methodist at no additional cost even when they are out of network. Next, Dentsply's exclusionary policy only worked to hurt rivals—that is, there was no legitimate business reason for the policy. Here St. Francis benefits from its exclusives by way of more predictable patient volume and insurance companies freely choose exclusivity to avoid paying an open-network premium. St. Francis' prices may be high, but it is a partial monopolist and is permitted to charge monopoly prices for those services it has a monopoly over. Finally, the Peoria market is small and concentrated. Methodist knows exactly which major employers it could target to increase its ASO business, unlike [*Dentsply*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=) which**[\*44]** had a large and geographically dispersed market that would be nearly impossible for a small manufacturer to reach without the help of a distributor's network. In sum, while this case bears some superficial resemblance to *Dentsply*, the evidence does not show Methodist is substantially foreclosed from competing for commercially insured patients, and therefore there can be no federal ***antitrust*** liability.

**c. The outpatient surgical services market**

The second part of this case involves alleged foreclosure of the outpatient medical services market. The crux of the claim is the same: St. Francis' exclusive contracts that bar payers from including Methodist in their provider networks substantially forecloses Methodist from competing for outpatient surgical business.

Outpatient surgical services are performed at ambulatory surgical centers or at hospitals or at doctors' offices and do not require an overnight stay in a hospital. In one paragraph of Capps' report, he states that "[a] wide variety of procedures can now be performed on an outpatient basis including colonoscopies, endoscopies, arthroscopies, various eye procedures, musculoskeletal procedures, and other procedures such as carpal tunnel**[\*45]** surgery." Capps Report ¶ 66. He then tightens his definition of outpatient surgery significantly to include only "invasive surgical procedures that are generally performed in an operating room and often require anesthesia." *Id.* ¶ 69. Capps' second definition excludes any diagnostic testing that does not involve an incision (for example, imaging, endoscopy, or other services typically marketed on ambulatory surgical centers' websites). By way of background, St. Francis' exclusive contracts generally bar payers from including Methodist hospital in their provider networks.[[17]](#footnote-16)17 As a consequence, patients covered by, for example, the BCBS PPO would not be in network if they received outpatient surgery at Methodist.

St. Francis makes two arguments in support of summary judgment on the outpatient surgery claims: (1) Capps did not perform a foreclosure analysis for the outpatient surgery market, instead assuming the figures matched those for inpatient services, and (2) the relevant exclusive contracts simply do not restrict network construction as it relates to outpatient surgery. Methodist falls back on its inpatient**[\*46]** foreclosure calculation and argues that "[t]he question is not the market share of the providers in the outpatient surgery market . . . but the size of the various payers, particularly the foreclosed payers." Resp. 138.

The Court agrees with St. Francis for two reasons. First, there is no evidence of the level of foreclosure in the outpatient surgical services market. To contend as Methodist does that the level of foreclosure for outpatient surgery as for inpatient surgery is the same is simply too speculative, especially in a case replete with documentary evidence from which it could have performed calculation of the relevant services. Second, Methodist relies entirely on the foreclosure levels that the Court has already found insufficient to support a Sherman Act claim as a matter of law. Accordingly, the motion for summary judgment is granted on any claims arising out of the market for outpatient surgical services.[[18]](#footnote-17)18

**d. Remaining state law claims**

The complaint asserts eight state law claims. They include three ***antitrust*** claims arising under Illinois law (exclusive dealing, monopolization, and attempted monopolization), four tortious interference claims (one for each St. Francis exclusive contract), and an [*Illinois Consumer Fraud Act ("ICFA")*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C66-13F1-6YS3-D44B-00000-00&context=) claim.

St. Francis contends the Illinois ***antitrust*** claims must fail because Illinois ***antitrust*** law tracks federal ***antitrust*** law; the ICFA claim must fail because it is premised on alleged ***antitrust*** violations; and the tortious interference claims fail due to the defense of competitor privilege. Methodist concedes that if the federal ***antitrust*** claims fail the Illinois ***antitrust*** claims fail. It then contends that all that is needed to support an ICFA claim is an "oppressive" practice and it has proved that St. Francis has oppressed**[\*48]** Methodist through its use of exclusive contracts. Finally, it argues that its tortious interference claim cannot be defeated by competitor's privilege under Illinois law.

As to the Illinois ***antitrust*** claims, they fail because the Sherman Act claims do. *See* [*740 ILCS 10/11*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C66-0WY1-6YS3-D06K-00000-00&context=) ("When the wording of this Act is identical or similar to that of a federal ***antitrust*** law, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act."). Methodist does not argue differently.

As to the tortious interference claims, Illinois courts have created a competitor's privilege to liability that St. Francis is entitled to rely upon. *See* [*Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc., 227 Ill. 2d 381, 882 N.E.2d 1011, 1019, 317 Ill. Dec. 855 (Ill. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RSK-7FS0-TXFS-P1VJ-00000-00&context=) ("Under Illinois law, commercial competitors are privileged to interfere with one another's prospective business relationships provided their intent is, at least in part, to further their businesses and is not solely motivated by spite or ill will."). "[I]mproper competitive strategies that employ fraud, deceit, intimidation, or deliberate disparagement," however, are not privileged. *Id.* "[*Section 767 of the Restatement (Second) of Torts*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42JH-HPR0-00YF-T12S-00000-00&context=) defines the factors to be considered in determining whether interference is improper," thus vitiating the privilege. [*Miller v. Lockport Realty Grp., Inc., 377 Ill. App. 3d 369, 878 N.E.2d 171, 178, 315 Ill. Dec. 945 (Ill. App. Ct. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R5X-9CN0-TXFS-N1W0-00000-00&context=). One of those factors, "the**[\*49]** relations between the parties," is further broken down into four sub-factors, which if satisfied conjunctively preclude a finding of impropriety. *Id.* Those four sub-factors are that:

(a) the relation concerns a matter involved in the competition between the actor and the other and

(b) the actor does not employ wrongful means and

(c) his action does not create or continue an unlawful restraint of trade and

(d) his purpose is at least in part to advance his interest in competing with the other.

[*Id*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R5X-9CN0-TXFS-N1W0-00000-00&context=)*.* (citing [*Restatement (Second) of Torts § 768(1)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42JH-HPR0-00YF-T12T-00000-00&context=)); *see also* [*A-Abart Elec. Supply, Inc. v. Emerson Elec. Co., 956 F.2d 1399, 1404 (7th Cir. 1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5F20-008H-V03P-00000-00&context=). The first and fourth elements are met in this case. The third is as well based on the Court's analysis of the ***antitrust*** claims above and the ICFA claim below. The final sub-factor, the non-employment of wrongful means, is further defined by the Restatement to include things like physical violence, fraud, or civil lawsuits. *See* [*Restatement (Second) of Torts § 768 comment (e)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42JH-HPR0-00YF-T12T-00000-00&context=). The Restatement's commentary specifically permits "limited economic pressure" and also for the competitor to refuse to do business with third parties. *Id.*

Given that the Court has found no legal basis for any ***antitrust*** violations, and the record does not show any wrongful means as Illinois courts use that term, the tortious interference claims must**[\*50]** fail due to St. Francis' invocation of the competitor's privilege. To the extent Methodist contends that St. Francis used threats and coercion to secure its exclusive contracts, the Court has already noted that the evidence does not show any such threats actually occurred, and if they did they would have been so remote that no executive could have afforded them credence.

Finally, as to the ICFA claim, Methodist contends that summary judgment is improper because is has shown that St. Francis' tactics are oppressive. The text of the ICFA primarily addresses deceptive business conduct, *see* [*815 ILCS 505/2*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C66-13F1-6YS3-D44C-00000-00&context=), but Illinois courts have also held the statute proscribes "unfair" conduct, *see* [*Robinson v. Toyota Motor Credit Corp., 201 Ill. 2d 403, 775 N.E.2d 951, 960, 266 Ill. Dec. 879 (Ill. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45WX-J160-0039-41DH-00000-00&context=). In order to prevail on an ICFA claim based on unfair conduct, a plaintiff must prove "(1) [that] the practice offends public policy; (2) [that] it is oppressive; and (3) [that] it causes consumers substantial injury." [*Saunders v. Michigan Ave. Nat'l Bank, 278 Ill. App. 3d 307, 662 N.E.2d 602, 608, 214 Ill. Dec. 1036 (Ill. App. Ct. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-28K0-003D-H03C-00000-00&context=). "'All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.'" [*Robinson, 775 N.E.2d at 961*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45WX-J160-0039-41DH-00000-00&context=) (quoting [*Cheshire Mortgage Serv., Inc. v. Montes, 223 Conn. 80, 612 A.2d 1130, 1143 (Conn. 1992))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-07G0-003D-83CW-00000-00&context=). Methodist does not explain what "public policy" means, or attempt to**[\*51]** apply that definition to the facts of this case. *See* Resp. 149-50. It states only that St. Francis' practices were oppressive (but does not define oppression or explain how or why St. Francis has acted the oppressor) and concludes that St. Francis injured consumers by charging high prices. Methodist has not produced evidence from which a jury could conclude the ICFA has been violated. *See* [*Saunders, 662 N.E.2d at 608*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-28K0-003D-H03C-00000-00&context=) ("[C]harging an unconscionably high price generally is insufficient to establish a claim for unfairness under the Consumer Fraud Act. . . . Rather, the defendant's conduct must . . . be so oppressive as to leave the consumer with little alternative but to submit . . . ."). Especially so since the Court has found that St. Francis' conduct was not unlawful under the federal ***antitrust*** laws and the record does not show the threats and coercion alleged in the complaint.

Summary judgment is granted on the state law claims.

**II. Parties' Motions to File Under Seal**

Both Methodist and OSF have moved to file a number of documents accompanying their briefing under seal, ECF Nos. 151, 164, 165, 174. These motions are GRANTED in part and DENIED insofar as they request sealing and redaction of documents cited by the Court in**[\*52]** this Order.

**1. Legal Standard**

As a general rule, "the record of a judicial proceeding is public." [*Jessup v. Luther, 277 F.3d 926, 927 (7th Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44XX-1PJ0-0038-X1HV-00000-00&context=). Concealing records reduces the public's ability to monitor judicial performance. [*Id. at 928*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44XX-1PJ0-0038-X1HV-00000-00&context=). Moreover, judicial proceedings are public, and parties "must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials" when they call upon the courts. [*Union Oil Co. of Cal. v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:40S7-2R30-0038-X40F-00000-00&context=). Exceptions to this rule are limited: "[w]hen there is a compelling interest in secrecy, as in the case of trade secrets, the identity of informers, and the privacy of children, portions and in extreme cases the entirety of a trial record can be sealed." [*Jessup, 277 F.3d at 928*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44XX-1PJ0-0038-X1HV-00000-00&context=); *see also* [*Baxter Int'l, Inc. v. Abbott Labs., 297 F.3d 544, 546 (7th Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4698-PW20-0038-X453-00000-00&context=) ("[V]ery few categories of documents are kept confidential once their bearing on the merits of a suit has been revealed.").

The parties to this litigation have rightly noted that the ***antitrust*** context presents its own particular challenges for courts weighing the public release of information. Pl.'s Am. Mot. Leave to File Under Seal 5, ECF No. 164; Def.'s Am. Mot. Leave to File Under Seal 5, ECF No. 174. Discovery in ***antitrust*** litigation, by its broad nature, requires the production of sensitive information regarding business strategy, financials, and**[\*53]** operations. *See e.g.* [*AlliedSignal, Inc. v. B.F. Goodrich Co., 183 F.3d 568, 577 (7th Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WVN-GWR0-0038-X48V-00000-00&context=). Further, the purpose of ***antitrust*** law is to foster market competition, and the exchange of pricing information during litigation could be used by other parties as "the basis of effective collusion" in future negotiations. [*Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1346 (7th Cir. 1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8PY0-0039-P2CD-00000-00&context=). Specific to the healthcare industry, the Seventh Circuit has acknowledged that the release of provider-payer rate negotiations could result in an unfair advantage to providers. [*Id. at 1345*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8PY0-0039-P2CD-00000-00&context=). Illinois law recognizes that certain information shared between providers and payers during contracting constitutes confidential trade secrets. [*215 ILCS 5/368b(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C66-08G1-6YS3-D41D-00000-00&context=) (fee schedules, capitation schedules, and the network provider administration manual are trade secrets).

Secrecy is fine at the discovery stage, before the material enters the judicial record. But those documents, usually a small subset of all discovery, that influence or underpin the judicial decision are open to public inspection unless they meet the definition of trade secrets or other categories of bona fide long-term confidentiality.

[*Baxter Int'l, 297 F.3d at 545*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4698-PW20-0038-X453-00000-00&context=) (internal citation omitted); *see also* [*United States v. Foster, 564 F.3d 852, 853 (7th Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W70-C670-TXFX-91W3-00000-00&context=) ("Information that affects the disposition of litigation belongs in the public record unless a statute or privilege justifies nondisclosure.").

**2. Analysis [\*54]**

Following the approach laid out by the Seventh Circuit in [*Baxter*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4698-PW20-0038-X453-00000-00&context=), and after a thorough review of the sealed record,[[19]](#footnote-18)19 the Court accepts the parties' designations of confidential information, except in regard to those documents that underpin the Court's ruling on the summary judgment motion. *See* [*Baxter Int'l, 297 F.3d at 545-46*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4698-PW20-0038-X453-00000-00&context=). To determine whether their contents meet the sealing standard, the Court has paid special attention to documents cited in this Order, including: the Defendant's Memorandum in Support of its Motion for Summary Judgment, ECF No. 151-1, the Plaintiff's Response to OSF's Motion for Summary Judgment, ECF No. 164-1, the Expert Report of Dr. Cory S. Capps, ECF No. 162-4, Ex. 233, and Duggan 3/5/2010 Email, Resp. Ex. 156, ECF No. 159-11.

Regarding the Memorandum in Support of the Motion for Summary Judgment and the Plaintiffs' Response, the parties filed both unredacted, sealed versions, ECF Nos. 144-1, 153-1, for the Court, and redacted, unsealed public versions, ECF Nos. 151-1, 164-1, to accompany their motions to seal. Most of the redacted information in these two documents may remain redacted, either because it was not relied upon in the Court's Order, or because the Court has determined that good cause exists for the information to remain redacted. However, the Court relied on a portion of the redacted briefing that does not meet the sealing standard. For example, some information unsealed by the Court included general definitions of market foreclosure, statements about the calculation of market foreclosure, and general descriptions of healthcare industry contracting trends. *See e.g.*, Court's Partially Unsealed Def.'s Mem. Supp. Mot. Summ. J. 65 (testimony discussing "standard practice[s]" amongst hospitals); *Id.* at 58 (describing generally Capps' approach to foreclosure calculation).

The Court will file a third version of these documents in which it has unsealed the**[\*56]** information it has determined does not meet the standard.[[20]](#footnote-19)20 The Court has not unsealed information—particularly regarding contract negotiations, specific contractual terms, and pricing information—that it determined to meet the above standard for remaining under seal.

Plaintiffs moved to file under seal the entirety of the expert report of Dr. Cory Capps. Pl.'s Am. Mot. For Leave to File Under Seal 8. Though the report undoubtedly contains sensitive information, the entirety of its 234 pages do not. The Court has provided a redacted version of the Report,[[21]](#footnote-20)21 unsealing only the portions cited in its Order: the unsealed portions of the Report include information such as the types and volumes of services provided at each hospital, which are not highly sensitive or confidential. *See e.g.*, Court's Partially Unsealed Capps Report ¶¶ 105-08; 234.

The Court finds that Resp. Ex.156, a document produced by Caterpillar containing**[\*57]** a detailed discussion of pricing terms and negotiation strategy for its agreement with OSF, should remain under seal.

The parties' motions for leave to file under seal, ECF Nos. 151, 164, 165, 174, are granted in full, except as detailed above.

CONCLUSION

The Clerk is directed to unseal Defendant's Motion for Summary Judgment and change the caption of ECF No. 144 to reflect that it is the Motion for Summary Judgment by OSF Healthcare System d/b/a Saint Francis Medical Center. All other exhibits filed with the Motion are to remain under seal. Defendant's Motion for Summary Judgment, ECF No. 144, is GRANTED. Plaintiff's Motion to Address Misrepresentations and to Correct the Record, ECF No. 172, is GRANTED. The parties' motions for leave to file under seal, ECF Nos. 151, 164, 165, 174, are GRANTED in full, except as detailed in this Order. The Clerk is directed to enter judgment and close the case.

Entered September 30, 2016.

/s/ Sara Darrow

SARA DARROW

UNITED STATES DISTRICT JUDGE

**OSF HEALTHCARE SYSTEM'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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**I. INTRODUCTION**

Pursuant to [*Federal Rule of Civil Procedure 56*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=), Defendant OSF Healthcare System d/b/a St. Francis Medical Center ("OSF") submits this brief in support of its motion for summary judgment on all counts of Plaintiff UnityPoint Health — Methodist f/k/a Methodist**[\*66]** Health Services Corporation ("UPM")'s Complaint. OSF is entitled to summary judgment on UPM's claims under the federal ***antitrust*** laws because (1) UPM cannot prove it is foreclosed from its alleged relevant markets; (2) UPM cannot prove ***antitrust*** injury; and (3) UPM cannot prove that its alleged product market is proper. The remaining state law claims either fail because they are duplicative of the federal claims or fail as a matter of Illinois law.

**Summary of the Argument**

This lawsuit centers on UPM's allegation that it has been the victim of a campaign of intimidation and coercion waged by OSF. According to the Complaint, OSF threatened to refuse to contract with commercial health insurers unless they agreed to exclude UPM as a network provider for inpatient hospital services and outpatient surgical services in the three-county Peoria, Illinois area. ECF No. 1, Complaint (Compl.) ¶¶ 1-8. Specifically, UPM has alleged that OSF threatened to refuse to contract with insurers for all of its hospitals unless they agreed to exclude UPM as a network provider for their health plans. *Id.* ¶¶ 4, 59. In the face of these threats, the insurers were supposedly powerless, because OSF is a "must have"**[\*67]** hospital such that no health plan could survive without including OSF in its provider network. *Id.* ¶ 58. As a result, UPM claims that OSF foreclosed UPM's ability to compete in "over 60%" of the alleged relevant markets. *Id.* ¶ 99.

UPM is seeking to use the ***antitrust*** laws and this Court to obtain a competitive advantage over OSF that it has been unable to achieve through its own skill and business acumen. After extensive discovery, the undisputed facts show that UPM's allegations are pure fiction. The record is clear -- OSF has not coerced insurers; OSF is not a "must have" hospital; and UPM is not foreclosed from 60% of the alleged relevant market. UPM — an affiliate of UnityPoint Health, the nation's fourth largest non-denominational health system boasting more than fifteen hospitals and billions of dollars in annual revenue — has not been foreclosed from competing on the merits, and the Court should award OSF summary judgment on all claims.

*First*, there is no evidence of coercion. Although UPM's Complaint identifies four insurers, its allegations primarily focus on a single product of a single insurer, the Blue Cross Blue Shield of Illinois ("BCBS") PPO. *Id.* at ¶¶ 64-85. Leaving aside**[\*68]** that UPM is an innetwork provider for *other* BCBS health products, BCBS witnesses have dismissed UPM's theory that its exclusion from the PPO network is the result of alleged OSF coercion and threats to withdraw from the plan. Specifically, BCBS executive Steve Hamman, *who was in charge of contract negotiations with OSF*, testified that:

Q. Okay. It's fair to say that, I mean, you don't -- given the passage of time, you don't remember some specific conversations from 2007, 2008 and 2009?

A. That's correct.

Q. Okay. Either do I. So -- so is it possible that someone from OSF in that time period could have told you that they were threatening to -- that they would pull their -- all their hospitals out of the PPO contract if Methodist was let in and you just don't remember it?

MR. BASSMAN: Objection.

THE WITNESS: No, I would have remembered that.

Statement of Undisputed Material Facts ("SMF") ¶ 140 *infra*. Mr. Hamman's predecessor, Phil Lumpkin, testified similarly:

Q. Okay. Do you recall whether or not in any of your discussions with [OSF Executive Vice President] Mr. Schoeplein he ever threatened to pull all the OSF hospitals out of the PPO network?

MR. GRIFFIN: Same objection.

THE WITNESS: I don't**[\*69]** recall specifically him saying it. I wouldn't have taken it seriously if I did recall it.

Q. Okay. Why wouldn't you have taken it seriously?

A. Because it's sort of an idle threat from my perspective. I don't think in the reality of healthcare delivery it would have been viable.

SMF ¶ 141. Consistent with this, none of the other insurers named in the Complaint testified that OSF threatened to withdraw from their health plans if they contracted with UPM. The Complaint's allegations of coercion are simply false.

Also, contrary to UPM's claim that OSF refuses to work with payers working with UPM, commercial payers have created health plans that include both UPM and OSF when the payer has determined that having both hospitals in network is in its interest. Most notably, Peoria's largest employer, Caterpillar (which sponsors and funds its own health plan for employees), decided in 2010 to add UPM to a PPO plan that was historically exclusive to OSF, and the PPO has included both hospitals ever since. SMF ¶¶ 116, 117, 125. More recently, Aetna and United have offered plans that include both UPM and OSF in their networks. SMF ¶¶ 94, 229. Similarly, area employers such as Bradley University have**[\*70]** offered their employees the choice of picking OSF or UPM-centered plans. SMF ¶ 137.

*Second*, OSF is *not* a "must have" hospital. Commercial payers can and have constructed viable and successful health plans in Peoria that do ***not*** include OSF. For example:

• United Healthcare, the "2nd largest player [in Peoria] compared to BCBSIL", did not have OSF as an in-network provider from 2008-2014. It did contract with UPM. SMF ¶¶ 91-92.

• Coventry Health Care, another national health insurance carrier, included UPM but excluded OSF from its networks during the relevant time period.

• BCBS offered an HMO product in Peoria from 2006-2014 that included UPM but did not include OSF. SMF ¶¶ 101-104.

• UPM's highly successful Methodist First Choice health plan network, which contracted with dozens of Peoria-area employers, included UPM and excluded OSF. SMF ¶¶ 79-87.

• Caterpillar, the area's largest employer, offered an HMO plan to its employees from 2009-2010 that included UPM but excluded OSF. SMF ¶¶ 116, 119.

The existence of myriad health plans that do not include (or previously have not included) OSF demonstrates that OSF is not a "must have" hospital. To be sure, OSF and UPM compete aggressively with**[\*71]** one another, and sometimes this competition takes the form of competing to be the exclusive or semi-exclusive provider of services for certain health plans. Sometimes OSF wins; sometimes UPM wins; and sometimes health plans choose both OSF and UPM. This case seeks to pervert that healthy competition by taking the contracting and pricing decisions out of the hands of the payers and instead requiring all commercial payers to contract with UPM.

*Third*, UPM's claim that it has been "foreclosed" from competing for "over 60%" of its defined relevant market is also false. The record demonstrates that:

1. Employers and individuals can purchase commercial health insurance from United, Coventry, or from any other carrier that offers UPM as an innetwork provider if those employers want to have UPM in their health plan. SMF ¶¶ 92, 95.

2. UPM competes against OSF on an out-of-network basis for patients in the very same health plans from which it claims to be foreclosed, and here its out of network status does not render it an ineffective competitor. SMF ¶¶ 126-130.

Regardless of the fact that UPM is not in-network with every payer, UPM has the ability to compete for every commercially insured patient**[\*72]** in Peoria, and therefore is not foreclosed from serving the alleged relevant market *at all*.

Nevertheless, even accepting UPM's allegation that it is foreclosed from some portion of the alleged relevant markets, it is clear that foreclosure is not "over 60%." By way of example, UPM claims that it has been foreclosed from treating patients ***who were actually treated at UPM***. Further, UPM's claim that it has been foreclosed from the entirety of the BCBS PPO (the largest portion of its foreclosure claim) is plain wrong. It is undisputed that at all times BCBS could add UPM to the PPO network for any employer-funded plan that requested the option ("ASO accounts"). SMF ¶¶ 171-175. These ASO (administrative services only) accounts represent well over half of the claimed BCBS PPO foreclosure. UPM could have actively marketed this option to all self-funded employers and insurance brokers, which could have provided for UPM's inclusion in the PPO network for these customers, but instead deliberately elected not to do so. SMF ¶¶ 181-182. UPM's choice, however, does not constitute exclusion or equate to an inability to compete. Thus — even if one assumes UPM is foreclosed from some portion of the**[\*73]** alleged relevant market (which it is not) — its claimed foreclosure is wildly overstated. At best, UPM was foreclosed from less than 20% of the alleged relevant market, an amount far too low to negatively affect competition and impose ***antitrust*** liability.

*Fourth*, UPM has not proven ***antitrust*** injury — damages that result from an injury to competition itself, rather than just harm to UPM. [TEXT REDACTED BY THE COURT] That is why many payers serving the claimed relevant market have elected to adopt limited networks which are "exclusive" to either OSF or UPM, and why limited networks have become a widespread design choice in many regions of the nation to foster cost efficiency, rather than being viewed as an instrument of anticompetitive harm to patients and smaller providers.

The ***antitrust*** laws are not meant to protect competitors from competition, displace competition or dictate competition results. By UPM's own admission it remains a well-funded vibrant competitor, with high quality services and the continuing ability to compete against OSF. Because UPM has access to the very patients it claims are inaccessible, the Court should award summary judgment to OSF on all counts.

**II. STATEMENT [\*74]  OF UNDISPUTED FACTS**

**A. The Parties**

**1. OSF**

1. OSF Healthcare System is an integrated not for profit Catholic health system owned and operated by The Sisters of the Third Order of St. Francis, in Peoria, Illinois. Exh. 117 ([*https://www.osfhealthcare.org/about/*](https://www.osfhealthcare.org/about/), last visited Oct. 28, 2015)

2. OSF Healthcare System consists of 11 acute care facilities and two colleges of nursing. OSF Healthcare's 11 inpatient facilities have a total of 1,314 licensed acute care beds. *Id.*

3. OSF Saint Francis Medical Center ("SFMC") is both the largest hospital in Peoria and the largest hospital in the OSF Healthcare System. (Compl. ¶ 38[[22]](#footnote-21)1).

4. SFMC is "a 609-licensed bed tertiary care teaching center providing numerous specialty services and extensive residency programs for physicians." Exh. 117 ([*https://www.osfhealthcare.org/about/*](https://www.osfhealthcare.org/about/), last visited Oct. 28, 2015)

5. SFMC provides many sophisticated academic medical services that are not offered at other hospitals in the Peoria area, such as Level I trauma and organ transplants. (Compl.**[\*75]** ¶ 39, 55)

6. Within SFMC is the Children's Hospital of Illinois ("CHOI"), which provides advanced academic specialty care services to children. Exh. 118 ([*https://www.osfhealthcare.org/saint-francis/services/pediatrics*](https://www.osfhealthcare.org/saint-francis/services/pediatrics), last visited Oct. 28, 2015).

7. CHOI is "designated as the area's Regional Perinatal Center, with central Illinois only Level IV neonatal intensive care unit and Level I Trauma Center." Id. ([*https://www.osfhealthcare.org/saint-francis/services/pediatrics*](https://www.osfhealthcare.org/saint-francis/services/pediatrics), last visited Oct. 30, 2015).

8. [TEXT REDACTED BY THE COURT] Exh. 1 (OSF00353630).

9. [TEXT REDACTED BY THE COURT] Exh. 2 (OSF00007924 at 16).

10. SFMC has grown to be the largest provider of hospital services in the Peoria area by making significant investments and taking substantial risks. One notable example of SFMC's commitment to improving healthcare in Central Illinois was the "Milestone Project": an 8-story, 440,000 square foot addition to SFMC's campus that was, at the time, the largest private investment in the history of Peoria ($234 million). Exh. 3 (OSF00232122 at 13).

11. The Milestone Project (1) expanded SFMC's emergency and surgical facilities; (2) consolidated CHOI in a single building; (3) expanded both the pediatric ICU and neonatal ICU; and (4) added 43 additional ICU beds. *Id.*

12. The Milestone Project was completed in July 2010.**[\*76]** Exh. 4 (OSF00569381 at 6).

13. OSF imposed no restrictions on affiliated-physicians' ability to perform procedures or refer patients to UPM. Exh. 102 (G. McShane Dep. 68:5-68:15).

**2. UPM**

14. UPM is a hospital located in Peoria, Illinois, and the second-largest hospital in the three-county Peoria area. It has 329 beds, 17 operating rooms is a Level Two trauma center, and is located directly across the street from SFMC. (Compl. ¶ 39).

15. UPM is the exclusive provider of inpatient mental health services and bone marrow transplants in the Peoria area. Exh. 5 (Methodist0006444); Exh. 6 (Methodist00310794).

16. [TEXT REDACTED BY THE COURT] Exh. 7 (Methodist00043098).

17. [TEXT REDACTED BY THE COURT] Exh. 98 (Leaver Dep. at 61-62).

18. UnityPoint is the fourth largest non-denominational health system in the United States. Exh. 119 ([*https://www.unitypoint.org/overview.aspx*](https://www.unitypoint.org/overview.aspx), last visited October 30, 2015).

19. UnityPoint consists of 17 hospitals in multiple states and boasts $3.7 billion in annual revenue. *Id.*

20. [TEXT REDACTED BY THE COURT] Exh. 90 (Gordon Dep. 39:3-39:11); Exh.. 100 (Mackay Dep. 108:23-109:3.)

21. [TEXT REDACTED BY THE COURT] Exh. 77 (Baker Dep. 214:13-214:19 (academic costs); Exh. 110 (Stumpe Dep. 112:18-112:23 (residency)).**[\*77]**

22. [TEXT REDACTED BY THE COURT] Exh. 8 (Methodist00463526) (9/9/13 Affiliation Agreement).

23. both hospitals being affiliated with UnityPoint. *Id.*; ([*http://www.unitypoint.org/peoria/Default.aspx*](http://www.unitypoint.org/peoria/Default.aspx), last visited October 28, 2015).

24. UnityPoint's affiliation with UPM and UPP "show [that] the organization continues to place a strong emphasis on investments in strategic initiatives that management believes will place it in a leading position...." Exh. 9 (UnityPoint June 2015 Financial Report).

25. [TEXT REDACTED BY THE COURT] Exh. 10.

26. With respect to UPM's outpatient surgical services, during the relevant time, UPM owned 49% of the Central Illinois Endoscopy Center, an outpatient surgical center, which was an in-network provider with the BCBS PPO. Exh. 104 (Quin Dep. at 16:8-17:4).

27. With respect to UPM's outpatient surgical services, UPM's CEO, Debbie Simon, testified that UPM considered (and continues to consider) establishing alternatives to OSF's Center for Health, but has so far elected not to because it had other prioities. Exh. 109 (Simon Dep. 157:21-158:12).

28. Affiliated with UPM is the Methodist Medical Group ("MMG"). MMG employed 160 physicians and ancillary providers as of April 2011. Exh. 11 (Dep. Ex. 290, at 6).

29.**[\*78]** MMG is in-network for the BCBS PPO. Exh. 96 (Keyes Dep. at 179:8-179:18).

**B. Sources of Patient Volume**

**1. Medicare and Medicaid**

30. [TEXT REDACTED BY THE COURT] Exh. 111 (Turner dep. 21:1-21:10; Exh. 93 (Harbaugh Dep. 75:20-75:23).

31. [TEXT REDACTED BY THE COURT] Exh. 12 (Methodist00033183, at 92).

32. [TEXT REDACTED BY THE COURT] *Id.* (Methodist00033183, at 92).

33. [TEXT REDACTED BY THE COURT] *Id.* (Methodist00033183, at 92).

34. [TEXT REDACTED BY THE COURT] Exh. 74 (Expert Report of Cory Capps. ("Capps Rep.") Fig. 19).[[23]](#footnote-22)2

35. UPM witnesses consistently testified that the volume of patients from government payers were important to UPM's operations. Exh. 113 (Waters Dep. 73:5-73:7); Exh. 110 (Stumpe Dep. 55:16-56:1); Exh. 83 (Bryant Dep. 131:12-132:5); Exh.100 (MacKay Dep. 34:2-34:14).

**2. Commercial Health Plan Coverage**

36. [TEXT REDACTED BY THE COURT] Exh. 12 (Methodist0033183, at 92); Exh. 71 (Capps Rep. Fig. 19).

37. [TEXT REDACTED BY THE COURT] Exh. 12 (Methodist0033183,**[\*79]** at 92)

38. [TEXT REDACTED BY THE COURT] Exh. 74 (Capps. Rep. Fig. 19).

39. [TEXT REDACTED BY THE COURT] Id. (Capps Rep. ¶¶ 148-49).

40. [TEXT REDACTED BY THE COURT] Exh. 79 (Beebe Dep. 110:7-11); Exh. 74 (Capps Rep. at ¶¶ 148, 150).

41. [TEXT REDACTED BY THE COURT] (*See* Exh. 81 (Biedermann Dep. 176:6-10); Exh. 83 (Bryant Dep. 195:12-22); Exh. 74 (Capps Rep. P 149).

42. [TEXT REDACTED BY THE COURT] Exh. 79 (Beebe Dep. 112:22-24); Exh. 92 (Hamman Dep. 82:18-20); Exh. 74 (Capps Rep. at ¶ 149).

43. The common thread between fully insured and employer self-funded plans is that either the insurance company or the employer is providing a non-governmental health plan to the plan members. Exh. 96 (Keyes Dep. 69:22-69:24).

44. Commercial health plans typically distinguish between "in-network" and "out of network" providers. Insureds receive better benefits (including lower out of pocket costs) when using in-network providers. (Compl. ¶ 90).

45. Commercial HMO plans are typically highly restrictive in the benefits provided to enrollees who seek care outside of the HMO's network of participating providers. (Compl. ¶ 67; Exh.80 (Berry Dep. 22:17-21)).

46. Commercial PPOs provide larger benefits and lower**[\*80]** out of pocket costs when members use in-network providers. (Compl. ¶ 90).

47. In both cases, because plan members are incentivized to use in-network providers, health care providers like UPM and OSF offer discounted prices and other contract concessions to health plans in order to be included in those networks. Being included in the network increases the likelihood that the provider will treat the health plan's members. (Compl. ¶ 91).

48. Although contracts between commercial insurers and providers may last more than one year, employers themselves have the ability to move to different carriers or offer different health plans on an annual basis. (*See* Exh. 80 (Berry Dep. 149:10-149:13)).

**C. Commercial Health Plan Contracting**

**1. Network Construction and Access to Patients**

49. The nature of commercial health plans is that some providers will be included in a payer's network and some will not. Networks can be narrow or broad. A narrow network restricts the number of in-network providers, while a broad network likely includes most, if not all, providers in a given area.

50. Providers participating in a narrow network are able to offer payers better prices, because they can predict that plan members**[\*81]** are more likely to be treated at their facility. (Compl. ¶ 91). As in many industries, the potential for greater volume leads to greater discounts.

51. [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

Exh. 82 (Breeden Dep. 37:18-38:6).

52. An "exclusive contract," which provides for a single in-network provider for a health plan in a particular area, often provides the payer with the lowest prices. Patients, in turn, benefit from those lower prices. Exh. 96 (Keyes Dep. 60:9-61:8).

53. [TEXT REDACTED BY THE COURT] (*E.g.*, Exh. 93 (Harbaugh Dep. 102:10-102:12); Exh. 85 (Crowell Dep. 55:2-55:6)).

54. [TEXT REDACTED BY THE COURT] Id. (Harbaugh Dep. 102:10-102:12; Crowell Dep. 55:2-55:6).

55. [TEXT REDACTED BY THE COURT] Exh. 96 (Keyes Dep. 103:15-104:18); Exh. 82 (Breeden Dep. 254:19-255:1).

56. [TEXT REDACTED BY THE COURT] Exh. 96 (Keyes Dep. 154:19-22, 190:8-196:7); Exh. 82 (Breeden Dep. 223:21-224:11).

**2. UPM's Commercial Health Plan Contracting Strategies**

57. [TEXT REDACTED BY THE COURT] Exh. 98 (Leaver Dep. 90:9-19).

58. UPM has attempted to maximize its revenues and patient volumes *by entering into exclusive contracts* that designated it as the in-network provider and excluded OSF (and**[\*82]** possibly other area providers). *See* ¶¶ 63-76, *infra*.

59. For example, a UPM "Managed Care Contracting" presentation indicates that one of UPM's negotiating strategies was to "actively attempt to convert shared contracts to exclusive." Exh. 115 (Methodist00185603, at 3).

60. Jana Keyes, former UPM Director of its Physician Hospital Organization and Managed Care, testified that UPM's contracting strategy "appeared to be exclusivity when possible." (*See* Exh. 96 (Keyes Dep. 111:23-112:1)).

61. Tony Schierbeck, UPM's Director of Managed Care Contracting, testified that UPM sought exclusive contracts, because they guaranteed increased patient volume, and therefore were a benefit to UPM. Exh. 107 (Schierbeck Dep. 47:11-16).

62. Michael Bryant, UPM's former CEO, testified that UPM sought exclusive contracts, because they guaranteed increased patient volume, and therefore were a benefit to UPM. Exh. 83 (Bryant Dep. 138:1-139:23).

63. To entice payers, UPM and UnityPoint have offered deeper discounts to payers willing to enter into exclusive or narrow network contracts. *See* ¶¶ 57-64, *infra*.

64. Deborah Davis, who works in UPM's managed care group, testified that "[W]e give better rates if it's an exclusive**[\*83]** contract than if it's a nonexclusive contract." Exh. 86 (Davis Dep. 27:18-23).

65. Calvin Mackay, UPM's former CFO, testified that there was a difference in UPM's exclusive and shared network rates and that UPM "gave [payers] a better rate if they did not sign with OSF." Exh. 100 (Mackay Dep. 54:1-21).

66. Kim Lauber, UPM's sales manager for business development, testified that UPM offers better rates for exclusivity "because all of the business comes to one facility." Exh. 79 (Lauber Dep. 23:17-24).

67. When UPM made shared and limited network (only UPM and Proctor) proposals to BCBS in 2008, it offered a 65% discount for the network that excluded OSF versus a 57% discount for a network that included OSF. Exh. 104 (Quin Dep. 82:14-84:10); Exh. 13 (Methodist00123209).

68. UPM executive Robert Quin made the point clearly at his deposition: "It's a volume game. Additional volume usually grants larger discounts." Exh. 104 (Quin Dep. at 84:5-84:6).

69. UPM generally followed its own internal guidelines that an exclusive contract proposal would have 10 to 20% lower rates than a non-exclusive proposal. Exh. 104 (Quin Dep. 122:19-123:22); *see e.g*. Exh. 14 (Methodist00155618, at 18); Exh. 15 (Methodist00220492).**[\*84]**

70. For example, in a 2011 email, Rob Quin indicated that Tazwell County should be informed that the rate for its health plan would increase 15 to 20% if the network was opened to Proctor hospital. Exh. 16 (Dep. Ex. 667, at Methodist00294865).

71. [TEXT REDACTED BY THE COURT] Exh. 85 (Crowell Dep. 34:25-35:20)

72. [TEXT REDACTED BY THE COURT] Id. (Crowell Dep. 36:4-16).

73. Third party witnesses agreed that UPM's approach of trading discounts for some degree of exclusivity is standard in the industry. (*See* ¶¶ 78-81, *infra*).

74. Stephen Hamman, who was in charge of BCBS payer contracting in Peoria between 2009 and 2015, testified that narrower networks lead to increased discounts to payers. Exh. 92 (Hamman Dep, 104:24-105:9).

75. Joseph Arango, former BCBS Divisional Vice President of Provider Contracting, was not surprised that, in 2008, UPM offered BCBS increased discounts for an exclusive network because "with an exclusive arrangement, [UPM] would get more business and, therefore, could afford to receive a lower price on greater volume." Exh. 76 (Arango Dep. 181:3-20).

76. [TEXT REDACTED BY THE COURT] Exh. 103 (Petzold Dep. 65:6-17; 165:6-11).

77. Maxine Wallner, HAMP's Director of Contracting**[\*85]** and Provider Service, testified that she understood that HAMP would receive increased discounts from providers for a narrower network. Exh. 112 (Wallner Dep. 133:6-12).

**D. UPM Has Access to Multiple Channels of Distribution for Commercial Patients**

78. UPM successfully employed numerous strategies to compete for and access patients with commercial health plan coverage. UPM offered its own exclusive network, Methodist First Choice, to self-employed customers; UPM was an in-network provider for multiple national health insurers; and UPM offering "matching" programs for patients enrolled in OSF-centered health plans. *See* ¶¶ 83-139, *infra*.

**1. UPM Offers Its Own Exclusive Methodist First Choice Network to Employer Self-Funded Plans**

79. UPM offered employers the opportunity to contract directly with UPM for provider services through a prepackaged provider network called Methodist First Choice ("MFC"). Exh. 107 (Schierbeck Dep. 104:7-104:22).

80. MFC allows an employer with a self-funded health plan to access the network's participating health care providers at discounted prices. Exh. 97 (Lauber Dep. 15:12-16:5). 81. When an employer chooses to use the MFC network, it will typically hire a separate**[\*86]** third party administrator to provide administrative support services to the employer's health plan. Id. (Lauber Dep. 18:7-15).

82. [TEXT REDACTED BY THE COURT] See, *e.g.*, Exhs. 17, 18 and 19 (Dep. Exs. 328 at Methodist00222292, 329 at Methodist00215790, 330 at Methodist00202197).

83. [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT] Exh. 17 (Dep. Ex. 328 at Methodist00222292) (emphasis added).

84. [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT] Exh. 18 (Dep. Ex. 329 at Methodist00215790) (emphasis added).

85. MFC has been very successful. UPM admits that half of Peoria's 25 largest employers have contracted with MFC. Exh. 104 (Quin Dep. 230:18-230:22).

86. By 2012, there were more than 30,000 covered lives in the MFC network. Exh. 20 (Methodist00159332).

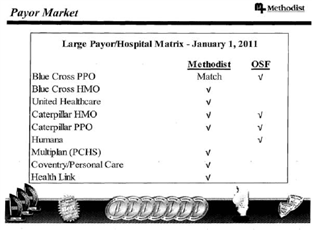
87. [TEXT REDACTED BY THE COURT] Exh. 10 (Dep. Ex. 1278 at UnityPoint00003980).

88. OSF also offers a "Direct Access Network" -- commonly referred to as the "DAN network"-- which is the (far less successful) OSF analogue to MFC. Exh. 80 (Berry Dep. 176:16-177:20).

**2. UPM Was An In-Network Provider for Health Plans Operated by National Commercial Insurers**

89. During the relevant time, UPM has been an in-network provider for health**[\*87]** plans operated by prominent, national commercial insurers, as well in-network for Caterpillar's self-funded health plans. *See ¶¶* 94-129, *infra*.

90. UPM represented to Moody's during a April 25, 2011 ratings presentation that the 2011 payer market in Peoria was as follows:



Exh. 11 (Dep Ex. 290, at 63.)

**a. United Healthcare**

91. United is the "2nd largest player [in Peoria] compared to BCBS-IL." Exh. 21 (UnityPoint00003156 at 32).

92. From 2009 to 2014, UPM was the sole in-network provider for all of United's health plans, with the exception of the Caterpillar PPO. Exh. 104 (Quin Dep. 146:17-147:6); Exh. 87 (Donovan Dep. 14:13-16; 170:14-172:7).

93. OSF was added to United's provider network effective January 1, 2015. Exh. 87 (Donovan Dep. 140:14-180).

94. Since that time, both OSF and UPM have been in-network providers for United health plans. Id. (Donovan Dep. 141:12-18).

**b. Coventry Healthcare**

95. [TEXT REDACTED BY THE COURT] Exh. 94 (Jefferson Dep. 15:17-17:2)

96. [TEXT REDACTED BY THE COURT] (Jefferson Dep. 17:13-18:23).

97. [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT][[24]](#footnote-23)3 Exh. 22 (Dep. Ex. 1451 § 6.15 (defining "exclusivity")).

98. [TEXT REDACTED BY THE COURT] Exh. 98 (Jefferson Dep. 23:10-23:19) ; Exh. 23 (Dep. Ex. 1452).

99. The amended Coventry-UPM agreement continued to prevent Coventry from adding OSF as an in-network provider for acute hospital services offered by UPM. *Id.*

100. [TEXT REDACTED BY THE COURT] Exh. 24 (Dep. Ex. 1287, UNITYPOINT00004088, at 89, "Aetna/Coventry has agreed that they will not add OSF to Coventry").

**c. Blue Cross/Blue Shield HMO**

101. The Chair of UPM's board and UPM's former CEO have both acknowledged that BCBS has historically offered two health plans in Peoria: an HMO that was effectively exclusive to UPM and the PPO that included OSF, but not UPM. Exh. 83 (Bryant Dep. at 59:7-59:14); Exh. 110 (Stumpe Dep. 16:13-16:22).

102. [TEXT REDACTED BY THE COURT] Exh. 104 (Quin Dep. 17:5-17:22); Exh. 25 (Methodist00063209).

103. The HMO offered UPM access to BCBS commercially insured patients. Exh. 110 (Stumpe Dep. 16:13-16:22).

104. [TEXT REDACTED BY THE COURT] Exh. 74 (Capps. Rep. Fig. 14).

**(1) The HMO Has Not Succeeded Because of UPM's High Prices**

105. In the Peoria area, the BCBS HMO has been less successful than the BCBS PPO. Exh. 105 (Rappenecker Dep. 52:9-12).

106. Rich Rappenecker of BCBS**[\*89]** testified that UPM did a "horrible job" at managing the HMO. Id. (Rappenecker Dep. 80:4-9)

107. In November 2011, BCBS believed that the HMO plan was not competitively priced in Peoria because UPM's rates were too high. Exh. 92 (Hamman Dep. 157:3-10).

108. UPM's CFO, Rob Quin, testified that BCBS had communicated to him that UPM's prices for the HMO were too high on at least two different occasions, and that UPM did not agree to reduce the HMO rates to the levels that BCBS requested. Exh. 104 (Quin Dep. 28:1-24).

109. [TEXT REDACTED BY THE COURT] Exh. 81 (Biedermann Dep 181:24-183:2); Exh. 26 (Dep. Ex. 1077 at HCSC00013554).

110. [TEXT REDACTED BY THE COURT] Exh. 81 (Biedermann Dep. 183:4-6).

**(2) The OSF-BCBS PPO Contract Did Not Prohibit UPM From Lowering the Price of the HMO**

111. [TEXT REDACTED BY THE COURT] Exh. 74 (Capps. Rep. ¶ 267)

112. [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

Exh. 27 (HCSC00000396 (emphasis added).)

113. Steve Hamman of BCBS testified that the phrase "like or similar benefits" was to be construed narrowly and that it only limited BCBS's ability to price an HMO product if the HMO offered the same health benefit structure as the BCBS PPO. Exh. 92 (Hamman**[\*90]** Dep. 140:5-24).

114. Phil Lumpkin agreed that "Blue Cross could offer an HMO product at any price that it wanted to so long as the benefits were not similar." Exh. 99 (Lumpkin Dep. 93:8-11).

115. Phil Lumpkin testified that the BCBS HMO and PPO products did ***not*** offer "like or similar benefits", explaining "that's the point of the HMO from our perspective, that it would be a more economical product offering so we would want the pricing to be well below PPO all things considered." Id. (Lumpkin Dep. 59:22-60:2).

**d. Caterpillar**

116. [TEXT REDACTED BY THE COURT] Exh. 95 (Keller Dep. at 179:14-16.)

117. [TEXT REDACTED BY THE COURT] Exh. 74 (Capps. Rep. ¶ 332).

118. [TEXT REDACTED BY THE COURT] Exh. 95 (Keller Dep. 179:17-24)

119. [TEXT REDACTED BY THE COURT] Exh. 95 (Keller dep. 186:4-19); Exh. 74 (Capps Rep. ¶ 332).

120. [TEXT REDACTED BY THE COURT] Id. (Keller Dep. at 188:6-188:8; Capps Rep. ¶¶ 332, 334)

121. Following the introduction of the HMO, Caterpillar determined that, going forward, its PPO agreement would include both OSF and UPM. Exh. 28 (OSF00179704).

122. [TEXT REDACTED BY THE COURT] (Id.; Exh. 95 (Keller Dep. 97:7-98:6)).

123. [TEXT REDACTED BY THE COURT] Exh. 95 (Keller Dep. 163:17-22).**[\*91]**

124. [TEXT REDACTED BY THE COURT] Exh. 29 (Dep. Ex. 1387 at CAT06753); Exh. 88 (Duggan Dep. 84:24-85:8).

125. The Caterpillar PPO network has included both UPM and OSF ever since July 1, 2010.

**3. UPM Offered a "Matching Program" to Compete for BCBS PPO Patients on an Out-of Network Basis**

126. Although UPM has been out of network in the BCBS PPO during the relevant time period, UPM has offered BCBS PPO patients a "matching" program in which UPM waives the difference in out of pocket costs between receiving services at UPM on an out of network basis and obtaining services from an in-network such as OSF. *See*, Exh. 30 (Dep Ex. 190 at Methodist0014456).

127. Minutes from a Methodist First Choice Provider Resource Management Board meeting explain how the program worked:

Methodist will absorb out-of-network penalties typically assessed to Blue Cross/Blue Shield PPO insurance holders who come to Methodist for hospital care when Methodist is considered out-of-network. The majority of Blue Cross/BlueShield PPO members qualify for this program; examples of exclusions are those individuals covered under Medicare, Medicaid and those with secondary insurance coverage. Basically, the Matching Program covers**[\*92]** inpatient, outpatient and diagnostic services, but not physician charges. However, MMG [Methodist Medical Group] physicians and specialty physicians associated with Methodist are in the BC/BS PPO network and their charges will be processed according to an individual's plan in-network benefit.

(*Id.; see also* Exh. 113, Waters Dep. 104:22-105:12 (explaining the same)).

128. [TEXT REDACTED BY THE COURT] Exh. 97 (Lauber Dep. 107:8-110:8, 113:16 - 114:16); Exh. 83 (Bryant Dep. 127:17-128:8); Exh. 96 (Keyes Dep. 196:12-196:14); Exh. 31 (Dep. Ex. 1106 KHA\_METHODIST000222); *see e.g.* Exh. 32 (Dep. Ex. 903, Methodist00185892).

129. UPM advertised the "matching program" as follows:

Methodist Medical Center will absorb the out-of-network penalty ordinarily assessed to BCBS PPO insurance holders who come to Methodist for hospital care when Methodist is considered out-of-network. ***What this means to you is that you will be treated as you are in network and will not pay anything more than what you would pay at an in-network facility***. Exh. 32 (emphasis added).

130. The matching program was even structured at times such that the patient paid ***lower*** out of pocket costs for seeking treatment at UPM, the out**[\*93]** of network facility, than at OSF, the in-network hospital. Exh. 33 (Methodist00253300); Exh. 104 (Quin Dep. 64:19 - 66:14).

131. A significant majority of the employers who used BCBS PPO plans took advantage of the matching program. Exh. 34 (Methodist00147508, at 11-15).

132. Revenues from the matching program have increased over time. Exh. 97 (Lauber Dep. 109:16-18)

133. UPM's revenues from BCBS PPO patients grew by 54% between 2006 and 2008. Exh. 35 (Methodist00030758 at 814).

134. UPM's CFO, Rob Quin, testified that the matching program enabled UPM to grow its BCBS revenues by 5-10% on an annualized basis. Exh. 104 (Quin Dep. 55:1-55:14)

135. By 2010, UPM's revenues from BCBS PPO patients exceeded $40 million. Exh. 36 (Dep. Ex. 290, at 71).

**4. Peoria Employers Offered Their Employees Choices Between OSF and UPM-Centered Health Plans**

136. Some employers have offered their employees the option of choosing either an OSF-centered plan or a UPM-centered plan. For example, Peoria School District 150, one of the largest employers in the Peoria area Exh. 37 (Methodist00046147 at 6152) provides its employees with a choice between a Methodist First Choice or OSF DAN (the OSF equivalent of MFC) health**[\*94]** plan. Exh. 116 (information from Peoria School District 150 website).

137. Bradley University, another major employer in the area (Methodist 0000046147 at 6152), currently offers its employees the option of either a BCBS PPO with OSF or a UPM PPO. Exh. 38 (information from Bradley University website).

**E. The Four Challenged OSF Agreements**

138. Despite UPM's numerous means to access commercially insured patients, the Complaint alleges that UPM has been foreclosed from competing in the alleged relevant market because it was supposedly wrongfully excluded from four networks: BCBS PPO; Humana; Health Alliance; and Aetna. (Compl. ¶¶ 64-88).

**1. Blue Cross/Blue Shield PPO**

139. The bulk of UPM's Complaint concerns the fact that it is not an in-network provider for the BCBS PPO. (Compl. ¶¶ 64-85).

140. Contrary to the Complaint, Steve Hamman, who was in charge of BCBS's contract negotiations with OSF, testified that OSF never threatened to withdraw its hospitals from the PPO network if BCBS contracted with UPM. Exh. 92 (Hamman Dep. 94:11-19).

141. Mr. Hamman's predecessor, Phil Lumpkin similarly testified that OSF never threatened to withdraw its hospitals from the PPO network if BCBS contracted with**[\*95]** UPM. (Lumpkin Dep. 50:3-16).

142. During the relevant time period, OSF has been in-network for the BCBS PPO, while UPM has been out of network. (Compl. ¶¶ 66-84).

143. [TEXT REDACTED BY THE COURT] Exh. 27; Exh 39 (OSF00704446); Exh. 40 (OSF00088845).

144. During the relevant time period, the Methodist Medical Group and other UPM-affiliated practices and facilities have been in-network for the BCBS PPO. (*See* ¶¶ 29, *supra*, 190, *infra*).

145. During the relevant time period, UPM was permitted to be in the BCBS PPO network for any self-funded plan that chose to include UPM. (*See* ¶¶ 178-179, *infra*).

146. [TEXT REDACTED BY THE COURT] Exhs. 27, 39 and 40.

147. Prior to the termination of the 2006 OSF/BCBS PPO agreement on December 31, 2008, BCBS elected to roll the agreement over for an additional year. Exh. 41 (OSF00237023).

148. [TEXT REDACTED BY THE COURT] Exh. 42 (OSF0070446).

149. [TEXT REDACTED BY THE COURT] Exh. 42 (OSF00302071).

150. [TEXT REDACTED BY THE COURT] Exh 40. (OSF00088845).

151. The network construction rate clause for the 2006 Agreement (rolled over through 2009) provides:

[TEXT REDACTED BY THE COURT]

Exh. 27 (OSF00704437)

152. [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

Exh. 39 (OSF00704446).**[\*96]**

153. [TEXT REDACTED BY THE COURT] Exh. 40 (OSF00088845 at 8846).

154. The network construction rates clause guaranteed *rates* and its plain language only prohibited BCBS from seeking to add (or adding) UPM to the PPO network during the contract period without renegotiating the contract rates with OSF.

155. None of the network construction rate provisions preclude BCBS from contracting with *any* UPM-affiliated outpatient facility or physician practice on an in-network basis. Exh. 76 (Arango Dep. 169:1-11).

156. Thus, for example, the Methodist Medical Group (Methodist-employed physicians) are in-network for the BCBS PPO. (*E.g.*, Exh. 110 (Stumpe Dep. 14:6-8); Exh. 104 (Quin Dep. at 16:1-16:6); Exh. 89 (Emanuel Dep. 79:24-80:1).

157. [TEXT REDACTED BY THE COURT][[25]](#footnote-24)4 [TEXT REDACTED BY THE COURT] Exh. 81 (Biedermann Dep. 168:22-169:4); Exh. 76 (Arango Dep. 172:16-172:23).

**a. During the Relevant Time, UPM Has Competed With OSF For Inclusion in the BCBS PPO Every Time the Contract Was Up for Renewal**

158. UPM has known at each juncture when the BCBS PPO agreement has been up for renewal and has communicated with BCBS regarding its desire for a contract at each instance. Exh.**[\*97]** 83 (Bryant Dep. 28:21-29:8, 66:9-66:13).

159. UPM representatives have met with individuals from BCBS almost every year to discuss opportunities to contract for the PPO. Exh. 104 (Quin Dep. 74:8-74:13); Exh. 89 (Emanuel Dep. 80:17-80:24); Exh. 100 (Mackay Dep. 178:18-179:13).

160. Approaching the end of every BCBS/OSF contract term, UPM had the opportunity to compete to be a participating provider in the BCBS PPO. Exh. 107 (Schierbeck Dep. 201:8-202:9).

161. [TEXT REDACTED BY THE COURT] Exh. 107 (Schierbeck Dep. 186:11-187:17); Exh. 13 (Dep. Ex. 1153, Methodist00123209); Exh. 43 (OSF00231242); Exh. 44 (OSF00235862).

162. [TEXT REDACTED BY THE COURT] Exh. 81 (Biedermann Dep. 59:16-59:19, 86:5-86:16); *see also* Exh. 76 (Arango dep. 33:2-33:18).

163. [TEXT REDACTED BY THE COURT] Exh. 45 (Ex. 427 (OSF00236711)).

164. In 2009, UPM continued its push to be a participating provider in the PPO network effective January 1, 2010. *See, e.g*, Exh. 107, (Schierbeck Dep. 98:5-100:22) (discussing 2009 meeting with State Farm in attempt to get support to be added to BCBS PPO).

165. BCBS witnesses testified that its discussions with UPM concerning its inclusion in the PPO collapsed when BCBS perceived that**[\*98]** UPM competed unfairly when UPM's MFC network and BCBS were competing to become the administrator for Bradley University's health plan. Exh. 101 (McCarty Dep. 135:13-137:1); Exh. 105 (Rappenecker Dep. 66:22-70:2, 69:21-70:2); *see also* Exh. 107 (Schierbeck Dep. 189:18-191:17).

166. In 2012, BCBS offered to include UPM in the PPO if UPM was willing to participate in a separate risk-sharing product. Exh. 46 (Methodist00319603); Exh. 104 (Quin Dep. 90:6-91:2).

167. Specifically, as Tony Schierbeck reported internally to UPM's leadership team, "BCBS would like to also offer a narrow-network, co-branded, [UPM] PPO in which we take full risk." Exh. 47 (Dep. Ex. 912, Methodist00052602)

168. Despite the offer, UPM never made a proposal to BCBS. Indeed, it never even considered making one. Exh. 104 (Quin Dep. 91:15-17, 100:3-5).

169. This was because UPM "was not in position to take full risk to get into the PPO soon." Exh. 48 (Dep. Ex. 911, Methodist00502482).

170. [TEXT REDACTED BY THE COURT]. Exh. 40 (OSF0088845).

**b. The OSF/BCBS PPO Agreements Did Not Prohibit ASO Accounts From Adding UPM as an In-Network Provider**

171. [TEXT REDACTED BY THE COURT] Exh. 74 (Capps. Rep. ¶ 272).

172. [TEXT REDACTED**[\*99]** BY THE COURT]

[TEXT REDACTED BY THE COURT]

Exh. 27; Exh. 39 (OSF00704446).

173. [TEXT REDACTED BY THE COURT] Exh. 81 (Biedermann Dep. 175:24-176:2; *see* Exh. 27).

174. UPM's senior executives knew that employers could add UPM to their self-funded BCBS PPO networks. Exh. 83 (Bryant Dep. 71:23-72:3); Exh. 104 (Quin Dep. 50:1-50:12).

175. Former UPM CEO Michael Bryant testified that he advised an employer regarding adding UPM to its BCBS PPO ASO account.

Q You also advised Ms. Gast that her client or that District 150 could have a benefit design plan where the employees could have Methodist as well as OSF within the Blue Cross PPO if she demanded that of them and then you could participate through an ASO mechanism or something like what ATS and RLI two other local employers had done, correct?

A Yes.

Exh. 83 (Bryant Dep. 157-18-157:25); Exh. 49 (Methodist00029367).

176. [TEXT REDACTED BY THE COURT] Exh. 50 (Methodist00299656).

177. [TEXT REDACTED BY THE COURT] (Methodist00299656).

178. [TEXT REDACTED BY THE COURT] *Id.* (Methodist00299656).

179. Nevertheless, Rob Quin, UPM's CFO, testified that Michael Bryant, UPM's former CEO, believed that the ASO option would cause "confusion" if UPM attempted to**[\*100]** promote it, and thus UPM deliberately decided not to do so. Exh. 104 (Quin Dep. 51:2-52:2).

180. Further, Tony Schierbeck testified that Michael Bryant refused to market the ASO option to Bradley University — even though BCBS requested that it do so — because Bryant would only accept UPM becoming a full in-network provider for the PPO. Exh. 107 (Schierbeck Dep. 190:10-191:2).

181. UPM could have marketed the ASO option to area employers and insurance brokers, if it had wanted to. Exh. 104 (Quin Dep. at 50:1-52:9); Exh. 83 (Bryant Dep. 157:14-157:24); *see* Exh. 51 (Methodist00193448); Exh. 52 (Methodist00271137).

182. [TEXT REDACTED BY THE COURT] Exh. 75 (Capps Rebuttal Rep. ¶ 252).

183. The "Plan Hospital" agreement generally covers indemnity insurance products that do not vary benefits by whether health care providers are in or out of network, but BCBS can apply it when there is no other contract governing services for a different BCBS product. Exh. 99 (Lumpkin Dep. 39:23-40:7).

**2. Humana**

184. The Complaint alleges that UPM was wrongfully precluded from Humana's network following Humana's purchase of OSF Health Plans ("OSFHP") in 2008. (Compl. ¶ 86).

185. [TEXT REDACTED BY THE COURT] Exh.**[\*101]** 53 (OSF00052972 at 2989); Exh. 108 (Sehring Dep. 17:7-10).

186. [TEXT REDACTED BY THE COURT] Exh. 103 (Petzold Dep. 159:3-22).

187. [TEXT REDACTED BY THE COURT] Exh. 103 (Petzold Dep. 160:3-15; *see also* Exh. 108 Sehring Dep. 14:15-21).

188. [TEXT REDACTED BY THE COURT] Exh. 103 (Petzold Dep. at 160:3-15).

189. [TEXT REDACTED BY THE COURT] Exh. 85 (Crowell Dep. 68:22-69:19).

190. Consistent with industry practice, following its acquisition of UPM terminated UPP's agreements with OSF and most of its providers, so that UPP employees would no longer have SFMC as an in-network provider.

191. [TEXT REDACTED BY THE COURT] Exh. 106 (Rosenberg Dep. 244:21-245:6).

192. [TEXT REDACTED BY THE COURT] Exh. 103 (Petzold Dep. 164:19-23).

193. Humana and OSF began negotiating the sale of OSFHP in January 2007. Exh. 54 (OSF00623180).

194. [TEXT REDACTED BY THE COURT] Exh. 103 (Petzold Dep. 31:15-31:21).

195. [TEXT REDACTED BY THE COURT] Id. (Petzold Dep. 30:7-30:19).

196. [TEXT REDACTED BY THE COURT] Exh. 103 (Petzold Dep. 159:14-162:1); Exh. 108 (Sehring Dep. 32:19-33:12).

197. [TEXT REDACTED BY THE COURT] Exh. 108 (Sehring Dep. 194:5-22); Exh. 103 (Petzold Dep. 50:12-51:10).

198. [TEXT REDACTED BY THE COURT] Exh.**[\*102]** 103 (Petzold Dep. 167:17-168:22; 182:4-15).

199. [TEXT REDACTED BY THE COURT] Id. (Petzold Dep. 162:19-164:9)

200. [TEXT REDACTED BY THE COURT] Id. (Petzold Dep. 163:21-164:18).

201. [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

Id. (Petzold Dep. 182:7-182:15).

202. [TEXT REDACTED BY THE COURT] Ex. 108 (Sehring Dep. 34:20-35:1); Exh. 103 (Petzold Dep. 166:11-167:11).

203. The MFN allowed Humana to reduce medical costs so that it could offer lower insurance premiums. Exh. 78 (Barksdale Dep. 80:5-21).

204. [TEXT REDACTED BY THE COURT] Exh. 103 (Petzold Dep. 22:2-9).

205. [TEXT REDACTED BY THE COURT] Exh. 55 (OSF00651293 at 1304).

**3. Health Alliance Medical Plan**

206. The Complaint alleges that OSF required Health Alliance Medical Plan ("HAMP") to terminate its prior agreements with UPM as a part of OSF's acquisition of the Carle Clinic in Bloomington in 2009. (Compl. ¶ 88).

207. Prior to July 1, 2009, HAMP had an exclusive provider contract with UPM (OSF was excluded), though HAMP and OSF had a limited, tertiary services agreement which applied when OSF could provide services that other facilities in HAMP's network could not. Exh. 112 (Wallner Dep. 35:2-36:20).

208. [TEXT REDACTED BY THE**[\*103]** COURT] Exh. 56 (Methodist00250628 at 0632-33); Exh. 112 (Wallner Dep. 31:19-32:9).

209. In 2008, HAMP decided that it wanted to enter into a risk-sharing agreement with a provider in the Peoria area. Exh. 112 (Wallner Dep. 140:11-21).

210. As the incumbent, HAMP provided UPM with multiple opportunities to enter into such an agreement, but UPM refused. As HAMP's corporate representative testified:

Q. Was Methodist amenable to entering into a risk-sharing agreement?

A. No.

Q. Did Health Alliance raise the issue of a potential risk-sharing agreement with Methodist multiple times?

A. Yes.

Q. Did Methodist refuse to enter into such an agreement every time?

A. Yes.

Id. (Wallner Dep. 134:8-17).

211. Tony Schierbeck, UPM's Director of Managed Care Contracting, confirmed that UPM rejected HAMP's offer to enter into a risk-sharing contract in 2008. Exh. 107 (Schierbeck Dep. 258:12-259:14).

212. [TEXT REDACTED BY THE COURT] Exh. 57 (OSF00225452).

213. [TEXT REDACTED BY THE COURT] Exh. 58 (HAMP-INGRUM000080).

214. [TEXT REDACTED BY THE COURT] (*See id*; Exh. 59 (OSF00246051); Exh. 60 (OSF00246052); Exh. 61 (OSF00246055); Exh. 62 (OSF00247003); Exh. 63 (OSF00247005); Exh. 64 (OSF00247008); Exh. 65 (OSF00247595).**[\*104]**

215. [TEXT REDACTED BY THE COURT] Exh. 66 (HAMP-INGRUM0000047).

216. [TEXT REDACTED BY THE COURT] Exh. 67 (HAMP-INGRUM000044).

217. [TEXT REDACTED BY THE COURT] Exh. 68 (HAMP-PARKER000546).

218. [TEXT REDACTED BY THE COURT] Exh. 69 (OSF00252589).

219. This proposal was uncontroversial to the parties because, given the nature of risk based contracting, HAMP allows its risk partners "to have a say-so in the network development." Exh. 112 (Wallner Dep. 115:19-20).

220. [TEXT REDACTED BY THE COURT] Exh. 85 (Crowell Dep. 40:18-40:22); Exh. 86 (Davis Dep. 153:7-153:15)

221. Thus, HAMP has explained that it terminated its contracts with UPM because OSF was willing to enter into a risk-sharing agreement and UPM was not.

Q. Did Health Alliance terminate [UPM] from its contracts because of the Carle acquisition?

A. No.

[Objection]

Q. Why did it terminate [UPM]?

A. It was due to the further relationship that [HAMP] developed with OSF that brought them into being a risk partner with us.

Exh. 112 (Wallner Dep. 96:19-97:2)

**4. Aetna**

222. Finally, UPM claims it was wrongfully excluded from Aetna's health plans between 2009 and 2014. (Compl. ¶ 88).

223. Aetna had a contract with UPM for approximately 23 years. (Compl.**[\*105]** ¶ 87.)

224. UPM's internal documents characterized Aetna as the payer which paid the highest prices for UPM's services. Exh. 86 (Davis Dep. 114:3-114:20); Exh. 70 (Methodist00324098); Exh. 71 (Methodist001573790).

225. Prior to 2009, Aetna's network did not include OSF. (Compl. ¶87).

226. [TEXT REDACTED BY THE COURT] Exh. 72 (OSF00128245) (Hospital Participation Agreement between Aetna and OSF, effective 9/1/2009).

227. [TEXT REDACTED BY THE COURT] Exh. 91 (Hall Dep. 101:11-16).

228. [TEXT REDACTED BY THE COURT] Id. (Hall Dep. 69:17-70:14; 79:21-22; 99:8-100:3).

229. [TEXT REDACTED BY THE COURT] *See* Exh. 91 (Hall Dep. 89:7-23, 112:18-113:13); Exh. 73 (Aetna00042193) ; Exh. 85 (Crowell Dep. 248:19-21).

**F. Expert Reports**

230. In support of its claims, UPM has submitted affirmative and rebuttal expert reports from Cory Capps. The Capps Report is attached as Exh. 74, and is cited in the Argument section of this brief as "Capps. Rep." The Capps Rebuttal Report is attached as Exh. 75, and is cited in the argument section as "Capps Rebuttal Rep."

231. For purposes of this motion alone, OSF has cited certain fact assertions of the Capps Report in the preceding paragraphs, in order to demonstrate the**[\*106]** absence of a material fact dispute on that particular issue. OSF otherwise reserves the right to dispute any and all factual assertions and arguments made in the Capps Report or the Capps Rebuttal Report.

232. OSF took Cory Capps' deposition on October 2, 2015. Portions of the transcript are attached as Exh. 84, and are cited in the Argument as "Capps Dep."

233. In support of its defenses, OSF has submitted the expert report of Professor Robert Willig, which is attached as Exh. 114 and is cited in the argument section as "Willig Rep." OSF refers only to two charts and a single paragraph of the Willig Report in the argument section.

**III. ARGUMENT**

UPM claims that OSF is a "must have" hospital whose services are required in every health insurance network and that OSF uses its alleged "must have" status to threaten and bully payers into excluding UPM. Compl. ¶¶ 3-4, 58-59. UPM alleges that OSF's exclusive contracts have foreclosed "over 60%" of the alleged relevant market. *Id.* ¶ 99. The record facts are starkly different. After exchanging over 300,000 documents, reviewing an additional 250,000 documents produced by third-parties, and taking over 60 depositions, UPM's grievances have been revealed**[\*107]** to reflect nothing more than lawful competition between Peoria's two largest hospitals, both of which have competed for and won exclusive or semi-exclusive contracts.

Summary judgment is warranted on multiple grounds. First, UPM cannot prove that it has been foreclosed from competing even in the market that it has alleged. Second, UPM is unable to prove ***antitrust*** injury, as it cannot demonstrate injury from harm to *competition* due to from OSF's alleged misconduct. Third, UPM will be unable to prove a proper product market, as discovery has confirmed that the government payers are important purchasers of UPM's services and thus must be considered when assessing how much opportunity remains for UPM. Fourth and, finally, all of the state law claims will fail as a result of the dismissal of the ***antitrust*** claims.

**A. Standard of Review**

Summary judgment should be granted where the pleadings, the discovery and disclosure materials on file, and any affidavits show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." [*Fed. R. Civ. P. 56(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=), [*(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=). The party with the burden of proof on an issue may not rest on the pleadings, but must affirmatively demonstrate**[\*108]** that there is a genuine issue of material fact requiring trial on each element of its claims. [*Warsco v. Preferred Technical Group, 258 F.3d 557, 563 (7th Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43F3-PCK0-0038-X0BT-00000-00&context=).

On a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. [*SMS Demag Aktiensgesellschaft v. Material Sciences Corp., 565 F.3d 365, 368 (7th Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W7T-WYD0-TXFX-938X-00000-00&context=). Although reasonable inferences from the facts must be construed in favor of the non-movant, the court is not required to accept every conceivable inference. [*Smith v. Hope School, 560 F.3d 694, 699 (7th Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VYP-HGW0-TXFX-92B9-00000-00&context=). In particular, "[i]nferences that are supported by only speculation or conjecture will not defeat a summary judgment motion." [*McDonald v. Vill. of Winnetka, 371 F.3d 992, 1001 (7th Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CN0-9PW0-0038-X361-00000-00&context=). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" [*Gleason v. Mesirow Fin., 118 F.3d 1134, 1139 (7th Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FV50-00B1-D2HP-00000-00&context=) (quoting [*Matsushita Indus. Elec. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7P90-0039-N51W-00000-00&context=).

**B. The Federal *Antitrust* Law Claims Fail Because There Is No Evidence of Substantial Foreclosure**

UPM's Complaint asserts three claims under the federal ***antitrust*** laws. Counts I, II and III of the Complaint assert that OSF's contracts with BCBS (for the PPO), Humana, and previously, Aetna and HAMP, are unlawful exclusive agreements (and OSF's supposed coercison of the insurers to enter into them) in violation of *Section 1* of the Sherman Act. Compl. ¶¶ 110-118, and demonstrate monopolization or attempted monopolization in violation of *Section 2* of the Sherman Act.**[\*109]** Compl. ¶¶ 119-132. Each of these claims require UPM to demonstrate that the four relevant payer agreements have foreclosed UPM from such a large portion of the available opportunities to compete to provide services to patients in the alleged relevant market that it is no longer able to compete effectively — "substantial foreclosure". The undisputed facts demonstrate that UPM is able to and does *compete* effectively for the vast majority of the patients in the tri-county area. Accordingly, all of the federal claims fail.

**1. Standard of Liability for Exclusive Contracts**.

**a. UPM's Sherman Act Claims**

*Section 1* of the Sherman Act prohibits '"[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce,' *15 U.S.C. § 1*, though courts have long restricted its reach to agreements that *unreasonably* restrain trade." [*Omnicare, Inc. v. Unitedhealth Group, Inc., 629 F.3d 697, 705 (7th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51X9-8W91-F04K-R0F7-00000-00&context=) (emphasis added). "To prevail under *§ 1* under any theory, plaintiffs generally must prove three things: (1) that defendants had a contract, combination, or conspiracy ('an agreement'); (2) that as a result, trade in the relevant market was unreasonably restrained; and (3) that they were injured." *Id.* Moreover, UPM must demonstrate ***antitrust*** injury — losses that flow from harm to competition**[\*110]** in the market — and not simply harm to UPM. [*Kochert v. Greater Lafayette Health Servs., 463 F.3d 710, 715-16 (7th Cir. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4KW6-GV70-0038-X047-00000-00&context=).

*Section 2* of the Sherman Act prohibits monopolization or attempted monopolization. In addition to proving ***antitrust*** injury, a monopolization claim requires the plaintiff to show that (1) the defendant "possessed monopoly power" in a relevant market and (2) that it "willfully acquired or maintained that power by means other than the quality of its product, its business acumen, or historical accident." [*Mercatus Group, LLC v. Lake Forest Hosp., 641 F.3d 834, 854 (7th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:52Y8-X3K1-F04K-R0J2-00000-00&context=) citing [*Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427, 430 (7th Cir. 1980)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KKW0-0039-W0CY-00000-00&context=). Attempted monopolization requires the plaintiff to prove that (1) the defendant specifically intended "to achieve monopoly power in a relevant market"; (2) the defendant engaged in "predatory or anticompetitive conduct directed to accomplishing this purpose"; and (3) there was "a dangerous probability" that the defendant would succeed. *Id.* The common thread between both *Section 2* claims is that UPM must prove that OSF "engaged in predatory or anticompetitive conduct of some kind." *Id.* In other words, while "many kinds of conduct may prevent or discourage a potential competitor from entering a particular market", the "federal ***antitrust*** laws are implicated only when that conduct is predatory or unjustifiable." *Id.* ("'*Section 2* forbids not the intentional pursuit**[\*111]** of monopoly power but the employment of unjustifiable means to gain that power.'" (citation omitted)).

**b. Exclusive Agreements are Presumptively Lawful**

Regardless of whether challenged under *Section 1* or *2* of the Sherman Act, exclusive agreements are generally and presumptively lawful. [*Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 65 (1st Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CPF-49N0-0038-X3XG-00000-00&context=). Without some further evidence of harm to competition, such contracts are neither unreasonable restraints of trade under *Section 1* nor predatory conduct under *Section 2*. *See id.; see also* [*Roland Mach. Co. v. Dresser Indus., 749 F.2d 380, 393 (7th Cir. 1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VWT0-003B-G00F-00000-00&context=) (exclusive contract is "condemned" only if it restrains trade unreasonably).

There is good reason why courts hesitate to condemn exclusive agreements. Vertical arrangements, such as those between health care providers and commercial insurers, are often viewed favorably by the courts because of the procompetitive benefits that they offer. *See* [*Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 710 (7th Cir. 1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-WT90-003B-G31J-00000-00&context=) ("vertical integration usually is procompetitive."); *see also* [*Hendricks Music Co. v. Steinway, Inc., 689 F. Supp. 1501, 1514 (N.D. Ill. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-9720-003B-61VH-00000-00&context=) ("it is perfectly legitimate, and, in fact, procompetitive, for manufacturers to insist that their dealers devote their undivided loyalty to their products and not those of their competitors."). The recognized benefits of exclusive agreements include, but are not limited to, the assurances of supply, price stability and sales outlets. [*E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, 357 F.3d 1, 8 (1st Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BH6-KDK0-0038-X1PB-00000-00&context=) ("[I]t is widely**[\*112]** recognized that in many circumstances [exclusive contracts] may be highly efficient — to assure supply, price stability, outlets, investment, best efforts or the like — and pose no competitive threat at all." ); *see* [*Imaging Ctr., Inc. v. W. Md. Health Sys., Inc., 158 Fed. Appx. 413, 420 (4th Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HT6-DSM0-0038-X4YW-00000-00&context=) (affirming summary judgment for defendants on plaintiff's ***antitrust*** claims where the exclusive contracts at issue provided procompetitive benefits such as controlling for quality and cost and ensuring availability of high quality services at all times).

Vertical exclusive agreements are also pro-competitive when they reflect the result of competition between firms to be the exclusive supplier of a product or service for a particular customer. As one court has explained, "short-term competition for exclusive contracts...allows purchasers regularly to select a new supplier, and thus encourages both the incumbent and competitor firms to improve prices and product quality." *See* [*Maxon Hyundai Mazda v. Carfax, Inc., No. 13-CV-2680 (AJN), 2014 U.S. Dist. LEXIS 139480, at \*252 (S.D.N.Y. Sept. 29, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D7X-GTC1-F04F-04JW-00000-00&context=).

In the context of this case, if a commercial payer is willing to enter into an "exclusive" or narrow network contract for a particular health plan, that will encourage competition between hospital providers to win that payer's business. Competition will lead to providers offering lower prices and other**[\*113]** benefits to payers, which may then be passed on to consumers. The law encourages such competition. *See* [*Balaklaw v. Lovell, 14 F.3d 793, 799 (2d Cir. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8YV0-003B-P2WY-00000-00&context=) (In health care,"[vertical exclusive agreements] may actually encourage, rather than discourage, competition, because the incumbent and other, competing anesthesiology groups have a strong incentive continually to improve the care and prices they offer in order to secure the exclusive positions."); *see also* [*Dos Santos v. Columbus-Cueno-Cabrini Med. Ctr., 684 F.2d 1346, 1355 (7th Cir. 1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-28D0-003B-G519-00000-00&context=) (directing district court to consider whether competition for exclusive contracts "stimulates competition among anesthesiologists to obtain such contracts.").

**c. The Substantial Foreclosure Requirement**

Because they are typically procompetitive, to prove that an exclusive agreement violates the ***antitrust*** laws, a plaintiff must demonstrate substantial foreclosure. [*Dos Santos, 684 F.2d at 1352*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-28D0-003B-G519-00000-00&context=); [*Roland Mach., 749 F.2d at 394*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VWT0-003B-G00F-00000-00&context=); *see also* [*Collins v. Associated Pathologists, Ltd., 676 F. Supp. 1388, 1393-97 (C.D. Ill. 1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-DMD0-003B-64GM-00000-00&context=) (granting summary judgment to defendants where plaintiff could not demonstrate substantial foreclosure). ***"Foreclosure" occurs when a competitor is unable to compete for sales in an alleged relevant market****.* [*Omega Envtl. v. Gilbarco, Inc., 127 F.3d 1157, 1163 (9th Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHD-RB00-0038-X2V2-00000-00&context=) (need to evaluate all opportunities to compete for sales to evaluate foreclosure). In any substantial foreclosure analysis, courts examine both (1) the amount of sales opportunities foreclosed in the relevant**[\*114]** market and (2) the duration that those sales opportunities are foreclosed. The opportunities for other traders to enter into or remain in that market must be "significantly limited" in order for there to be substantial foreclosure. [*Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 328, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HKK0-003B-S3Y4-00000-00&context=) *see also* [*Collins, 676 F. Supp. at 1394*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-DMD0-003B-64GM-00000-00&context=), aff'd, [*844 F.2d 473 (7th Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1GH0-001B-K0KT-00000-00&context=) *citing* [*Tampa Electric, 365 U.S. at 327-28*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HKK0-003B-S3Y4-00000-00&context=)).

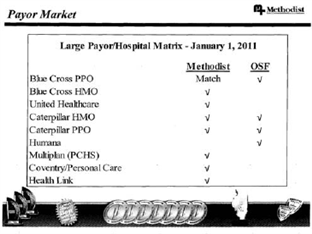
Although there is no bright line rule as to what does or does not constitute "significantly limited", courts in the Seventh Circuit have held that the substantial foreclosure requirement is not met where a buyer or seller has ***adequate means*** to bring a product to market, particularly where the market is highly competitive. *See* [*Magnus Petroleum Co. v. Skelly Oil Co., 599 F.2d 196, 201-02, 204 (7th Cir. 1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-W0B0-0039-M1SP-00000-00&context=) (finding no substantial foreclosure where plaintiff was able to buy large quantities of gasoline from other suppliers and retail gasoline market in area was highly competitive during relevant time period).

Therefore, to succeed on its claims, UPM must demonstrate that OSF's semi-exclusive contracts with the four insurers identified in the Complaint substantially foreclosed UPM *from competing* to provide inpatient hospital services and outpatient surgical services to commercially insured patients in and around Peoria. For purposes of the substantial foreclosure argument that follows only, OSF assumes *arguendo****[\*115]*** that UPM has properly defined the relevant markets. However, as addressed in part in section III.D, *infra*, and more fully in OSF's own expert reports, testimony and previous filings, OSF maintains that UPM has not properly established the alleged relevant markets.

**2. UPM Cannot Establish Substantial Foreclosure Because It Had Ample Distribution Channels For Its Services**

UPM's claims ignore that it has participated in numerous commercial health plan networks (often exclusively or without OSF) in the Peoria area. *See* SMF ¶¶ 92, 95-96, 101-103, 119. OSF's provider contracts for the BCBS PPO, and with HAMP, Humana and (formerly) Aetna only represent four distribution channels through which Peoria hospitals may provide hospital and surgical services to commercially insured patients. UPM, however, reaches the same alleged market through alternative channels. During the entirety of the relevant time period, UPM was able to sell its services to commercially insured patients through: (i) United Healthcare, the "2nd largest player [in Peoria] compared to BCBS-IL"; (ii) Coventry Health Care; (iii) UPM's own, successful Methodist First Choice ("MFC") plan; and (iv) the BCBS HMO. SMF ¶¶ 79, 91-92,**[\*116]** 95, 101. Importantly, until recently, all of these distribution channels were *exclusive to UPM*.[[26]](#footnote-25)5 Moreover, since 2009 UPM has been able to provide its services to Caterpillar, by far and away the largest employee-self funded plan in Peoria — first through an exclusive HMO plan and then through both the HMO and PPO in a shared network. SMF ¶¶ 116, 119, 125. After Aetna acquired Coventry in 2014, UPM became an in-network provider to Aetna. SMF ¶ 229. At other times in the past, UPM has been the exclusive in-network provider with Humana and HAMP. SMF ¶¶ 194, 207. The following table, taken from OSF's expert report, demonstrates the network status for UPM and OSF during the relevant time frame: [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT] Consistent with this (and contrary to the Complaint's allegations of foreclosure), UPM boasted of**[\*117]** its in-network status for the majority of the commercial insurance plans in the Peoria area in an April 2011 presentation to Moody's, which included the following chart:



SMF ¶ 90.[[27]](#footnote-26)6

UPM will undoubtedly protest that its access to these distribution channels does not matter, because the payers affiliated with OSF accounted for more covered lives in the Peoria area. UPM is wrong. These commercial networks provided UPM with the *means to compete*. If, as it contends, UPM offered equal or better quality services at lower prices than OSF, then United, Coventry, the BCBS HMO, and MFC were options available to every single tri-county area employer and individual to buy insurance products that would take advantage of those benefits in cost and quality. In other words, employers and individuals could buy UPM's services through United, Coventry and these other payers and networks *if* they were persuaded to do so as a result of competition on the merits. If an area employer preferred UPM over OSF, that employer was free to choose United, Coventry, MFC, or the BCBS HMO.[[28]](#footnote-27)7

Further, although UPM and OSF's agreements with commercial insurers may last for more than one year, the employers themselves are able to move to a different carrier on an annual basis. SMF ¶ 48. As a result, the market share of these payers, and the amount of market share directed to a hospital in those payer networks, can easily change over time.

Beyond UPM's ability to access commercial patients through the many networks in which it participated, employers are readily able to provide their employees with multiple health plan options. In Peoria, employers regularly offered choices between (1) a plan exclusive to UPM and (2) a plan exclusive to OSF. [TEXT REDACTED BY THE COURT] SMF ¶ 120. Similarly, Peoria School District 150, one of the largest employers in the Peoria area, provides its employees with a choice between MFC and OSF's DAN network (the analogue to MFC). SMF ¶ 136. Bradley University, another major employer in the area, currently offers its employees the**[\*119]** option of either a BCBS PPO with OSF or a UPM PPO. SMF ¶ 137. Thus, even if UPM could not convince an employer to offer only a UPM-centric health plan, it was still *able to compete* by persuading employers to offer their employees the option of a UPM plan alongside an OSF plan. Again, if UPM offered equal or better quality services at lower prices than OSF, then employers and individuals would be eager to offer health plans that would take advantage of those benefits in cost and quality.

Accordingly, UPM had more than enough distribution channels through which it could compete for patients covered by commercial health insurance. In cases like this one, when the exclusive arrangement applies at the middleman level instead of directly at the consumer level, courts "require a higher standard of proof of substantial foreclosure." [*Ryko Mfg. Co. v. Eden Services, 823 F.2d 1215, 1235 (8th Cir. 1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-93S0-001B-K2JB-00000-00&context=) (internal quotations omitted). "If competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution, it is unclear whether such restrictions foreclose from competition any part of the relevant market." [*Omega Envtl., 127 F.3d at 1163*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHD-RB00-0038-X2V2-00000-00&context=) ("[F]oreclosure of even 'a large percentage of one mode of distribution will have little anticompetitive effect**[\*120]** if another mode is available.'" (quoting Herbert Hovenkamp, Federal ***Antitrust*** Policy § 10.8 (1994))). Where alternative distribution channels exist, the courts will find even a facially high level of foreclosure insignificant.

For example, in *CDC Techs., Inc. v. IDEXX Labs., Inc., 7 F. Supp. 2d 119 (D. Conn. 1998)*, both plaintiff and defendant sold instruments to conduct hemotology analyses on veterinary blood, both directly and through distributors. *Id. at 123*. Plaintiff initially sold its instruments through four distributors (*id.*), but the defendant subsequently entered into exclusive dealing relationships with those same distributors. *Id. at 124*. On summary judgment, it was undisputed that defendant had an 80% share of the end-user clinical hemotology instrument market, with the exclusive agreements having foreclosed plaintiff from 50% of the distributor outlet market. *Id. at 129*. Nonetheless, the magistrate judge recommended summary judgment for defendant on the grounds that the plaintiff had ample *ability to compete* through alternate distributors as well as direct sales to end users:

In this case, CDC sells its product through direct sales, markets its products through numerous non-distributor sources, uses non-IDEXX distributors, and can compete for IDEXX's existing distributors by**[\*121]** offering them a superior deal. '***Antitrust*** laws require no more.'

*Id. at 130* (citing [*Omega Envtl., 127 F.2d at 1163*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHD-RB00-0038-X2V2-00000-00&context=)). In adopting the magistrate's report and recommendation, the district court explained that "[w]here the undisputed evidence shows CDC continued to reach end users," even the plaintiff's initially *claimed* 65% distributor foreclosure "would be inadequate to support the inference of anti-competitiveness". *Id. at 121*.

Here, even assuming that OSF coerced payers into excluding UPM from the four contracts at issue (which it did not), there is no dispute that UPM has had (and continues to have) access to multiple commercial health plans — at a minimum, United, Coventry, the BCBS HMO — and its own MFC network through which it can sell its inpatient hospital services and outpatient surgical services to commercially insured patients.[[29]](#footnote-28)8 UPM has every opportunity to compete with OSF. It can increase its presence by (1) persuading employers to offer commercial insurance plans that include UPM as an in-network provider; and (2) persuading employees to elect a plan that includes UPM as an in-network provider when given a choice of insurance options. Given these indisputable, available routes to market, no reasonable jury could conclude that OSF's**[\*122]** payer agreements with BCBS (for the PPO only), Humana, HAMP, and Aetna have substantially foreclosed UPM's ability to compete for patients in the alleged relevant markets. [*Omega Envtl., 127 F.3d at 1163*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHD-RB00-0038-X2V2-00000-00&context=); [*Ryko Mfg. Co., 823 F.2d 1215, 1234-35*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-93S0-001B-K2JB-00000-00&context=); *CDC Techs., 7 F. Supp. 2d at 129-130*.

**3. UPM's Matching Program Defeats Any Claim of Substantial Foreclosure**

OSF's contracts with health plans do not (and could not) actually bar any patient from seeking treatment at UPM. As such, UPM's foreclosure claim is based on the fact that OSF has been an "in-network" hospital for the BCBS PPO, Humana, HAMP, and Aetna health plans at times when UPM has been "out-of-network." UPM's claims that in-network status is "crucial because patients generally seek healthcare services from 'in-network' providers because insurers provide substantial financial incentives (*e.g.*, lower cost sharing) to their policy holders to visit hospitals within their provider networks." Compl. ¶ 90. Patients who seek care at out-of-network facilities (in this case, UPM) pay a higher out of pocket cost than they would at an in-network facility**[\*123]** (OSF). Essentially, UPM alleges that this out of pocket cost differential precluded BCBS PPO, Humana, HAMP and Aetna plan members from seeking treatment at UPM. Compl. ¶ 90

UPM's claims ignore, however, that it has a "matching" program that eliminated this cost differential entirely for BCBS PPO patients. *See* SMF ¶¶ 126-127. As described above, the matching program provided that BCBS PPO plan members could receive treatment at UPM without having to pay any out of network penalties. *Id.* [TEXT REDACTED BY THE COURT] SMF ¶¶ 128-129. As UPM advertised:

Methodist Medical Center will absorb the out-of-network penalty ordinarily assessed to BCBS PPO insurance holders who come to Methodist for hospital care when Methodist is considered out-of-network. ***What this means to you is that you will be treated as you are in network and will not pay anything more than what you would pay at an in-network facility***.

SMF ¶ 129. The matching program was even structured at times such that the patient paid ***lower*** out of pocket costs for seeking treatment at UPM, the out of network facility, than at OSF, the innetwork hospital. SMF ¶ 130. [TEXT REDACTED BY THE COURT] SMF ¶¶ 127, 144, 151, 152, 156. As such, there**[\*124]** was nothing in the OSF agreements that prevented UPM physicians from acting as the initial point of contact for and the referrers of patients to UPM.

The matching program was a success. Revenues from BCBS patients exceeded $40 million in 2010 — a figure at odds with UPM's cries of foreclosure in this litigation. SMF ¶ 135. Further, the significant majority of the employers who used BCBS PPO plans took advantage of the matching program. SMF ¶ 131.

Thus, it is undisputed that (a) UPM actually treated BCBS PPO plan members that it claims to have been foreclosed from treating, and (b) that it benefitted financially from doing so. UPM will no doubt argue that the matching program did not allow it to treat *enough* BCBS PPO plan members, but that does not change the fact that the matching program allowed UPM to compete with OSF for BCBS PPO patients on what, from the patient's perspective, was an equal financial footing. Out-of-network status did not render UPM foreclosed from competing for each and every patient.

[TEXT REDACTED BY THE COURT] SMF ¶ 56. [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

Exh. 74 (Capps Rebuttal Rep. ¶ 102, n. 87).

Thus, it cannot be disputed that UPM and OSF,**[\*125]** through their matching programs, competed and won patients on an out-of-network status. Each hospital lowered out of pocket prices in order to offset their out-of-network status. Nothing prohibited UPM from adopting similar programs for Humana, HAMP and Aetna insureds for any periods that it was out of network. Although being in-network provides some competitive advantage, there is a difference between a competitive challenge and foreclosure. "[T]hat certain major alternative channels of distribution . . . may be less hospitable . . . does not give rise to an ***antitrust*** law violation. The ***antitrust*** law does not require competitors to be able to succeed in alternative channels; it merely requires them to have the *opportunity* to succeed." [*Church & Dwight Co. v. Mayer Labs., Inc., 868 F. Supp. 2d 876, 915 (N.D. Cal. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55D3-V0H1-F04C-T1G2-00000-00&context=) *rev'd on other grounds* [*No. C-10-4429, 2012 U.S. Dist. LEXIS 6868*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:54SV-N2D1-F04D-K08J-00000-00&context=); *see* [*Omega Envtl., 127 F.3d at 1163*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHD-RB00-0038-X2V2-00000-00&context=) ("The...***antitrust*** laws were not designed to equip the plaintiffs' hypothetical competitor with [the defendant's] legitimate competitive advantage" of exclusive agreements with distributors); *CDC Techs., 7 F. Supp. 2d at 129* (same).

Where the record demonstrates sufficient channels to compete (and where indisputable facts demonstrate success in competing), a reasonable jury cannot find foreclosure, let alone substantial foreclosure. UPM was not**[\*126]** only "in-network" in multiple commercial health plans where it could compete for business and convince employers to choose those plans, but it also demonstrated ability and success in competing for out-of network patients.

**4. The Alleged Exclusive Contracts Foreclosed, At Most, Less Than 20% of the Market for Inpatient Hospital Services**

The Court can and should grant OSF's motion based solely on the undisputed facts which demonstrate UPM's ability to compete to provide its inpatient and outpatient services to patients on an in-network and out-of-network basis. However, even assuming that UPM was "foreclosed" from competing for some patients by OSF's alleged exclusive contracts (which is not the case), summary judgment is also appropriate because UPM's alleged foreclosure from the alleged relevant market is far too low to impose ***antitrust*** liability.

**a. UPM's Claim that OSF's Exclusive Contracts Foreclosed 52-54.6% of the Alleged Relevant Market is Insupportable**

UPM has submitted the Capps Report in support of its foreclosure claim. Capps concludes that OSF's "exclusive" contracts foreclosed UPM from 54.6.% of the relevant market for inpatient hospital services in 2009 (as measured in payments)**[\*127]** and from 52% of the relevant market in 2012. Exh. 74 (Capps Rep. at 185-185, Fig. 48; 195-196, Fig. 49).

As a threshold matter, the Capps Report's calculations are entirely inadequate to demonstrate substantial foreclosure. Measurement of foreclosure in the alleged relevant market requires analysis of discharges of all patients from all providers in the Tri-County area. Shockingly, the Capps Report only measures the shares of UPM and OSF discharges, thus both ignoring (a) other competitors in the alleged market (such as Pekin Hospital and UPP) and (b) the geographic limit that UPM itself imposed on the alleged market. The Capps Report's purported measurement of foreclosure for inpatient services is thus unreliable and represents a failure of proof. On this basis alone, summary judgment should be granted in OSF's favor

Moreover, even Capps' 52-54.6% figure is too low to support a claim, particularly where UPM has viable alternative channels of distribution, such as UPM's in-network relationships with United Healthcare, Coventry, BCBS HMO and MFC. [*Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 237-38 (1st Cir. 1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XX40-003B-G0JD-00000-00&context=) (finding 50% foreclosure of the relevant market is not substantial "in light of the nature of the contracts and the market."); *CDC Techs., 7 F. Supp. 2d at 121* (granting summary judgment for defendant,**[\*128]** despite existence of 65% and 80% foreclosure in relevant markets where plaintiff had ability to sell its products through alternative distribution channels). Nevertheless, even Capps' facially insufficient foreclosure percentages are wildly inflated.

**b. Calculation of Foreclosure Percentages**

The Capps Report calculates the amount of foreclosure in a straightforward (though incorrect) fashion: if UPM is out-of-network for any particular health plan, then *all patients* -- and the associated revenues -- are foreclosed to UPM. For 2009, Fig. 48 of the Capps Report identifies the following commercial payers/health plans and the associated payments to UPM and OSF:

**Figure 48. Combined commercial impatient discharges and payments at SFMC and Methodist, 2009**

[*Go to table3*](#Table3)



Source: 2009 SFMC and Methodist billing data.

[1] Humana completed its acquisition of OSF Health Plans in May, 2008.

[TEXT REDACTED BY THE COURT]

Figure 49 of the Capps Report identifies the same information for 2012:

**Figure 49. Combined commercial impatient discharges and payments at SFMC and Methodist, 2009**

[*Go to table4*](#Table4)



Source: 2012 SFMC and Methodist billing data.

[TEXT REDACTED BY THE COURT][[30]](#footnote-29)9 [[31]](#footnote-30)10

Here, the Capps Report claims that the revenues from four payers/plans are entirely foreclosed to UPM: (i) BCBS PPO (34.4%); (ii) Humana (10.3%); (iii) HAMP (6.1%); and (iv) Aetna (1.4%). The sum of the claimed "foreclosure" is 52%.

Both of the 2009 and 2012 claimed foreclosures are artificially inflated. "Foreclosure" occurs when a competitor is ***unable to compete*** for sales in an alleged relevant market. *See* [*Omega Envtl., 127 F.3d at 1163*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHD-RB00-0038-X2V2-00000-00&context=) (need to evaluate all channels through which party can compete for sales to determine foreclosure). Nonetheless, to reach its calculated 52-54.6% foreclosure, UPM is forced to outrageously claim that it was foreclosed from patients who were actually treated at UPM. Additionally, the record demonstrates that UPM has been able to (but chose not to) compete *on an in-network basis* for self-funded plans that were administered by BCBS, an amount which represents over half of the claimed foreclosure. With respect to the OSF employee health plan (from which UPM also claims to be improperly foreclosed), the record is indisputable that such patient volume would never have been available to UPM. Even more importantly, the U.S.**[\*131]** Supreme Court has repeatedly made clear that OSF has no obligation to deal with its [TEXT REDACTED BY THE COURT]titor, UPM. Thus, OSF is not required to make its employee health plan available to UPM at all, much less on the terms that UPM would like. When these and other overstatements are properly accounted for, the resulting foreclosure claim is, at best, 15-20% -- wholly insufficient to establish an ***antitrust*** violation.

**c. UPM's Foreclosure Percentages Include Fully Insured BCBS PPO and Other Patients Whom It Actually Treated**

The record shows that, every year, BCBS PPO patients and other purportedly "foreclosed" health plan members are treated at UPM on an out-of-network basis, whether through the BCBS PPO matching program or otherwise. Nonetheless, the Capps Report counts all patients covered by an OSF "exclusive" health plan as being foreclosed to UPM. Capps Dep. 205:17-22. In other words, the Capps Report concludes that UPM was unable to compete to provide treatment for patients *who were actually treated at UPM*. This is beyond the pale. Removing these patients from the 2009 and 2012 calculations results in the following:

• **2009**: The overall foreclosure declines by 4.6% from 54.6%**[\*132]** to 50%. Willig Report at Appendix A, Table 20.

• **2012**: The overall foreclosure declines 3.6% from 52% to 48.4%. Willig Report at 27, Table 1.[[32]](#footnote-31)11

**d. UPM Was Not Foreclosed From Treating Patients Enrolled in Self-Funded Employer BCBS PPO Plans**

The BCBS PPO represents 29% of the claimed foreclosure in 2009 and 34% in 2012. These amounts include both (a) fully-insured PPO plans and (b) self-funded employer plans that are administered by BCBS ("ASO accounts"). The Capps Report treats these categories identically in the foreclosure tables. Exh. 84 (Capps Dep. at 202:6-16.) With respect to foreclosure, however, they are not the same. [TEXT REDACTED BY THE COURT] SMF ¶¶ 72-173. As the Capps Report admits:

[TEXT REDACTED BY THE COURT][[33]](#footnote-32)12

Exh. 74 (Capps. Report ¶ 272). UPM's**[\*133]** senior leadership, including former CEO Michael Bryant, Rob Quin and Tony Schierbeck, has long known that a self-funded employer health plan could add UPM to its BCBS PPO network. SMF ¶¶ 174. Indeed, former UPM CEO Michael Bryant specifically advised one employer about the option of including UPM in its network:

Q You also advised Ms. Gast that her client or that District 150 could have a benefit design plan where the employees could have Methodist as well as OSF within the Blue Cross PPO if she demanded that of them and then you could participate through an ASO mechanism or something like what ATS and RLI two other local employers had done, correct?

A Yes.

SMF ¶ 175. [TEXT REDACTED BY THE COURT] SMF ¶¶ 176-178. Notwithstanding these successes, UPM's CFO admits that UPM chose *not* to further or actively market the BCBS ASO PPO option. After learning about the ASO option during UPM's 2008-2010 discussions with BCBS, Mr. Quin testified that Mr. Bryant declined to market the option of adding UPM to BCBS ASO networks:

Q: Sure. Did you relay what Mr. McCarty [of BCBS] had told you about Blue Cross's ability to offer [UPM] to its self-funded clients to anyone else within [UPM]?

A: Yes

Q: To whom**[\*134]** did you relay this?

A: Tony Schierbeck, Michael Bryant. Tony was probably in the original conversation too.

Q: What was Mr. Schierbeck's reaction?

A: He wanted to do it.

Q: Was he surprised too?

A: Yes.

Q. What was Mr. Bryant's reaction?

A: His reaction was that he thought it would provide confusion in the market and that we would — they run on a Blue Cross PPO platform. But if you look at any of the marketing material or any of the network material on Blue Cross's web site, et cetera, it shows [UPM] as not being an in network provider.

*See* SMF ¶ 179. UPM declined to market this option because it would only accept becoming a full in-network provider for the PPO. SMF ¶ 180. Indeed, Tony Schierbeck testified that Mr. Bryant said as much when BCBS approached UPM about using the option for a Bradley University health plan. *Id.* Regardless of UPM's reason for not marketing the ASO option to self-funded employer plans, the record indisputably demonstrates that (i) UPM could be added as an in network provider BCBS PPO ASO accounts; (ii) UPM knew this; and (iii) some tri-county employers availed themselves of this option. UPM was not, in any way, unable to compete for these ASO accounts on an in-network**[\*135]** basis.

Nevertheless, UPM has offered three reasons why it believes that it is still foreclosed from competing for BCBS PPO ASO customers. [TEXT REDACTED BY THE COURT] . Even if true, this is irrelevant.[[34]](#footnote-33)13 UPM could have, if it wanted marketed that option to area employers and insurance brokers, just as it did with District 150. SMF ¶ 181. Indeed, Capps conceded at his deposition that UPM "could have" chosen to market this option to employers. Exh. 84 (Capps. Dep. at 236-37). UPM declined to do so, which was UPM's decision and not the inevitable result of OSF's BCBS agreement.

[TEXT REDACTED BY THE COURT] Exh. 75 (Capps Rebuttal Rep. ¶¶ 252, 257). This was, of course, also UPM's own fault, not the result of OSF's BCBS contract. UPM is in charge of its own prices. [TEXT REDACTED BY THE COURT] . (Capps Rebuttal**[\*136]** Rep. ¶ 252). Nothing stopped UPM from lowering those prices to BCBS. It would defy logic to blame OSF for UPM's decision not to lower its rates to BCBS or to claim that BCBS would not have jumped at the chance for a rate reduction.

Third, UPM's economist asserts that "direct contracting is not common" because of the "transaction costs" in employers negotiating contracts directly with hospitals. Id. (Capps Rebutal Rep. ¶ 257). [TEXT REDACTED BY THE COURT] Id. (Capps Rebuttal Rep. ¶ 252).

In sum, UPM was not foreclosed from competing for BCBS's ASO accounts. [TEXT REDACTED BY THE COURT] Exh. 74 (Capps Rep. at 59). Removing ASO accounts from the BCBS PPO foreclosure calculation consequently has a dramatic effect:

• **2009**: The BCBS PPO foreclosure drops from 29.0% to 10.9%. When combined with the adjustment for patients treated at UPM, the overall foreclosure figure falls from 54.6% to 31.9%. Willig Rep. at Appendix A, Table 20.

• **2012**: The BCBS PPO foreclosure drops from 34.4% to 12.6%. When combined with the adjustment for patients treated at UPM, the overall foreclosure figure falls from 52% to 26.6%. Willig Rep. at 27, Table 1.

**e. UPM's Humana Foreclosure Percentages Improperly Include OSF's Own Employees and Their Dependents [\*137]**

The Humana foreclosure percentages included in UPM's calculation are also inflated. As discussed above, a significant portion of Humana's commercial membership in the alleged relevant market consists of OSF's own employees (and their dependents) enrolled in OSF's self-funded employer health plan. SMF ¶ 186. As a matter of law, UPM improperly includes these OSF employees in its foreclosure calculations.

As David Petzold of Humana testified, it is standard practice for hospitals to require their own employee health plan network to exclude competitors. SMF ¶ 188. UnityPoint's Director of Payer Contracting, Amanda Crowell, agreed. SMF ¶ 189.

The Supreme Court made patently clear in [*Verizon Commc'n., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BFM-T0F0-004C-001J-00000-00&context=) and [*Pac. Bell Tel. Co. v. linkLine Communs., Inc., 555 U.S. 438, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VPF-5H70-TXFX-11YJ-00000-00&context=), that OSF has no obligation whatsoever to contract with UPM, its competitor, for its employee health plan. In *Trinko*, plaintiff claimed that Verizon, which owned a telephone network, breached the 1996 Telecommunications Act by filling competitors' orders on a discriminatory basis to discourage customers from becoming or remaining customers of a competitive local exchange carrier. [*Id. at 405*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BFM-T0F0-004C-001J-00000-00&context=). The Court held that plaintiff's allegations that Verizon failed to share its network with competitors**[\*138]** as required by the 1996 Act did not constitute an ***antitrust*** claim under *Section 2* of the Sherman Act. [*Id. at 415-16*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BFM-T0F0-004C-001J-00000-00&context=). The Court explained the Sherman Act "does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition." *Id.* "*Trinko* thus makes clear that [even if a firm is an actual monopolist, it] has no ***antitrust*** duty to deal with its competitors" and "it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous." [*linkLine Communs., 555 U.S. at 450*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VPF-5H70-TXFX-11YJ-00000-00&context=) (expanding holding of *Trinko* beyond "insufficient assistance" cases and holding that upstream monopolist has no ***antitrust*** obligation to deal with rivals).

OSF and UPM are rivals. OSF has no duty to deal with UPM, and is free to restrict enrollees in OSF's employee health plan to an OSF-exclusive network. UPM cannot complain that it was unlawfully foreclosed from treating patients when OSF lawfully prevented UPM from doing so. UPM is well aware of this controlling law and carefully excludes members of OSF's employee health plan from its damages calculations. Exh. 74 (Capps Rep. at 213). Nevertheless, UPM inexplicably includes these patients in its foreclosure tables.**[\*139]** Ex. 84 (Capps. Dep. at 204:23-205:17). Removing the enrollees in OSF's employee health plan results in the following adjustments:

• **2009**: The overall foreclosure similarly declines from 54.6% to 49.8%. When combined with adjustments for patients treated at UPM and BCBS ASO accounts, the overall foreclosure drops from 54.6% to 27.1%. Willig Rep. at Appendix A, Table 20.

• **2012**: The overall foreclosure declines from 52% to 47.2%. When combined with adjustments for patients treated at UPM and BCBS ASO accounts, the overall foreclosure falls from 52% to 22.1%. Willig Rep. at 27, Table 1.

**f. UPM Was Not Foreclosed From Treating HAMP Patients**

UPM's 2012 foreclosure claim includes HAMP covered lives,[[35]](#footnote-34)14 notwithstanding the fact that UPM had every opportunity to contract with HAMP prior to HAMP contracting with OSF. Specifically, HAMP approached UPM on multiple occasions in 2008, and asked UPM to enter into a risk-sharing agreement. SMF ¶¶ 209-211. UPM refused every time. *Id.* [TEXT REDACTED BY THE COURT] . SMF ¶¶ 212-214. There is no foreclosure when plaintiff turns down an opportunity to contract because it does not like the buyer's terms. In such a situation, plaintiff cannot show that "'the opportunities for other**[\*140]** traders to enter into or remain in that market are significantly limited' by the exclusive-dealing arrangement" because plaintiff rejected its opportunity to gain the portion of the market it now claims it is foreclosed from. [*Imaging Ctr., Inc. v. W. Md. Health Sys., 158 Fed. Appx. 413 (4th Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HT6-DSM0-0038-X4YW-00000-00&context=) *quoting* [*Tampa Elec., 365 U.S. at 328*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HKK0-003B-S3Y4-00000-00&context=)*; see also* [*Paddock Publ'ns., Inc. v. Chicago Tribune Co., 103 F.3d 42, 45 (7th Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YB50-006F-M134-00000-00&context=) (dismissing plaintiff's ***antitrust*** claim and noting that the plaintiff "never tried to make a better offer" and that "[i]t should try to outbid the [defendants] in the marketplace, rather than outmaneuver them in court"). Adjusting the claimed 2012 foreclosure to account for this reality results in the following:

• **2012**: On its own, the overall foreclosure declines 6.1% from 52% to 45.9%. When combined with adjustments for, patients treated at UPM, BCBS ASO accounts, and the Humana/OSF employees the overall foreclosure falls from 52% to 15.7%. Exh. 114 (Willig Rep. at 27, Table 1).

**g. UPM Cannot Include the Caterpillar PPO in its Foreclosure Tables Because No Caterpillar Claim Was Pled**

UPM's Complaint asserts claims based on OSF's contracts with four commercial insurers: Aetna, BCBS, HAMP and Humana. Compl. ¶¶ 64-88. There is no claim asserted whatsoever with respect to the Caterpillar PPO. Indeed, the word "Caterpillar"**[\*141]** only appears in paragraph 81 of the Complaint, which simply describes an alleged conversation between a Caterpillar employee and a BCBS employee. Compl. ¶ 81. Prior to issuing its expert report, UPM never claimed — in any filing in this case — that OSF was liable based on UPM's then-exclusion from the Caterpillar PPO network.[[36]](#footnote-35)15 Nonetheless, five months after the close of fact discovery, the Capps Report desperately asserts a new $2.25 million (*$6.75 million with trebling*) claim[[37]](#footnote-36)16 based on the fact that UPM was out-of-network for the Caterpillar PPO prior to 2010. *See* Exh. 74 (Capps. Rep. Fig. 62).

UPM's new claim is patently improper at this late date. Because UPM never asserted a claim based on the Caterpillar PPO, UPM's 2009 foreclosure calculation cannot include the Caterpillar PPO.[[38]](#footnote-37)17 On its own, removing Caterpillar from the claimed 2009 foreclosure table reduces the overall foreclosure percentage by 12.0% from 54.6% to 42.6%. When combined with the other adjustments for 2009 detailed above, the overall foreclosure tumbles from 54.6% to 15.1%.

**h. The Sum of the BCBS, Humana, Caterpillar, and HAMP Adjustments Demonstrate That There Is No Substantial Foreclosure**

Combining the adjustments discussed above, the foreclosure percentage for 2009 is only 15.1% and for 2012 it is only 15.7%. Below is a table summarizing the adjustments:

[*Go to table5*](#Table5)



[*Go to table6*](#Table6)



Such limited foreclosure is far too small to be considered substantial and a serious impediment to UPM's ability to compete. See [*Jefferson Parish Hosp. District No. 2 v. Hyde, 466 U.S. 2, 45, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3HK0-003B-S4MG-00000-00&context=) (O'Connor, J. concurring) ("Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal."). "Foreclosure levels are **unlikely** to be of concern where they are less than 30 or 40 percent,' and while high numbers do not guarantee success for an ***antitrust*** claim, 'low numbers make dismissal easy.'" [*Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112, 124 (1st Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:8337-V571-652P-Y05B-00000-00&context=) (emphasis added)**[\*144]** (quoting [*Stop & Shop Supermarket, 373 F.3d at 68*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CPF-49N0-0038-X3XG-00000-00&context=)) (affirming summary judgment for defendant when plaintiff was foreclosed from 30% of market through exclusive contracts); see [*United States v. Microsoft Corp., 87 F. Supp. 2d 30, 52 (D.D.C. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YYD-PYB0-0038-Y3MD-00000-00&context=) ("unless the evidence demonstrates that Microsoft's agreements excluded Netscape altogether from access to roughly forty percent of the browser market, the Court should decline to find such agreements in violation of *§ 1*."), rev'd on other grounds, [*253 F.3d 34, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43CK-3HW0-0038-X4RT-00000-00&context=)

Courts have repeatedly held that foreclosure well below 30%, as is the case here, are simply insufficient to make out a claim under the ***antitrust*** laws. See e.g., [*Sterling Merch., 656 F.3d at 124, 126*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:8337-V571-652P-Y05B-00000-00&context=) (affirming summary judgment to defendant and finding that 30.8% market foreclosure was not substantial); [*Barry Wright Corp., 724 F.2d at 237-38*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XX40-003B-G0JD-00000-00&context=) (finding that 50% market foreclosure was not substantial); [*R. J. Reynolds Tobacco Co. v. Philip Morris, 199 F. Supp. 2d 362 (M.D.N.C. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45SS-SFN0-0038-Y47B-00000-00&context=) (granting summary judgment to defendant and finding that 34% foreclosure was insufficient); [*Bepco, Inc. v. Allied-Signal, Inc., 106 F. Supp. 2d 814, 828 (M.D.N.C. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:40KY-KWP0-0038-Y0PK-00000-00&context=) (holding that 21.5% foreclosure was not substantial); [*Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196, 1212-13 (W.D.N.C. 1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-BGR0-0054-41BP-00000-00&context=) (holding that market foreclosure of 40% was insufficient); [*Kuck v. Bensen, 647 F. Supp. 743, 746 (D. Me. 1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-7PC0-0039-R3HG-00000-00&context=) (holding that 37% market foreclosure was not substantial). This makes sense, because limited foreclosure demonstrates that UPM has adequate means and opportunity to compete in the alleged relevant market.

**5. There is No Meaningful Foreclosure for Outpatient Surgical Services**

Capps**[\*145]** has performed no separate analysis of the outpatient surgical services market foreclosure for 2009 and 2012 (or any other year). Because UPM has not specified the alleged foreclosure caused by OSF's BCBS PPO, Humana, HAMP, and Aetna semi-exclusive payer agreements, OSF cannot specifically respond to UPM's claim. This is an obvious failure of proof, and summary judgment should be awarded on this ground alone. [*Thomas Consol. Indus. v. Koster Group, Inc., 93 Fed. Appx. 926, 928 (7th Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BY4-2270-0038-X1NW-00000-00&context=) ("[A] complete failure of proof concerning even one essential element of the nonmoving party's case necessarily renders all other facts immaterial." (citing [*Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6HC0-0039-N37R-00000-00&context=).

The foreclosure for outpatient services cannot simply be assumed to be the same as the foreclosure for inpatient services. Outpatient surgical service providers in the alleged relevant market are not restricted to hospitals. They also include multiple Ambulatory Surgical Centers ("ASC's"). As the Capps Rep. explains, "[ASC's] are free standing facilities (sometimes owned by hospitals) that provide outpatient surgical services, and some nonsurgical services, to patients who do not require an overnight stay." Exh. 74 (Capps Rep. ¶ 67). Thus, [TEXT REDACTED BY THE COURT] See, e.g. Exh. 74 (Capps Rep. ¶ 57).

[TEXT REDACTED BY**[\*146]** THE COURT] SMF ¶¶ 151-153. It does not preclude BCBS from contracting with any UPM outpatient facility or physician practice on an in-network basis. SMF ¶ 155. [TEXT REDACTED BY THE COURT] SMF ¶ 226. That BCBS or Aetna could include a UPM-owned ASC in their networks (but not the hospital itself) is consistent with BCBS's existing inclusion of the Methodist Medical Group (Methodist-affiliated physicians) as in the PPO network. SMF ¶ 144. In other words, the network restrictions in the relevant contracts only applied to BCBS PPO or Aetna patients seeking treatment at UPM itself. They do not preclude BCBS or Aetna from including any UPM-affiliated provider in their networks.

In fact, UPM owned 49% of the Central Illinois Endoscopy Center, an outpatient surgical center, which was an in-network provider with the BCBS PPO during the relevant time period. SMF ¶ 26. More importantly, UPM has had ample opportunity to expand its footprint in outpatient facilities. Indeed, UPM's CEO, Debbie Simon, testified that UPM had the means to invest in additional outpatient facilities, but has elected not to do so:

Q Has Methodist developed an alternative to offer the commercial market for the Center for**[\*147]** Health

A Not as of today.

Q. Is Methodist considering developing an alternative to the Center for Health?

A. Yes.

Q. And why hasn't Methodist embarked on an effort to develop an alternative to the Center for Health?

A. Competing priorities, I think.

Q. What are the priorities that have prevented Methodist from making that decision?

A. A variety of things. You know, we have many different priorities. This has not risen to the top.

SMF ¶ 27.

There is no record evidence (because it is not the case) that OSF used its purported "must have" status to restrict any payer from anything related to outpatient services. UPM has never tried (because it cannot) to prove anything to the contrary. In the end, UPM has not even attempted to demonstrate the amount of the alleged outpatient surgical services market from which it claims to be foreclosed, and cannot prove by inference that the foreclosure would be the same as the foreclosure for inpatient services. Further, because OSF's semi-exclusive payer agreements did not preclude UPM from developing its outpatient capacity, any market foreclosure is minimal at best.

**6. UPM Was Able to Compete for the Alleged Exclusive BCBS PPO Contract**

Finally UPM's claim that**[\*148]** it was illegally foreclosed from the BCBS PPO network — the significant majority of the total claimed foreclosure — also fails because the OSF/BCBS contracts were short-term agreements that were frequently renegotiated. See Sec. III.B.1.b, supra. UPM competed at each renegotiation cycle to enter the BCBS PPO network. The competition favored by the ***antitrust*** laws is often competition to be the exclusive supplier to a customer. [*Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 76 (3d Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:800W-G5B1-652R-100H-00000-00&context=); [*Menasha Corp. v. News Am. Mktg. In-Store, Inc., 354 F.3d 661, 663 (7th Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BDV-XPM0-0038-X0X7-00000-00&context=) (explaining that competition to be an exclusive supplier may constitute "a vital form of rivalry, and often the most powerful one, which the ***antitrust*** laws encourage rather than suppress"); [*Carfax, Inc., 2014 U.S. Dist. LEXIS 139480, at \*252*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D7X-GTC1-F04F-04JW-00000-00&context=). "Competition-for-the-contract is a form of competition that ***antitrust*** laws protect rather than proscribe, and it is common." [*Paddock Public'ns. v. Chicago Tribune Co., 103 F.3d 42, 45 (7th Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YB50-006F-M134-00000-00&context=). As one appellate court explained: "Such a situation may actually encourage, rather than discourage, competition, because the incumbent and other, competing anesthesiology groups have a strong incentive continually to improve the care and prices they offer in order to secure the exclusive positions." [*Balaklaw, 14 F.3d at 799*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8YV0-003B-P2WY-00000-00&context=); see [*Dos Santos, 684 F.2d at 1355*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-28D0-003B-G519-00000-00&context=); [*Spinelli v. NFL, No. 13 Civ. 7398, 96 F. Supp. 3d 81, 2015 U.S. Dist. LEXIS 40716, at \*74 (S.D.N.Y. Mar. 27, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FMR-66T1-F04F-00FB-00000-00&context=) ("It also is well established that exclusive agreements do not harm competition when there is competition to obtain the exclusive contract.").**[\*149]**

UPM was not foreclosed because it had the opportunity, again and again, to bid for the BCBS PPO business. That OSF fought and won the competitive skirmish does not violate the ***antitrust*** laws. Every instance that BCBS's PPO contract has come up for renewal, UPM has had the ability to compete — and has competed -- to be an in-network provider in the PPO. SMF ¶¶ 158-170. UPM has known at each juncture when the BCBS PPO agreement has been up for renewal and has communicated with BCBS regarding its desire for a contract at each instance. SMF ¶ 158. These communications have included substantive negotiations to be included in the BCBS PPO. SMF ¶ 161. During the negotiations, BCBS witnesses have testified that they not only considered adding UPM to the PPO, but they also considered changing to a UPM exclusive PPO. SMF ¶ 165. [TEXT REDACTED BY THE COURT] SMF ¶ 163.

OSF's contracts for the BCBS PPO in the limitations period ultimately break down to four separate agreement periods, which were all for relatively short terms: a one year renewal (2009 renewal), a two year agreement (2010-2011), a one year renewal (2012) and a three year agreement (2013-2015). SMF ¶ 146. To begin with, the two instances**[\*150]** of one year renewals should not be considered part of the foreclosure analysis at all because "[e]xclusive dealing contracts terminable in less than one year are presumptively lawful[.]" [*Roland Mach. Co., 749 F.2d at 395*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VWT0-003B-G00F-00000-00&context=); see [*Omega Envtl., 127 F.3d at 1163-64*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHD-RB00-0038-X2V2-00000-00&context=) (reversing denial of defendant's motion for judgment as a matter of law when exclusive contracts were all available in a year or less). During these one-year periods, UPM could have won the BCBS contract just by offering a better deal. See [*PNY Techs., Inc., v. SanDisk Corp., No. 11-cv-04689-WHOP, 2014 U.S. Dist. LEXIS 90649, at \*14 (N.D. Cal. July 2, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CK1-SD71-F04C-T0J4-00000-00&context=).

The remaining contract periods of two and three year terms did not substantially foreclose UPM from being able to compete given the fact that UPM had the opportunity to compete for these contracts and the terms of the contract were relatively short. "Even an exclusive-dealing contract covering a dominant share of a relevant market need have no adverse consequences if the contract is let out for frequent rebidding." [*Pro Search Plus, LLC v. VFM Leonardo, Inc., No. SACV 12-2102-JST, 2013 U.S. Dist. LEXIS 107895, at \*8 (C.D. Cal. July 30, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:591F-9P21-F04C-T0NM-00000-00&context=) quoting 11 Philip Areeda & Herbert Hovenkamp, ***Antitrust*** Law ¶ 1802g2 & n. 68 (3d ed. 2011). When the contracts are frequently available, there is no possible ***antitrust*** injury, because all parties will have the opportunity to compete. [*Race Tires Am., Inc., 614 F.3d at 74*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:800W-G5B1-652R-100H-00000-00&context=) (affirming**[\*151]** district court's decision granting summary judgment to the defendants when the plaintiff had "the opportunity to bid on exclusive supply deals and ha[d] in fact done so with some success"); see [*Spinelli, 96 F. Supp. 3d 81, 2015 U.S. Dist. LEXIS 40716, at \*74*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FMR-66T1-F04F-00FB-00000-00&context=) (dismissing plaintiff's ***antitrust*** claims and holding that exclusive agreements of three years or less and that are awarded competitively "do not foreclose competition"); [*Kolon Indus. v. E.I. du Pont de Nemours & Co., No. 3:11cv622, 2012 U.S. Dist. LEXIS 48722, at \*58, \*66 (E.D. Va. Apr. 5, 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55BM-PS11-F04F-F2BJ-00000-00&context=) (awarding summary judgment to defendant on the plaintiff's ***antitrust*** claims when the exclusive contracts at issue lasted for as long as two years).

**C. The Federal *Antitrust* Claims Fail Because UPM Cannot Demonstrate *Antitrust* Injury**

Summary judgment is also appropriate because UPM cannot demonstrate the requirement of ***antitrust*** injury. Because the ***antitrust*** laws protect competition, not competitors, mere allegations of economic injury are sufficient to state a claim. [*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=). Rather, a plaintiff must prove "injury of the type the ***antitrust*** laws were intended to prevent and that flows from that which makes defendants' acts unlawful." [*Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 394 (7th Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FS00-003B-P41J-00000-00&context=) quoting [*Brunswick Corp., 429 U.S. 477 at 487-88, 97 S. Ct. 690, 50 L. Ed. 2d 701*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=). To satisfy the ***antitrust*** injury requirement, a "plaintiff must allege, not only injury to himself, but an injury to the market as well."**[\*152]** [*Agnew v. NCAA, 683 F.3d 328, 335 (7th Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55X7-KYR1-F04K-R0GK-00000-00&context=). Where, as here, the plaintiff alleges that its competitor engaged in exclusionary conduct and attempted monopolization, that plaintiff must show that its "'loss comes from acts that reduce output or raise prices to consumers.'" [*Stamatakis Indus., Inc. v. King, 965 F.2d 469, 471 (7th Cir. 1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-36F0-008H-V35K-00000-00&context=) (quoting [*Chicago Prof.'l Sports LP v. Nat'l Basketball Ass'n, 961 F.2d 667, 670 (7th Cir. 1992))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4DV0-008H-V55X-00000-00&context=); see also [*Kochert, 372 F. Supp. 2d at 515*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GC2-9280-TVTW-G2VF-00000-00&context=) ("To show an ***antitrust*** injury, Kochert must prove that the exclusive contract affected the price, quantity or quality of anesthesia services, not just her own welfare.").

UPM's Complaint alleges two theories of ***antitrust*** injury. [TEXT REDACTED BY THE COURT] See, e.g., (Compl.) at ¶¶ 100, 108; Exh. 74 (Capps Rep. ¶¶ 28, 30). See, e.g., Compl. at ¶¶ 99-100; Exh. 74 (Capps Rep. ¶ 35). Despite the fact that an expert report does not constitute evidence, as with the substantial foreclosure requirement, UPM's relies on the Capps Rep. to support both theories.[[39]](#footnote-38)18 However, neither the Capps Rep. nor the record upon which it is based provides such support.

**1. UPM Has Not Identified Any Investment That It Did Not Make Due to OSF's Conduct**

UPM**[\*153]** has not identified any investment that it would have made but for OSF's alleged conduct. [TEXT REDACTED BY THE COURT] . *See* Capps Rep. ¶¶ 466-67 Capps conceded during his deposition that "I am not in a position to say what specific investments [UPM] would have made" in the absence of OSF's alleged misconduct. Exh. 84 (Capps Dep. 92:20-93:2). [TEXT REDACTED BY THE COURT] *Id.* at 94:4-17, 95:25-96:10, Exh. 75(Capps Rebuttal Rep. at ¶ 383).

[TEXT REDACTED BY THE COURT] The claimed harm is therefore entirely speculative, and as a result, UPM cannot demonstrate ***antitrust*** injury. [*Thomas Consol. Indus., supra 93 Fed. Appx. at 928*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BY4-2270-0038-X1NW-00000-00&context=).

**2. Methodist's Allegations that Consumers Would Have Paid Less for Healthcare Absent OSF's Conduct is Not Supported by the Record Evidence**

Alternatively, UPM claims that OSF's actions led to higher healthcare costs for consumers in the Peoria area. Compl. ¶ 5. [TEXT REDACTED BY THE COURT] Exh. 74 (Capps Rep. ¶ 522 & figs.62-64, 74-76); Exh. 75 (Capps Rebuttal Rep. ¶ 532 & fig.53). [TEXT REDACTED BY THE COURT] Exh. 74 (Capps Rep. ¶ 522).

The assumptions underlying this calculation, however, contradict the undisputed factual record. [TEXT REDACTED BY THE COURT][[40]](#footnote-39)19 In other words, Capps assumes that there is no "open network**[\*154]** premium." Exh. 84 (Capps. Dep. at 40:13-42:5). [TEXT REDACTED BY THE COURT][[41]](#footnote-40)20 [TEXT REDACTED BY THE COURT] Exh. 114 (Willig Report ¶ 258).[[42]](#footnote-41)21

[TEXT REDACTED BY THE COURT]

*First*, and most importantly, UPM witnesses repeatedly admitted that there is an open network premium, i.e. providers charge higher prices in an open network than in a narrow or exclusive network. For example:

• Robert Quin, Methodist's CFO, testified, "In general, more narrow networks usually means less reimbursement levels to providers." Mr. Quin also confirmed that Methodist offers lower rates in a narrower network because it believes it will receive greater patient volume. SMF ¶ 68.

• Calvin Mackay, Methodist's former CFO, testified that there was a difference in UPM's exclusive and shared network rates and that UPM "gave [payers] a better rate**[\*155]** if they did not sign with OSF." SMF ¶ 65.

• Deborah Davis, who works in UPM's managed care group, testified that "[W]e give better rates if it's an exclusive contract than if it's a nonexclusive contract." SMF ¶ 64.

• Amanda Crowell, UnityPoint's Director of Payer Contracting, testified that [TEXT REDACTED BY THE COURT]

*Second*, the payers themselves confirmed the existence of an open network premium — they expect to pay more in a shared or open network. For example:

• Stephen Hamman, who was in charge of BCBS payer contracting in Peoria, testified that narrower networks lead to increased discounts to payers. SMF ¶ 74.

• Joseph Arango, former Divisional Vice President of Provider Contracting, was not surprised that, in 2008, UPM offered BCBS increased discounts for an exclusive network because that "with an exclusive arrangement, [UPM] would get more business and, therefore, could afford to receive a lower price on greater volume." SMF ¶ 75.

• David Petzold, the Director of Contract Negotiations, Provider Transparency and Analytics for Humana, testified [TEXT REDACTED BY THE COURT] SMF ¶ 201.

• Maxine Wallner, HAMP's Director of Contracting and Provider Services, testified that she understood**[\*156]** that HAMP would receive increased discounts from providers for a narrower network. SMF ¶ 77.

*Third*, numerous OSF witnesses — including former OSF CEO Jim Moore, OSF's chief managed care contracts negotiator Mary Breeden, Saint Francis Medical Center CFO Ken Harbaugh, and former OSF Health Plans CEO Bob Sehring — testified that providers charge payers more (offer less of a discount) in shared or open networks. *See, e.g.* SMF ¶ 51. Accordingly, contrary to Capps' assumption, the undisputed record evidence is that there is an open network premium.

**3. Capps' Failure to Account for an Open Network Premium Renders His Conclusions Unsupportable**

[TEXT REDACTED BY THE COURT][[43]](#footnote-42)22 Exh. 75 (Capps Rebuttal Rep. ¶¶ 69, 390).

[TEXT REDACTED BY THE COURT] Tellingly, during his deposition, Capps admitted that he neither examined the relevant claims data nor even**[\*157]** the final contract between Caterpillar and OSF. Exh 84 (Capps. Dep. at 42:11-19). [TEXT REDACTED BY THE COURT] Exh. 75 (Capps Reputtal Rep. ¶¶ 69, 390). [TEXT REDACTED BY THE COURT] *See* [*Baldonado v. Wyeth, No. 04 C4312, 2012 U.S. Dist. LEXIS 68691, at \*15-16 (N.D. Ill. May 17, 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55ND-YHF1-F04D-726X-00000-00&context=) (mere advocacy-based interpretation of discovery materials is not an expert opinion).

[TEXT REDACTED BY THE COURT] Exh. 120 (Dep. Ex. 1389). SMF ¶ 124.

[TEXT REDACTED BY THE COURT] *See id.* This hardly rebuts the extensive and undisputed testimony and record establishing that an open network premium exists.

It cannot be disputed narrow networks result in lower prices to payers. It similarly cannot be disputed that open networks result in higher prices and therefore, increased costs to payers. It is simply contrary to the record evidence to infer or conclude that OSF would be or is unable to achieve at least some open network premium level. [TEXT REDACTED BY THE COURT] *See* Exh 74 (Capps Rep. ¶¶ 35-36, 206, 469). If consumers are paying more for open networks, they very well could be worse off in a world where all health plans that are exclusive to OSF are opened to all Peoria providers. At the very least, UPM has not met its burden to show that consumers would be better off in such a world.

Because UPM cannot**[\*158]** demonstrate that OSF's conduct resulted in higher healthcare costs to consumers, there is, again a failure of proof that OSF's alleged conduct has harmed competition. Thus, UPM cannot demonstrate ***antitrust*** injury. *See, e.g.,* [*Stamatakis Indus., 965 F.2d at 471-72*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-36F0-008H-V35K-00000-00&context=) (affirming summary judgment on Sherman Act claims for failure to demonstrate ***antitrust*** injury); *see also* [*B&H Medical, LLC v. AB Administration, Inc., 526 F.3d 257, 265-66 (6th Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SFR-W7N0-TXFX-838J-00000-00&context=) (same).

**D. The Federal *Antitrust* Claims Fail Because UPM Improperly Excludes Government Payers From Its Relevant Markets**

As addressed previously in OSF's Motion for Judgment on the Pleadings (Dkt. Nos. 82 and 89), OSF is entitled to summary judgment on all of UPM's claims because UPM has improperly narrowed its alleged relevant market to include only commercial health insurers and to exclude government payers like Medicare and Medicaid, which are the largest buyers of health care services from OSF and UPM. Compl. ¶¶ 15-24. UPM's improper exclusion of government payers has become even clearer with the full development of the factual record, and the critical part that government payers play in the survival of hospitals. [TEXT REDACTED BY THE COURT] Capps Rep. at 67, Figure 19; SMF ¶ 34. Unsurprisingly, UPM's witnesses testified that the volume of patients from government payers**[\*159]** was very important to them. SMF ¶ 35.

The reason for UPM's exclusion of government payers is obvious: there were no restrictions on UPM's ability to provide services to Medicaid and Medicare patients. As these government programs provided well more than half of the patient volume at both OSF and UPM, the foreclosure effect of OSF's alleged exclusive contracts with certain commercial health insurers would be *de minimis* in an overall market that included beneficiaries of government health care programs. [TEXT REDACTED BY THE COURT]

UPM cannot narrowly define the product market so as to overstate OSF's alleged market power and UPM's claimed foreclosure. *See* [*Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111, 1119 (10th Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4T0M-YNG0-TX4N-G1C5-00000-00&context=) ("When there are numerous sources of interchangeable demand, the plaintiff cannot circumscribe the market to a few buyers in an effort to manipulate those buyers' market share.") *cf.* 2B Philip Areeda & Herbert Hovenkamp, ***Antitrust*** Law ¶570e, (3d ed. 2007) ("Limiting the market definition to high-profit sales for purposes of assessing foreclosure is wrong."). Under very similar facts to this case, in [*Little Rock Cardiology Clinic PA v. Baptist Health, 591 F.3d 591, 598 (8th Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XDY-BF40-YB0V-M007-00000-00&context=), the Eight Circuit held that "as a matter of law, in an ***antitrust*** claim brought by a seller, a product market cannot be limited to a single**[\*160]** method of payment when there are other methods of payment that are acceptable to the seller." *Id.* In that case, the Little Rock Cardiology Clinic ("LRCC") cardiologists had been on staff at Baptist Health and in Blue Cross & Blue Shield of Arkansas's preferred provider network until LRCC split away from Baptist Health and developed the competing Arkansas Heart Hospital. Blue Cross then removed LRCC from its network. LRCC sued Baptist Health and Blue Cross for conspiring to restrain trade to protect Baptist Health from competition in the relevant market, which it alleged did not include government payers. [*Id. at 594, 596*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XDY-BF40-YB0V-M007-00000-00&context=). The district court dismissed the case for failure to properly define the relevant product market, and the Eighth Circuit affirmed.

LRCC proposes a market limited by how consumers pay for cardiology procedures. This theory lacks support in both logic and law. ... In this case--an exclusive-dealing case involving shut-out cardiologists--the relevant inquiry is whether there are alternative patients available to the cardiologists. ... Thus, LRCC must look to alternative patients who are able to pay the required fees, not just those who pay using private insurance.

[*Id. at 597*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XDY-BF40-YB0V-M007-00000-00&context=).

The Southern District**[\*161]** of Illinois addressed this same question in [*Marion HealthCare, LLC v. S. Ill. Healthcare, No. 12-CV-00871-DRH-PMF, 2013 U.S. Dist. LEXIS 120722, at \*1-\*5 (S.D. Ill. Aug. 26, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:596V-5NT1-F04D-70BM-00000-00&context=). Plaintiff alleged that defendant entered into an exclusionary contract with Blue Cross and Blue Shield of Illinois which foreclosed plaintiff from competing in the markets for "(1) 'the sale of general acute-care inpatient hospital services, including pediatric services and neonatal care services to commercial health insurers,' and (2) 'the sale of outpatient surgical services to commercial health insurers'"—precisely the markets UPM alleged here. [*Id. at \*5*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:596V-5NT1-F04D-70BM-00000-00&context=). In that case, BCBS argued "that the markets defined by plaintiff are deficient because they are limited to inpatient hospital and outpatient surgical services paid for by commercial insurers and, therefore, exclude government payers (Medicare and Medicaid) to whom plaintiff can sell its services." [*Id. at \*26-27*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:596V-5NT1-F04D-70BM-00000-00&context=). The court held that by failing to include government payers in the proposed market, "the relevant markets as defined by plaintiff are not plausible as stated," since the "[p]laintiff failed to include in the relevant markets all potential buyers of inpatient or outpatient services." [*Id. at \*30*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:596V-5NT1-F04D-70BM-00000-00&context=).

Although this Court previously denied OSF's Motion for Judgment**[\*162]** on the Pleadings, discovery has not revealed any information that render UPM's product market allegations proper. The fact that commercial health plans pay more than government health plans is insufficient to remove the majority of the patients who seek treatment at UPM and OSF from the product market.

**E. The Remaining State Law Claim Fail As a Matter of Law**

**1. Illinois State *Antitrust* Statutes Follow Federal Law in Exclusive Dealing Claims**

Because the Illinois state ***antitrust*** statutes follow federal law in exclusive dealing claims, summary judgment should be granted in favor of OSF with respect to Counts IV through VI, which are identical to UPM's federal claims. *See* [*740 Ill. Comp. Stat. 10/11*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C66-0WY1-6YS3-D06K-00000-00&context=) ("When the wording of this Act is identical or similar to that of a federal ***antitrust*** law, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act."); [*Menasha Corp. v. News America Marketing In-Store, Inc., 238 F. Supp. 2d 1024, 1034 (N.D. Ill. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:47N5-95Y0-0038-Y31Y-00000-00&context=) (applying same analysis to federal and Illinois state ***antitrust*** claims), *aff'd*, [*354 F.3d 661 (7th Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BDV-XPM0-0038-X0X7-00000-00&context=); [*DSM Desotech, Inc. v. 3D Sys. Corp., No. 08 cv 1531, 2013 U.S. Dist. LEXIS 13017, \*31-42 (N.D. Ill. Jan. 31, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57MP-C221-F04D-70BG-00000-00&context=) (applying same analysis to federal and Illinois state ***antitrust*** claims), *aff'd*, [*749 F.3d 1332 (Fed. Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5C0X-94H1-F04B-M01V-00000-00&context=); *see also* [*House of Brides, Inc. v. Alfred Angelo, Inc., No. 11 C 7834, 2014 U.S. Dist. LEXIS 1850 at \*25-26 (N.D. Ill. Jan. 8, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5B7M-DS51-F04D-730S-00000-00&context=) (explaining that subsection 3(2) of the Illinois ***Antitrust*** Act's language**[\*163]** closely resembles *§ 1 of the Sherman Act* and thus "is interpreted in light of applicable federal precedent").

In fact, in [*Gilbert's Ethan Allen Gallery v. Ethan Allen, Inc., 162 Ill. 2d 99, 642 N.E.2d 470, 204 Ill. Dec. 769 (Ill. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1S00-003D-H2N9-00000-00&context=), the Illinois Supreme Court explained that, while there were some differences between *Section 2* of the Sherman Act and [*Illinois* ***Antitrust*** *Act subsection 3(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C66-0WY1-6YS3-D061-00000-00&context=), the relevant difference is that "[*section 3(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C66-0WY1-6YS3-D061-00000-00&context=) is *narrower* than *section 2*. In order to violate [*subsection 3(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C66-0WY1-6YS3-D061-00000-00&context=), anticompetitive behavior must be accompanied by an improper purpose; *section 2* has no such requirement." [*Id. at 472*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1S00-003D-H2N9-00000-00&context=) (emphasis added). Accordingly, because OSF is entitled to summary judgment on UPM's federal ***antitrust*** claims, it is likewise necessarily entitled to summary judgment on UPM's Illinois state ***antitrust*** claims.

**2. The Illinois Consumer Fraud Act Claim Fails For Lack of Proof of Federal *Antitrust* Violations**

UPM alleges that OSF violated the Illinois Consumer Fraud Act by (a) engaging in improper and unlawful business practices that allegedly deprived UPM of BCBS's business and (b) violating federal and state ***antitrust*** laws. Compl. ¶ 185. Because UPM's ***antitrust*** claims fail, UPM's Consumer Fraud Act claim based on *explicit violations* of the ***antitrust*** laws must fail as well. To the extent UPM alleges that OSF's conduct with respect to BCBS independently**[\*164]** violates the Consumer Fraud Act, the allegations that form the basis of its Consumer Fraud claim are identical to the allegations that form its ***antitrust*** claims. *See* Compl. ¶¶183-188. Further, UPM did not cite a single public policy in its Complaint that OSF's conduct purportedly violates separate from the ***antitrust*** laws. Thus, any allegedly separate Consumer Fraud Act claim should be dismissed for the same reasons as discussed above. *See* [*Batson v. Live Nation Entm't. Inc., 746 F.3d 827, 830-831 (7th Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BTT-V1F1-F04K-R000-00000-00&context=).

**3. The Tortious Interference Claims Are Barred by the Competitor Privilege**

UPM's claims for tortious interference with prospective economic advantage in Counts VII through X are barred by the competitor's privilege. "Under Illinois law, commercial competitors are privileged to interfere with one another's prospective business relationships provided their intent is, at least in part, to further their businesses and is not *solely* motivated by spite or ill will." [*Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc., 227 Ill. 2d 381, 882 N.E.2d 1011, 1019, 317 Ill. Dec. 855 (Ill. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RSK-7FS0-TXFS-P1VJ-00000-00&context=) (emphasis added). Illinois courts look to the Restatement (Second) of Torts to determine the proper scope of the competitor's privilege. *See, e.g.*, [*Miller v. Lockport Realty Group, Inc., 377 Ill. App. 3d 369, 878 N.E.2d 171, 178, 315 Ill. Dec. 945 (Ill. App. Ct. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R5X-9CN0-TXFS-N1W0-00000-00&context=). [*Section 768 of the Restatement*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42JH-HPR0-00YF-T12T-00000-00&context=) provides:

(1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor**[\*165]** . . . does not interfere improperly with the other's relation if (a) the relation concerns a matter involved in the competition between the actor and the other and (b) the actor does not employ wrongful means and (c) his action does not create or continue an unlawful restraint of trade and (d) his purpose is at least in part to advance his interest in competing with the other.

[*A-Abart Elec. Supply v. Emerson Elec. Co., 956 F.2d 1399, 1405 (7th Cir. 1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5F20-008H-V03P-00000-00&context=); [*Miller, 878 N.E.2d at178*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R5X-9CN0-TXFS-N1W0-00000-00&context=) (quoting [*Restatement (Second) of Torts §768*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42JH-HPR0-00YF-T12T-00000-00&context=) (1979)). UPM has already admitted in its Complaint that UPM and OSF are competitors; that this case involves the competition between them; and that OSF's alleged exclusive dealing contracts were entered into by OSF for the purpose of advancing its competition with UPM. Complaint at ¶¶ 8, 43. Moreover, as shown above, there is no evidence that OSF has engaged in an unlawful restraint of trade. *See* [*A-Abart Elec. Supply, 956 F.2d at 1405*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5F20-008H-V03P-00000-00&context=) (holding that there was no unlawful restraint of trade for purposes of the tortious interference claim when the court found there was no evidence to support the plaintiff's Sherman Act claim); [*Classic Commc'n v. Rural Tel. Serv. Co., 956 F. Supp. 910, 922 (D. Kan. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-HBG0-00B1-F2B8-00000-00&context=) (finding that the plaintiff could not show that the defendant engaged in unlawful restraint of trade when the court previously dismissed its ***antitrust*** claims).

Thus, the only question is whether there is evidence that**[\*166]** OSF employed "wrongful means" in competing with UPM. [*Comment e to section 768 of the Restatement (Second) of Torts*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42JH-HPR0-00YF-T12T-00000-00&context=) provides that "wrongful means" are "physical violence, fraud, civil suits and criminal prosecutions. . . ." Here, there is no evidence of fraud or physical violence or criminal prosecutions.

In fact, exclusive dealing arrangements, such as UPM challenges here, are protected by the competitor's privilege. "Comment e also provides that the actor *may use* persuasion, limited economic pressure, and *may refuse other business transactions with third persons relating to that business*." [*Zenith Elecs. Corp. v. Exzec, Inc., No. 93 C 5041, 1997 U.S. Dist. LEXIS 6066, at \*30 (N.D. Ill. Mar. 27, 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-DR80-00B1-F3N3-00000-00&context=) (emphasis added). The competitor's privilege permits a party to "refuse to deal with the third persons in the business in which he competes with the competitor if they deal with the competitor. Or he may refuse other business transactions with the third person relating to that business." [*Polyad Co. v. INDOPCO INC., No. 06 C 5732, 2008 U.S. Dist. LEXIS 85089, at \*16 (N.D. Ill. Sept. 12, 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4TRS-W6P0-TXFP-T2Y2-00000-00&context=) (citing comment f to Clause (c) of the Restatement) (finding that defendant's threat to stop doing business with customer if customer kept doing business with plaintiff "falls under the sort of communication protected by the competitor's privilege").

Nor has plaintiff put forth evidence that OSF acted with malice. For UPM to prove the actual malice needed to overcome a conditional privilege, "'the**[\*167]** evidence must establish that the individual acted with a desire to harm which was unrelated to the interest he was presumably seeking to protect . . . .'" [*Capital Options Invest., Inc. v. Goldberg Bros. Commodities, Inc., 958 F.2d 186, 189 (7th Cir. 1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5220-008H-V31Y-00000-00&context=) (quoting [*Langer v. Becker, 176 Ill. App. 3d 745, 531 N.E.2d 830, 834, 126 Ill. Dec. 203 (Ill. App. Ct. 1988))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-5300-003D-H07G-00000-00&context=). UPM has failed to present any evidence that OSF acted with an intent to harm unrelated to the intent to negotiate favorable deals with commercial health insurers. Accordingly, OSF is entitled to judgment as a matter of law on UPM's claims for tortious interference with prospective economic advantage.

**IV. CONCLUSION**

For the reasons set forth above, OSF is entitled to an order granting its motion for summary judgment on UPM's claims and dismissing the Complaint with prejudice.

Dated: October 30, 2015

Respectfully submitted,

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MEDICAL CENTER

**EXHIBIT A**

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO OSF HEALTHCARE SYSTEM'S MOTION FOR SUMMARY JUDGMENT**

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**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO OSF HEALTHCARE SYSTEM'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff, Methodist Health Services Corporation (n/k/a UnityPoint Health — Methodist, "Methodist"), by and through its attorneys, responds to and opposes the Motion for Summary Judgment of Defendant OSF Healthcare System d/b/a Saint Francis Medical Center ("SFMC"), and states as follows:

**INTRODUCTION**

SFMC does not want a jury to consider the evidence in this case because the key facts against it are compelling. What these facts show are clear ***antitrust*** violations by SFMC and numerous instances of SFMC intentionally and unlawfully preventing Methodist from contracting with Blue Cross Blue Shield of Illinois ("BCBS"), Humana, Aetna, Health Alliance ("HAMP"), and Caterpillar**[\*178]** ("CAT"). Not only is the evidence compelling—including "smoking guns" in the form of SFMC's own conduct and words—but there is also plenty of it.

SFMC's summary judgment motion is narrowly focused so most of the key elements of Methodist's claims are not in dispute. For those issues SFMC challenges, its motion describes a fictional story of how health care is delivered in the Peoria area and of how managed care contracting works. This story is based on gross distortions of the record and on "facts" which do not exist, and bears no relation to health care services or health care contracting in the Peoria area.

Simply put, for many years SFMC has abused its dominant position as a "must have" hospital to thwart competition in the commercial health care market in the Tri-County Area (*i.e.*, Peoria, Woodford and Tazewell counties). More specifically, SFMC used exclusive contracts that run afoul of the ***antitrust*** laws to insulate itself from straightforward competition. The anticompetitive effect of SFMC's conduct is palpable. The record demonstrates that the market suffers from higher prices, reduced choice, heightened entry barriers, and less transparency. In fact, the only beneficiary of**[\*179]** SFMC's conduct is SFMC itself [TEXT REDACTED BY THE COURT]

SFMC used its substantial market power—not challenged in SFMC's motion—to force BCBS to exclude Methodist from its PPO product, the most significant commercial health care product in the Tri-County area. There is no doubt that during the relevant time period BCBS always wanted Methodist in its PPO network, and generally preferred to offer its beneficiaries broad networks. In fact, BCBS was so anxious to have Methodist in its PPO network that on one occasion it offered to pay bonus to SFMC, and on another occasion considered allowing SFMC's parent to add an extra hospital to its PPO network in Rockford (where SFMC had a sister hospital) in return for SFMC not blocking Methodist from the PPO in Peoria. SFMC, however, did block Methodist from participating in the PPO each time the contract came up for renewal. The record shows that SFMC did not secure exclusivity because of lower prices, superior quality or better efficiency, but rather by leveraging its substantial market power.

SFMC also used its market power to force Humana to not only exclude Methodist from all of its insurance products in the relevant area, but to terminate**[\*180]** Methodist from those contracts to which it was a party. SFMC took similar action with respect to two other commercial health insurers, Aetna and HAMP. Finally, for a portion of the relevant time, SFMC also forced CAT to exclude Methodist from CAT's PPO program, [TEXT REDACTED BY THE COURT]. Such use of SFMC's substantial market power resulted in Methodist being excluded from more than 50% of the commercial health care market in the relevant area.

In its motion, SFMC contends that its conduct was benign because Methodist had access to patients who were enrolled in plans for which Methodist was an in-network provider. SFMC attempts analogize these plans to "alternative distribution channels" referenced in cases involving manufacturer/distributor networks. This analogy fails because it ignores the unique market dynamics of managed health care contracting, including, among other things, how hospitals compete based on price for network status (*i.e.*, payor contract negotiations for network status), the significance of network status on patient volume, and the legal and practical impediments employers face in switching payors. These managed care contracting dynamics are clearly established**[\*181]** by the factual record in this case and show that SFMC's exclusives with key payors made its market power unchallengeable.

Despite the substantial economic pressure on patients to see in-network providers only, SFMC also makes the incredible claim that Methodist had access to all patients enrolled in plans for which SFMC was in the network, but Methodist was not. This is simply wrong. The record demonstrates the lengths to which SFMC would go to obtain and protect its in-network status, and deny network status to Methodist. The hard truth is that SFMC has and continues to act as a monopolist (*i.e.*, dictating contract terms and raising prices without concern for responsive action by its competitors).

Besides violating the federal ***antitrust*** laws, SFMC's conduct also violated analogous provisions of Illinois' ***antitrust*** laws, the Illinois Consumer Fraud Act and constituted tortious interference with Methodist's contractual relations and Methodist's prospective economic advantage with commercial health care payors.

As demonstrated below, the factual record in this case is such that the SFMC's Motion for Summary Judgment must be denied.

**STATEMENT OF FACTS**

**I. UNDISPUTED MATERIAL FACTS**

Methodist**[\*182]** does not dispute nor contest the materiality of the facts set forth in the following paragraphs of SFMC's motion[[44]](#footnote-43)1: 1, 2, 3, 4, 6, 7, 8, 9, 11, 12, 14, 15, 27, 28, 29, 30, 35, 36, 37, 38, 39, 42, 43, 44, 45, 46, 47, 51, 52, 55, 61, 64, 66, 67, 70, 72, 75, 76, 77, 80, 81, 83, 84, 86, 90, 92, 93, 94, 95, 97, 98, 99, 102, 105, 106, 109, 111, 112, 114, 116, 117, 118, 120, 121, 122, 123, 125, 127, 128, 129, 132, 134, 136, 137, 142, 143, 148, 151, 152, 153, 156, 159, 173, 175, 176, 177, 178, 181, 183, 184, 185, 186, 188, 189, 191, 193, 196, 199, 200, 201, 203, 204, 205, 206, 207, 209, 210, 211, 214, 216, 217, 218, 219, 220, 221, 222, 223, 225, 226, 227, 228, 230 and 232.

**II. DISPUTED MATERIAL FACTS**

Methodist disputes the facts contained in the following paragraphs of SFMC's motion:

5. SFMC provides many sophisticated academic medical services that are not offered at**[\*183]** other hospitals in the Peoria area, such as Level I trauma and organ transplants. (Compl. ¶ 39, 55)

**RESPONSE**: As stated in the citations to the Complaint, SFMC is the only area provider of "some essential services,, including solid organ transplants and Level I trauma. 10. SFMC has grown to be the largest provider of hospital services in the Peoria area by making significant investments and taking substantial risks. One notable example of SFMC's commitment to improving healthcare in Central Illinois was the "Milestone Project": an 8-story, 440,000 square foot addition to SFMC's campus that was, at the time, the largest private investment in the history of Peoria ($234 million). Exh. 3 (OSF00232122 at 13).

**RESPONSE**: SFMC has been the largest provider of hospital services in the Peoria area for a long time. There is no record evidence to support the notion that this occurred because of significant investments or taking substantial risks. Methodist believes SFMC's exclusive managed care contracting is a major contributor to its size. As to the Milestone Project, the only support for its being the largest private investment in the history of Peoria is SFMC's own unsupported statement to**[\*184]** that effect. Such a statement ignores the fact that the Milestone Project was also developed with substantial contributions solicited from and raised by the community. (Ex. 222 at 55-56 (M. Breeden Dep.).)

13. OSF imposed no restrictions on affiliated-physicians' ability to perform procedures or refer patients to UPM. Exh. 102 (G. McShane Dep. 68:5-68:15).

**RESPONSE**: The citation refers only to OSF Medical Group and does not say there are "no restrictions," but simply that they are permitted to and not discouraged from treating patients at Methodist. In addition, SFMC effectively discouraged physicians from treating patients at Methodist by leveraging their relationships with physicians and encouraging them to treat SFMC's needs as a first priority. (Ex. 208 at 22-24 (M. Bryant Dep.); Ex. 31 (Dep. Ex. 128).) Physicians closely aligned with SFMC were disinclined to provide services at Methodist and prioritized SFMC, and Methodist knew that there was a risk that SFMC could require that those physicians not provide services at Methodist. (Ex. 211 at 39-40, 95-97 (T. McCormack Dep.).)

16. [TEXT REDACTED BY THE COURT]. Exh. 7 (Methodist00043098).

**RESPONSE**: The Affiliation Agreement was signed**[\*185]** in June, but the actual affiliation occurred on October 1, 2011. (UnityPoint Health, "Our History & Progress," [*http://www.unitypoint.org/peoria/our-history.aspx*](http://www.unitypoint.org/peoria/our-history.aspx) (last visited on Nov. 30, 2015).)

17. As part of the affiliation, [TEXT REDACTED BY THE COURT]. Exh. 98 (Leaver Dep. at 61-62).

**RESPONSE**: As part of the affiliation, [TEXT REDACTED BY THE COURT]. (Ex. 209 at 241-243 (R. Quin Dep.).)

20. [TEXT REDACTED BY THE COURT]. Exh. 90 (Gordon Dep. 39:3-39:11); Exh. 100 (Mackay Dep. 108:23-109:3.)

**RESPONSE**: The citations do not refer to a time frame. Moreover, SFMC's conduct at issue caused Methodist actual damages in excess of $100 million since 2009. (Ex. 233 at ¶¶ 488-544 (Expert Report of Cory S. Capps, Ph.D.) (including all figures); Ex. 234 at ¶¶ 527-536 (Expert Rebuttal Report of Cory S. Capps, Ph.D.).)

21. [TEXT REDACTED BY THE COURT]. Exh. 77 (Baker Dep. 214:13-214:19 (academic costs); Exh. 110 (Stumpe Dep. 112:18-112:23 (residency)).

**RESPONSE**: The citations do not provide support for the proposition stated. With just a few exceptions, Methodist provides most of the service lines provided by SFMC. (Ex. 217 at 74-75 (D. Simon Dep.).)

24. UnityPoint's affiliation with UPM and UPP "show [that] the organization continues to place a strong**[\*186]** emphasis on investments in strategic initiatives that management believes will place it in a leading position...." Exh. 9 (UnityPoint June 2015 Financial Report).

**RESPONSE**: The quotation specifically refers to affiliations in 2014 with two Wisconsin entities and ***not*** with Methodist and Proctor. (SFMC Statement of Undisputed Facts ("SFF") Ex. 9 at 7, 32.)

40. [TEXT REDACTED BY THE COURT]. Exh. 79 (Beebe Dep. 110:7-11); Exh. 74 (Capps ¶¶ 148, 150).

**RESPONSE**: While most of the statement is generally true, it fails to acknowledge that insureds bear the risk of deductibles and, with respect to out-of-network care, a potentially significant portion of the cost of such care, including potential balance billing up to the provider's undiscounted list charges. (Ex. 233 at ¶¶ 187-188.)

41. [TEXT REDACTED BY THE COURT]. (*See* Exh. 81 (Biedermann Dep. 176:6-10); Exh. 83 (Bryant Dep. 195:12-22); Exh. 74 (Capps ¶ 149).

**RESPONSE**: Again, the statement fails to acknowledge that insureds bear the risk of deductibles and, with respect to out-of-network care, a potentially significant portion of the cost of such care, including potential balance billing up to the provider's undiscounted list charges. (Ex. 233**[\*187]** at ¶¶ 153, 187-188.)

48. Although contracts between commercial insurers and providers may last more than one year, employers themselves have the ability to move to different carriers or offer different health plans on an annual basis. (*See* Exh. 80 (Berry Dep. 149:10-149:13)).

**RESPONSE**: The citation does not provide support for the stated proposition. Moreover, it can be difficult and costly for an employer to move to different carriers or offer different health plans on an annual basis (even where a multi-year contract does not preclude this). (Ex. 192 at 53 (J. Arango Dep.); Ex. 193 at 90-91 (S. Hamman Dep.); Ex. 196 at 80-81, 103-104 (M. McCarty Dep.).) Further, SFMC maintained numerous direct contracts which called for terms of more than one year, [TEXT REDACTED BY THE COURT]. (Ex. 199 at 90-91 (K. Keller Dep.); Ex. 182 at 8 (ICC\_002689); Ex. 188 at 8 (OSF00753317); Ex. 181 at 8 (HAMP 0136023).)

49. The nature of commercial health plans is that some providers will be included in a payer's network and some will not. Networks can be narrow or broad. A narrow network restricts the number of in-network providers, while a broad network likely includes most, if not all, providers in a given**[\*188]** area.

**RESPONSE**: While the statement may be generally true, it is misleading in the context of this case where BCBS—by far the largest commercial health insurer in Illinois—has traditionally included virtually all Illinois hospitals in its PPO network with very few exceptions, particularly Methodist and another hospital that is a competitor of an SFMC sister hospital. (Ex. 11 at 2 (Dep. Ex. 67); Ex. 12 at 1 (Dep. Ex. 69); Ex. 238 (Dep. Ex. 105); Ex. 121 (Dep. Ex. 1063).)

50. Providers participating in a narrow network are able to offer payers better prices, because they can predict that plan members are more likely to be treated at their facility. (Compl. ¶ 91). As in many industries, the potential for greater volume leads to greater discounts.

**RESPONSE**: The citation does not support the assertions in this statement. While the statement may be generally true in certain circumstances, it is misleading in the context of this case [TEXT REDACTED BY THE COURT] (Ex. 11 at 2; Ex. 239 (Dep. Ex. 296); Ex. 233 at ¶¶ 208-213; Ex. 234 at ¶¶ 46-49, Fig. 2, ¶¶ 272-74, Fig. 26.)

53. [TEXT REDACTED BY THE COURT]. (*E.g.*, Exh. 93 (Harbaugh Dep. 102:10-102:12); Exh. 85 (Crowell Dep. 55:2-55:6)).

**RESPONSE [\*189]**: The citations do not support this statement. Moreover, the statement is misleading regarding policies that have no out-of-network benefits. (Ex. 233 at ¶¶ 187-188; Ex. 209 at 53-54; SFF ¶ 45.)

54. [TEXT REDACTED BY THE COURT]. Id. (Harbaugh Dep.102:10-102:12; Crowell Dep. 55:2-55:6).

**RESPONSE**: Again, the citations do not support this statement. Moreover, the statement is not accurate with respect to policies that have no out-of-network benefits. (Ex. 233 at ¶¶ 187-188; Ex. 209 at 53-54; SFF ¶ 45.)

56. [TEXT REDACTED BY THE COURT]. Exh. 96 (Keyes Dep. 154:19-22, 190:8-196:7); Exh. 82 (Breeden Dep. 223:21- 224:11).

**RESPONSE**: Apart from the fact that SFMC and Methodist had certain matching programs, the citations do not provide support for this statement. In particular, Methodist did not view its BCBS benefit match program as a manner of competing, but rather, as a way of mitigating damages. As stated by former Methodist employee Jana Keyes in the citation above: ". . . it wasn't a success because no matter how much you marketed it . . . the percentage of usage was still very low." (Ex. 214 at 191-92 (J. Keyes Dep.); Ex. 209 at 54-55.)

57. [TEXT REDACTED BY THE COURT]. Exh. 98 (Leaver Dep.**[\*190]** 90:9-19).

**RESPONSE**: Apart from the fact that the citation does not support this statement, Methodist believes that there have not historically been "narrow networks" in Peoria, nor has it been commercial payors' choice to have narrow networks. (Ex. 192 at 30-31, 91-92, 119-120; Ex. 203 at 61-62, 68 (T. Barksdale Dep.); Ex. 197 at 38-39 (L. Biedermann Dep.); Ex. 232 at 76-78 (R. Donovan Dep.); Ex. 191 at 20-22, 38-39 (S. Hall Dep.); Ex. 199 at 19-21; Ex. 195 at 21-23 (P. Lumpkin Dep.); Ex. 204 at 39-40 (D. Petzold Dep.); Ex. 139 (Dep. Ex. 1304).)

58. UPM has attempted to maximize its revenues and patient volumes *by entering into exclusive contracts* that designated it as the in-network provider and excluded OSF (and possibly other area providers). *See* ¶¶ 63-76, *infra*.

**RESPONSE**: The citations do not support this statement. Also, the contracts presumably referred to represented only a very small portion of the relevant market and a very small portion of Methodist's revenues. (Ex. 234 at Figs. 31-32.) [TEXT REDACTED BY THE COURT]. (Ex. 233 at ¶¶ 302-305; Ex. 26 (Dep. Ex. 100); Ex. 119 (Dep. Ex. 1059); Ex. 186 at 40 (OSF00465046).)

59. For example, a UPM "Managed Care Contracting" presentation**[\*191]** indicates that one of UPM's negotiating strategies was to "actively attempt to convert shared contracts to exclusive." Exh. 115 (Methodist00185603, at 3).

**RESPONSE**: While Methodist admits that this statement contains an accurate quotation of one sentence from a multi-page presentation at least 10 years old, the record makes clear that Methodist's true goal in managed care contracting was to not be left out of contracts. (Ex. 210 at 30 (D. Davis Dep.); Ex. 214 at 63, 113-114.)

60. Jana Keyes, former UPM Director of its Physician Hospital Organization and Managed Care, testified that UPM's contracting strategy "appeared to be exclusivity when possible." (*See* Exh. 96 (Keyes Dep. 111:23-112:1)).

**RESPONSE**: Methodist repeats its response to SFF ¶ 59 as its response to ¶ 60. Further, Ms. Keyes was not testifying to personal knowledge as to that document but rather was merely speculating as to what a document appeared to represent. (Ex. 214 at 111-113.)

62. Michael Bryant, UPM's former CEO, testified that UPM sought exclusive contracts, because they guaranteed increased patient volume, and therefore were a benefit to UPM. Exh. 83 (Bryant Dep. 138:1-139:23).

**RESPONSE**: The citation does not support**[\*192]** this statement and, in fact, specifically contradicts it: "That was never a key strategy for us. . . . But our first commitment was always to what the client wanted. So if they wanted a shared contract, we offered it. If they wanted an exclusive, we certainly were willing to do that as well."

63. To entice payers, UPM and UnityPoint have offered deeper discounts to payers willing to enter into exclusive or narrow network contracts. *See* ¶¶ 57-64, *infra*.

**RESPONSE**: The citation does not support this statement and it is contradicted by the quotation in the response to ¶ 62 above.

65. Calvin Mackay, UPM's former CFO, testified that there was a difference in UPM's exclusive and shared network rates and that UPM "gave [payers] a better rate if they did not sign with OSF." Exh. 100 (Mackay Dep. 54:1-21).

**RESPONSE**: While the portion of the quotation in the statement is accurate, it misrepresents what Mr. Mackay said. The full quotation states, "We didn't sign exclusive contracts. We signed contracts and gave them a better rate if they did not sign with OSF."

68. UPM executive Robert Quin made the point clearly at his deposition: "It's a volume game. Additional volume usually grants larger discounts."**[\*193]** Exh. 104 (Quin Dep. At 84:5-84:6).

**RESPONSE**: While the quotation is accurate, it cannot be an example of the assertions in the prior paragraphs because, for example, the assertion in ¶ 65 is not correct. Moreover, it referred to a specific proposal to BCBS and was not a general statement.

69. UPM generally followed its own internal guidelines that an exclusive contract proposal would have 10 to 20% lower rates than a non-exclusive proposal. Exh. 104 (Quin Dep. 122:19-123:22); *see e.g.* Exh. 14 (Methodist00155618, at 18); Exh. 15 (Methodist00220492).

**RESPONSE**: Methodist denies this statement. First, there is no support anywhere in the record for the proposition that Methodist had such "internal guidelines." Moreover, the statement is contradicted by SFMC's own assertion in ¶ 67, which Methodist has admitted. Further, it is also contradicted by Rob Quin's cited testimony, which makes clear that this is a speculative "estimate" at best and varied by client and circumstance. (Ex. 209 at 122-124.)

71. [TEXT REDACTED BY THE COURT]. Exh. 85 (Crowell Dep. 34:25-35:20)

**RESPONSE**: This statement is not supported by the citation. In fact, the assertion in the second sentence of the statement regarding**[\*194]** [TEXT REDACTED BY THE COURT] is specifically denied twice in the cited testimony.

73. Third party witnesses agreed that UPM's approach of trading discounts for some degree of exclusivity is standard in the industry. (*See* ¶¶ 78-81, *infra*).

**RESPONSE**: There is no basis to determine what "Third party witnesses" SFMC is referring to as the citation offers no support for the statement.

74. Stephen Hamman, who was in charge of BCBS payer contracting in Peoria between 2009 and 2015, testified that narrower networks lead to increased discounts to payers. Exh. 92 (Hamman Dep, 104:24-105:9).

**RESPONSE**: The statement is misleading as the citation parses Mr. Hamman's statement, focusing only on his remark that narrow networks are one of at least two ways to get increased discounts; the other way was to have everyone in network.

78. UPM successfully employed numerous strategies to compete for and access patients with commercial health plan coverage. UPM offered its own exclusive network, Methodist First Choice, to self-employed customers; UPM was an in-network provider for multiple national health insurers; and UPM offering "matching" programs for patients enrolled in OSF-centered health plans. *See* ¶¶**[\*195]** 83-139, *infra*.

**RESPONSE**: Methodist denies that the statement is supported by the citation. Moreover, while Methodist did offer Methodist First Choice, it represented a very small portion of the market. (Ex. 234 at ¶¶ 249-250.) Also, it is unclear what "multiple national health insurers" SFMC is referring to. Finally, the only Methodist "matching program" discussed in the record was not wholly successful and was an effort to mitigate damages, not to "compete for and access patients with commercial health plan coverage." (Ex. 208 at 32-33; Ex. 215 at 113-114 (K. Lauber Dep.); Ex. 212 at 107-108 (T. Waters Dep.).)

79. UPM offered employers the opportunity to contract directly with UPM for provider services through a prepackaged provider network called Methodist First Choice ("MFC"). Exh. 107 (Schierbeck Dep. 104:7-104:22).

**RESPONSE**: Methodist denies this statement and further denies that the citation provides support for the statement.

82. [TEXT REDACTED BY THE COURT] See, *e.g.*, Exhs. 17, 18 and 19 (Dep. Exhs. 328 at Methodist00222292, 329 at Methodist00215790, 330 at Methodist00202197).

**RESPONSE**: Methodist denies that the citations support the statement and further states that the cited clauses**[\*196]** allow the employer to contract with any provider with Methodist's express written consent.

85. MFC has been very successful. UPM admits that half of Peoria's 25 largest employers have contracted with MFC. Exh. 104 (Quin Dep. 230:18-230:22).

**RESPONSE**: Methodist denies this statement and further denies that the citation provides support for the statement. (*See also* Ex. 234 at ¶ 249.)

88. OSF also offers a "Direct Access Network" -- commonly referred to as the "DAN network"-- which is the (far less successful) OSF analogue to MFC. Exh. 80 (Berry Dep. 176:16-177:20).

**RESPONSE**: Methodist denies this statement and further denies that the citation provides support for the statement. In fact, the number of 2012 discharges from the DAN and MFC are similar. (Ex. 234 at Figs. 31-32.)

89. During the relevant time, UPM has been an in-network provider for health plans operated by prominent, national commercial insurers, as well in-network for CAT's self- funded health plans. *See* ¶¶ 94-129, *infra*.

**RESPONSE**: The citation does not support this statement, so Methodist cannot know the commercial insurers to which SFMC refers. However, Methodist does agree that it has been in some plans (but not others) offered**[\*197]** by some national commercial insurers during all or a portion of the relevant time, has been in CAT's HMO during the relevant time, and has been in CAT's PPO for a portion of the relevant time (having been excluded by SFMC during a portion of the relevant time).

91. United is the "2nd largest player [in Peoria] compared to BCBS-IL." Exh. 21 (UnityPoint00003156 at 32).

**RESPONSE**: [TEXT REDACTED BY THE COURT] (Ex. 233 at ¶ 135, Fig. 17; Ex. 221 at 22-23 (D. McGrew Dep.); *see* Ex. 20 at 41 (Dep. Ex. 94); *see* Ex. 227 at 98 (I. Rosenberg Dep.).) [TEXT REDACTED BY THE COURT] (Ex. 233 at ¶ 332; Ex. 200 at 22-25, 28-29 (J. Duggan Dep.).)

100. [TEXT REDACTED BY THE COURT] Exh. 24 (Dep. Ex. 1287, UNITYPOINT00004088, at 89, [TEXT REDACTED BY THE COURT]).

**RESPONSE**: Methodist admits the accuracy of the quotation, but denies the implication that Methodist's agreement with Coventry continued to preclude Coventry from adding SFMC. [TEXT REDACTED BY THE COURT] (Ex. 170 (AETNA00014056).) [TEXT REDACTED BY THE COURT] (Ex. 190 at 104-107 (B. Jefferson Dep.).)

101. The Chair of UPM's board and UPM's former CEO have both acknowledged that BCBS has historically offered two health plans in Peoria: an HMO that was**[\*198]** effectively exclusive to UPM and the PPO that included OSF, but not UPM. Exh. 83 (Bryant Dep. at 59:7-59:14); Exh. 110 (Stumpe Dep. 16:13-16:22).

**RESPONSE**: Methodist denies that BCBS historically offered an HMO and PPO in Peoria. The PPO has been offered since January 1, 1988, while the HMO has been offered only since 2006. (Ex. 208 at 65; *see* Ex. 1 (Dep. Ex. 38); *see also* Ex. 240 (Dep. Ex. 576); Ex. 196 at 45-47, 61-63; Ex. 193 at 21.) Moreover, the balance of the statement is misleading because Methodist had been the only provider in the HMO because SFMC declined to participate, whereas Methodist has not been in the PPO because SFMC excluded it. (Ex. 194 at 28-29 (R. Rappenecker Dep.); Ex. 227 at 322; Ex. 119; *see e.g.*, Ex. 192 at 119-120; Ex. 195 at 23; Ex. 79 (Dep. Ex. 521).)

103. The HMO offered UPM access to BCBS commercially insured patients. Exh. 110 (Stumpe Dep. 16:13-16:22).

**RESPONSE**: This statement is not supported by the citation. However, Methodist admits that the HMO provided access to a very small number of BCBS commercially insured patients. (Ex. 233 at ¶¶ 118-119; Ex. 234 at Figs. 31-32; Ex. 192 at 158.)

104. [TEXT REDACTED BY THE COURT]. Exh. 74 (Capps. Rep. Fig. 14).**[\*199]**

**RESPONSE**: The citation does not support this statement. In addition, Methodist believes that the correct year is 2015 (not 2014). (Ex. 233 at ¶ 275.)

107. In November 2011, BCBS believed that the HMO plan was not competitively priced in Peoria because UPM's rates were too high. Exh. 92 (Hamman Dep. 157:3-10).

**RESPONSE**: Methodist denies this statement as the cited testimony states that Methodist's rates were "part of the reason" the HMO was not competitively priced. Another reason was inaccurate calculations used by BCBS. (Ex. 196 at 112-115.)

108. UPM's CFO, Rob Quin, testified that BCBS had communicated to him that UPM's prices for the HMO were too high on at least two different occasions, and that UPM did not agree to reduce the HMO rates to the levels that BCBS requested. Exh. 104 (Quin Dep. 28:1-24).

**RESPONSE**: Methodist denies this statement because it misleadingly suggests that Methodist did not lower its HMO rates when, in fact, it did lower its rates in reaching a compromise with BCBS on the issue. (Ex. 209 at 28-29.)

110. [TEXT REDACTED BY THE COURT]. Exh. 81 (Biedermann Dep. 183:4-6).

**RESPONSE**: Methodist denies that BCBS [TEXT REDACTED BY THE COURT]; rather, BCBS's Lee Biedermann**[\*200]** was "conveying" information from the BCBS marketing department regarding what was required to price the HMO product "aggressively." (SFF Ex. 81; Ex. 197 at 182-183.)

113. Steve Hamman of BCBS testified that the phrase "like or similar benefits" was to be construed narrowly and that it only limited BCBS's ability to price an HMO product if the HMO offered the same health benefit structure as the BCBS PPO. Exh. 92 (Hamman Dep. 140:5-24).

**RESPONSE**: Methodist denies that Mr. Hamman testified that the phrase quoted was to be "construed narrowly" or that the citation supports such an assertion.

115. Phil Lumpkin testified that the BCBS HMO and PPO products did ***not*** offer "like or similar benefits", explaining "that's the point of the HMO from our perspective, that it would be a more economical product offering so we would want the pricing to be well below PPO all things considered." Id. (Lumpkin Dep. 59:22-60:2).

**RESPONSE**: This statement is misleading in that the quotation is taken out of context and does not refer to the contract language in issue. Moreover, BCBS has testified that the language did, in fact, refer to the HMO. (Ex. 195 at 61-62; Ex. 197 at 40-41; Ex. 228 at 123-125 (K. Schoeplein**[\*201]** Dep.); Ex. 113 (Dep. Ex. 828).)

119. [TEXT REDACTED BY THE COURT]. Exh. 95 (Keller dep. 186:4-19); Exh. 74 (Capps Rep. ¶ 332).

**RESPONSE**: Methodist denies this statement and further states that the citations do not support the statement. Moreover, the plan was not exclusive to Methodist. [TEXT REDACTED BY THE COURT] (Ex. 148 at CAT06218-20 (Dep. Ex. 1358); Ex. 154 (Dep. Ex. 1383).)

124. In anticipation of the opening of the network, [TEXT REDACTED BY THE COURT] Exh. 29 (Dep. Ex. 1387 at CAT06753); Exh. 88 (Duggan Dep. 84:24-85:8).

**RESPONSE**: Methodist denies this statement as misleading [TEXT REDACTED BY THE COURT] (Ex. 156 (Dep. Ex. 1389).) [TEXT REDACTED BY THE COURT] (Ex. 234 at ¶¶ 415, 419, 422, Figs. 35, 37.)

126. Although UPM has been out of network in the BCBS PPO during the relevant time period, UPM has offered BCBS PPO patients a "matching" program in which UPM waives the difference in out of pocket costs between receiving services at UPM on an out of network basis and obtaining services from an in-network such as OSF. *See*, Exh. 30 (Dep Ex. 190 at Methodist0014456).

**RESPONSE**: Methodist denies this statement because it misleadingly suggests that Methodist offered the "matching" program**[\*202]** to all BCBS PPO patients when, in fact, it was offered to only certain BCBS PPO patients. The matching program was difficult and expensive to administer due to its complex nature. (Ex. 209 at 53-54; Ex. 212 at 107-108, 113-114; Ex. 37 (Dep. Ex. 191); Ex. 57 (Dep. Ex. 342).)

130. The matching program was even structured at times such that the patient paid ***lower*** out of pocket costs for seeking treatment at UPM, the out of network facility, than at OSF, the in-network hospital. Exh. 33 (Methodist00253300); Exh. 104 (Quin Dep. 64:19 - 66:14).

**RESPONSE**: The citations do not support the statement. In addition, the situation being referred to was a hypothetical one only.

131. A significant majority of the employers who used BCBS PPO plans took advantage of the matching program. Exh. 34 (Methodist00147508, at 11-15).

**RESPONSE**: Methodist denies this statement because the exhibit is not legible, it is unclear what is meant by a "significant majority" and because it is misleadingly asserted as a general statement when only one year is being referred to.

133. UPM's revenues from BCBS PPO patients grew by 54% between 2006 and 2008. Exh. 35 (Methodist00030758 at 814).

**RESPONSE**: Methodist denies the statement**[\*203]** because what is being referred to are charges, not revenues. Revenue is often less than half of charges. (Ex. 233 at Figs. 56, 70.)

135. By 2010, UPM's revenues from BCBS PPO patients exceeded $40 million. Exh. 36 (Dep. Ex. 290, at 71).

**RESPONSE**: Methodist denies the statement because what is being referred to are charges, not revenues. Revenue is often less than half of charges. (Ex. 233 at Figs. 56, 70.)

138. Despite UPM's numerous means to access commercially insured patients, the Complaint alleges that UPM has been foreclosed from competing in the alleged relevant market because it was supposedly wrongfully excluded from four networks: BCBS PPO; Humana; Health Alliance; and Aetna. (Compl. ¶¶ 64-88).

**RESPONSE**: Methodist denies that it has "numerous means to access commercially insured patients" because it is foreclosed from over 50% of the market for such patients by virtue of SFMC's exclusionary contracting. Methodist admits that it alleges that it was wrongfully excluded from the four networks mentioned, but contends that for a portion of the relevant period it was also foreclosed from the CAT PPO. (Ex. 233 at ¶ 452, Fig. 49.)

139. The bulk of UPM's Complaint concerns the fact that**[\*204]** it is not an in-network provider for the BCBS PPO. (Compl. ¶¶ 64-85).

**RESPONSE**: Methodist denies that SFMC has accurately described the Complaint by referring to 22 of the Complaint's 188 paragraphs.

140. Contrary to the Complaint, Steve Hamman, who was in charge of BCBS's contract negotiations with OSF, testified that OSF never threatened to withdraw its hospitals from the PPO network if BCBS contracted with UPM. Exh. 92 (Hamman Dep. 94:11-19).

**RESPONSE**: This statement mischaracterizes the Complaint, which alleges that OSF/SFMC threatened **BCBS** (and not Mr. Hamman specifically) to withdraw its hospitals from the PPO network if BCBS contracted with Methodist. And, documents authored by Mr. Hamman refer to OSF's threat to terminate BCBS if it were to contract with Methodist. (Cmplt. ¶ 68; Ex. 193 at 69-70; Ex. 104 (Dep. Ex. 806); Ex. 194 at 74-75; Ex. 135 at Methodist00052649 (Dep. Ex. 1234); Ex. 196 at 103-104.)

141. Mr. Hamman's predecessor, Phil Lumpkin similarly testified that OSF never threatened to withdraw its hospitals from the PPO network if BCBS contracted with UPM. (Lumpkin Dep. 50:3-16).

**RESPONSE**: This statement misrepresents the citation, which instead reflects that Mr. Lumpkin**[\*205]** could not recall whether or not Mr. Schoeplein, OSF's CEO, ever made such a threat.

144. During the relevant time period, the Methodist Medical Group and other UPMaffiliated practices and facilities have been in-network for the BCBS PPO. (*See* ¶¶ 29, *supra*, 190, *infra*).

**RESPONSE**: The statement is not supported by the citation. While Methodist agrees that Methodist Medical Group was in-network for the BCBS PPO, it cannot determine the veracity of the balance of the statement because it is not supported by the citations and it is unclear what "affiliated practices and facilities" are being referred to.

145. During the relevant time period, UPM was permitted to be in the BCBS PPO network for any self-funded plan that chose to include UPM. (*See* ¶¶ 178-179, *infra*).

**RESPONSE**: The citation does not support the statement and Methodist denies that the statement is accurate. Among other things, BCBS agreed not to market Methodist as being available for the PPO to such self-funded plans and further noted that it would consider such a request on an "exception" basis only if such a plan initiated that request. BCBS could also reject such a request. (Ex. 196 at 40-43; Ex. 209 at 52-53; Ex. 194 at 34-35; Ex. 40**[\*206]** (Dep. Ex. 217); Ex. 88 (Dep. Ex. 575).)

146. [TEXT REDACTED BY THE COURT] Exhs. 27, 39 and 40.

**RESPONSE**: This statement is misleading in that, as reflected in SFMC Exh. 40, [TEXT REDACTED BY THE COURT] (Ex. 1 at OSF00704427 (01/04), OSF00704437 (01/06), OSF00704446 (11/09 amendment); Ex. 39 (Dep. Ex. 212); Ex. 122 (Dep. Ex. 1064).)

147. Prior to the termination of the 2006 OSF/BCBS PPO agreement on December 31, 2008, BCBS elected to roll the agreement over for an additional year. Exh. 41 (OSF00237023).

**RESPONSE**: This statement is misleading because BCBS and SFMC together made that decision.

149. [TEXT REDACTED BY THE COURT] Exh. 42 (OSF00302071).

**RESPONSE**: This statement is misleading because BCBS and SFMC together made that decision.

150. [TEXT REDACTED BY THE COURT] Exh 40. (OSF00088845).

**RESPONSE**: Methodist denies this statement [TEXT REDACTED BY THE COURT].

154. The network construction rates clause guaranteed *rates* and its plain language only prohibited BCBS from seeking to add (or adding) UPM to the PPO network during the contract period without renegotiating the contract rates with OSF.

**RESPONSE**: Methodist denies this statement—which is not supported by citation—because there is no "network**[\*207]** construction rates clause" or renegotiation provision and because the statement misconstrues the Network Construction clauses, which do exclude Methodist from the PPO. (Ex. 1 at OSF00704446; Ex. 2 (Dep. Ex. 40); Ex. 171 at 1 (HCSC00000396); SFF Ex. 40 at 2 ("#7. There will be no change to current language in PPO agreement concerning network construction.").)

155. None of the network construction rate provisions preclude BCBS from contracting with *any* UPM-affiliated outpatient facility or physician practice on an in-network basis. Exh. 76 (Arango Dep. 169:1-11).

**RESPONSE**: This statement is not supported by the citation, which does not refer to **Methodist-affiliated** outpatient facilities or physician practices. In addition, the statement is misleading because Methodist's hospital is excluded from providing any outpatient surgical services under SFMC's exclusive contracts. (SFF Exs. 27, 39.)

157. [TEXT REDACTED BY THE COURT] Exh. 81 (Biedermann Dep. 168:22-169:4); Exh. 76 (Arango Dep. 172:16-172:23).

**RESPONSE**: The statement is not supported by the citations, each of which refer to the same one year of negotiations,

158. UPM has known at each juncture when the BCBS PPO agreement has been up**[\*208]** for renewal and has communicated with BCBS regarding its desire for a contract at each instance. Exh. 83 (Bryant Dep. 28:21-29:8, 66:9-66:13).

**RESPONSE**: This statement is not supported by the citations in that Mr. Bryant actually testified that he was only "generally" aware of when the contracts were up for renewal.

160. Approaching the end of every BCBS/OSF contract term, UPM had the opportunity to compete to be a participating provider in the BCBS PPO. Exh. 107 (Schierbeck Dep. 201:8-202:9).

**RESPONSE**: The citation does not support the statement, and the statement is false. In fact, Methodist was allowed by BCBS to propose rates only one time during the relevant period (in 2008), a discussion which came to an end when SFMC told BCBS it rejected including Methodist in the PPO network. (Ex. 209 at 90-91.) Indeed, as evidenced by BCBS always wanting a network that included Methodist, but not contracting with Methodist due to SFMC's insistence on a Peoria network that did not include Methodist, Methodist never had a true "opportunity to compete." (Ex. 192 at 119-20, 166; Ex. 222 at 172; Ex. 195 at 21, 23; Ex. 228 at 179-80.)

161. [TEXT REDACTED BY THE COURT] Exh. 107 (Schierbeck Dep. 186:11-187:17);**[\*209]** Exh. 13 (Dep. Ex. 1153, Methodist00123209); Exh. 43 (OSF00231242); Exh. 44 (OSF00235862).

**RESPONSE**: The citations do not support the statement's claim [TEXT REDACTED BY THE COURT] Methodist also incorporates it response to ¶ 160 above. (*See also*, Ex. 5 (Dep. Ex. 59); Ex. 77 (Dep. Ex. 516) (OSF declining BCBS's request for a non-exclusive proposal with Methodist in network in April 2008); Ex. 78 (Dep. Ex. 517).)

162. [TEXT REDACTED BY THE COURT] Exh. 81 (Biedermann Dep. 59:16-59:19, 86:5-86:16); *see also* Exh. 76 (Arango dep. 33:2-33:18).

**RESPONSE**: The cited testimony is misleading in that it truncates both witnesses' testimony. Mr. Biedermann testified that "[a]s we did more analysis and we saw the market share differences and the service differences, it became less of an option, less desirable. . . . So, you know, gradually that - it was decided not to do that." (Ex. 197 at 86-87; Ex. 192 at 33-35.)

164. In 2009, UPM continued its push to be a participating provider in the PPO network effective January 1, 2010. *See, e.g.*, Exh. 107, (Schierbeck Dep. 98:5-100:22) (discussing 2009 meeting with State Farm in attempt to get support to be added to BCBS PPO).

**RESPONSE**: The citation discusses some**[\*210]** of only a single meeting with State Farm, which Mr. Schierbeck said may have been in 2009. In fact, Methodist was not even afforded an opportunity to even propose rates in 2009 to BCBS. (Ex. 209 at 90-91.)

165. BCBS witnesses testified that its discussions with UPM concerning its inclusion in the PPO collapsed when BCBS perceived that UPM competed unfairly when UPM's MFC network and BCBS were competing to become the administrator for Bradley University's health plan. Exh. 101 (McCarty Dep. 135:13-137:1); Exh. 105 (Rappenecker Dep. 66:22-70:2, 69:21-70:2); *see also* Exh. 107 (Schierbeck Dep. 189:18-191:17).

**RESPONSE**: Methodist denies the accuracy of this statement as to Methodist competing unfairly and regarding the "collapse" of negotiations. The citation is again misleading by truncating key testimony. For example, Mr. McCarty went on to testify that "[n]o one criticizes [Methodist] for doing that...[and] in spite of whatever my feelings are...we still need to do the right thing for the best interest of our customers" which was to "[p]rovide the biggest possible network of high quality at the lowest possible price. That was always the objective." (Ex. 196 at 136-138.)

166. In 2012, BCBS offered to**[\*211]** include UPM in the PPO if UPM was willing to participate in a separate risk-sharing product. Exh. 46 (Methodist00319603); Exh. 104 (Quin Dep. 90:6-91:2).

**RESPONSE**: This statement is not supported by the citations. As stated in Mr. Quin's testimony, BCBS never made such an offer and, if it had, Methodist would have considered it. (Ex. 209 at 90-91.)

168. Despite the offer, UPM never made a proposal to BCBS. Indeed, it never even considered making one. Exh.104 (Quin Dep. 91:15-17, 100:3-5).

**RESPONSE**: The statement is not correct because, as noted in the first pages cited, BCBS never made such an offer. Methodist also incorporates its response to ¶ 166 above.

169. This was because UPM "was not in position to take full risk to get into the PPO soon." Exh.48 (Dep. Ex. 911, Methodist00502482).

**RESPONSE**: See Response to ¶ 166 above.

170. [TEXT REDACTED BY THE COURT] Exh. 40 (OSF0088845).

**RESPONSE**: [TEXT REDACTED BY THE COURT]

171. [TEXT REDACTED BY THE COURT] Exh. 74 (Capps. Rep. ¶ 272).

**RESPONSE**: The citation does not support the statement. [TEXT REDACTED BY THE COURT] 172.

172. [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT] Exh. 27; Exh. 39 (OSF00704446).

**RESPONSE**: The citations do not provide**[\*212]** an explanation as to why the clause is in certain agreements and certainly does not include the explanation included in the statement. [TEXT REDACTED BY THE COURT] (Ex. 111 (Dep. Ex. 826); Ex. 113.)

174. TJPM's senior executives knew that employers could add UPM to their self-funded BCBS PPO networks. Exh. 83 (Bryant Dep. 71:23-72:3); Exh. 104 (Quin Dep. 50:1-50:12).

**RESPONSE**: Methodist executives were told by BCBS that BCBS could allow certain self-funded employers to add Methodist, but were not aware of the relevant contract language in question or of BCBS '5 commitment to OSF not to market Methodist to such employers. (Ex. 196 at 40-43; Ex. 209 at 52-53; Ex. 194 at 34-35; Ex. 40; Ex. 88.)

179. Nevertheless, Rob Quin, UPM's CFO, testified that Michael Bryant, UPM's former CEO, believed that the ASO option would cause "confusion" if UPM attempted to promote it, and thus UPM deliberately decided not to do so. Exh. 104 (Quin Dep. 51:2-52:2).

**RESPONSE**: The citation does not support the statement's assertion that "UPM deliberately decided not to do so." Moreover, SFMC cites three examples where Methodist did do so. (SFF ¶¶ 175-178.)

180. Further, Tony Schierbeck testified that Michael Bryant**[\*213]** refused to market the ASO option to Bradley University - even though BCBS requested that it do so - because Bryant would only accept UPM becoming a full in-network provider for the PPO. Exh. 107 (Schierbeck Dep. 190:10-191:2).

**RESPONSE**: The statement is a misleading representation of the testimony in the citation. Significantly, the citation suggests that it was BCBS that was to do the marketing, that BCBS was not sure if Bradley would accept the PPO as proposed, that Methodist "didn't understand how that was even going to happen because [it wasn't] in their overall PPO," and that Methodist "didn't want to just do it one employer at a time."

182. [TEXT REDACTED BY THE COURT] Exh. 75 (Capps Rebuttal Rep. ¶ 252).

**RESPONSE**: The citation does not support the statement because Methodist has not "taken the position." Instead, as the citation reflects, this is the interpretation of Methodist's expert based on various statements of BCBS executives.

187. [TEXT REDACTED BY THE COURT] Exh. 103 (Petzold Dep. 160:3-15; *see also* Exh. 108 Sehring Dep. 14:15-21).

**RESPONSE**: The statement is not supported by the citation and, in particular, the citations make no mention of prices or a rationale for prices.**[\*214]**

190. Consistent with industry practice, following its acquisition of UPM terminated UPP's agreements with OSF and most of its providers, so that UPP employees would no longer have SFMC as an in-network provider.

**RESPONSE**: This statement is not supported by citation. Among other things, Methodist does not believe there is an "industry practice" in this regard (and no record evidence of such). Also, the statement is out of context since it provides no time frames.

192. [TEXT REDACTED BY THE COURT] Exh. 103 (Petzold Dep. 164:19-23).

**RESPONSE**: The statement is not supported by the citation (which refers to a deposition question only), [TEXT REDACTED BY THE COURT]. It is also misleading in that it refers to rates **after** Humana acquired OSFHP.

194. [TEXT REDACTED BY THE COURT] Exh. 103 (Petzold Dep. 31:15-31:21).

**RESPONSE**: The statement is not supported by the citation, [TEXT REDACTED BY THE COURT].

195. [TEXT REDACTED BY THE COURT] Id. (Petzold Dep. 30:7-30:19).

**RESPONSE**: [TEXT REDACTED BY THE COURT]

197. [TEXT REDACTED BY THE COURT] [TEXT REDACTED BY THE COURT] Exh. 108 (Sehring Dep. 194:5-22); Exh. 103 (Petzold Dep. 50:12-51:10).

**RESPONSE**: The statement is misleading [TEXT REDACTED BY THE COURT]**[\*215]** (Ex. 204 at 49-51, 57 [TEXT REDACTED BY THE COURT], 76; Ex. 164 at 2 (Dep. Ex. 1581); Ex. 166 at 2 (Dep. Ex. 1587).)

198. [TEXT REDACTED BY THE COURT] Exh. 103 (Petzold Dep. 167:17-168:22; 182:4-15).

**RESPONSE**: The citation does not support the existence [TEXT REDACTED BY THE COURT]. The cited testimony, and Methodist's response to SFF ¶ 197, [TEXT REDACTED BY THE COURT].

202. [TEXT REDACTED BY THE COURT]. Ex. 108 (Sehring Dep. 34:20-35:1); Exh. 103 (Petzold Dep. 166:11-167:11).

**RESPONSE**: The statement is not supported by the citations.

208. [TEXT REDACTED BY THE COURT]. Exh. 56 (Methodist00250628 at 0632-33); Exh. 112 (Wallner Dep. 31:19-32:9).

**RESPONSE**: [TEXT REDACTED BY THE COURT]. Also, the citations do not support the balance of the statement.

212. [TEXT REDACTED BY THE COURT]. Exh. 57 (OSF00225452).

**RESPONSE**: The citations do not support the implication in the statement regarding the timing of the two situations. [TEXT REDACTED BY THE COURT] (Ex. 175 at HAMP 0044932, 44943 (HAMP 0044932), Ex. 176 (HAMP 0044933), Ex. 177 (HAMP 0044934).)

213. [TEXT REDACTED BY THE COURT]. Exh. 58 (HAMP-INGRUM000080).

**RESPONSE**: [TEXT REDACTED BY THE COURT] the balance of the statement is not supported by**[\*216]** the citation. Methodist additionally incorporates its response to SFF ¶ 212.

215. [TEXT REDACTED BY THE COURT] Exh. 66 (HAMP-INGRUM0000047).

**RESPONSE**: [TEXT REDACTED BY THE COURT]. (Ex. 173 (HAMP 0015854).) [TEXT REDACTED BY THE COURT] (*Id.*)

229. [TEXT REDACTED BY THE COURT]. *See* Exh. 91 (Hall Dep. 89:7-23, 112:18-113:13); Exh. 73 (Aetna00042193); Exh. 85 (Crowell Dep. 248:19-21).

**RESPONSE**: The statement [TEXT REDACTED BY THE COURT] is not supported by the citation.

233. In support of its defenses, OSF has submitted the expert report of Professor Robert Willig, which is attached as Exh. 114 and is cited in the argument section as "Willig Rep." OSF refers only to two charts and a single paragraph of the Willig Report in the argument section.

**RESPONSE**: The statement is misleading in that, in support of its defenses SFMC actually submitted two expert reports, the second of which is not used as an exhibit and is not cited by SFMC in its brief. This is significant in light of SFMC's argument that damages from CAT's commercial health insurance arrangements should not be part of Methodist's damages because a substantial portion of that second report focuses on an "event study" based on CAT data.**[\*217]** (CAT data is also cited in Mr. Willig's report.) (Ex. 235 (Expert Report of Professor Robert D. Willig); Ex. 236 (Expert Report of Margaret E. Guerin-Calvert).)

**III. UNDISPUTED NON-MATERIAL FACTS**

18. UnityPoint is the fourth largest non-denominational health system in the United States. Exh. 119 ([*https://www.unitypoint.org/overview.aspx*](https://www.unitypoint.org/overview.aspx) (last visited Oct. 30, 2015).)

**RESPONSE**: This statement does not contain a material fact because UnityPoint is not a party to this litigation, so its size is not relevant to any issue raised in SFMC's motion.

19. UnityPoint consists of 17 hospitals in multiple states and boasts $3.7 billion in annual revenue.

**RESPONSE**: This statement does not contain a material fact because UnityPoint is not a party to this litigation, so the number of hospitals in UnityPoint's system and system's annual revenue are not relevant to any issue raised in SFMC's motion.

26. With respect to UPM's outpatient surgical services, during the relevant time, UPM owned 49% of the Central Illinois Endoscopy Center, an outpatient surgical center, which was an in-network provider with the BCBS PPO. Exh. 104 (Quin Dep. at 16:8-17:4).

**RESPONSE**: This statement does not contain a material fact because Methodist's minority ownership**[\*218]** in the Central Illinois Endoscopy Center is not relevant to any issue raised in SFMC's motion as Methodist does not consider an endoscopy to be an outpatient surgical service.

31. [TEXT REDACTED BY THE COURT] Exh. 12 (Methodist00033183, at 92.)

**RESPONSE**: This statement does not contain a material fact as Medicare and Medicaid are not part of the relevant market, so admissions of Medicare and Medicaid patients are not relevant to any issue in SFMC's motion.

32. In 2010, [TEXT REDACTED BY THE COURT]. *Id.* (Methodist00033183, at 92.)

**RESPONSE**: See response to SFF ¶ 31 above.

33. In 2010, [TEXT REDACTED BY THE COURT]. *Id.* (Methodist00033183, at 92.)

**RESPONSE**: See response to SFF ¶ 31 above.

34. According to the economist retained by UPM, from 2009-2013, [TEXT REDACTED BY THE COURT] Exh. 74 (Expert Report of Cory Capps. ("Capps Rep.") Fig. 19).

**RESPONSE**: See response to SFF ¶ 31 above.

167. Specifically, as Tony Schierbeck reported internally to UPM's leadership team, "BCBS would like to also offer a narrow-network, co-branded, [UPM] PPO in which we take full risk." Exh. 47 (Dep. Ex. 912, Methodist00052602).

**RESPONSE**: This statement does not contain a material fact because BCBS never offered the narrow-network**[\*219]** described, so it is not relevant to any issue in SFMC's motion.

231. For purposes of this motion alone, OSF has cited certain fact assertions of the Capps Report in the preceding paragraphs, in order to demonstrate the absence of a material fact dispute on that particular issue. OSF otherwise reserves the right to dispute any and all factual assertions and arguments made in the Capps Report or the Capps Rebuttal Report.

**RESPONSE**: This statement does not contain a material fact because it simply states how SFMC has used citations to the reports of Methodist's expert.

**IV. DISPUTED NON-MATERIAL FACTS**

22. [TEXT REDACTED BY THE COURT]. Exh. 8 (Methodist00463526) (9/9/13 Affiliation Agreement).

**RESPONSE**: The Methodist-Proctor transaction occurred two years after the UnityPoint-Methodist affiliation. Moreover, this statement does not contain a material fact because Proctor is not a party to this case, so Proctor's affiliation with Methodist and UnityPoint is not relevant to any issue in SFMC's motion.

23. [TEXT REDACTED BY THE COURT], with both hospitals being affiliated with UnityPoint. *Id.*; ([*http://www.unitypoint.org/peoria/Default.aspx*](http://www.unitypoint.org/peoria/Default.aspx) (last visited Oct. 28, 2015).

**RESPONSE**: Methodist and Proctor merged their operations, but operate separate**[\*220]** campuses. Methodist is the sole corporate parent of Proctor. (SFF Ex. 8 at Methodist00463528, 463531.) This statement does not contain a material fact because of the reason stated in response to SFF ¶ 22 above.

25. [TEXT REDACTED BY THE COURT]. Exh. 10.

**RESPONSE**: The citation [TEXT REDACTED BY THE COURT] and otherwise does not support the statement. Moreover, this statement does not contain a material fact because Proctor is not a party to this case, so the combined market share of Methodist and Proctor is not relevant to any issue in SFMC's motion.

87. [TEXT REDACTED BY THE COURT] Exh. 10 (Dep. Ex. 1278 at UnityPoint00003980).

**RESPONSE**: [TEXT REDACTED BY THE COURT] This statement does not contain a material fact because Proctor is not a party to this case, so references to the combined number of direct to employer contracts held by Methodist and Proctor is not relevant to any issue in SFMC's motion.

96. [TEXT REDACTED BY THE COURT]. (Jefferson Dep. 17:13-18:23).

**RESPONSE**: [TEXT REDACTED BY THE COURT] Moreover, the statement does not contain a material fact because the relevant time period for this case is 2009 to the present, so a Methodist-Coventry contract in 2004 is not relevant to any**[\*221]** issue in SFMC's motion.

163. [TEXT REDACTED BY THE COURT] Exh. 45 (Ex. 427 (OSF00236711)).

**RESPONSE**: The statement is not supported by the citation. Moreover, this statement does not contain a material fact because a comparison of SFMC's rate to BCBS and SFMC rates to other commercial payors is not relevant to any issue in SFMC's motion.

224. UPM's internal documents characterized Aetna as the payer which paid the highest prices for UPM's services. Exh. 86 (Davis Dep. 114:3-114:20); Exh. 70 (Methodist00324098); Exh. 71 (Methodist001573790).

**RESPONSE**: The statement is misleading because, as reflected by the citations, the comments refer to one year only—2006. Moreover, this statement does not contain a material fact because whether Aetna paid the highest prices for Methodist's services for one year prior to the beginning of the relevant period in 2009 is not relevant to any issue in SFMC's motion.

**V. METHODIST'S ADDITIONAL UNDISPUTED MATERIAL FACTS**

**A. Parties**

**1. Methodist Health Services Corporation**

1. Methodist has a long and established history in Peoria, Illinois, beginning on May 24, 1900. In 1975, Methodist's name changed to Methodist Medical Center of Illinois. (UnityPoint Health, "Our**[\*222]** History & Progress," [*http://www.unitypoint.org/peoria/our-history.aspx*](http://www.unitypoint.org/peoria/our-history.aspx) (last visited on Nov. 30, 2015).)

2. On October 1, 2011, Methodist became an affiliate of Iowa Health Systems, a nondenominational health system. (Ex. 185 (UNITYPOINT00002202-2264); UnityPoint Health, "Our History & Progress," [*http://www.unitypoint.org/peoria/our-history.aspx*](http://www.unitypoint.org/peoria/our-history.aspx) (last visited on Nov. 30, 2015).)

3. Methodist is a recognized leader in Central Illinois healthcare. It has won many awards for providing outstanding health care. Methodist includes two emergency departments with a Level II Trauma Center, the area's most comprehensive mental health services, state-of-the-art diagnostic imaging services, the area's most experienced sleep disorder center, and many other leading services. (UnityPoint Health, "Our History & Progress," [*http://www.unitypoint.org/peoria/our-history.aspx*](http://www.unitypoint.org/peoria/our-history.aspx) (last visited on Nov. 30, 2015).) Methodist, however, does not provide Level I Trauma care, a Level III NICU, tertiary pediatric services, and certain organ transplants services, all services available at SFMC. (Ex. 208 at 36-38; Answer ¶¶ 39, 40.)

**2. OSF Healthcare System d/b/a Saint Francis Medical Center**

4. In its 2014 fiscal year, OSF Healthcare System reported more than $6.9 billion in gross patient services revenue and assets of more than $2.9 billion. (OSF HealthCare, "About**[\*223]** Us," [*https://www.osfhealthcare.org/about/facts/*](https://www.osfhealthcare.org/about/facts/) (last visited on Nov. 30, 2015).)

5. SFMC's financial success is neither recent nor typical for hospitals nation-wide. [TEXT REDACTED BY THE COURT]. (Ex. 234 at ¶ 47, Ex. 187 at 50 (OSF00734502).)

6. SFMC is OSF's flagship hospital, its largest hospital and the seventh largest medical center in the state of Illinois. [TEXT REDACTED BY THE COURT] (Answer ¶ 38; Ex. 228 at 51-52; Ex. 219 at 12, 26-27 (J. Moore Dep.).)

7. With approximately 616 licensed beds and a medical staff of approximately 800 physicians, SFMC is by far the largest hospital in Peoria and the Tri-County Area (Peoria, Tazewell, and Woodford Counties). (Answer ¶ 38.)

8. In 2006, the Sisters of the Order of Saint Francis decided to reduce their involvement in operating OSF to focus on other activities. (Ex. 221 at 12-14.)

**B. Commercial Health Insurance Background**

9. Commercial health insurance, also called private health insurance, refers to two main categories of health insurance: employer-sponsored insurance ("ESI") and individual and family insurance. (Ex. 233 at ¶ 146.)

10. Under most ESI plans, the employer or other plan sponsor makes health insurance available to eligible employees and their dependents as an employment**[\*224]** benefit. (Ex. 233 at ¶ 146.)

11. For commercial health insurance, applicable payment rates to providers (doctors and hospitals) are determined through negotiations between payors (such as commercial health insurers or employers) and providers, rather than being set by the state or federal government. (Ex. 233 at ¶ 153.)

12. To provide enough time to inform the community of any changes to commercial health plan networks, providers typically begin negotiations in the summer and finalize arrangements in early fall so that the parties may then sell and market those particular products for a January 1 start date. (Ex. 206 at 201-02 (T. Schierbeck Dep.).)

13. Although some employers may have the contractual right to switch insurance providers annually, as a practical matter employers cannot switch frequently or readily because of concerns about disruption to their employees. (Ex. 218 at 144-45, 154-55 (C. Capps. Dep.).) Dr. Capps described disruption as "taking what [patients] are currently doing with their healthcare and saying you have to do something different now, whether it's changing their doctor or otherwise." (*Id.* at 146.)

**1. Types of health plans**

14. Managed care organizations ("MCO"s) are health**[\*225]** plans that deliver care to members through a defined network of contracted providers ("provider network" or "network"), like hospitals and physicians. (Ex. 233 at ¶¶ 114, 186.)

15. Contracts between providers and MCOs set forth reimbursement rates and other conditions governing their relationship. Contractually specified rates are below the provider's list of charges, with the ultimate rates determined in negotiations. (Ex. 233 at ¶ 186.)

16. The most common types of MCO plans include Preferred Provider Organizations ("PPO"s), Health Maintenance Organizations ("HMO"s), Point of Service plans ("POS"s) and Exclusive Provider Organizations ("EPO"s). (Ex. 233 at ¶ 114.)

17. HMOs are typically more restrictive than PPOs in several respects. (Ex. 233 at ¶ 157.) PPO plans are by far the most popular types of plans. (*Id.* at ¶ 158, Fig. 18.)

**2. Significance of being in network**

18. Both HMOs and PPOs provide their enrollees with financial incentives to select in-network providers, usually in the form of reduced patient cost-sharing. For example, a patient might face a fixed co-payment of $500 for an inpatient stay at an in-network hospital but, for out-of-network care, could be obligated to pay 30%**[\*226]** of the insurer's allowed payment and to cover the gap between the provider's list charges and the allowed payment. In addition, patients who receive care from an out-of-network provider can be subject to balance billing for the gap between the payment level allowed by the MCO and the out-of-network provider's list charges. (Ex. 233 at ¶ 187.)

19. PPOs usually—but not always—offer out-of-network coverage and do so at a reduced level of benefit. (Ex. 233 at ¶ 188.)

**3. Key differences between government and commercial insurers**

20. There are substantial differences in payment rates across types of insurers. The term "payor mix" commonly refers to the breakdown of a hospital's set of patients by type of insurance—for example, commercial, Medicaid, Medicare and uninsured. A favorable payor mix is one that has a higher proportion of more profitable commercially insured patients and a less favorable payor mix is one with a higher proportion of uninsured and government-insured patients. [TEXT REDACTED BY THE COURT] (Ex. 233 at ¶ 167; Ex. 24 at 30 (Dep. Ex. 98).)

21. Hospitals with an overly high proportion of Medicaid and Medicare patients relative to commercial patients will struggle financially.**[\*227]** (Ex. 233 at ¶ 169.)

22. Most hospitals—including Methodist and SFMC—rely on the profits generated by commercial insurance to offset the losses suffered from government payors and uninsured patients. (Answer ¶ 94; Ex. 222 at 242-43; Ex. 86 (Dep. Ex. 534); Ex. 216 at 185 (C. Emanuel Dep.); Ex. 221 at 24-25, 100-01; Ex. 101 (Dep. Ex. 738); Ex. 204 at 156; Ex. 228 at 62-63; Ex. 225 at 41 (K. Steffen Dep.).)

**C. Market Definition**

**1. Relevant geographic market**

**a. SFMC recognized the Tri-County Area as a distinct market and Methodist as its primary competitor**

23. In its Motion for Summary Judgment, SFMC has not disputed that the Relevant Geographic Market is comprised of the "Tri-County Area," which consists of Peoria, Tazewell, and Woodford Counties in Illinois.

24. SFMC's own documents and the testimony of its key executives make clear that SFMC has considered the Tri-County Area to be its primary service area during the relevant time period. (Ex. 230 at 73, 86, 107-109, 112-14, 122-23, 127 (D. Baker Dep.); Ex. 219 at 139-40; Ex. 220 at 153 (K. Harbaugh Dep.); Ex. 229 at 57, 130 (M. Hohulin Dep.); Ex. 221 at 26; Ex. 225 at 250-251; Ex. 20 at 3; Ex. 21 at 3 (Dep. Ex. 95); Ex. 22 at 4 (Dep. Ex.**[\*228]** 96); Ex. 23 at 5 (Dep. Ex. 97); Ex. 24 at 4; Ex. 95 (Dep. Ex. 599).)

25. Within the Tri-County Area, SFMC identified Methodist as its main competitor. (Ex. 230 at 124; Ex. 225 at 34-35; Ex. 227 at 320, 326; Ex. 220 at 12; Ex. 219 at 42, 118-119; Ex. 20 at 32.)

26. SFMC's Management Plans for all years between 2008 and 2012 tracked and reported on SFMC's market share (and that of Methodist) in the Tri-County Area. (Ex. 229 at 145-47; Ex. 102 (Dep. Ex. 747); Ex. 20 at 44-55; Ex. 21 at 43, 47-57; Ex. 22 at 26-28; Ex. 23 at 43-44; Ex. 24 at 66-73; Ex. 95 at 4.)

27. Commercial payors also recognize Peoria and the surrounding counties as a distinct market or subset of a market in which they need a competitive and high-quality network. (Ex. 192 at 17-18, 130; Ex. 3 at 4 (Dep. Ex. 53); Ex. 200 at 41; Ex. 196 at 27-29; Ex. 204 at 116; Ex. 198 at 29-30 (T. Shook Dep.); Ex. 202 at 26-27 (M. Wallner Dep.).)

**b. Patients prefer not to travel for healthcare**

28. Customers of insurance companies and the employers who reach agreement with insurance companies want access to local care, particularly for basic services. (Ex. 196 at 104; Ex. 204 at 101; Ex. 209 at 270-71, 290-91; Ex. 212 at 45-46.)

29. 94% of**[\*229]** commercially insured residents of the Tri-County Area go to a hospital located in the Tri-County Area for care. (Ex. 233 at ¶ 358.)

**2. Relevant product market**

30. The definition of outpatient surgery used by Methodist is the Agency for Healthcare Research and Quality's narrow definition. That definition requires penetration or breaking of the skin, as well as the likely use of an operating room and anesthetic and excludes diagnostic procedures such as endoscopy. (Ex. 233 at ¶ 69; Surgery Flag Software, [*http://www.hcup-us.ahrq.gov/toolssoftware/surgflags/surgeryflags.jsp*](http://www.hcup-us.ahrq.gov/toolssoftware/surgflags/surgeryflags.jsp) (last visited Nov. 24, 2015).)

31. OSF has judicially admitted that commercially insured patients are substantially more profitable than those covered by Medicare, Medicaid, or TRICARE. (Minute Entry by Judge Hawley on May 26, 2015; Transcript of May 26, 2015 Hearing at 35, ECF No. 141; Answer ¶ 93.) It has also judicially admitted that patients covered by government plans are not adequate substitutes for commercially insured patients and that the ability to compete for commercial patients is a "key determinant of a hospital's overall profitability, ability to invest, and long-term sustainability." (Answer ¶¶ 94, 98; *see also*, Order of Judge Sarah Darrow on March 25, 2015, ECF No. 131**[\*230]** at 5, 6, 14.)

32. Commercial payors pay more than the government payors for the same treatment. (Ex. 192 at 80; Ex. 229 at 127; Ex. 196 at 86; Ex. 202 at 42.) [TEXT REDACTED BY THE COURT] (Ex. 233 at ¶ 183, Fig. 21.)

33. In general, the payments made by Medicare and Medicaid do not cover hospitals' cost of providing care, an issue at both Methodist and SFMC. (Ex. 197 at 28-29; Ex. 222 at 227-28; Ex. 85 (Dep. Ex. 530); Ex. 220 at 76-77; Ex. 229 at 127; Ex. 213 at 218 (C. Mackay Dep.); Ex. 221 at 100-01; Ex. 101; Ex. 225 at 41; Ex. 226 at 97 (S. Wozniak Dep.).)

34. [TEXT REDACTED BY THE COURT] (Ex. 222 at 240-43; Ex. 86 at 2.)

35. Because government payors do not pay enough to satisfy the costs of treatment and commercial payors pay more, hospitals—including SFMC—rely on commercial payors to offset the low payments from Medicare and Medicaid. (Ex. 222 at 242-43, Ex. 86; Ex. 216 at 185; Ex. 221 at 100-01; Ex. 101; Ex. 204 at 156; Ex. 228 at 62-63; Ex. 225 at 41; Ex. 227 at 49-50; Ex. 58 (Dep. Ex. 405).)

36. The federal government does not negotiate rates for Medicare and Medicaid. (Ex. 213 at 218-19.)

**D. SFMC Interactions With Commercial Payors**

**1. SFMC contracting strategy**

37. [TEXT REDACTED**[\*231]** BY THE COURT] (Ex. 29 at 41 (Dep. Ex. 119).)

**2. OSF required exclusivity**

38. One of OSF's goals for managed care contracting was to obtain exclusive or semi-exclusive provisions regarding the network. (Ex. 225 at 29; *see also* Ex. 220 at 87, 168-69; Ex. 226 at 49-50; Ex. 219 at 112-13; Ex. 48 at 1-2 (Dep. Ex. 301.)

39. OSF's managed care consultant, Ira Rosenberg, stated that "OSF is very unique that they are still able to request and get exclusivity." (Ex. 60 at 4 (Dep. Ex. 407).)

40. In Peoria, exclusivity for SFMC meant that SFMC would permit commercial payors to establish hospital networks that include Proctor, but were not allowed to include Methodist. (Ex. 84 (Dep. Ex. 528).) In a January 30,2007 email, SFMC 's Senior Vice President of Managed Care, Mary Breeden, wrote to OSF CEO Kevin Schoeplein, "**[i]n Peoria — by exclusive, we really mean no Methodist** . . . . " (*Id.* (emphasis added).)

41. [TEXT REDACTED BY THE COURT] (Ex. 221 at 79, 82-83; Ex. 100 at 4 (Dep. Ex. 736).)

42. [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

(Ex. 50 (Dep. Ex. 310))

**3. OSF leveraged its system in contract negotiations**

43. [TEXT REDACTED BY THE COURT] (Ex. 222 at 17-19.)

44. [TEXT REDACTED BY THE COURT]**[\*232]** (Ex. 33 at 4 (Dep. Ex. 140))

45. In a similar interview, Mr. Rosenberg stated that OSF was "[a]ble to negotiate as a system which gives great leverage." (Ex. 60 at 11.)

46. [TEXT REDACTED BY THE COURT] (Ex. 33 at 28,31)

**4. OSF would not offer non-exclusive proposals in Peoria**

47. When asked if OSF would offer nonexclusive rates to payors if the payor requested it, Mr. Schoeplein testified "Why would—why would—why—why would—why would you—why would you negotiate that way." (Ex. 228 at 270.)

48. Despite requests to do so, OSF ***never*** made a non-exclusive proposal to BCBS for its PPO, nor did it ever calculate the rates that it would require if Methodist was allowed in BCBS's PPO network. (Ex. 222 at 172; Ex. 193 at 25, 98; Ex. 228 at 179-80; Ex. 223 at 175-76 (B. Sehring Dep.).)

49. [TEXT REDACTED BY THE COURT] (Ex. 222 at 164-66.)

**E. Blue Cross Blue Shield Of Illinois**

50. BCBS offers PPO, HMO, and indemnity insurance in Peoria. The PPO plan is the most popular, with the "majority by far" of all of BCBS's members. (Ex. 192 at 26; *see also id.* at 22-25.) [TEXT REDACTED BY THE COURT] (Ex. 233 at ¶ 118.)

51. [TEXT REDACTED BY THE COURT] (Ex. 233 at ¶ 135, Fig. 17.)

52. Because BCBS believed that it could reach a more**[\*233]** favorable reimbursement arrangement with Methodist and that it was overpaying SFMC, BCBS considered terminating its contract with SFMC every time the contract came up for renegotiation. (Ex. 192 at 33-34.)

53. During the relevant time period in the Tri-County Area, the network construction for the BCBS PPO product included SFMC, Proctor and Pekin Hospital. (Ex. 222 at 50-51.) Only Methodist was excluded. (*Id.*)

**1. Significance of BCBS to SFMC**

54. [TEXT REDACTED BY THE COURT] (Ex. 229 at 172-75; Ex. 27 (Dep. Ex. 103).)

55. [TEXT REDACTED BY THE COURT] (Ex. 59 at 1 (Dep. Ex. 406).) (*Id.*)

56. (Ex. 90 at [TEXT REDACTED BY THE COURT] HCSC00014456 (Dep. Ex. 582).)

57. [TEXT REDACTED BY THE COURT] (Ex. 227 at 175-78.)

58. [TEXT REDACTED BY THE COURT] (Ex. 225 at 207-208; Ex. 52 at OSF00660939 (Dep. Ex. 316).)

**2. Significance of SFMC to BCBS**

59. OSF is the "largest provider of care [] outside of the metropolitan Chicago area." SFMC was considered a "dominant provider in the Peoria market." (Ex. 196 at 34, 82, 140-141.)

60. According to BCBS, SFMC was "always considered to be the most critical [hospital within] the OSF network." (Ex. 196 at 82; Ex. 197 at 36.)

61. Key executives at BCBS viewed SFMC as**[\*234]** a "must have" or "always needed" hospital for the BCBS network. (Ex. 193 at 95-96 ("must have"); Ex. 196 at 57 ("always needed"); Ex. 197 at 36 ("extremely important" to have SFMC in network").)

62. BCBS executive Stephen Hamman testified that, as a "must have" hospital, SFMC was a hospital that a commercial payor required in order to be competitive in the market. (Ex. 193 at 95-97.) A network comprised of Methodist and Proctor alone would not be competitive. (*Id.*)

63. In a declaration, BCBS's Joseph Arango wrote:

Because OSF's flagship hospital in Peoria has achieved a dominant position in that market, BCBS-IL's PPO product would be less attractive to employers and individuals in Peoria if OSF's Peoria hospital is not included in our network. As a result, it is important for BCBS-IL to maintain its in-network status with OSF.

(Ex. 192 at 10; Ex. 3 at ¶ 20.)

64. Mr. Arango testified that BCBS ". . . customers, especially [the] national account customers, would not be happy . . . with the loss of Saint Francis from the Blue Cross PPO network." (Ex. 192 at 34-35, 53, 174-75; *see also* Ex. 193 at 154.) BCBS national accounts were large "household name companies that have employees in multiple**[\*235]** locations throughout the United States, including Peoria." (Ex. 192 at 35; Ex. 197 at 33.) The BCBS executives who handled national accounts "were more in favor of keeping the status quo in Peoria and not rocking the boat by risking the loss of OSF." (Ex. 192 at 53.) They wanted the status quo and no disruptions in the Peoria network. (Ex. 192 at 174-75; Ex. 193 at 154.)

65. Phil Lumpkin, of BCBS, told Ms. Breeden in August of 2005 that "it would be absolutely ridiculous" for BCBS not to have SFMC in the BCBS PPO product. (Ex. 110 (Dep. Ex. 825).)

66. Mr. McCarty felt it was necessary to have SFMC in the network:

One of them was that they . . . offered some services that were not available regionally by any—either Proctor or Methodist. . . . I can't remember exactly, but there were several different types of services that were only offered by OSF, so that was critical for us.

Number two, having OSF in the network or trying to remove them from the network is always difficult because then you have [to] take all of our existing customers and tell them now you've got to go someplace else to get your Healthcare, and that's disruption to our customers that we always try to avoid.

(Ex. 196 at**[\*236]** 80-81.)

67. Because of its dominant position in the Peoria market, there was a perception at BCBS that SFMC had leverage over it in contract negotiations. (Ex. 196 at 133-34.)

68. BCBS executives were concerned that if BCBS contracted with Methodist, SFMC might terminate its contract. (Ex. 196 at 103-04). Mr. Hamman explained that even a threat to terminate by SFMC could harm BCBS if its customers and members learned of the situation and brought pressure on BCBS. (Ex. 193 at 93.)

69. Mr. McCarty was aware that BCBS had a concern that if it contracted with Methodist, OSF might terminate its contract. He stated:

From a marketing side [OSF's termination] would have a significant impact in that the lives that were in this service region that had been used to going to OSF would now have to be shifted to a different provider, in this case let's say Methodist, which is disruption, which causes all kinds of problems when our intent is to try to make things as simple and easy as possible for our members and customers. So that would have been a significant issue to have OSF terminate its contract with us. In addition, the other item being OSF does offer some services that were unique to them and**[\*237]** not available readily in that marketplace, so we would be in a position where we would have to find another source, which might be geographically difficult, or contract with OSF for those specific services separate if they were willing to.

(Ex. 196 at 103-04.)

**3. BCBS's desire for an open network**

70. Every time the BCBS PPO contract was up for negotiation, BCBS sought to have an open network in Peoria that included all three hospitals—Methodist, Proctor, and SFMC. (Ex. 222 at 41-43, 169; Ex. 219 at 182; Ex. 227 at 192; Ex. 228 at 180-81.)

71. BCBS executives testified that BCBS always wanted to have all Peoria hospitals—including Methodist—in its network because "the brand of Blue Cross Blue Shield is best served by the widest network possible, both in terms of the PPO and the HMO . . . . it's always best for the brand to offer the widest choice within that economic possibility as possible." (Ex. 195 at 21 (paragraph structure omitted); Ex. 192 at 30, 120.) With regard to Peoria, BCBS "would have come to that marketplace wanting all three hospitals in the market because from our standpoint that would have been the best outcome, to have everybody in it." (Ex. 195 at 23; Ex. 192 at 119-20.)**[\*238]**

72. If not for the exclusivity provision in its contract with OSF, BCBS would have contracted with Methodist. (Ex. 192 at 119-20.)

73. BCBS does not generally put restrictive network language into its contracts. BCBS and its customers prefer to have more hospitals within its network, rather than less. (Ex. 197 at 38-39; *see also* Ex. 192 at 30.) Mr. Biedermann could recall only two instances other than OSF in which BCBS agreed to exclusivity language in a contract. (Ex. 197 at 51.) Mr. Arango wrote that OSF hospitals were the only hospitals that BCBS had an exclusive arrangement with in 2008. (Ex. 11.)

74. OSF knew that BCBS wanted Methodist in its PPO. (Ex. 193 at 31.)

75. BCBS preferred to negotiate separately with each hospital in a system, but Mr. Lumpkin felt that OSF tried to leverage its system in their negotiations with BCBS. (Ex. 195 at 27-28.)

**4. History of OSF contracting with BCBS**

76. OSF and BCBS entered into a PPO agreement for SFMC effective for two years starting January 1, 1988. (Ex. 1 at OSF00704394.)

77. Between 2000 and 2013 OSF never made a non-exclusive PPO proposal to BCBS. (Ex. 192 at 166.)

78. In January 2002, the *8th Amendment* to the BCBS PPO Hospital Contract for SFMC was executed,**[\*239]** extending the agreement until December 31, 2003, and amending Exhibit B such that "Exhibit B is amended as follows with Saint Francis Medical Center and Proctor Hospital as hospital providers in Peoria County." (Ex. 39 at OSF00704424.) Former OSF CEO Jim Moore testified that he understood this language to limit BCBS's network such that Methodist was not included. (Ex. 219 at 94-95.) Previously, the contract provided three different rate provisions depending on whether the PPO network included one, two, or all three Peoria hospitals. (Ex. 1 at OSF00704407-09.)

79. The [*9th Amendment*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNK1-NRF4-403M-00000-00&context=) to that contract extended the term to December 31, 2005 and again amended Exhibit B such that "Exhibit B is amended as follows with Saint Francis Medical Center and Proctor Hospital as *the only* hospital providers in Peoria County." (Ex. 1 at OSF00704427 (emphasis added).)

**5. 2005/2006 Negotiations**

80. [TEXT REDACTED BY THE COURT] (Ex. 230 at 149-50; Ex. 26 at OSF00045347 [TEXT REDACTED BY THE COURT].)

81. Because in August 2005 BCBS was considering adding Methodist to its network, OSF's Carol Stever sent Mr. Schoeplein an email, asking: "If BCBS intends to include Methodist in their PPO, then is OSF's position one of termination?**[\*240]** All markets? Peoria only?" Mr. Schoeplein responded "I don't expect them to have Methodist in thje [sic] network." (Ex. 110 at 1.)

82. [TEXT REDACTED BY THE COURT] (Ex. 76 at 1 (Dep. Ex. 515).)

83. [TEXT REDACTED BY THE COURT] (Ex. 76 at 1.)

84. [TEXT REDACTED BY THE COURT] (Ex. 61 at 1-2 (Dep. Ex. 411).)

85. OSF "issued a termination of the contract as part of the negotiation to get that exclusive language in the contract" during the negotiation of the 2006 contract amendment. (Ex. 197 at 93.) In a September 30, 2005 email, BCBS responded to one of OSF's "key concerns," which was whether BCBS offered "an exclusively self-funded PPO product that includes all three hospitals (using the PLAN HOSPITAL CONTRACT, or Commercial Contract) in Peoria." BCBS stated:

. . . Blue Cross does NOT market such a product in the area, and that only on an exception basis, at the express request of a client, would we allow a client to add a hospital that is not in the PPO network to be included. We stated that in such a case (there are three customers that we know of) the client must bear the full difference between the Plan and PPO contract at a material financial cost to the client.

(Ex. 40 at HCSC00001437.)**[\*241]**

86. On October 5, 2005, OSF responded to BCBS that "while we understand and respect your desire to meet the express request of clients for access to additional hospitals, doing so even on an exception basis as you have noted violates the spirit and intent of our contract." (Ex. 133 at OSF00180988 (Dep. Ex. 1222).) OSF agreed with BCBS that it was important to resolve the contract issues quickly, but noted:

We remind you, however, that OSF is an Integrated System which has developed and nurtured organized systems of care between our hospitals and our physicians and physician partners that we believe provides enhanced value across areas of the clinical continuum to the benefit of payors like Blue Cross. As such it is important that the entire System participates in the Blue Cross network. Therefore, separating one OSF hospital from another OSF hospital in contracting discussions in Central Illinois cannot be considered.

(*Id.*) Mr. Lumpkin of BCBS testified with regard to OSF's attempt to negotiate for its entire system at once:

So we're really talking about leverage here and the ability for Blue Cross to be able to provide the largest network at the lowest cost. It wouldn't have been necessarily**[\*242]** achievable to get the lowest cost if we did a system because some of these hospitals are more important than others, must-haves versus not so much.

(Ex. 195 at 48.)

87. In October 2005 Mr. Schoeplein wrote to Mr. Rosenberg: "We are not going to allow them to access our PPO rates for a three hospital contract. Period." (Ex. 111 at 1.) Mr. Rosenberg responds, "I whole heartedly agree." (*Id.*)

88. On November 10, 2005, Carol Stever sent BCBS executives Mr. Lumpkin and Ken Zudycki a proposed PPO contract for SFMC with the following language:

The rates contained herein shall apply so long as Proctor Hospital and Saint Francis Medical Center are the only providers in Peoria County, IL contracted under a Blue Cross Participating Provider Option (PPO) Hospital Contract and shall not be tiered against by any other BCBS product. Blue Cross will not use any provision of a Blue Cross Plan contract intended to provide Covered Services to Covered Persons to reimburse services to a provider organization as if those services were provided on an in-network basis under a PPO or HMO or any other product of any type covered Agreement providing PPO or HMO Covered Services to PPO or HMO Covered Persons, whether**[\*243]** the PPO or HMO Covered Agreement has been offered on an insured or self funded basis in any manner. Further, Blue Cross agrees that during the term of this agreement that it will not offer an HMO benefits plan (whether fully insured or self funded) at a lower rate than it offers a PPO benefits plan (whether fully insured or self funded) with like or similar benefits.

(Ex. 113 at OSF00618364.)

89. [TEXT REDACTED BY THE COURT] (Ex. 134 at 1 (Dep. Ex. 1225).) [TEXT REDACTED BY THE COURT] (*Id.; see also* Ex. 195 at 55.)

90. On November 15, 2005, Mr. Lumpkin emailed Mr. Schoeplein with regard to the November 10 proposed language. (Ex. 112 at 1 (Dep. Ex. 827).) He wrote that "[o]ur corporate position is that we must have the right to Market to our clients all products within the legal parameters of our contracts. The language above appears to restrict the ability of our clients to design and deliver products with providers to serve their needs." (*Id.*) He suggested that OSF's counsel contact BCBS counsel "for further clarification regarding the Blue Cross position on such a restrictive clause for the Blue Cross PPO contract." (*Id.*) Mr. Lumpkin also wrote that the restriction prohibiting HMO rates**[\*244]** below PPO rates "is not a negotiable term for a Blue Cross PPO contract." (*Id.*)

91. [TEXT REDACTED BY THE COURT] (Ex. 62 at 3 (Dep. Ex. 414).)

92. [TEXT REDACTED BY THE COURT] (Ex. 62 at 1.) [TEXT REDACTED BY THE COURT] (*Id.*; Ex. 227 at 156.) [TEXT REDACTED BY THE COURT] (Ex. 227 at 165-66.)

93. On December 5, 2005, BCBS's Mick McCarty wrote to Mr. Lumpkin and other BCBS executives that UHC was buying John Deere Health. (Ex. 88 at 1.) Mr. McCarty wrote that he was concerned that UHC might have all three hospitals in Peoria and stated:

If that is the case, then we need to confront OSF/Kevin with the 2 hospital/3 hospital issue. The good work were [sic] doing in Peoria with the small group pricing and the HMO development is diminished significantly if UHC has the run of the place and Kevin is the one who is in the catbird seat.

(*Id.*) Mr. McCarty wanted BCBS to confront Mr. Schoeplein regarding the restrictive OSF PPO contract, because patients would prefer a UHC network with broader access. (Ex. 196 at 38-40.)

94. Mr. McCarty also wrote that Methodist was working to change its plan contract with BCBS to provide greater discounts in hopes that BCBS would promote them to its self-funded accounts.**[\*245]** (Ex. 196 at 40-42.) Mr. McCarty states, "[s]ince we are committing to OSF/Kevin that we will not do this, it is necessary to let Methodist know of our restrictions. We should not get them to sign this contract based on false expectations." (*Id.*; Ex. 88.) Mr. McCarty testified that BCBS would not promote Methodist because it was not in BCBS networks and BCBS sales employees were instructed not to mention Methodist or support the idea of including it. (Ex. 196 at 42.)

95. In January 2006, OSF and BCBS executed an amendment to the SFMC PPO contract extending the term from January 1, 2006 to December 31, 2008. It provided new language stating:

The rates contained herein shall apply so long as Proctor Hospital and Saint Francis Medical Center are the only Hospitals in Peoria County, Il [sic] contracted under a Blue Cross Participating Hospital Option (PPO) Hospital Contract and shall not be tiered against any other BCBS product. Blue Cross agrees to notify Hospital if Blue Cross allows an employer self funded plan access to Covered Services for Covered Persons under a Plan Hospital Agreement. Further, Blue Cross agrees that during the term of this agreement that it will not offer an HMO benefits**[\*246]** plan (whether fully insured or self funded) at a lower rate than it offers a PPO benefits plan (whether fully insured or self funded) with like or similar benefits.

(Ex. 1 at OSF00704437.)

**6. 2008 Negotiations**

96. Mr. Hamman wrote that negotiations with OSF for the 2009 PPO were "different from our past strategy" because BCBS was focused on "keeping unit costs down while potentially broadening the network," specifically to include Methodist. (Ex. 196 at 187-89, Ex. 94 at HCSC00012857 (Dep. Ex. 598).)

97. In an email discussing contract negotiations with SFMC, Mr. Hamman wrote "[i]deally we'll have Methodist and OSF in the network to set us apart, but in the absence of having both, we'll have the most competitive deal with the preferred hospital in the Peoria market." (Ex. 193 at 118-19; Ex. 107 at HCSC00005744 (Dep. Ex. 811).)

98. Mr. Biedermann testified that in 2008 one option BCBS was considering was canceling SFMC's PPO contract. He stated "[a]s we did more analysis and we saw the market share differences and the service differences, it became less of an option, less desirable." (Ex. 197 at 86-87.)

99. In an August 2007 email, Mr. McCarty discussed the implications of the Humana acquisition of OSF**[\*247]** HealthPlans. (Ex. 89 at HCSC00013105 (Dep. Ex. 577).) He wrote "Humana will receive a long term favored nation contract with OSF. This opens up a can of worms for Kevin/OSF at our next contract negotiations (1/1/2009) perhaps paving the way for Methodist." (*Id.*; Ex. 196 at 49-51.)

100. BCBS was concerned that SFMC may respond to the inclusion of Methodist with a "ransom" demand, which may include higher rates or threats from OSF to terminate its participation in the BCBS PPO. (Ex. 193 at 69-70; Ex. 105 at HCSC00005131 (Dep. Ex. 808).) As Mr. Hamman wrote to BCBS head of national accounts Karen Atwood:

We have hospital contract renewals for 2009 in both Peoria and Rockford that could cause some network "commotion." In Peoria, for example, we may consider adding Methodist Hospital to our PPO network. While this may be very beneficial for our membership in the Peoria area, it would not be well received by St. Francis (OSF) who may demand ransom in return for losing their exclusivity.

(Ex. 105 at HCSC00005131.)

101. In February 2008, BCBS received a request from one of its customers to include Methodist in the PPO. Mr. Hamman responded internally that he was meeting with Methodist for a "relationship"**[\*248]** meeting and stated:

As you may know, allowing Methodist into the PPO network would have significant ramifications on the OSF agreements in their five locations, most notably Peoria, Bloomington, and Rockford. Ramifications include a loss of significant discount percentage and/or loss of their participation in our PPO network (which has been their threat for years with regard to Methodist).

(Ex. 104 at HCSC00004158.)

102. [TEXT REDACTED BY THE COURT] (Ex. 63 at 1 (Dep. Ex. 419).)

103. BCBS executives testified that OSF's proposed rates were too high for an exclusive network. (*See e.g*. Ex. 192 at 69-71; Ex. 197 at 48.)

104. Upon receipt of OSF's response that the proposed rates were for the same hospital network as then existed (*i.e.*, no Methodist), BCBS's Mr. Zudycki requested that OSF provide "a rate scenario with Methodist in the network in Peoria." (Ex. 5 at HCSC00001500.) OSF refused to "submit a non-exclusive proposal." (Ex. 197 at 53; Ex. 78 at OSF00233947.)

105. OSF never sent a non-exclusive proposal in response to Mr. Zudycki's request. (Ex. 197 at 53.)

106. On May 20, 2008, Mr. Biedermann sent Ms. Breeden counterproposals in which the language excluding Methodist would be deleted.**[\*249]** (Ex. 197 at 64-65; Ex. 6 at HCSC00008609-10 (Dep. Ex. 60).)

107. On June 19, 2008, BCBS's Mr. Arango and Mr. Biedermann met with Ms. Breeden and Mr. Rosenberg to discuss the 2009 PPO contract. Of OSF's hospitals, SFMC was the most important hospital to BCBS because of its size and popularity. OSF had told BCBS that SFMC was the most important hospital to them as well. (Ex. 197 at 69-71; Ex. 7 (Dep. Ex. 61); Ex. 192 at 75-77.)

108. [TEXT REDACTED BY THE COURT] (Ex. 192 at 180; Ex. 19 (Dep. Ex. 90); Ex. 197 at 79-82.) [TEXT REDACTED BY THE COURT] (Ex. 233 at ¶¶ 309-10, Fig. 35.)

109. In late July 2008, an Archer Daniels Midland ("ADM") employee emailed BCBS indicating that she had heard from someone in human resources "that Methodist Hospital is restructuring and expanding and they want to talk to the Blues about joining the PPO network. YES YES." (Ex. 94 at HCSC00012858.) She asked "How do we go about starting conversations with Methodist to join the PPO network? Currently OSF and Proctor are part of the PPO network but would be nice to offer more choice for our employees." (*Id.*) Discussing the communication internally, Mr. Hamman wrote:

[O]ur discussions continue with Methodist, OSF, and Rockford**[\*250]** Memorial . . . all of whom will be affected. The challenge is keeping unit costs down while potentially broadening the network . . . different from our past strategy of keeping unit costs down by contracting with only two of the three hospitals in Peoria and Rockford.

(Ex. 94 at HCSC00012857.) ADM was a large national account of BCBS, which today has more than 30,000 employees. (Ex. 196 at 187-88; ADM Homepage, [*http://www.adm.com/en-US/Pages/default.aspx*](http://www.adm.com/en-US/Pages/default.aspx) (last visited Dec. 2, 2015).)

110. On August 6, 2008, Mr. Arango wrote to a BCBS national accounts executive, informing him that BCBS executives had "agreed that on Friday we will verbally press OSF to give up exclusivity in Peoria (perhaps along with the carrot of more $) but will not take any formal action like cancelling the contract — or specifically threatening to do so." (Ex. 192 at 83-86; Ex. 8 (Dep. Ex. 63).)

111. [TEXT REDACTED BY THE COURT] (Ex. 227 at 212; Ex. 64 at OSF00181292 (Dep. Ex. 423).)

112. [TEXT REDACTED BY THE COURT] (Ex. 230 at 100-01; Ex. 21 at 39.)

113. Mr. Arango wrote to Mr Hamman on August 8, 2008, informing him that OSF was refusing to acknowledge that their contract hurt BCBS and "[t]hey clearly stated that they would not accept Methodist or 3 hosps in Rockford."**[\*251]** (Ex. 192 at 89; Ex. 9 at HCSC00005438 (Dep. Ex. 64).)

114. In August and September 2008, OSF and BCBS exchanged proposed PPO agreements, with BCBS asking for a two-year agreement that deleted the previous exclusivity language restricting BCBS from contracting with Methodist. (Ex. 227 at 215-17; Ex. 65 at OSF00234686 (Dep. Ex. 424).) OSF continued to seek exclusivity. (Ex. 10 at HCSC00011100-104 (Dep. Ex. 65); Ex. 66 at 0SF00235747-56 (Dep. Ex. 425); Ex. 122 at HCSC0001329-34.) OSF insisted on resolving the exclusivity issue before addressing the other terms of the proposal. (Ex. 197 at 73; Ex. 122.)

115. On September 26, 2008, BCBS responded to OSF's latest proposal, writing:

Basically, we feel the high level of the current PPO rates does not justify an exclusive arrangement. The OSF hospitals are the only hospitals that BCBS11, has an exclusive arrangement with, yet the rates are much higher than rates for hospitals that do not have an exclusive arrangement. This situation has become exasperated by the high increase in average in atient and out atient er unit avment rates over the last six years thru 2007: [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

(Ex. 11 at HCSC00001426.)**[\*252]**

116. Mr. Biedermann, who drafted the letter, stated that "Blue Cross was willing to provide a bonus payment to OSF in order to get out from under the exclusive language in the contract." (Ex. 197 at 102, 104-05.) He could not recall any other situation in which BCBS offered a bonus payment specifically to remove language from a contract. (*Id.*)

117. BCBS was concerned that OSF was attempting to lock BCBS into a longer term contract that excluded Methodist, wherein BCBS was still trying to figure out a way for a network that included Methodist. (Ex. 196 at 107-10; Ex. 92 at HCSC00010886 (Dep. Ex. 586).)

118. BCBS was unsuccessful in its attempt to add Methodist to its PPO network for January 1, 2009:

We have an exclusive PPO arrangement with OSF for several of their hospitals, including St. Mary's, Galesburg. This language was forced by OSF when they issued termination notices for their hospitals 2 years ago. This exclusive PPO contract language prevents us from adding other hospitals in their markets to the PPO network . . . . We did attempt to have the language deleted this past year, but could not come to agreement.

(Ex. 123 at HCSC00006279 (Dep. Ex. 1065).)

119. BCBS's contracting notes**[\*253]** state that because it was unable to reach an agreement with OSF, the decision was made on October 8, 2009 to allow the contract to roll over for one year, to December 31, 2009. (Ex. 122 at HCSC00001394.)

**7. Interactions with BCBS in 2009**

120. Going into negotiations for the January 1, 2010 PPO contract renewal, [TEXT REDACTED BY THE COURT] (Ex. 197 at 61-62; Ex. 120 at HCSC00000784 (Dep. Ex. 1062)) and that SFMC was 14% more expensive for inpatient and 17% more expensive for outpatient than Methodist in 2008. (Ex. 197 at 111-16; Ex. 124 at HCSC00007286 (Dep. Ex. 1066).)

121. Removing exclusivity and adding Methodist remained a high priority for BCBS. On June 16, 2009, Mr. Hamman emailed Mr. Arango and Mr. Biedermann that he had spoken with BCBS's Rick Allegretti and "[g]iven the choice/goals of 1) improved deal with OSF or 2) add Methodist...he chose #2." (Ex. 16 at HCSC00003668 (Dep. Ex. 83).)

122. On March 4, 2009, BCBS's Rich Rappenecker wrote to Mr. McCarty that BCBS's top priorities for 2009 included: "#! [sic] priority for us are the network issues," specifically listing "OSF hospital discussions" and "Methodist." (Ex. 93 at HCSC00015462 (Dep. Ex. 590); Ex. 194 at 45 ("marketing had always**[\*254]** wanted to be able to put Methodist in the PPO.").)

123. BCBS communicated that desire to OSF. A July 2009 email from Mr. Hamman to OSF's Mr. Schoeplein stated "[w]hile we remain open to a long term agreement, discussions on increasing quality and driving efficiencies in care, our goals also include lower costs and broad access for our members. Changes in the Peoria marketplace over the last year alone support that overwhelming desire." (Ex. 108 at HCSC00013003 (Dep. Ex. 814).) By "broad access," Mr. Hamman was referring to access to additional hospitals and physicians. (Ex. 193 at 128.)

124. [TEXT REDACTED BY THE COURT] (Ex. 22 at 49.)

125. On August 3, 2009, a BCBS account executive asked Mr. Hamman if there had been any headway in getting Methodist into the PPO. Mr. Hamman responded "[n]ot without threatening the OSF agreement. Hopefully we'll have it resolved within a couple weeks." (Ex. 193 at 131-32; Ex. 109 at HCSC00006445 (Dep. Ex. 816).)

126. On August 12, 2009, BCBS proposed an amended PPO contract for SFMC that [TEXT REDACTED BY THE COURT], delete the exclusivity language, and provide that "[t]he rates contained herein shall apply regardless of the number of Hospitals in Peoria County, Illinois**[\*255]** contracted under a Blue Cross Participating Hospital Option (PPO) Hospital Contract." (Ex. 197 at 119-21; Ex. 126 at HCSC00001083 (Dep. Ex. 1068).)

127. OSF responded with a proposed five-year contract for the *entire* system, which included the following language:

Network Composition: The rates set forth have been premised upon the expectation by Hospitals of a certain patient volume as a result of this Agreement generating certain volume to the contracted Hospitals. As such, unless prohibited by law or ***regulation***, the rates set forth in this Agreement shall apply only if all of the following conditions are maintained; **BCBS does not contract with any other Hospital located less than two (2) miles from Saint Francis Medical Center in Peoria, IL**; (ii) BCBS does not contract with more than one other Hospital within seven (7) miles of Saint Anthony Medical Center in Rockford, IL and (iii) BCBS does not contract with any other Hospital within three (3) miles of Saint Mary's Hospital in Galesburg, IL. Additionally, the rates contained herein shall apply under the condition that Hospitals shall not be tiered against by [sic] any other BCBS product. In Peoria, IL, Blue Cross agrees to notify**[\*256]** Hospital if Blue Cross allows an employer self funded plan access to Covered Services for Covered Persons under a Plan Hospital Agreement. Further, Blue Cross agrees that during the term of this agreement that it will not offer an HMO benefits plan (whether fully insured or self funded) at a lower rate than it offers a PPO benefits plan (whether fully insured or self funded) with like or similar benefits.

(Ex. 197 at 121-23; Ex. 12 at HCSC00008826 (emphasis added)). BCBS understood that the only hospital within two miles of SFMC was Methodist. (Ex. 192 at 107.)

128. OSF's subsequent proposals included that same exclusivity language and sought to combine all OSF hospitals into a single contract. (Ex. 192 at 109-111.)

129. [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

(Ex. 79 at 1.)

130. [TEXT REDACTED BY THE COURT] (Ex. 81 at 1 (Dep. Ex. 523).)

131. By early October 2009, OSF had accomplished its objective. [TEXT REDACTED BY THE COURT] (Ex. 28 at OSF00064096 (Dep. Ex. 114).)

132. In November 2009, BCBS and OSF executed an amendment to SFMC's PPO contract extending the term from January 1, 2010 to December 31, 2011, which provided in part:

Network Composition: The rates set forth**[\*257]** have been premised upon the expectation by Hospital of a certain patient volume as a result of this Agreement generating certain volume to the contracted Hospital. As such, unless prohibited by law or ***regulation***, the rates set forth in this Agreement shall apply only if all of the following conditions are maintained: A) **Blue Cross does not contract with any other Hospital located less than two (2) miles from Saint Francis Medical Center**; B) The rates contained herein shall apply under the condition that Hospital shall not be tiered against by [sic] any other Blue Cross product; and C) Blue Cross agrees to notify Hospital if Blue Cross allows an employer self funded plan access to Covered Services for Covered Persons under a Plan Hospital Agreement. Further, Blue Cross agrees that during the term of this agreement that it will not offer an HMO benefits plan (whether fully insured or self funded) at a lower rate than it offers a PPO benefits plan (whether fully insured or self funded) with like or similar benefits.

(Ex. 1 at 53 (emphasis added).)

**8. Interactions with BCBS from 2010 to 2011**

133. [TEXT REDACTED BY THE COURT] (Ex. 82 at 5, 8 (Dep. Ex. 524).)

134. OSF's high rates were again**[\*258]** a concern to BCBS, which wrote internally that according to a consultant's report BCBS had the lower rates everywhere except the markets where OSF had a hospital. (Ex. 192 at 131-34; Ex. 14 at HCSC00007926 (Dep. Ex. 77).)

135. BCBS also again planned to "delete exclusivity language" from its contract with OSF. (Ex. 127 at HCSC00000562 (Dep. Ex. 1071).) BCBS intended to offer a "one time only lump sum payment" in order "[t]o create a package that [OSF] would agree to and that we could live with." (Ex. 197 at 147-48.)

136. BCBS even suggested to Methodist that it consider filing a lawsuit against OSF and/or BCBS in order to force the exclusivity provision to go away. (Ex. 192 at 162-65; Ex. 17 at HCSC00009149 (Dep. Ex. 85); Ex. 18 at HCSC00011473 (Dep. Ex. 86); Ex. 193 at 143.)

137. Mr. Arango later reported to Mr. Hamman about a call with Methodist's attorney in which Mr. Arango explained "OSF antipathy towards Methodist exceeded rationality. I suggested he file suit against us and OSF in the fall." (Ex. 18 at HCSC0001147.) Mr. Arango testified that he told the attorney "why don't you just sue them. And, you know, we would like nothing more than this provision to go away." (Ex. 192 at 165.)**[\*259]**

138. In July 2011, Mr. Biedermann sent Ms. Breeden a draft proposal for a one year PPO for SFMC, which deleted exclusivity. (Ex. 197 at 151; Ex. 15 at HCSC00000545 (Dep. Ex. 78).) Ms. Breeden forwarded the proposal to Mr. Rosenberg, stating "[h]ighlights," the first of which was "[w]ant the entire network composition paragraph to go away (no surprise)." (Ex. 80 at OSF00185944 (Dep. Ex. 522).) Ms. Breeden then sent the proposal to OSF's Bob Sehring, stating that there were "3 key items: Non-exclusive, 1 year, more fixed pricing on OP side." (*Id.*)

139. On August 30, 2011, Ms. Breeden emailed Mr. Arango and Mr. Biedermann a proposed PPO contract for the OSF system. It included exclusivity language providing:

Network Composition: The rates set forth in this Agreement have been premised upon the expectation by Hospitals of generating certain volume to System Hospitals. As such, unless prohibited by law or ***regulation***, the rates set forth in this Agreement shall apply only if all of the following conditions are maintained; BCBS does not contract with any other Hospital located less than two (2) miles from Saint Francis Medical Center in Peoria, IL; (ii) BCBS does not contract with more than one other Hospital**[\*260]** within seven (7) miles of Saint Anthony Medical Center in Rockford, IL (iii) BCBS does not contract with any other Hospital within three (3) miles of Saint Mary's Hospital in Galesburg, IL. Additionally, the rates contained herein shall apply under the condition that Hospitals shall not be tiered against by [sic] any other BCBS product. In Peoria, IL, Blue Cross agrees to notify Hospital if Blue Cross allows an employer self funded plan access to Covered Services for Covered Persons under a Plan Hospital Agreement. Further, Blue Cross agrees that during the term of this agreement that it will not offer any HMO benefits plan (whether fully insured or self funded) at a lower rate than it offers a PPO benefits plan (whether fully insured or self funded) with like or similar benefits.

(Ex. 128 at OSF00298916 (Dep. Ex. 1072).)

**9. Interactions with BCBS in 2012**

140. When OSF's Rockford hospital was attempting to merge with another Rockford hospital in 2012, BCBS hoped that a benefit of the merger would be that it would have the ability to bring Methodist into the PPO network. Mr. Arango testified that if OSF asked for its new Rockford hospital to be in the PPO network, BCBS could say yes if**[\*261]** OSF "in turn, waived [its] language which precluded us from contracting with Methodist Hospital in the Peoria market." (Ex. 192 at 20, 28-30; Ex. 4 at 102 (Dep. Ex. 54).)

141. In April 2012, BCBS again proposed terms for the BCBS PPO and plan contracts that eliminated the exclusivity that prohibited BCBS from contracting with Methodist. (Ex. 83 at 1 (Dep. Ex. 525).)

142. [TEXT REDACTED BY THE COURT] (Ex. 230 at 231; Ex. 30 at OSF00041029 (Dep. Ex. 121).) (Ex. 98 at 1 (Dep. Ex. 709).)

143. [TEXT REDACTED BY THE COURT] (Ex. 223 at 312-14; Ex. 98 at 1.)

**10. BCBS interactions with Methodist**

144. On more than one occasion, Mr. McCarty and Mr. Rappenecker told Methodist executives Tony Schierbeck and Rob Quin, that at times when Methodist was close to negotiating a contract with BCBS, OSF had threatened to terminate their contracts with BCBS if Methodist were added to the PPO network. (Ex. 196 at 162-65; Ex. 209 at 74-75, 80; Ex. 206 at 178-79, 183-84.)

145. Former Methodist CEO Michael Bryant testified that he was told by Mr. Hamman, Mr. McCarty, and Mr. Rappenecker "that OSF was extremely resistant and would threaten to pull out their entire network if they brought Methodist in." (Ex. 208 at**[\*262]** 73-75.) This was a common topic of discussion with BCBS over the years. (*Id.* at 77.) Mr. Bryant found the threat credible and believable. (*Id.* at 75-76.)

146. There were customers in the Peoria market who preferred Methodist and as a consequence BCBS wanted Methodist in the PPO network. (Ex. 196 at 59-60; Ex. 194 at 55-56.)

147. Mr. Quin testified that he attended a 2008 meeting during which BCBS asked if Methodist could handle all the volume if SFMC were to pull out of the PPO in reaction to Methodist joining, which BCBS indicated was a possibility. (Ex. 209 at 82; Ex. 115 (Dep. Ex. 908).) Methodist responded that it would work to handle all of the BCBS volume. (*Id.*) Mr. Hamman testified that the ultimate decision to include Methodist would have required a number of BCBS executives "because of the impact and potential for disruption that may occur either in the construct of the network or in the premium rates that would result from a change in that market." (Ex. 193 at 90-91.) The potential impact would extend to all of OSF's markets. (*Id.* at 91.)

148. In May 2010, Paul Gaeto of CAT wrote to Mr. Bryant that he had spoken with Ms. Atwood at BCBS. He stated:

I explained to her what Cat was doing with our network in**[\*263]** Peoria and why we believed an open, competitive market was better for the community. She understood our philosophy and agreed with it. She said OSF does have an exclusivity provision in their contract with BCBS and that it is a requirement for doing business with them.

(Ex. 132 at Methodist00044125 (Dep. Ex. 1117).) Mr. Bryant forwarded the email to other Methodist executives, commenting that "[a]s big as BCBS is, this email says they are afraid to challenge OSF . . . still amazes me." (*Id.*)

149. On July 26, 2011, Mr. Schierbeck spoke with Mr. Rappenecker regarding Methodist joining the BCBS PPO network. Mr. Schierbeck's note stated that Mr. Rappenecker "said we will probably not get in the PPO because of the market dynamics in Rockford and Bloomington. . . . cannot afford to disrupt those markets if OSF were to pull out of the network." (Ex. 194 at 77; Ex. 135 at Methodist00052649.)

150. On March 13, 2012, Mr. Schierbeck emailed BCBS's Terry Shook. He wrote "Terry, next Monday Debbie Simon and Bill Leaver are meeting with Steve Hamman. Can Debbie discuss the PPO and Methodist willingness to take full risk on that product if the hospital was also provider in January of 2013?" (Ex. 87 at Methodist00319727**[\*264]** (Dep. Ex. 544).) Mr. Shook does not recall if he responded. (Ex. 198 at 64-65.)

151. Mr. Quin testified that Methodist had informed BCBS that they would consider any proposal BCBS made, but BCBS never made any proposal including a full-risk proposal. He testified "[m]y recollection, it gets to the part where they ask OSF if Methodist can join, be part of the network. And then OSF says no, and the conversations stop." (Ex. 209 at 90-91.)

152. In May 2012, Mr. Shook told Mr. Schierbeck that BCBS was interested in creating a narrow-network PPO with Methodist in which Methodist would accept all the risk. (Ex. 116 at Methodist00052602 (Dep. Ex. 912).) BCBS wanted the product to be 15 to 20 percent less expensive than its current PPO. (*Id.*) Mr. Quin testified that BCBS never offered a formal proposal for this product. (Ex. 209 at 100-04.)

**11. BCBS HMO product**

153. During the time that OSF owned OSF HealthPlans, it was not interested in joining the BCBS HMO because it was a competing product. (Ex. 197 at 41-43; Ex. 119 at HCSC00006365; Ex. 227 at 322.)

**F. Caterpillar**

154. CAT is by far the largest employer in the Tri-County Area. (County of Peoria, Illinois, "Comprehensive Annual Financial Report,**[\*265]** Year Ended December 31, 2012," [*http://www.peoriacounty.org/download/?path=%2Ffinance%2FBudget+and+Financial+Information%2FAnnual\_Financial\_Reports%2F2012CAFR.pdf*](http://www.peoriacounty.org/download/?path=%2Ffinance%2FBudget+and+Financial+Information%2FAnnual_Financial_Reports%2F2012CAFR.pdf) at 146, (last visited Dec. 2, 2015).)

155. [TEXT REDACTED BY THE COURT] (Ex. 199 at 90-91; Ex. 149 at 2 (Dep. Ex. 1360); Ex. 200 at 28-29; Ex. 226 at 48-49.) (Ex. 199 at 90-91; Ex. 149 at 2.)

156. SFMC's Chief Operating Officer Susan Wozniak attributed SFMC's "market share advantage" (including a greater than 50% market share in Peoria), to SFMC's exclusive PPO contract with CAT. (Ex. 226 at 56-59; Ex. 96 (Dep. Ex. 600).)

157. [TEXT REDACTED BY THE COURT] (Ex. 200 at 22-25, 56-57; Ex. 155 at 17 (Dep. Ex. 1384); Ex. 149 at 3-4, 8-10.)

158. [TEXT REDACTED BY THE COURT] (Ex. 200 at 24-25, 57.) (Ex. 149 at 3.)

159. [TEXT REDACTED BY THE COURT] (Ex. 200 at 136.)

**1. CAT had concerns with SFMC's high cost, low quality, and lack of transparency**

160. In April 2008, OSF's Ms. Breeden documented that CAT had specifically complained that "OSF cannot report quality" and that "[w]e [at CAT] have had problems with OSF that we haven't had with any other hospitals." (Ex. 47 at 3-4 (Dep. Ex. 298).) That memorandum states that CAT employees were unhappy with the exclusive PPO arrangement with SFMC and that "we [CAT] need employee choice." (*Id.* at 3.)

161. [TEXT REDACTED BY THE COURT] (Ex.**[\*266]** 75 (Dep. Ex. 514).) (*Id.*)

162. [TEXT REDACTED BY THE COURT] (Ex. 154.) (*Id.*)

163. (Ex. 153 at 2 (Dep. Ex. 1380); Ex. 154.)

**2. OSF attempted to block CAT's decision to open up its networks**

164. [TEXT REDACTED BY THE COURT] (Ex. 32 at 1-2 (Dep. Ex. 135).) (*Id.*)

165. OSF's Mr. Sehring, drafted correspondence threatening CAT with the loss of tertiary and quaternary services offered only at SFMC: "Absent OSF' [sic] participation in the HMO offering, Caterpillar and HAMP will be faced with either acquiring many of these services locally at billed charges or the disruption of attempting to move patients far from their home location for treatment." (Ex. 97 (Dep. Ex. 706).) [TEXT REDACTED BY THE COURT] (Ex. 199 at 79-81; Ex. 147 at 3 (Dep. Ex. 1357).)

166. [TEXT REDACTED BY THE COURT] (Ex. 200 at 115-16.) (*Id.* at 46-47.)

167. [TEXT REDACTED BY THE COURT] (Ex. 97; Ex. 152 at 4 (Dep. Ex. 1376).)

168. [TEXT REDACTED BY THE COURT] (Ex. 22 at 49; Ex. 150 (Dep. Ex. 1361).)

169. [TEXT REDACTED BY THE COURT] (Ex. 151 (Dep. Ex. 1367).)

170. [TEXT REDACTED BY THE COURT] (Ex. 156.)

**G. Humana**

**1. Events preceding Humana's acquisition of OSF HealthPlans**

171. [TEXT REDACTED BY THE COURT] (Ex. 165 (Dep. Ex. 1582).) Prior to Humana's**[\*267]** acquisition of OSF HealthPlans, Methodist and Proctor were in network for Humana. (Ex. 203 at 16; Ex. 204 at 20, 22.)

172. [TEXT REDACTED BY THE COURT] (Ex. 204 at 159.)

**2. Negotiations regarding network construction between OSF and Humana**

173. [TEXT REDACTED BY THE COURT] (Ex. 204 at 31.) Humana pursued the contract with OSF with the expectation and intention that it would have all three hospitals—Methodist, SFMC, and Proctor—in its network. (Ex. 203 at 22.)

174. [TEXT REDACTED BY THE COURT] (Ex. 204 at 40; Ex. 161 (Dep. Ex. 1578); Ex. 162 (Dep. Ex. 1579).)

175. [TEXT REDACTED BY THE COURT] (Ex. 204 at 49-51; Ex. 164.)

176. [TEXT REDACTED BY THE COURT] (Ex. 204 at 47; Ex. 163 (Dep. Ex. 1580).)

177. [TEXT REDACTED BY THE COURT] (Ex. 204 at 51, 61, 179-80.) (Ex. 204 at 179-81.)

178. [TEXT REDACTED BY THE COURT] (Ex. 204 at 43-44.) Humana's goal was to expand its network and to have every provider available. (Ex. 203 at 62; Ex. 204 at 43-45.)

179. [TEXT REDACTED BY THE COURT] (Ex. 204 at 87.)

**3. An open network was a deal breaker for OSF**

180. [TEXT REDACTED BY THE COURT] (Ex. 204 at 57.)

181. Mr. Petzold requested OSF's position on what the rate would be for a temporarily broad network that included**[\*268]** Methodist. (Ex. 67 (Dep. Ex. 432).) OSF never responded. (Ex. 204 at 70-72, 107-08.)

182. On February 8, 2008, Mr. Schoeplein wrote to Jim Murray, COO of Humana, setting out OSF's "final offer" with regard to the acquisition. The offer required Humana to agree to "maintain the same OSF HealthPlans network construct in those cities where OSF has hospital facilities," with a narrow exception for the Bloomington, Illinois market. (Ex. 167 (Dep. Ex. 1593).)

183. On February 21, 2008, Ms. Breeden sent Mr. Petzold a draft of "Attachment A-1" to the contract between OSF and Humana regarding network construction. In the Peoria market, OSF required that Humana "submit term notice to Methodist after close of transaction" and agree "to no further marketing of the current network." SFMC and Proctor were to be the only two providers in Humana's Peoria network for Humana products. (Ex. 168 (Dep. Ex. 1594).)

184. Upon review of the draft of "Attachment A-1" pertaining to network construction, OSF's managed care consultant was "still concerned that specifically naming the counties may put the System at risk if the contract was ever subject to discovery." (Ex. 68 (Dep. Ex. 435).)

**4. The final provider [\*269]  agreement between Humana and OSF excluded Methodist**

185. [TEXT REDACTED BY THE COURT] (Ex. 203 at 29; Ex. 35 at 18 (Dep. Ex. 178).)

186. [TEXT REDACTED BY THE COURT] (Ex. 35 at 20.)

187. Methodist became out-of-network for Humana's products after December 31, 2008. (Ex. 184 (Methodist00185551-552).)

**5. Subsequent negotiations between Humana and OSF**

188. [TEXT REDACTED BY THE COURT] (Ex. 203 at 68-71.)

189. [TEXT REDACTED BY THE COURT] . (Ex. 203 at 67-68; Ex. 204 at 139-41; Ex. 74 (Dep. Ex. 512).)

190. [TEXT REDACTED BY THE COURT] (Ex. 204 at 143; Ex. 169 (Dep. Ex. 1599).)

**H. HAMP**

191. [TEXT REDACTED BY THE COURT] (Ex. 202 at 31-32; Ex. 136 at 32 (Dep. Ex. 1239).)

192. [TEXT REDACTED BY THE COURT] (Ex. 202 at 40-41; Ex. 136 at 32.)

193. [TEXT REDACTED BY THE COURT] (Ex. 202 at 35, 57-59; Ex. 136 at 32.)

194. In an August 26, 2008 internal BCBS email Mr. McCarty stated, "OSF had told Health Alliance that [HAMP] must contract with OSF for all products or OSF would terminate the tertiary care contract that they do have with [HAMP] (e.g. NICU)." (Ex. 91 (Dep. Ex. 583).)

**1. OSF's acquisition of Carle Clinic in Bloomington, Illinois**

195. [TEXT REDACTED BY THE COURT] (Ex. 175 at HAMP 0044932, 44943; Ex.**[\*270]** 176; Ex. 177.)

196. [TEXT REDACTED BY THE COURT] (Ex. 202 at 96.) Around that time, HAMP, which is owned by the Carle Foundation, agreed to enter an exclusive provider agreement with OSF. (Ex. 42 (Dep. Ex. 230).)

197. The idea of aligning OSF with the Carle Clinic in Bloomington arose from the fact that OSF's position was moving away from OSF HealthPlans and towards finding another carrier with access to patients, such as HAMP. Acquisition of the Carle Clinic physician group presented an "opportunity to create a system wide provider contract with HAMP that is semi exclusive." Physician alignment and getting in with HAMP were two of the primary goals for OSF in acquiring the Carle Clinic. (Ex. 224 at 214 (G. McShane Dep.); Ex. 34 (Dep. Ex. 150).)

198. Mr. Quin, Mr. Schierbeck and Mr. Bryant met with Jeff Ingrum, President of HAMP, to discuss the fact that OSF had purchased the Carle Clinic in Bloomington. The affiliation of those Carle physicians with OSF Medical Group meant that they would not be in network for HAMP unless HAMP reached an agreement with OSF. (Ex. 209 at 177-79.)

199. [TEXT REDACTED BY THE COURT] (Ex. 202 at 51-52.)

200. [TEXT REDACTED BY THE COURT] (Ex. 224 at 198; Ex.**[\*271]** 179 (HAMP 0066050).)

**2. Methodist's exclusion from HAMP's network**

201. Mr. Ingrum told Methodist that HAMP approached OSF about including the Carle Clinic physicians in their network. OSF told HAMP that in order for the Carle Clinic physicians to be included in the HAMP network, HAMP would need to sign a system contract with OSF and terminate its agreement with Methodist. (Ex. 209 at 177-78.)

202. HAMP had been told by OSF that it could not contract with Methodist or it would pull its entire network out. (Ex. 213 at 167.)

203. [TEXT REDACTED BY THE COURT] (Ex. 174 (HAMP 0019444).)

204. [TEXT REDACTED BY THE COURT] (Ex. 199 at 124-26.)

205. After OSF's acquisition of the Carle Clinic physician group, HAMP terminated its Methodist contracts. (Ex. 42 at 5, 6.)

206. HAMP did not decide to exclude Methodist from its network. (Ex. 209 at 178.) [TEXT REDACTED BY THE COURT] (Ex. 202 at 97.) OSF preferred to "have sole access to the Health Alliance product" in Bloomington and elsewhere, including Peoria. (Ex. 219 at 76.)

207. [TEXT REDACTED BY THE COURT] (Ex. 222 at 80-81), (Ex. 42 at 5-6, 20-26; Ex. 137 (Dep. Ex. 1252).)

**3. 2009 provider agreement between HAMP and OSF**

208. [TEXT REDACTED BY THE COURT]**[\*272]** (Ex. 172 (HAMP 0002811); Ex. 180 (HAMP 0125865).)

209. The Letter of Intent between OSF and HAMP, executed on March 17, 2009, required as part of its terms that "for new and renewing ASO clients, Health Alliance will initially offer only the Health Alliance/OSF Provider Network," which excludes Methodist. It further states that "Health Alliance will not offer a dual option product of OSF and non-OSF networks to any employer." (Ex. 41 at 2 (Dep. Ex. 229).)

210. [TEXT REDACTED BY THE COURT] (Ex. 178 (HAMP 0056473).)

211. [TEXT REDACTED BY THE COURT] (Ex. 73 (Dep. Ex. 506).)

212. Ultimately, in July 2009 HAMP and OSF entered into a five-year provider agreement for hospital services. Both sections 4.5 and 4.6 of the provider agreement memorialize OSF's proposed restrictive network language. (Ex. 42 at 5, 6.)

213. Section 4.5 of the executed HAMP hospital provider agreement states that "unless prohibited by law or ***regulation***, the rates set forth in this Agreement shall apply only if all of the following conditions are maintained; (i) Health Alliance does not contract with any other hospital located less than two (2) miles from Saint Francis Medical Center in Peoria, IL." (Ex. 42 at 5, 6.) [TEXT REDACTED BY THE COURT]**[\*273]** (Ex. 72 (Dep. Ex. 505).)

214. Section 4.6 of the HAMP Hospital Provider Agreement reads, "Health Alliance and Hospital agrees that for new and renewing ASO clients in the counties of Peoria, Tazewell, Woodford, Fulton, Warren, and Knox, Health Alliance will present to their clients only the Health Alliance/OSF Provider Network." (Ex. 42 at 6.)

215. [TEXT REDACTED BY THE COURT] (Ex. 234 at ¶ 102.) (Ex. 234 at Fig. 5.)

**I. AETNA**

216. Methodist had a long-standing relationship with Aetna dating back to their first contract effective January 1, 1987. That contract with Methodist included Proctor. (Ex. 183 (Methodist00029349-350).)

217. [TEXT REDACTED BY THE COURT] (Ex. 191 at 24-26.) (*Id.* at 26.)

218. [TEXT REDACTED BY THE COURT] (Ex. 191 at 21.) (*Id.* at 22-23.) (*Id.* at 22-24.)

219. [TEXT REDACTED BY THE COURT] (Ex. 191 at 24-26, 38-39; Ex. 139.)

220. [TEXT REDACTED BY THE COURT] (Ex. 191 at 38-39; Ex. 139.) (Ex. 222 at 92-93.)

221. [TEXT REDACTED BY THE COURT] (Ex. 191 at 41-43: Ex. 140 at 12 (Dep. Ex. 1306))

222. [TEXT REDACTED BY THE COURT] (Ex. 191 at 43--55; Ex. 141 (Dep. Ex. 1307).) [TEXT REDACTED BY THE COURT] (Ex. 191 at 44-45.)

223. [TEXT REDACTED BY THE COURT] (Ex. 191 at 46; Ex. 141.)

224. [TEXT REDACTED BY THE COURT] (Ex. 191 at 121.)

225. Ms. Breeden sent a letter to Aetna**[\*274]** on February 16, 2009 which stated, "I have completed review of both the Hospital Participation Agreement between Aetna and OSF Healthcare System. . . .Please find enclosed a redlined version of both documents." [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT] (Ex. 191 at 50-52; Ex. 142 at 0SF00246552, 246565 (Dep. Ex. 1309))

226. On July 8, 2009, Mr. Moore, former CEO of OSF, executed the agreement between OSF and Aetna, which became effective on September 1, 2009. Section 9.8 of the final Hospital Participation Agreement states:

The reimbursement negotiated in this Agreement has been premised upon the expectation by the contracted Hospitals of a certain patient volume as a result of this Agreement generating certain volume to the contracted Hospitals. As such, unless prohibited by law or ***regulation***, the rates set forth in this Agreement shall apply only if all of the following conditions are maintained; (i) within 120 days of the effective date of this Agreement, Company does not contract with any other Hospital located less than two (2) miles from Saint Francis Medical Center in Peoria, IL and that during this 120 day time period any hospital located less than**[\*275]** the two (2) mile [sic] will not be marketed to any Aetna new or renewal client.

(Ex. 191 at 58-60; Ex. 143 at 12-13 (Dep. Ex. 1311).)

227. [TEXT REDACTED BY THE COURT] (Ex. 191 at 80, 97-98.)

228. On July 17, 2009, Aetna's Suzanne Hall sent Ms. Breeden an email with the subject, "Internal Notices of Termination." Ms. Hall wrote, "The notices have been released internally. Below is an extract from the Methodist document." The excerpt stated:

Effective 01/01/2010, Methodist Medical Center of Illinois located in Peoria IL will terminate from the Northern IL Aetna network. Aetna has recently contracted with OSF Health System. Due to Aetna's exclusivity requirements with OSF Health System, we are required to terminate our contract with Methodist Medical Center of Illinois. OSF Health System has provided Aetna with a transition period which allows Methodist to remain in the network until 01/01/2010; however Methodist Medical Center should no longer be marketed to customers.

(Ex. 191 at 60-61; Ex. 71 (Dep. Ex. 503) (paragraph structure omitted).)

229. In a July 18, 2009 letter to Methodist's CEO, Mr. Bryant, Ms. Hall issued its termination notice to Methodist, writing:

Pursuant to Section 4c Term and Termination of the Hospital Provider Agreement and Amendments between Provider**[\*276]** Resource Management and Aetna Health Management, Inc. and The Methodist Medical Center of Illinois, this notice services to provide official notice of termination without cause of the above referenced agreements effective January 1, 2010.

(Ex. 191 at 61-62; Ex. 144 (Dep. Ex. 1312).)

230. [TEXT REDACTED BY THE COURT] (Ex. 145 (Dep. Ex. 1313).)

231. [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

(Ex. 191 at 83-85; Ex. 146 (Dep. Ex. 1317) (paragraph structure omitted).)

232. [TEXT REDACTED BY THE COURT] (Ex. 191 at 114-16; Ex. 241 (Dep. Ex. 1326).) [TEXT REDACTED BY THE COURT] (Ex. 231 at 190-91 (R. Willig Dep).)

**J. Other Payors**

233. OSF was "pleased" to secure an exclusive contract with United Healthcare (UHC) effective January 1, 2006, Paragraph 3.7 of which provided:

**Network Composition**. In consideration for Facility's agreement to provide Covered Services at the contract rates provided in the All Payer Appendix attached hereto, United agrees that during the term of this Agreement, United will not contract for the provision of Covered Services under this agreement (except with respect to those Covered Services not provided by Facility) with any other hospital located within two (2)**[\*277]** miles of Saint Francis Medical Center. Further, United will not contract with any independent ambulatory surgical center that is newly established after January 1, 2006 in Peoria.

(Ex. 114 at OSF00047631 (Dep. Ex. 829); Ex. 158 (Dep. Ex. 1530).)

234. In February 2006, UHC acquired John Deere Healthcare. UHC had a contract with OSF and John Deere Healthcare had a contract with Methodist. After the acquisition, UHC offered two networks in Peoria, one with Methodist (the legacy John Deere network that United called Heritage or United Healthcare of the River Valley) and one with SFMC. It was UHC's goal to create a combined network that included both hospitals. (Ex. 232 at 9-10, 79-81.)

235. UHC requested rates for at least one product with an open network. (Ex. 159 (Dep. Ex. 1531).) OSF refused to provide such rates and sent correspondence to UHC intended "to end the conversation about network instruction [sic]." (Ex. 227 at 288-90; Ex. 232 at 84-86; Ex. 160 (Dep. Ex. 1532).)

236. OSF and UHC did not come to agreement and ultimately did not reach a contract because UHC could not agree to OSF's network excluding Methodist in Peoria. (Ex. 227 at 303.)

237. In considering whether OSF would contract**[\*278]** to keep its Bloomington and Pontiac hospitals in UHC's network, Ms. Breeden responded "I believe we should not have any OSF providers contract with UHC at this time. . . . The message needs to be clear to them, especially in these next few days, that OSF negotiates as a System. That is a strong message." (Ex. 69 (Dep. Ex. 441).)

238. In 2010, UHC was able to lock in Methodist for four years "at extremely competitive non-exclusive rates." (Ex. 189 (United-13-cv-1054-009010).)

239. As of January 1, 2015, OSF joined UHC's network. Methodist did not change its rates in response. (Ex. 215 at 63-67.)

240. [TEXT REDACTED BY THE COURT] (Ex. 190 at 104-05.) (*Id.* at 105-07.)

**K. Barriers to Entry**

241. SFMC concedes that entry barriers are high in the hospital industry. Its March 28, 2013 Answer and Affirmative Defense provides:

31. The capital costs to construct a new hospital are substantial. A hospital that would compete with Saint Francis in terms of service offerings would require an initial outlay of $250 million or higher. This would entail a significant risk to investors.

ANSWER: Admitted that the capital costs to construct a new hospital that would compete with St. Francis or Methodist across all their respective**[\*279]** service offerings would require a substantial outlay....

(Answer ¶ 31.)

242. Building a new hospital requires years of planning and ***regulatory*** approval. Under the Illinois Health Facilities Planning Act, infrastructure expansion and capital expenditures in excess of $12.5 million by a hospital require review by the Illinois Health Facilities and Services Review Board ("HFSRB") and issuance of a Certificate of Need Permit. ([*20 ILCS 3960*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C65-YT41-6YS3-D0GD-00000-00&context=); Illinois Health Facilities and Services Review Board, "Certificate of Need Program," [*http://www.hfsrb.illinois.gov/conprocess.htm*](http://www.hfsrb.illinois.gov/conprocess.htm) ; Ex. 233 at ¶ 398.)

243. The HFSRB is essentially a "Certificate of Need" (CON) board that has the effect of delaying and sometimes precluding entry. As the DOJ and FTC concluded in their comprehensive 2004 report:

The Agencies believe that CON programs can pose serious competitive concerns that generally outweigh CON programs' purported economic benefits. Where CON programs are intended to control health care costs, there is considerable evidence that they can actually drive up prices by fostering anticompetitive barriers to entry.

(Ex. 233 at ¶ 398.)

244. Even if HFSRB approval is obtained, there is still the time and expense of constructing a hospital. [TEXT REDACTED BY THE COURT]**[\*280]** (Ex. 233 at ¶ 399.)

245. Methodist does not have an ambulatory surgical center ("ASC"). (Ex. 208 at 71.) In 2011, creation of an ambulatory surgical center was one of four items that Methodist estimated would require a $175 million investment. (Ex. 103 at 3 (Dep. Ex. 793).) Creation of a new ASC would require CON approval by state ***regulators***. (Ex. 226 at 192-93.)

246. The exclusion of Methodist from BCBS's PPO presents a barrier for referrals to Methodist. (Ex. 130 at 4 (Dep. Ex. 1103).)

**L. SFMC's Additional Anticompetitive Conduct**

247. In a July 30, 2009 email, SFMC CEO Keith Steffen emailed a distribution list of SFMC employees and stated "I can share one bit of really good news. The OSF Healthcare System negotiated an exclusive managed care contract with Aetna. So Aetna joins HAMP, BC/BS and Human as exclusive providers of healthcare in this region. Not too many payers left out there—United HC and Personal Care????" Mr. Steffen testified that he believed that these were the major payors. (Ex. 225 at 137-38; Ex. 49 (Dep. Ex. 302).)

**1. Children's Hospital of Illinois**

248. SFMC leveraged the Children's Hospital of Illinois ("CHOI")—and the unique services provided there—in negotiations with**[\*281]** payors to control the marketplace. This conduct harmed Peoria residents by denying many children residents affordable local care for high level pediatric needs. (Ex. 201 at 102-03 (T. Walker Dep. (Fed. Warehouse Co.)); Ex. 56 (Dep. Ex. 327); Ex. 118 (Dep. Ex. 993).)

249. In January 2007, SFMC Chief Operating Officer Ms. Wozniak wrote that she had talked to then Methodist Chief Operating Officer Debbie Simon and that Ms. Simon had asked about giving Methodist employees and managed care contracts a discount at CHOI. Ms. Wozniak wrote "[s]he said that she was being pressured to gear up pediatric services to compete with the children's hospital. . . . It sounds like they are having some problems with their managed care sales maybe. Ha Ha." Mr. Steffen responded:

Hey, allowing MMC to use our CHOI in managed care contracts will NEVER happen. That would be so foolish on our part. Part of the competition strategy on both sides is market niche. That's one service that [sic] 'ain't' got. And I love it when I hear that our competition is spending money in places like this (CHOI) but still can't compete.

(Ex. 118.)

250. [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

(Ex. 220 at 112; Ex. 43 (Dep.**[\*282]** Ex. 252).)

251. [TEXT REDACTED BY THE COURT] (Ex. 199 at 72, 79-81; Ex. 147 at 3.)

252. September 2, 2008 minutes from an OSF Senior Vice Presidents Meeting report that "Mary Breeden said that an aggressive ad would soon appear in the *Journal Star* for St. Francis Medical Center/CHOI. The ad urges people to ask if they can use CHOI as their child's provider when they get new insurance." (Ex. 221 at 58; Ex. 99 at 3 (Dep. Ex. 733).)

253. In the late Summer of 2008, SFMC ran advertisements promoting CHOI and urging patients to select insurance providers who had CHOI in network. One ad featured the face of a child and the following text:

**You're a short drive away from the only full service children's hospital in downstate Illinois**.

**But will your health insurance get you there**?

Year after year, Children's Hospital of Illinois cares for thousands of kids. From asthma and hernia surgery to trauma or heart surgery, we have the specialty care you need. Not hours away. Right here in central Illinois.

We're the only full service children's hospital in Illinois outside of Chicago. And the only Children's Hospital in town. What does that mean?

It means we are the only area hospital with a pediatric intensive**[\*283]** care. And the only one with pediatric trauma, anesthesia and radiology. It means we have more than 80 pediatric specialty physicians who only care for kids. And they send their patients to Children's hospital of Illinois.

Shouldn't you choose a health insurance plan that does the same?

(Ex. 225 at 243; Ex. 55 (Dep. Ex. 325).)

254. [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

(Ex. 225 at 248; Ex. 56 (third and fifth ellipses in original))

**M. Competitive Harm**

**1. SFMC's prices are higher than Methodist's despite use of exclusive contracts**

255. [TEXT REDACTED BY THE COURT] (Ex. 233 at ¶ 210, Fig. 25.)

256. [TEXT REDACTED BY THE COURT] (Ex. 233 at ¶ 210, Fig. 25.)

257. [TEXT REDACTED BY THE COURT] (Ex. 233 at ¶ 208, Fig. 24.)

258. [TEXT REDACTED BY THE COURT] (Ex. 233 at ¶ 210, Fig. 25.)

259. [TEXT REDACTED BY THE COURT] (Ex. 234 at ¶ 436, Fig. 40.)

**2. SFMC's casemix-adjusted prices are higher than other Illinois teaching hospitals'**

260. [TEXT REDACTED BY THE COURT] (Ex. 234 at ¶ 272.)

261. [TEXT REDACTED BY THE COURT] (Ex. 234 at ¶ 272; *see also Id.* at Fig. 25 ( .).)

**3. Payors recognized [\*284]  that SFMC charged high prices**

262. Using a standard comparison program to calculate rate differences between Methodist and SFMC, Mr. Biedermann and other BCBS employees concluded that SFMC was 14% more expensive for inpatient and 17% more expensive for outpatient in 2008 than Methodist. (Ex. 197 at 111-16; Ex. 124; Ex. 125 (Dep. Ex. 1067).)

263. BCBS was paying SFMC "much more" than it was paying Proctor due to the relative popularity of SFMC in the marketplace which translates into bargaining power on the part of the hospital. (Ex. 192 at 135-36.)

264. In a September 26, 2008 letter to Ms. Breeden, Mr. Arango stated that BCBS feels that the "high level of the current PPO rates does not justify an exclusive arrangement." In fact, the "OSF hospitals are the only hospitals that BCBSIL has an exclusive arrangement with, yet the rates are much higher than rates for hospitals that do not have an exclusive arrangement." [TEXT REDACTED BY THE COURT] (Ex. 11 at HCSC00001426.)

**4. SFMC's higher prices are not justified by providing higher quality care than Methodist**

265. SFMC has not outperformed Methodist on quality scores. In addition, payors have not and do not view SFMC's quality as better than**[\*285]** Methodist. (Ex. 233 at ¶¶ 240-256.)

266. Methodist outperforms SFMC on government measures of patient satisfaction. For a metric measuring percentage of patients who rated each hospital a 9 or 10, Methodist did better than SFMC from 2010-2012 and the two hospitals tied in 2013. From 2010 to 2013, a higher percentage of patients indicated that they would "definitely recommend" Methodist than SFMC. Patient satisfaction at SFMC is no higher, and in some years is lower, than at Methodist. (Ex. 233 at ¶¶ 228-230, Figs. 26-27.)

267. On government measurements of hospital rates of mortality, readmission, and surgical complications, SFMC performed worse than the national benchmark on seven of nineteen categories (including "Hospital-wide rate of readmission after discharge," "Accidental puncture or laceration," and "Serious blood clots after surgery") and similarly to the national benchmark on the others from 2010 to 2013. Methodist performed similarly to the national benchmark in all categories during the same time period. (Ex. 233 at ¶¶ 231-233, Fig. 28.)

268. SFMC ranked 3,126th nationally for overall hospital care and Methodist ranked 145th in the Delta Group, Inc.'s 2010 National Scorecard**[\*286]** which shows detailed quality rating and scores of all hospitals. Methodist's score placed it above the 90th percentile of all hospitals while SFMC's score placed it between the 11th and 25th percentile. Of six broad categories measured in the Scorecard, Methodist scored better than SFMC on five (mortality, complications, inpatient quality, patient safety, and patient satisfaction) and tied SFMC on the sixth. (Ex. 51 at 1 (Dep. Ex. 313).)

**5. A shift in volume from higher-priced SFMC to lower-priced Methodist would result in significant savings for consumers**

269. From February 2009 through the end of 2016, a shift in volume from the higher-priced SFMC to the lower-priced Methodist without SFMC's exclusive arrangements would result in a total savings of over $17 million to consumers for inpatient services. (Ex. 234 at ¶¶ 530-32, Fig. 53.)

270. For outpatient services, the shift in volume from SFMC to Methodist from February 2009 through the end of 2016 would result in total consumer savings of more than $11 million. (Ex. 234 at ¶¶ 530-32, Fig. 53.)

271. In total, for both inpatient and outpatient services, patients were and will be harmed by over $28 million because of SFMC 's exclusionary**[\*287]** conduct from February 2009 through December 2016. (Ex. 234 at ¶¶ 530-32, Fig. 53.)

**6. Payors do not experience better quality care at SFMC**

272. OSF's internal documents reflect that OSF was aware that SFMC fared poorly in many quality assessments. (Ex. 233 at ¶¶ 251-56.)

273. A 2009 email from BCBS Division Vice President Mr. Biedermann to Ms. Breeden summarized BCBS's rankings for OSF hospitals based on BCBS 's March 2009 Hospital Profile Report Card. In its peer group, SFMC ranked 11th out of 15 hospitals. Among "Urban Groups," SFMC ranked 41st out of 94 hospitals. (Ex. 13 at HCSC00004707-08 (Dep. Ex. 74).)

274. [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

(Ex. 53 at 0SF00167923, 926 (Dep. Ex. 318).) Methodist's score for 2012 was 80.5%. (Ex. 233 at ¶ 239, Fig. 31.)

**7. SFMC's internal documents illustrate its struggle with quality**

275. [TEXT REDACTED BY THE COURT] (Ex. 24 at 6-7.) [TEXT REDACTED BY THE COURT] (*Id.* at 12.) [TEXT REDACTED BY THE COURT] (Ex. 225 at 276-77.)

276. [TEXT REDACTED BY THE COURT] (Ex. 24 at 12-13.)

277. [TEXT REDACTED BY THE COURT] (Ex. 24 at 13; Ex. 233 at ¶ 254.)

278. [TEXT REDACTED BY THE COURT] (Ex. 24 at 13.)

**8. SFMC struggled with capacity and access**

279. [TEXT**[\*288]** REDACTED BY THE COURT] (Ex. 54 at 12 (Dep. Ex. 319).) [TEXT REDACTED BY THE COURT] (Ex. 225 at 216.)

280. [TEXT REDACTED BY THE COURT] (Ex. 225 at 82.) [TEXT REDACTED BY THE COURT] (Ex. 226 at 69-70, 166-67, 169, 195.)

**N. Foreclosure**

281. In a February 21, 2005 email, Mr. Schoeplein wrote to a consultant that SFMC's market share "is a derivative of OSF possessing exclusive contracts with carriers that represent 90% of the insured market in Peoria. Share probably has an effect on net revenue at OSF SFMC but also impacts Methodist need to increase pricing on self funded and the remaining non insured business." (Ex. 25 at 1 (Dep. Ex. 99).)

282. In 2009, SFMC had exclusive contracts with the three largest insurance products in the Tri-County Area: the BCBS PPO, the CAT PPO, and Humana. Together, these three products accounted for more than 50% of commercial inpatient admissions and payments to SFMC and Methodist. (Ex. 233 at ¶ 447, Fig. 48.)

283. In 2012, SFMC had exclusive contracts with the BCBS PPO, Humana, HAMP, and Aetna. These four payors accounted for more than 50% of all inpatient commercial insurance admissions and payments to SFMC and Methodist. (Ex. 233 at ¶ 452, Fig. 49.)

284. Network**[\*289]** status is a critical determinant of where patients seek care. [TEXT REDACTED BY THE COURT]. (Ex. 234 at ¶ 102.)

285. Professor Willig offers a figure purporting to show the various payors for which Methodist and SFMC are in-network. (Ex. 235 at ¶ 35, Fig. 1 (Expert Report of Professor Robert D. Willig).) Dr. Capps created an adjusted version of the figure, scaled to represent the number of discharges each payor had and eliminate misleading data from prior to the relevant time period, resulting in the following:

[TEXT REDACTED BY THE COURT]

(Ex. 234 at ¶¶ 341-45, Figs. 31-32.)

286. With the exception of CAT, direct contracts with employers are not a significant source of admissions. Methodist's next largest direct contract is Keystone Steel and Wire Co., [TEXT REDACTED BY THE COURT]. A Methodist Peoria Area Market Overview listed the largest Methodist-only direct contracts as Keystone, Peoria County, Pekin Insurance, Matcor Metal Fabrication, and Tazewell County. [TEXT REDACTED BY THE COURT]. (Ex. 234 at ¶ 249; Ex. 129 at 12-13 (Dep. Ex. 1100).)

287. Methodist did not have direct contracts with large national employers who were BCBS customers, such as Walmart, Kroger, or the United States**[\*290]** Postal Service. (Ex. 234 at ¶ 248; Ex. 129 at 12-13.)

288. Although BCBS could allow certain ASO customers to have access to Methodist, OSF secured a commitment from BCBS that it would not promote Methodist as available to ASO customers and instructed its sales staff "to not mention that or to support that." (Ex. 196 at 41-42; *see also* Ex. 194 at 34-35; Ex. 40; Ex. 88.) Mr. Bryant asked BCBS to add Methodist to its provider directories as "in network" if it was going to market Methodist to any particular customer, but BCBS would not do so because they had only one PPO network. (Ex. 209 at 52-53.) Allowing an ASO client to access Methodist required a formal approval process within BCBS that included, in 2008, the approval of both Mr. McCarty and Mr. Hamman. (Ex. 106 (Dep. Ex. 810).) In addition, Methodist and BCBS did not have a contract for outpatient discounts, meaning that BCBS ASO clients who did access Methodist could still face high costs. (Ex. 194 at 22-25.) Mr. Lumpkin noted that "a lot of ASO clients will ask for a particular hospital to be in network that's not in the network, and then when they actually get the financials involving the cost, they don't necessarily go to fruition**[\*291]** with it." (Ex. 195 at 45.)

289. In order for a BCBS ASO client to add Methodist as in network, BCBS had to weigh whether a group was big enough to warrant the addition and then BCBS had to let OSF know if BCBS was in fact adding clients to the arrangement. (Ex. 194 at 34-35.) Mr. McCarty stated that BCBS limited ASO arrangements to certain size accounts and that BCBS would not necessarily try to administer a customized network for smaller groups. (Ex. 196 at 42-43.)

290. Upon the request of RLI Corp. and ATS Inc., Methodist provided discounts on outpatient charges for RLI and ATS through BCBS. (Ex. 206 at 192-193.) Specifically, RLI told BCBS that if BCBS would "simply put Methodist in network, in the PPO network, we wouldn't even really have to" seek additional discounts with Methodist. (*Id.* at 193.)

291. In order to contract directly with employers, Methodist would have to negotiate with and market itself to every single employer, whereas to be in network it would only have to negotiate with a single payor. Direct contracts therefore increase transaction costs. (Ex. 218 at 246-48.)

**O. Damages**

292. From 2005 to 2012, [TEXT REDACTED BY THE COURT] (Ex. 233 at ¶ 72.)

**1. Lost profit**

293. From 2009 to**[\*292]** the end of 2015, Methodist's lost profit from exclusion from payor networks is more than $75 million for inpatient services. (Ex. 234 at ¶¶ 528, Fig. 52; Figs. 65-66 at C-10-C-11.) Damages for inpatient services in 2016 would exceed $11 million. (*Id.* at Fig. 67 at C-12.)

294. Total damages from the lost outpatient surgeries would have been approximately $25 million from 2009 through 2016. (Ex. 233 at ¶ 544, Figs. 74-76.)

**2. Lost opportunities**

295. [TEXT REDACTED BY THE COURT] (Ex. 235 at ¶ 170.)

296. Methodist's 2006/2007 Strategic Plan stated that Methodist has barriers to growth as a result of being out-of-network with three significant payors: BCBS, CAT, and OSF HealthPlans. At the time, those plans had 162,360 covered lives between them. (Ex. 36 at 8 (Dep. Ex. 183).) Methodist's 2008 Environmental and Competitive Assessment Overview listed as Methodist's first weakness that it was locked out of the BCBS PPO. (Ex. 38 at Methodist00047347 (Dep. Ex. 193).) Access to just the BCBS PPO would give Methodist additional revenue to allow it to invest in different areas. (*Id.*; Ex. 212 at 134.)

297. A 2009 analysis by Methodist consultants Kaufman Hall examined whether Methodist could afford to**[\*293]** construct a replacement facility at a cost of $300 million. (Ex. 205 at 64-65 (R. Gish Dep.); Ex. 138 at 8 (Dep. Ex. 1268).) [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

(Ex. 70 at 4 (Dep. Ex. 455) (paragraph structure omitted).) Kaufman Hall's projections calculated that if Methodist built a replacement facility, [TEXT REDACTED BY THE COURT]. (Ex. 205 at 76-77; Ex. 138 at 9.) The analysis concluded, [TEXT REDACTED BY THE COURT] (Ex. 70 at 4, 59.)

298. A 2010 analysis by Iowa Health System ("IHS") during consideration of an affiliation with Methodist calculated that if Methodist were to carry out the $245 million in renovation, replacement, and expansion it contemplated, [TEXT REDACTED BY THE COURT]. (Ex. 157 at 5 (Dep. Ex. 1503).) [TEXT REDACTED BY THE COURT]. (*Id.* at 6.)

299. In the absence of SFMC's exclusive contracts, Methodist would have more ability and incentive to invest and be a stronger competitor to SFMC. Dr. Capps testified that in his opinion "the likely effect of an end to the exclusionary conduct and thus an end to the diminution of Methodist's investment incentives would be that it would make investments" targeted at narrowing service gaps with SFMC and increasing**[\*294]** its competitiveness in the market. (Ex. 218 at 198-200.) Potential categories of investments included physician recruitment and capital improvements. (*Id.* at 93.)

**3. Physician recruitment**

300. In 2009 many physicians felt they had to align with SFMC because, based on what SFMC communicated to the physicians, they did not believe that Methodist would get in network with CAT and BCBS. (Ex. 45 at 3 (Dep. Ex. 264).)

301. In a December 21, 2009 presentation to the Methodist board, Mr. Bryant discussed Methodist's physician recruiting efforts and explained that "[t]he major factor in recruiting and employing specialty physicians is the lack of volume at Methodist, without the Blue Cross contract." Minutes of the meeting state that "[t]he issue of not being part of the Blue Cross contract and [OSF] blocking our access to volume was discussed to be key to our future growth and success." (Ex. 44 at 10 (Dep. Ex. 262).)

302. A February 2010 Methodist presentation listed lack of volume as a factor causing "[d]ifficulty in recruiting quality candidates" and listed seven specialties that Methodist lacked or in which it did not have a sufficient number of physicians. Methodist executive Tim McCormack testified that high level specialists**[\*295]** consider "current volume and potential volume" and that he could recall instances in which a lack of volume was a factor in physicians leaving. (Ex. 211 at 47-50; Ex. 46 at 29-30 (Dep. Ex. 275).)

303. OSF executives also recognized the importance of volume to physician recruiting and retention. [TEXT REDACTED BY THE COURT] (Ex. 222 at 100-02.) Mr. Schoeplein stated that OSF desires "to have volume . . . to be able to have opportunity to recruit and retain specialists and subspecialties . . . . And do we believe that we need to possess the volume to achieve that, absolutely." (Ex. 228 at 106-07 (paragraph structure omitted).)

**4. Mitigation**

304. Methodist executives testified that the matching program was a limited success only, but could not compensate for being out-of-network with BCBS. (Ex. 208 at 32-33; Ex. 210 at 155-56; Ex. 216 at 75-76; Ex. 209 at 231; Ex. 207 at 63-64 (M. Stone Dep.).)

305. Regarding Methodist's matching program, Methodist's former Chief Financial Officer, Calvin MacKay, testified that Methodist was "capturing some of the patients" but specified that Methodist was "nowhere near the volume of the Blue Cross patients available." (Ex. 213 at 139.)

306. Similarly, Ms.**[\*296]** Keyes testified that overall, the matching program "wasn't a success because no matter how much you marketed it to employers directly, to the Methodist Medical Group patients, the percentage of usage was still very low." (Ex. 214 at 191-92.)

307. Terry Waters, Vice President of Strategy and Business Development for Methodist, testified that the matching program had a "limited upside," stating that the "Matching Program success is going to be limited just because of its nature where we're asking folks that are covered by insurance to go out of network, and that presents a financial risk for them to do that." (Ex. 212 at 108.)

308. Mr. Bryant believes that BCBS encouraged Methodist's matching program as a way to work around the fact that they could not get Methodist in to the PPO contract directly. (Ex. 208 at 72.) Mr. Bryant also clarified that even though Methodist's matching program brought business through the BCBS PPO, that business was a minor portion of Methodist's overall charges. (Ex. 208 at 127-28; Ex. 131 at slide 49 (Dep. Ex. 1106).) ("Can I add, you understand what a charge is here? . . . It's pretty material here. Our charges were a billion dollars. This is a minor, very**[\*297]** small amount of-it's improving but it's not a big number.") [TEXT REDACTED BY THE COURT] (Ex. 226 at 172-73.)

309. Ms. Lauber stated that the matching program was not a "permanent fix" and said, "the Matching Program is something I consider a Band-Aid, and you always have to educate so people remember that program is out there to get patients to the hospital." (Ex. 215 at 113-14.)

310. Methodist's Cathy Emanuel testified that the matching program was not attractive to patients. (Ex. 216 at 76.) Ms. Emanuel stated that Methodist would have to investigate as to whether it legally could offer the matching program and discuss that issue with payors like BCBS, and in at least one instance had to temporarily discontinue the program. (*Id.* at 71-77.)

311. In an April 27, 2007 email from Ms. Bassi to Ms. Emanuel, Ms. Simon, Mr. Feldman, and Mr. Schierbeck, with subject line "90 day action plan — Blue Cross Blue Shield," Ms. Bassi states that "[Mr. Schierbeck's] action item is to 1) develop the BC/BS matching program education material for MMG offices and patients...2) and then educate all MMG office staff on the matching program and who to contact with questions." Further, Ms. Bassi writes that Mr. Feldmen's**[\*298]** action items are to "1) implement the BC/BS matching program in all MMG offices —e.g. offer to all BC/BS patients, etc. 2) build BC/BS matching program into new office staff orientation." (Ex. 117 (Dep. Ex. 955).)

312. Kim Lauber of Methodist stated that as part of the "Blue Cross/Blue Shield Project Plan," the goal of which was to "[d]evelop a plan to navigate MMG Blue Cross/Blue Shield PPO patients to use MMCI for other services needed for care," Methodist hired two new staff members who were responsible for educating individuals at each of MMG's offices about the matching program. (Ex. 215 at 112-13; Ex. 57.)

313. Mr. Waters testified that Methodist promoted the matching program through "direct sales" which meant that Methodist "would have a salesperson go out and talk to employees of companies that were in the Blue Cross product." (Ex. 212 at 107-08.)

314. Mr. Waters stated that the matching program required constant communication because of its complexity and because it is not something that doctors prefer discussing with their patients. (Ex. 212 at 113.) Mr. Waters stated that the matching program required someone to be "in the weeds, boots on the ground, all the time." (*Id.* at 113-14.)

315. Mr. Quin**[\*299]** testified that under the original version of the matching program, patients would call a matching line and request to use Methodist services which would then be approved. Methodist would write off the out-of-network penalties. If the PPO product had out-of-network benefits, BCBS would make some payment for services to Methodist but at an out-of-network benefit level. (Ex. 209 at 53-54.) Eventually Methodist changed the matching program because it was experiencing issues where people were accessing the matching program but did not have out-of-network benefits, resulting in zero payment from BCBS. Methodist eliminated the requirement that patients had to call and get preapproved, thus ensuring that Methodist would provide uncompensated care. (*Id.* at 54.)

316. Despite the matching program, Methodist could not compete for BCBS patients on an out-of-network basis. BCBS and third-party sources of information encouraged patients to stay in network to minimize costs and the BCBS website and other information did not list Methodist as in-network. (Ex. 234 at ¶¶ 105-07, Figs. 9-11; Ex. 218 at 86-88.)

**ARGUMENT**

SFMC does not compete based on prices, quality, or efficiency. It insulates itself from competition**[\*300]** by abusing its substantial market power as a "must have" hospital to obtain exclusive contracts that prevent commercial health care payors from dealing with its main competitor, Methodist. As a result the market suffers from higher prices, reduced choice, and heightened entry barriers. A jury is entitled to hear this evidence, and decide whether to award damages and put an end to SFMC's anticompetitive conduct.

**I. STANDARD OF REVIEW**

Summary judgment is appropriate only when the submissions show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. [*Fed. R. Civ. P. 56(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=). In ruling on a motion for summary judgment, the court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. [*Berry v. Chicago Transit Auth., 618 F.3d 688, 691 (7th Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:50VF-HR11-F04K-R00D-00000-00&context=) ("It is not for courts at summary judgment to weigh evidence or determine the credibility of such testimony."). All inferences reasonably drawn from the facts must be construed in favor of Methodist. [*Perez v. Sol Azteca Mexican Rest., Inc., No. 11-cv-1046, 2013 U.S. Dist. LEXIS 172062, 2013 WL 6406088, at \*1 (C.D. Ill. Dec. 6, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5B0K-BK51-F04D-717D-00000-00&context=). Any doubt as to the existence of a genuine issue for trial is resolved against SFMC. *Id.*

**II. SMFC'S EXCLUSIVE [\*301]  CONTRACTS VIOLATE THE SHERMAN ACT**

SFMC's exclusionary contracts unreasonably restrain trade in violation of *Section 1* of the Sherman Act,[[45]](#footnote-44)2 and enhance and protect SFMC's market power in violation of *Section 2* of the [*Sherman Act.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56P1-2KG1-F04K-K1YW-00000-00&context=)[[46]](#footnote-45)3 [*ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 268-69 & n.9 (3d Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56P1-2KG1-F04K-K1YW-00000-00&context=) (stating that exclusive dealing arrangements can support liability under *Section 1* and *2*).

**A. SFMC's Exclusive Dealing Arrangements Warrant *Antitrust* Scrutiny**

SFMC's claim that exclusive dealing arrangements are "presumptively legal" is incorrect. Exclusive dealing arrangements are capable of harming competition, and therefore are subject to careful ***antitrust*** scrutiny, particularly when deployed**[\*302]** by firms with substantial market power. Even the cases cited by SFMC demonstrate that courts engage in a detailed analysis of the market and the particular circumstances in which the exclusive arrangement was employed before determining legality.[[47]](#footnote-46)4

Exclusive dealing can harm competition by foreclosing competitors from marketing their products to the affected buyers. [*Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHD-RB00-0038-X2V2-00000-00&context=) ("The main ***antitrust*** objection to exclusive dealing is its tendency to 'foreclose' existing competitors or new entrants from competition in the covered portion of the relevant market during the term of the agreement." (footnote omitted)); [*United States v. Microsoft Corp., No. 98-cv-1232, 1998 U.S. Dist. LEXIS 14231, 1998 WL 614485, at \*19 (D.D.C. Sept. 14, 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TMX-M7F0-0038-Y1G5-00000-00&context=) (Exclusive dealing agreements "threaten to eliminate opportunities for products unable to find ample other outlets to the marketplace."). Exclusive dealing also can negatively impact competition by artificially raising barriers to entering the market. [*Microsoft Corp., 1998 U.S. Dist. LEXIS 14231, 1998 WL 614485, at \*19*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TMX-M7F0-0038-Y1G5-00000-00&context=).

A dominant firm can use exclusive dealing to improperly strengthen or maintain its market position. [*McWane, Inc. v. F.T.C., 783 F.3d 814, 832 (11th Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FS4-8HR1-F04K-X0C0-00000-00&context=) ("[A]n exclusive dealing arrangement can be harmful when it allows a monopolist to maintain its monopoly power by raising its rivals' costs sufficiently to prevent them from growing into**[\*303]** effective competitors."). The ***antitrust*** concern is that a dominant firm will use exclusive dealing as a means to increase prices, restrict output, reduce quality, slow innovation, or otherwise harm consumers. *See* [*ZF Meritor, LLC, 696 F.3d at 270-71*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56P1-2KG1-F04K-K1YW-00000-00&context=).

**B. Exclusive Dealing Arrangements Are Analyzed Under the Rule of Reason**

Exclusive dealing arrangements challenged under *Section 1* of the Sherman Act are evaluated under the rule of reason. [*Methodist Health Servs. Corp. v. OSF Healthcare Sys., No. 13-cv-01054, 2015 U.S. Dist. LEXIS 37887, 2015 WL 1399229, at \*4 (C.D. Ill. Mar. 25, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FKT-6HJ1-F04D-7277-00000-00&context=). Under the rule of reason, the factfinder must weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as an unreasonable restraint on competition. *See* [*Nat'l Soc'y Of Prof'l Eng'rs v. United States, 435 U.S. 679, 691-92, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8YC0-003B-S2D5-00000-00&context=). Courts conducting a rule of reason analysis examine the following factors: (1) the relevant market, (2) anticompetitive effects, and (3) procompetitive justifications. [*Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327-29, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HKK0-003B-S3Y4-00000-00&context=). The ultimate question "is whether the challenged agreement is one that promotes competition or one that suppresses competition." [*Nat'l Soc'y Of Prof'l Eng'rs, 435 U.S. at 691*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8YC0-003B-S2D5-00000-00&context=). Exclusive dealing is unlawful when its "probable effect" is to substantially lessen competition in the relevant market. [*Tampa Elec. Co., 365 U.S. at 327-29*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HKK0-003B-S3Y4-00000-00&context=); [*ZF Meritor, LLC, 696 F.3d at 268-69*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56P1-2KG1-F04K-K1YW-00000-00&context=); [*United States v. Dentsply Int'l, 399 F.3d 181, 191 (3d Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=).

Exclusive dealing arrangements challenged under *Section 2* of the Sherman Act are evaluated under a similar analysis.**[\*304]** [*United States v. Microsoft Corp., 253 F.3d 34, 51, 58-59, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43CK-3HW0-0038-X4RT-00000-00&context=). The only potential difference is that a firm with substantial market power may violate *Section 2* even though the exclusive dealing results in less market foreclosure.[[48]](#footnote-47)5 Again, the primary question for the jury is whether the "probable effect" of SFMC's conduct was to substantially lessen competition in the relevant markets.

**III. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT ON METHODIST'S SHERMAN ACT CLAIMS**

SFMC's summary judgment motion should be denied because its arguments conflict with market realities and mischaracterize the record. Moreover, the record contains: (1) ample evidence of foreclosure; (2) significant evidence of ***antitrust*** injury; and (3) overwhelming evidence, economic analysis, and judicial admissions supporting the defined product market.[[49]](#footnote-48)6

**A. SFMC's Exclusionary Contracts Substantially Foreclosed The Relevant Markets**

The evidence shows that SFMC's exclusionary contracts substantially foreclose its competitors from the relevant markets. A competitor is "foreclosed" when it is denied or disadvantaged in its access to significant sources of input or output. *See* [*Dentsply Int'l, 399 F.3d at 189-90*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=). There is no hard-and-fast rule for determining the point at which market foreclosure becomes "substantial." [*Microsoft Corp., 253 F.3d at 69-72*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43CK-3HW0-0038-X4RT-00000-00&context=). "The test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." [*Dentsply Int'l, 399 F.3d at 191*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=); *see* [*Microsoft Corp., 253 F.3d at 71*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43CK-3HW0-0038-X4RT-00000-00&context=).

Methodist's expert, Dr. Capps, analyzed foreclosure consistent with the case law, economic**[\*306]** literature, and SFMC's expert's definition. (Ex. 235 at ¶ 45 (Expert Report of Professor Robert D. Willig).) Dr. Capps calculates that SFMC's exclusive dealing foreclosed between 52% and 57% of the relevant markets. (Ex. 233 at ¶¶ 447-52, Figs. 48-49 (Expert Report of Cory S. Capps, Ph.D.).) Such foreclosure far exceeds the levels that have been found to support an ***antitrust*** violation.[[50]](#footnote-49)7

Additionally, even if the percentage of market foreclosure were much lower, as SFMC incorrectly argues, the percentage of the market foreclosed is neither**[\*307]** conclusive nor the sole consideration in determining whether foreclosure has been substantial. [*McWane, 783 F.3d at 835*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FS4-8HR1-F04K-X0C0-00000-00&context=); [*Kolon Indus. v. E.I. Dupont De Nemours & Co., 748 F.3d 160, 176 (4th Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BWR-B5V1-F04K-M029-00000-00&context=) ("a singular emphasis on the percentage of customers foreclosed cannot resolve the inquiry (as foreclosure of a few important customers could substantially foreclose access to a market)"). The Supreme Court has made clear that the probative value of any foreclosure measurement must be interpreted in the context of its relationship to the likely market impact of the restraint at issue. *See* [*Tampa Elec. Co., 365 U.S. at 329*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HKK0-003B-S3Y4-00000-00&context=). Thus the analysis focuses instead on the effect of the exclusive arrangement in creating, enhancing, or preserving SFMC's market power.[[51]](#footnote-50)8

SFMC's arguments fail to consider the impact of its exclusive contracts on its ability to harm competition, and incorrectly focus on whether Methodist can establish some magic foreclosure percentage. Specifically, SFMC argues that its exclusive arrangements did not result in foreclosure because: (1) the BCBS PPO was "available" to Methodist; (2) "alternative distribution channels" allegedly existed; (3) Dr. Capps' foreclosure calculations are allegedly inaccurate; and (4) Methodist-owned outpatient facilities were not prohibited from serving the market. None of these arguments entitle SFMC to summary judgment.[[52]](#footnote-51)9

**1. Methodist is foreclosed from the BCBS PPO contract**

**a. SFMC's anticompetitive conduct and market power prevented Methodist from competing for the BCBS PPO contract**

SFMC argues that even though it secured a contractual provision excluding Methodist from the BCBS PPO for almost 15 years, Methodist was never foreclosed from that network**[\*309]** because it had the opportunity to compete at every renewal period. (Mem. at 72.) But the record shows that: (1) BCBS felt constrained to have SFMC in network, and (2) SFMC consistently refused to accept a non-exclusive contract with BCBS.

SFMC held veto power over including Methodist. At each renewal it was SFMC and BCBS (and not Methodist and BCBS) that discussed whether Methodist could join the network. (Ex. 235 at ¶ 119 [TEXT REDACTED BY THE COURT].) Thus, Methodist did not have an opportunity to compete as discussed in the cases cited by SFMC. *E.g.,* [*Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 76 (3d Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:800W-G5B1-652R-100H-00000-00&context=); [*Menasha Corp. v. News Am. Mktg. In-Store, Inc., 354 F.3d 661, 663 (7th Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BDV-XPM0-0038-X0X7-00000-00&context=).

There is no doubt that BCBS preferred both SFMC and Methodist to be in network, but was given only an "all or nothing" choice by SFMC. BCBS has had no choice but to agree. *See* [*ZF Meritor, 696 F.3d at 285*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56P1-2KG1-F04K-K1YW-00000-00&context=); [*Race Tires Am., 614 F.3d at 77*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:800W-G5B1-652R-100H-00000-00&context=) (recognizing the importance of coercion to analysis of exclusive dealing cases); [*Dentsply Int'l, 399 F.3d at 195-96*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=). The fact that BCBS "made the best of a bad situation and accepted" an exclusive contract with SFMC "does not give [SFMC] immunity" from ***antitrust*** liability. [*U.S. Airways, Inc. v. Sabre Holdings Corp., 105 F. Supp. 3d 265, 2015 WL 2405569, at \*13 (S.D.N.Y. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J1S-KR51-F04F-04BJ-00000-00&context=) (internal quotation marks omitted). Unlike the situation in *Menasha* where the court asserted that purchasers "*like* exclusive deals," BCBS (like other payors) generally**[\*310]** prefers broad networks. [*Menasha Corp., 354 F.3d at 663*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BDV-XPM0-0038-X0X7-00000-00&context=).

**i. SFMC refused to consider BCBS's repeated requests to include Methodist in the PPO**

BCBS preferred to have "the widest network possible" and thought that it was "always best for the brand to offer the widest choice." (Methodist Additional Undisputed Material Facts ("MF") ¶ 71, *see* MF ¶¶ 70, 72-73.) BCBS almost never accepted exclusive contracts. In 2008 it told SFMC that "[t]he OSF hospitals are the only hospitals that BCBSIL has an exclusive arrangement with, yet the rates are much higher than rates for hospitals that do not have an exclusive arrangement." (MF ¶¶ 71, 73, 115.)

SFMC admits that BCBS always began negotiations seeking an open network (*i.e.*, including Methodist). (MF ¶ 70.) But SFMC consistently refused to provide a non-exclusive proposal to BCBS. SFMC never even calculated what non-exclusive rates would be when specifically asked to do so. (MF ¶¶ 48, 104-05.) There are numerous examples in the record.

[TEXT REDACTED BY THE COURT] (MF ¶¶ 102-03.) BCBS accordingly asked for a non-exclusive contract proposal, which SFMC refused to provide. (MF ¶¶ 104-05.) In proposals and meetings in 2008, BCBS continued to ask for an open network. (MF ¶¶ 110-12, 114,**[\*311]** 117-18.) [TEXT REDACTED BY THE COURT] (MF ¶¶ 115-16.) In response, SFMC continued to reject Methodist being added to the network and refused to discuss any other provisions of the contract until BCBS agreed to exclusivity. (MF ¶¶ 113-14, 118.)

In 2009, BCBS again sought an open network.[[53]](#footnote-52)10 (MF ¶¶ 123-24, 126, 129.) SFMC continued to require exclusivity and BCBS concluded that it could not have Methodist in network without threatening the SFMC contract. (MF ¶¶ 125, 127, 129-30.) [TEXT REDACTED BY THE COURT] (MF ¶ 129.) [TEXT REDACTED BY THE COURT] (MF ¶ 130.)

In 2011 and 2012, BCBS again sought a non-exclusive contract with SFMC, and was even prepared to offer**[\*312]** a lump-sum payment to OSF as compensation, but OSF again insisted on exclusivity. (MF ¶¶ 135, 138-39, 140-43.) BCBS executive Joe Arango told an attorney for Methodist that "OSF antipathy towards Methodist exceeded rationality" and went so far as to suggest that Methodist sue BCBS and OSF to eliminate exclusivity. Mr. Arango said that BCBS "would like nothing more than this provision to go away." (MF ¶¶ 136-37.)

**ii. SFMC leveraged its dominant market position to thwart BCBS's desire to include Methodist in its PPO**

BCBS viewed SFMC as a dominant, must-have hospital in the market and did not think its PPO could be as successful without it. (MF ¶¶ 59-67, 69.) *See* [*Dentsply Int'l, 399 F.3d at 194-95*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=) (reversing district court holding that competitors could offer better deals to capture exclusive contracts when dominant firm offered unmatchable economic advantages). Indeed, SFMC threatened to terminate its PPO contract with BCBS if Methodist was included. (MF ¶¶ 100-01, 113, 118, 125.) BCBS sales executive Rich Rappenecker told Methodist executive Tony Schierbeck about SFMC's threats and explained that BCBS could not risk the possibility of SFMC terminating its PPO contract. (MF ¶¶ 143-44, 147, 149.) Plainly, SFMC's market**[\*313]** dominance and refusal to negotiate prevented BCBS from including Methodist.

Although at times BCBS considered whether it might be feasible to cancel SFMC's contract, BCBS executive Lee Biedermann testified that "[a]s we did more analysis and we saw the market share differences and the service differences, it became less of an option, less desirable." (MF ¶ 98.) In 2008, senior BCBS executives decided that they could only press SFMC to give up exclusivity, but could not cancel the contract or even threaten to do so. (MF ¶ 110.) While Methodist and BCBS had some discussions about the PPO, SFMC's threats and dominant position precluded any formal proposals. (MF ¶¶ 147, 148, 150-52.) Only once in almost 15 years did Methodist and BCBS even discuss potential rates. (SFF Ex. 13; MF ¶ 108.) As Methodist CFO Rob Quin testified, "it gets to the part where they ask OSF if Methodist can join, be part of the network. And then OSF says no, and the conversations stop." (MF ¶ 151.)

The above tactics prevented competition between SFMC and Methodist for the BCBS PPO contract. SFMC's market power forced BCBS "to make an all-or-nothing choice." [*LePage's Inc. v. Minn. Mining & Mfg., 324 F.3d 141, 158 (3d Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4875-KVW0-0038-X13K-00000-00&context=) (en banc) (holding that exclusive dealing contracts could foreclose**[\*314]** market and be exclusionary conduct supporting a monopolization claim). As a result of SFMC's pressure on BCBS, Methodist was foreclosed from the market's largest program.

**iii. The duration of SFMC's contracts did not impact their severe anticompetitive effects**

SFMC further contends that the BCBS contracts are not anticompetitive and are "presumptively lawful" because of their duration. However, recognizing that the Supreme Court requires consideration of "the 'practical effect' of exclusive dealing arrangements," the Eleventh Circuit rejected an argument that "short-term and voluntary" agreements could not be anticompetitive because, "looking to 'the reality of the market place' . . . the practical effect of [defendant's] program was to make it economically infeasible for distributors to switch." [*McWane, Inc., 783 F.3d at 833-35*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FS4-8HR1-F04K-X0C0-00000-00&context=) (brackets and ellipses in original omitted).

Courts have found that factors such as high market share, market dominance, customer preference, and the high costs of switching from one company to another can result in significant foreclosure even from contracts that are terminable at will. [*McKenzie-Willamette Hosp. v. Peacehealth, No. 2-cv-6032, 2003 U.S. Dist. LEXIS 16203, 2003 WL 23537980, at \*7-8 (D. Ore. Aug. 15, 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49JP-0D30-0038-Y0FW-00000-00&context=) *vacated on other grounds by Cascade Health Solutions v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008)* (denying summary judgment**[\*315]** and noting that hospital's dominant position in market rendered exclusive contract with insurer not easily terminated); [*Minn. Mining & Mfg. v. Appleton Papers Inc., 35 F. Supp. 2d 1138, 1144 (D. Minn. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3VVY-94G0-0038-Y1XG-00000-00&context=); *see* [*Dentsply Int'l, 399 F.3d at 193-94 & n.2*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=) (large market share and exclusionary conduct of defendant allowed informal, at-will sales to foreclose the market); [*LePage's, 324 F.3d at 157 n.11*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4875-KVW0-0038-X13K-00000-00&context=) (rejecting argument that one-year exclusive contracts should be per se legal).

Contract duration is "only one among many factors the Court will consider and does not admit of, much less compel summary judgment." [*Microsoft Corp., 1998 U.S. Dist. LEXIS 14231, 1998 WL 614485, at \*20*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TMX-M7F0-0038-Y1G5-00000-00&context=). Since BCBS felt compelled to have SFMC in network, contract length was not significant. [*ZF Meritor, 696 F.3d at 287*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56P1-2KG1-F04K-K1YW-00000-00&context=); [*Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, 5-cv-12024, 2009 U.S. Dist. LEXIS 108858, 2009 WL 4061631, at \*8 (D. Mass. Nov. 20, 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7X58-00R0-YB0N-800D-00000-00&context=) (finding market foreclosed despite 90-day termination provisions when process by which group purchasing organizations chose manufacturers was not competitive).

Further, what SFMC characterizes as short contracts were in fact amendments to a contract that had been continuously in effect from 1988 and has contained exclusive language at least since 2002. (MF ¶¶ 76-78; SFF ¶ 146.) [TEXT REDACTED BY THE COURT] (MF ¶¶ 83-84, 118.)

Moreover, any substitution of providers in its network was costly to BCBS. BCBS tried to avoid this type of disruption. (MF ¶¶ 64, 66, 68-69, 147, 149.)**[\*316]** BCBS was particularly interested in avoiding network disruption that would negatively impact BCBS's relationship with its large "national" accounts. (MF ¶¶ 64, 100.) The fact that the insurer required months of lead time to inform brokers, employers, and patients about the network changes placed additional constraints on any change. (MF ¶ 12.) Regardless of the length of the amendments SFMC and BCBS entered into, SFMC and BCBS had an exclusive relationship for almost 15 years, which foreclosed access to Methodist.

**b. The matching program is not a substitute for in-network status**

SFMC contends that Methodist was not foreclosed from the BCBS PPO because it offered a matching program under which it waived out-of-network penalties for certain BCBS PPO patients who were treated at Methodist. (Mem. at 54.) SFMC is wrong. Methodist's matching program illustrates that SFMC did successfully foreclose Methodist from the PPO.

The only effective means of competition was to have in-network status. Denied this by SFMC's exclusive dealing, Methodist had no choice but to undertake costly efforts to mitigate its damages and seek a small slice of the volume for which it was not allowed to compete. *See****[\*317]***[*New York v. Actavis PLC, 787 F.3d 638, 655-56 (2d Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G38-K6G1-F04K-J0G4-00000-00&context=) (rejecting argument that generic drug manufacturer could compete through marketing to insurers, physicians, and pharmacists at higher costs when brand name manufacturer had effectively foreclosed the only cost-effective method of competition); [*ZF Meritor, 696 F.3d at 287-88*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56P1-2KG1-F04K-K1YW-00000-00&context=) (additional transaction costs required to compete when defendant excluded competitors from distributor marketing materials).

In an attempt to reduce the significance of network status—even though SFMC sought exclusivity at every opportunity—SFMC cites documents showing that "charges" (which SFMC incorrectly and misleadingly describes as revenue) from the matching program were $40 million in 2010. (Methodist Res. to SFF ("MR") ¶ 135.) But revenue is only a small portion of charges. (MF ¶ 308; MR ¶ 133.) Under the matching program, Methodist had to write off a patient's out-of-network penalties, causing additional expense to Methodist because it sacrifices part of the payment due for its services. (MF ¶ 315.) Also, patients could be seen under the matching program only if they had out-of-network benefits, otherwise Methodist would receive no reimbursement for its services. Methodist even had to change its policies because of instances in which**[\*318]** BCBS denied it payment because out-of-network benefits were absent. (MF ¶ 315.)

The record illustrates that the matching program could have only a limited effect and was in no way comparable to being in-network. (MF ¶¶ 304-09.) BCBS would not promote Methodist's matching program and none of the materials BCBS provided to its customers show Methodist as a provider option. (MF ¶¶ 316.); *see* [*Dentsply Int'l, 399 F.3d at 193*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=) (one fact showing foreclosure was that dealers foreclosed by defendant provided additional exposure and sales representative coverage, which would generally lead to more sales). Methodist was forced to market the matching program and educate physicians and patients about its existence. (MF ¶¶ 311-12.) Even then, patients were being asked "to go out of network, and that presents a financial risk for them to do that." (MF ¶ 307.)

Of course, Methodist was required to hire additional staff for physician education and to market the program. (MF ¶¶ 312-14.) Despite such efforts, the ad hoc nature of the matching program resulted in patient and physician confusion. (MF ¶ 314.) Moreover, Methodist's marketing and education efforts were contradicted by information provided by BCBS and other sources that advised**[\*319]** patients to use in-network providers to minimize costs. (MF ¶ 316.) A Methodist employee testified that the matching program could not be "a permanent fix" and that it was "something I consider a Band-Aid, and you always have to educate so people remember that program is out there to get patients to the hospital." (MF ¶ 309.)

Methodist questioned whether payors would tolerate a matching program and whether it was permissible. These questions required Methodist to analyze contracts, discuss the issue with payors, and in some instances temporarily discontinue a program. (MF ¶ 310.) If Methodist had been in the BCBS PPO network, none of these actions and additional costs would have been required. [*Dentsply Int'l, 399 F.3d at 193*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=) (noting that direct sale alternative did not defeat foreclosure because direct sales could not pose a threat to defendant's monopoly).

SFMC also contends—without any legal or factual support—that Methodist could have operated matching programs for other payors where it was foreclosed by SFMC's exclusive contracts. SFMC has offered no record evidence to demonstrate that this was possible for the CAT PPO, Humana, HAMP, or Aetna. Indeed, CAT PPO patients could not utilize Methodist's matching program.**[\*320]** (Ex. 233 at ¶ 496.) Moreover, none of the other payors have a contract like the BCBS-Methodist Plan contract from the 1980s, which applies in the absence of another governing policy. (Ex. 233 at ¶¶ 120-23.)

[TEXT REDACTED BY THE COURT] (Ex. 235 at ¶ 45.) Here, Methodist's matching program was dictated by SFMC's exclusive contracts.

**2. The alternative distribution channels proffered by SFMC do not demonstrate lack of foreclosure**

SFMC argues that its exclusive contracts do not foreclose the market because Methodist is capable of reaching the market through "alternative distribution channels" such as UHC, Coventry, the BCBS HMO, and the Methodist First Choice ("MFC") plan. (Mem. at 49.) This argument misstates the law, ignores market realities, and conflicts with the factual record.

"[T]he mere existence of potential alternative avenues of distribution, without an assessment of their overall significance to the market, is insufficient to demonstrate that Plaintiffs' opportunities to compete were not foreclosed." *See* [*ZF Meritor, LLC, 696 F.3d at 287*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56P1-2KG1-F04K-K1YW-00000-00&context=) (internal quotation marks omitted). The proper foreclosure analysis asks whether the alternative distribution channels actually "pose a real threat" to SFMC's exercise of market power.**[\*321]** [*Microsoft Corp., 253 F.3d at 71*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43CK-3HW0-0038-X4RT-00000-00&context=).

"Market power is the ability to raise prices above those that would be charged in a competitive market." [*N.C.A.A. v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 109 n.38, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3BC0-003B-S304-00000-00&context=). If the "alternative distribution channels" posed a real threat to SFMC's market power, then there should be evidence of Methodist's ability to provide some degree of competitive influence over SFMC's pricing. But the record establishes that SFMC sets prices in a manner consistent with a monopolist. *See* [*Dentsply Int'l, 399 F.3d at 191*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=) ("The picture is one of a manufacturer that sets prices with little concern for its competitors, something a firm without monopoly power would have been unable to do." (internal quotation marks omitted)).

For example, Dr. Capps evaluated SFMC's casemix-adjusted prices relative to the Illinois Council of Teaching Hospitals. (MF ¶¶ 260-61.) [TEXT REDACTED BY THE COURT] (*Id.*)

SFMC's higher prices cannot be explained by the quality of its services or by its underlying costs.[[54]](#footnote-53)11 (Ex. 233 at ¶¶ 207-256, Figs. 24-33; MF ¶¶ 160-62.) [TEXT REDACTED BY THE COURT].[[55]](#footnote-54)12 This pricing data is concrete evidence that the proffered alternative distribution channels are insufficient to combat the foreclosure effect of SFMC's exclusive contracts. *See* [*McWane, Inc., 783 F.3d at 838-39*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FS4-8HR1-F04K-X0C0-00000-00&context=) (lack of reduction in defendant's high prices demonstrated**[\*322]** anti-competitive harm of challenged practice).

Nevertheless, SFMC contends that the alternative distribution channels provide Methodist with a "means to compete." (Mem. at 51.) In support, SFMC uses Figure 1 from Professor Willig's report to "dramatically" demonstrate that in-network status shifted among the firms. But Figure 1 misleadingly inflates the significance of SFMC's proposed alternative distribution channels because it provides no indication of the relative size of the products that included SFMC and Methodist. [TEXT REDACTED BY THE COURT].

Dr. Capps accurately depicts the relative significance of the "distribution channels" available to SFMC and Methodist by replicating the Willig figure, but with each payor scaled to reflect its 2012 discharges. (MF ¶ 285.) When considering the**[\*323]** patient volumes of each payor, SFMC's supremacy due to its exclusive contracts with key payors is clear.[[56]](#footnote-55)13 This is similar to the conduct analyzed in *Dentsply*.

In *Dentsply*, the court held that at-will exclusivity arrangements violated *Section 2* of the Sherman Act even though competitors had alternative ways to sell their products. [*399 F.3d at 188-90*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=). There, the defendant manufactured artificial teeth and sold them to dental product dealers. [*Id. at 184*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=). The dealers then supplied the teeth and other materials to dental laboratories, which fabricated dentures for sale to dentists. *Id.* The defendant's policy discouraged its dealers from adding competitors' teeth to their lines of products. [*Id. at 185*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=). The court found that the competitors' ability to distribute their products through other channels did not negate the foreclosure effect of the defendant's policy: "[t]he reality in this case is that the firm that ties up the key dealers rules the market." [*Id. at 188-91*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=). The defendant's policy "was designed to block competitive distribution points**[\*324]** [and] not allow competition to achieve toeholds in dealers; tie up dealers; and not free up key players." [*Id. at 189*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=) (internal quotation marks omitted). As a result, the policy had a "significant effect" because it kept "sales of competing teeth below the critical level necessary for any rival to pose a real threat" to the defendant's market power. [*Id. at 191*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=).

Like the defendant in *Dentsply*, SFMC protects its market power by its exclusive dealing with key payors accounting for over 50% of the commercial market. SFMC thus limited the availability of commercial patient volume necessary for Methodist to effectively compete. *See* [*Microsoft Corp., 253 F.3d at 64*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43CK-3HW0-0038-X4RT-00000-00&context=) (holding that Microsoft was able to maintain its market position by denying Netscape the most efficient means of distribution).

SFMC says that the relative patient volume of the alternative distribution channels does not matter because employers can move to a different carrier each year and that "the market share of these payors, and the amount of market share directed to a hospital in those payor networks, can easily change over time." (Mem. at 52.) This argument fails for two reasons.

First, SFMC's record citation (*i.e.*, SMF ¶ 48) does not support the proposition that employers are**[\*325]** able to move to a different carrier annually. In fact there is substantial evidence to the contrary. SFMC itself had numerous contracts with employers for longer terms, [TEXT REDACTED BY THE COURT]. (MR ¶ 48.)

Second, the record contains no facts demonstrating that payor market shares changed easily, but instead establishes that payor market shares remained fairly constant. (Ex. 233 at ¶¶ 447, 452, Figs. 48-49.) Moreover, SFMC ignores market realities such as the tendency of employers to be loyal to their payor, and the legal and practical impediments employers face in switching payors year after year. *See* [*ZF Meritor, 696 F.3d at 285*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56P1-2KG1-F04K-K1YW-00000-00&context=) (rejecting the argument that any new or existing manufacturer may steal a customer from the defendant by offering a superior product at a lower price because the market realities proved that it was not realistic); [*Dentsply, 399 F.3d at 189-90*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=) (same). Employers and patients try to avoid disruption in their health insurance and provider networks.[[57]](#footnote-56)14 (MF ¶¶ 63-64, 66, 68-69, 147, 149.) As to the critical role of potential disruption in real market dynamics:

• [TEXT REDACTED BY THE COURT] (MF ¶ 166.)

• [TEXT REDACTED BY THE COURT] MF ¶ 179.

The situation of Archer Daniels Midland ("ADM") serves as another example of the fact that employers do not and cannot make decisions solely by comparing SFMC and Methodist. In 2008, an ADM employee mailed a BCBS national account executive that she had learned "that Methodist Hospital is restructuring and expanding and they want to talk to the Blues about joining the PPO network. YES YES." She asked "How do we go about starting conversations with Methodist to join the PPO network? Currently OSF and Proctor are part of the PPO network but would be nice to offer more choice for our employees." (MF ¶ 109.) ADM has more than 30,000 employees and is a large BCBS national account. (MF ¶ 109.) Yet, when ADM wanted Methodist in network, it asked BCBS to add Methodist instead of going through the disruption and other changes (*e.g.*, different providers, plan features, etc.) of switching to another insurer.**[\*327]** ADM presumably selected the BCBS PPO because of a number of factors, of which hospital choice in Peoria would only be one.

SFMC's last argument is that Methodist needs to "try harder" in its marketing efforts to convince employers to switch to the "alternative distribution channels." (Mem. at 52.) Once again SFMC ignores market realities. As one example, educating employers and employees regarding alternative health insurance options requires substantial cost and burden, as shown by Methodist's efforts with its matching program. (MF ¶¶ 309, 311-14.)

Methodist's ability to compete through other payors is hamstrung by the fact that hospital choice would hardly be an employer's only consideration between any two payors. For example, SFMC can hardly contend that Methodist could compete through the BCBS HMO when it has admitted that HMOs are less popular and more restrictive than PPOs. (Answer ¶ 67, MF ¶ 50.) Also, an employer switching health insurers might necessitate switching all of its healthcare providers nationwide. Methodist is clearly substantially foreclosed if it has to depend on convincing a national employer to make such changes for Methodist to be in network. *See* [*Dentsply Int'l, 399 F.3d at 189-90*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=); (Ex. 234**[\*328]** at ¶¶ 242-47 (Expert Rebuttal Report of Cory S. Capps, Ph.D.)). SFMC also ignores differences in management, administration, and reputation that make one plan more desirable than others, but over which Methodist has no control. SFMC's argument that, for example, Methodist could "compete" for BCBS PPO insureds by offering UHC "a better deal" than SFMC offered BCBS is a strange notion at odds with how health care contracting works. It makes Methodist's competitive success dependent on UHC's performance in competing for business with BCBS.

SFMC's reliance on *CDC Techs., Inc. v. IDEXX Labs, Inc., 7 F. Supp. 2d 119 (D. Conn. 1998)* does not salvage its arguments. In *CDC Techs., Inc.*, the court granted summary judgment because there the plaintiff still could reach end-users even though "distributors" were foreclosed. *Id. at 121*. SFMC's discussion of the case omits a critical distinction. The evidence demonstrated that the role of the "distributors" in effecting sales was unimportant because they did not actually sell the products in question, but instead provided the names of qualified leads (*i.e.*, veterinarians) who expressed interest in the products. *Id. at 122*. As a result, the court found that the distributors had never been critical to the plaintiff's sales strategy.

Unlike**[\*329]** the "distributors" in *CDC Techs., Inc.*, the undisputed record in this case establishes the essential role commercial payors play in the market. In fact, SFMC has admitted that (a) in-network status greatly affects patients' selection of hospitals; (b) patients have a strong financial incentive to use in-network providers; and (c) significant financial stakes are involved in the designation of an exclusive in-network provider. (Answer ¶¶ 90-91.)

The remaining cases cited by SFMC are also distinguishable because the courts' decisions were based on factors other than the mere availability of alternative distribution channels. *See* [*Omega Envtl., Inc., 127 F.3d at 1164*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHD-RB00-0038-X2V2-00000-00&context=) (finding the market was characterized by "increasing output, decreasing prices, and significantly fluctuating market shares."); [*Roland Mach. Co., 749 F.2d at 394-395*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VWT0-003B-G00F-00000-00&context=) (reversing *preliminary injunction* because of plaintiff's failure to show "a substantial anticompetitive effect, actual or potential," and defendant's plausible procompetitive justification). Similarly, SFMC's reliance on cases involving distributors fails because insurance providers are not distributors. Rather, the record shows that the market is characterized by high switching costs and barriers to entry, factors that require heightened**[\*330]** ***antitrust*** scrutiny.[[58]](#footnote-57)15 [*Tele Atlas N.V. v. NAVTEQ Corp., No. 5-cv-1673, 2008 U.S. Dist. LEXIS 111866, 2008 WL 4809441, at \*22 (N.D. Cal. Oct. 28, 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7X8M-STF0-YB0M-N00F-00000-00&context=) (distinguishing *Omega* on, among others, those grounds); (MF ¶¶ 64, 66, 68-69, 147, 149, 241-46.)

SFMC's argument that its exclusive arrangements did not foreclose the market because of alternative distribution channels is both legally and factually insufficient to support summary judgment. [*Insignia Sys., Inc. v. News America Marketing In-Store, Inc., 661 F. Supp. 2d 1039, 1064-65 (D. Minn. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4XC3-G8R0-TXFR-42H7-00000-00&context=) (denying summary judgment where evidence demonstrated foreclosure even though the plaintiff may compete for retailers with which defendant did not have a contract). If SFMC's exclusive contracts were of such little importance, why did SFMC try so hard to secure them and make exclusive contracting a central focus of its managed care policy? (MF ¶¶ 38-42.) At the very least, the extent to which SFMC's exclusionary contracts limit its rivals' opportunities is a fact question for the jury.

**3. Methodist's calculation [\*331]  of foreclosure percentages is accurate**

The record clearly establishes that SFMC's exclusive arrangements foreclosed between 52% and 57% of the relevant markets, which courts have found more than sufficient to support an ***antitrust*** violation. SFMC devotes 14 pages to rehashing Professor Willig's attempts to reduce Dr. Capps' foreclosure calculation percentage point by percentage point. (Mem. at 57-70.) SFMC's contentions are misleading and incorrect. At most, SFMC's contentions are merely disputes between experts that are not appropriate for summary judgment. [*Bullock v. Dart, 599 F. Supp. 2d 947, 960 (N.D. Ill. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VRH-FJ20-TXFP-T2BJ-00000-00&context=); [*Hot Wax, Inc. v. Turtle Wax, Inc., 27 F. Supp. 2d 1043, 1048 (N.D. Ill. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3V0H-JSS0-0038-Y53G-00000-00&context=).

**a. Methodist's data sources for its calculation are proper**

SFMC argues that, in measuring foreclosure, Methodist has failed to analyze the discharges at other hospitals and ignores "the geographic limit that [Methodist] imposed on the alleged market." (Mem. at 58.) SFMC's arguments are off the mark both legally and factually.

SFMC appears to assert that there is only one true way to calculate a foreclosure percentage, although it does not explain what that method is and its experts do not address the issue. SFMC's criticisms are no more than an assertion as to why a finder of fact might find Methodist's calculation unpersuasive.**[\*332]** SFMC's criticisms offered without legal authority, citation to the record, or expert analysis certainly do not eliminate the existence of a genuine issue as to the foreclosure percentage, especially when construing all facts and making all reasonable inferences in favor of Methodist. [*Smith v. Hope School, 560 F.3d 694, 699 (7th Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VYP-HGW0-TXFX-92B9-00000-00&context=). While SFMC may disagree with Methodist's calculation, Methodist has presented significant evidence on the point. Questions of weight and credibility are for the jury.

SFMC's argument is also misguided factually. The calculation by Methodist measures the fraction of the commercially insured patient base from which SFMC excluded Methodist in order to determine that there has been substantial foreclosure. (Ex 234 at ¶¶ 354-57.) The level of foreclosure apparent from Methodist's and SFMC's discharges is strong evidence that the payors from which Methodist was excluded are a majority of the relevant market. SFMC has not provided even speculation, much less record evidence, to dispute the accuracy of Methodist's evidence or explain why the addition of discharges from other Tri-County hospitals would affect the calculation.[[59]](#footnote-58)16 Even if no BCBS, Humana, HAMP, or Aetna patient had gone to the other four hospitals**[\*333]** in 2012 (an absurd notion), given those hospitals' limited share of the market the foreclosure percentage would still be approximately 43%.[[60]](#footnote-59)17

SFMC also complains that Methodist's calculation ignores "the geographic limit that [Methodist] itself imposed on the alleged market." (Mem. at 58.) As an initial matter, the meaning of this**[\*334]** skeletal argument is unclear and it should be deemed waived. [*Echo, Inc. v. Timberland Machs. & Irrigation, Inc., 661 F.3d 959, 967 (7th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:543P-HJK1-F04K-R0G6-00000-00&context=).) SFMC may be saying that Methodist's calculation is not limited to discharges of patients residing in the Tri-County Area. But SFMC offers no reason to think that the percentage of patients covered by each commercial insurer served by SFMC and Methodist differs systematically between the Tri-County Area and those patients outside the Tri-County Area. Thus, Methodist's calculation of the relative size of the payors is compelling evidence demonstrating substantial foreclosure.

**b. The foreclosure percentage properly includes patients treated at Methodist on an out-of-network basis**

SFMC argues that Methodist's foreclosure percentage should not include patients treated at Methodist on an out-of-network basis.[[61]](#footnote-60)18 SFMC is wrong. In fact, the foreclosure definition of SFMC's expert supports the inclusion of such patients:

Firms are said to be foreclosed from a portion of a market if they are unable to serve customers in that portion of the market ***or if they can only serve customers in that portion of the market on terms that are effectively controlled in an anticompetitive fashion by a competitor***.

(Ex. 235 at ¶ 45 (emphasis added).) SFMC's**[\*335]** exclusive dealing precluded Methodist from a number of insurance networks. SFMC thus controls the manner in which Methodist can service a sharply reduced number of patients in those networks (through extra effort and cost), which is Professor Willig's very definition of foreclosure. This does not change the fact that Methodist was foreclosed from the insurance products for which SFMC had exclusive contracts. [*Dentsply Int'l, 399 F.3d at 193*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=) (reversing district court and holding that exclusive contracts with distributors foreclosed the preferred distribution channels; direct sales were not a viable method of competition despite the fact that some competitors had acquired limited market share through direct sales); *see* [*Actavis PLC, 787 F.3d at 655-56*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G38-K6G1-F04K-J0G4-00000-00&context=); [*Abbott Labs. v. Teva Pharms. USA, Inc., 432 F. Supp. 2d 408, 423 (D. Del. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4K2P-CTR0-TVT4-013C-00000-00&context=). In managed care, in-network status is the sole cost-effective means of competing for patients, a means from which SFMC excluded Methodist.[[62]](#footnote-61)19

**c. The foreclosure percentage correctly includes patients and employers with self-funded BCBS PPO contracts**

SFMC contends that Methodist's foreclosure calculation improperly included patients who were members of the self-funded BCBS PPO contracts. Such administrative services only ("ASO") plans, were not expressly barred from including Methodist in their network by the BCBS-SFMC contract.[[63]](#footnote-62)20 (SFF ¶ 173.) Such patients should be included in the foreclosure calculation because Methodist cannot truly compete for them.

SFMC told BCBS that allowing Methodist in ASO contracts**[\*337]** "violates the spirit and intent of our contract." (MF ¶ 86.) In response, BCBS assured SFMC that it did not market such a product:

[O]nly on an exception basis, at the express request of a client, would we allow a client to add a hospital that is not in the PPO network to be included. We stated that in such a case (there are three customers that we know of) the client must bear the full difference between the Plan and PPO contract at a material financial cost to the client.

(MF ¶ 85.) BCBS also agreed not to promote Methodist to ASO clients. (MF ¶ 94.) BCBS instructed its staff not to promote Methodist as in-network, not to mention Methodist, and not to support the idea of including Methodist if the customer mentioned it. (MF ¶¶ 94, 288.) BCBS also had a formal approval process and might not have approved adding Methodist if the employer did not have enough business to justify BCBS administering the network. (MF ¶ 289.)

Even the three ASO clients who added Methodist to their network incurred significant costs to do so. There are considerable expenses in arranging a network such as evaluating providers and negotiating contracts. (Ex. 234 at ¶¶ 233-37, Figs. 22-23.); *see* [*Dentsply Int'l, 399 F.3d at 192*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=) (recognizing substantial**[\*338]** foreclosure when the distribution channel foreclosed offered customers the benefit of one-stop shopping); [*Graco Inc. v. PMC Global, Inc., No. 8-cv-1304, 2012 U.S. Dist. LEXIS 188865, 2012 WL 762448, at \*12 (D.N.J. Mar. 6, 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5546-YPP1-F04D-W208-00000-00&context=) (denying summary judgment when sufficient evidence indicated that dealer intermediaries were critical because "customers rely on dealer-provided customer service"); [*Natchitoches Parish, 2009 U.S. Dist. LEXIS 108858, 2009 WL 4061631, at \*7*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7X58-00R0-YB0N-800D-00000-00&context=) (denying summary judgment when medical supplies purchasers showed that group purchasing organizations were a significantly more efficient distribution channel because they reduced transaction costs). Creating a custom network is "difficult[ ]," "time-consuming and complex," and requires that the company have sufficient scale and employees concentrated in particular areas to be worthwhile. (Ex. 234 at ¶ 246.) [TEXT REDACTED BY THE COURT] (Ex. 234 at ¶¶ 242-45, Fig. 23.) Accordingly, Methodist did not have a direct contract with Walmart, Kroger, or the U.S. Postal Service, all large national employers who were BCBS customers. (MF ¶ 287.)

Methodist would have had to promote itself and negotiate not just with BCBS, but with every single employer who has an ASO contract. (MF ¶ 291.) SFMC suggests that Methodist should simply have undertaken that effort despite the lack of BCBS**[\*339]** support. Methodist tried to do so in some instances. (SFF ¶ 175.) But the mere fact that Methodist was forced to undertake additional promotion and negotiation—not in an attempt to compete but to mitigate its damages—illustrates foreclosure from cost-effective competition for the ASO customers. [*Actavis PLC, 787 F.3d at 655-56 & n.30*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G38-K6G1-F04K-J0G4-00000-00&context=) (upholding district court conclusion that a requirement to market product in a more costly way substantially foreclosed the market because it "severely impact[ed]" the ability to compete on price). SFMC cannot seriously contend that Methodist's prospects regarding ASO customers were not limited when BCBS had pledged to SFMC not to even mention that employers could consider Methodist.

SFMC makes two other arguments regarding ASO customers that actually contradict each other. First SFMC contends that, if it was costly for employers to add Methodist because of the lack of PPO discounts, Methodist should have just offered lower discounts compared to those in its BCBS Plan contract. But SFMC also contends that there were no significant transaction costs because Methodist and BCBS already had the Plan contract. The Plan contract cannot be both an impediment to Methodist's contracting and a useful tool**[\*340]** for avoiding transaction costs.

In fact, both arguments are incorrect. Methodist in some cases gave additional discounts to certain BCBS customers; it provided discounts to RLI and ATS at their request. (MF ¶ 290.) This illustrates the additional costs faced by both Methodist and potential ASO customers. As RLI told BCBS, if it "simply put Methodist in network, in the PPO network, we wouldn't even really have to" seek these additional, special discounts. (*Id.*)

Because of SFMC's exclusive contract, ASO customers faced both additional burden and transaction costs in determining whether they wished to include Methodist in their networks. Methodist faced the corresponding burdens of devoting resources to promoting itself to all BCBS ASO employers and potentially negotiating different agreements with each. It is no surprise that SFMC cites only three ASO customers who chose this path. As a result of these additional obstacles, Methodist was substantially foreclosed from competing for BCBS ASO customers.

**d. OSF employees are properly part of the foreclosure percentage**

SFMC argues that Methodist should not include OSF's employees in its foreclosure calculation because it is normal for hospitals**[\*341]** to offer its own employees an exclusive plan.[[64]](#footnote-63)21 SFMC cites as support the principle that a firm "has no obligation to deal under terms and conditions favorable to its competitors." [*Pac. Bell Tel. Co. v. linkLine Communs., Inc., 555 U.S. 438, 450-51, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VPF-5H70-TXFX-11YJ-00000-00&context=). This holding, of course, says nothing regarding whether a firm's own participation in the market should be used to determine foreclosure. Here, the obvious answer is yes. These patients were unavailable to Methodist because of SFMC's actions. [TEXT REDACTED BY THE COURT] (MF ¶ 172, SFF ¶ 186.) [TEXT REDACTED BY THE COURT] (MF ¶¶ 174-75, 177-78, 180-83, 185.) The total size of Humana's plan is relevant to determining whether Methodist is substantially foreclosed from the market, regardless of whether that plan includes OSF employees.

Moreover, SFMC attempts to have it both ways, contending that its employees would never be available to Methodist (*i.e.*, they are not within the market), but then calculates a foreclosure percentage including them. If OSF employees are excluded, they should not be used in either**[\*342]** the numerator or the denominator of the calculation. Correcting this inconsistency on the part of SFMC results in 48.3% foreclosure in 2012. (Ex. 234 at ¶ 357 n. 325.)

**e. Even crediting SFMC's arguments, the effect on Methodist's calculated foreclosure percentage is minimal**

Even if SFMC is correct that Methodist was not foreclosed from competing for patients treated at Methodist on an out-of-network basis, OSF employees, and patients covered in a BCBS ASO plan, the effect on Methodist's calculation of the foreclosure percentage is minimal. Removing patients treated at Methodist and all patients whose employers actually had direct contracts with Methodist, and removing OSF's employees from both the numerator and the denominator of the foreclosure calculation still results in a foreclosure percentage of 47% in 2012. (Ex. 234 at ¶ 357 & nn. 324-25.)

**f. Methodist was foreclosed from HAMP**

SFMC does not dispute that it entered into an exclusive contract with HAMP in 2009, but nevertheless contends that Methodist was not foreclosed from treating HAMP patients. SFMC argues that HAMP wished to enter into a risk-sharing contract and only SFMC was willing to offer such a contract. SFMC offers the**[\*343]** testimony of a single witness to support this claim, but there is ample record evidence demonstrating that the exclusion was motivated by OSF's acquisition of the Carle Clinic in Bloomington ("Carle") from HAMP's parent company.

Indeed, HAMP CEO Jeff Ingrum told Methodist that the Carle acquisition drove HAMP's decision to contract with OSF. (MF ¶¶ 198-202, 206.) [TEXT REDACTED BY THE COURT] (MF ¶¶ 199-200.) [TEXT REDACTED BY THE COURT] (MF ¶¶ 198-99.) [TEXT REDACTED BY THE COURT] (MF ¶¶ 192-94.) HAMP approached SFMC about keeping the Carle physicians in its network and was told that it would have to sign a system-wide, exclusive contract with OSF to do so. (MF ¶¶ 201-02, 206.) [TEXT REDACTED BY THE COURT] (MF ¶ 204.) [TEXT REDACTED BY THE COURT] (MF ¶ 210.)

From SFMC's perspective, purchasing Carle presented an "opportunity to create a system wide provider contract with HAMP that is semi exclusive." (MF ¶ 197.) OSF Medical Group's CEO identified obtaining a HAMP contract as one of the primary goals of the acquisition. (*Id.*)

[TEXT REDACTED BY THE COURT] (MF ¶ 195.) It strains credulity to believe that two months later HAMP would sign a letter of intent with SFMC requiring it to terminate**[\*344]** Methodist due solely to risksharing. (MF ¶ 209.) Further, nothing about a risk contract with SFMC required HAMP to terminate Methodist, except that SFMC demanded it. [TEXT REDACTED BY THE COURT] (MF ¶¶ 207, 213-14.) [TEXT REDACTED BY THE COURT] (MF ¶¶ 208, 214.)

**g. Methodist may offer evidence regarding CAT**

SFMC contends that because Methodist did not make a "claim" regarding CAT in the complaint, Methodist improperly included CAT PPO patients as part of the market from which it was foreclosed until July 1, 2010. SFMC conflates Methodist's claims with the facts Methodist has discovered to support those claims. [TEXT REDACTED BY THE COURT] (MF ¶ 155.) Similarly, the anticompetitive effects of SFMC's conduct include the fact that Methodist was foreclosed from the portion of the market consisting of those individuals who had CAT PPO insurance and Methodist's damages include those patients who would have otherwise come to Methodist. These facts are but one of many consistent lines of evidence establishing Methodist's claims.

SFMC essentially asserts that Methodist may not use any additional evidence that was not already present in its complaint. But, of course, Methodist "was not required**[\*345]** to set forth specific facts and legal theories of [its] case in [its] complaint." [*Conner v. Ill. Dep't of Natural Res., 413 F.3d 675, 679 (7th Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GHT-8720-0038-X43W-00000-00&context=); *accord* [*Vidimos, Inc. v. Laser Lab LTD., 99 F.3d 217, 222 (7th Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0630-006F-M1MH-00000-00&context=) (plaintiff has no burden to justify altering its legal theories). In the motion to dismiss context, the Seventh Circuit has recognized that "[a]ny decision declaring 'this complaint is deficient because it does not allege X' is a candidate for summary reversal . . . . Factual detail comes later . . . perhaps in response to a motion for summary judgment." [*Vincent v. City Colleges of Chicago, 485 F.3d 919, 923 (7th Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NM7-SR60-0038-X062-00000-00&context=). The court continued, "[f]acts that substantiate the claim ultimately must be put into evidence, but the rule 'plaintiff needs to prove Fact Y' does not imply 'plaintiff must allege Fact Y at the outset.'" [*Id. at 923-24*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NM7-SR60-0038-X062-00000-00&context=).

Even if Methodist's CAT evidence was a claim, SFMC makes no effort to allege any prejudice that would prevent Methodist from amending its complaint to add an additional claim, stating only that a new claim would be "patently improper at this late date," again without any authority. [*Federal Rule of Civil Procedure 15*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=), however, requires that leave to amend be freely given "when justice so requires." [*Life Plans, Inc. v. Sec. Life of Denver Ins. Co., 800 F.3d 343, 357 (7th Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GTJ-G1W1-F04K-R004-00000-00&context=). Here, SFMC was not prejudiced. The parties took substantial discovery related to CAT, including the depositions of two CAT provider contracting executives. (Exs. 199-200.) Indeed, SFMC has**[\*346]** freely used evidence related to CAT when it believes that such evidence favors it. Both of its experts place heavy reliance on CAT's contracting history to assert, incorrectly, that SFMC's exclusive contracts are not anticompetitive and that Methodist's expert's calculation of its damages is too high. (*E.g.*, Ex. 235 at ¶¶ 57-62, 162-66; Ex. 236 at ¶¶ 48-50 (Expert Report of Margaret E. Guerin-Calvert).)

**h. SFMC's exclusive contracts foreclosed Methodist from competing for patients covered by Humana and Aetna**

SFMC does not appear to dispute that Methodist was foreclosed from treating patients with Humana and Aetna health plans. Any such argument is now waived and may not be a basis for summary judgment. [*Cloe, 712 F.3d at 1182*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5855-4FY1-F04K-R0XS-00000-00&context=). The record evidence demonstrating that SFMC refused to negotiate non-exclusive contracts with Humana or Aetna and that the resulting exclusive contracts foreclosed Methodist from those patients, is so voluminous as to be indisputable. (MF ¶¶ 171-90, 216-32.)

**4. SFMC substantially foreclosed the outpatient market**

SFMC contends that Methodist has failed to show foreclosure in the outpatient surgery market. It advances two arguments, including that Methodist has not calculated the percent**[\*347]** of foreclosure in that market. In this case, Methodist has calculated the size of the commercial payors from which it was foreclosed by SFMC's exclusive contracts and has shown that they represent more than 50% of the commercial market from 2009 to 2012. (Ex. 233 at ¶¶ 446-52, Figs. 48-49; Ex. 234 at ¶ 356.) Methodist used payment data for inpatient admissions, but the critical fact shown by the calculation is the size of the foreclosed payors, which applies equally to the outpatient market. The question is not the market share of providers in the outpatient surgery market (*e.g.*, OSF's Center for Health), but the size of the various payors, particularly the foreclosed payors. Methodist's calculation is strong evidence of this foreclosure.

SFMC has not suggested any reason to think that the payors from which it has foreclosed Methodist have a different market share in the outpatient surgery market than in the inpatient market. BCBS, Humana, HAMP, Aetna, and CAT offer insurance for both inpatient services and outpatient surgical services. Even if SFMC could offer a reason to believe that Methodist's foreclosure evidence was less representative of the outpatient market (and it has not),**[\*348]** that would only be evidence disputing Methodist's calculation, not a justification for summary judgment.

SFMC's second argument is that Methodist was not foreclosed in the outpatient surgery market because SFMC's exclusive contracts only prohibited payors from contracting with Methodist as a hospital and did not prohibit contracts between payors and outpatient facilities owned by Methodist.[[65]](#footnote-64)22 In actuality, however, the exclusive contracts barred payors from contracting with Methodist hospital for all services, including outpatient surgery. (*E.g.*, SFF Exs. 27, 39, 72 at OSF00128257-58.) Methodist could not offer in-network outpatient surgical services to patients at its hospital covered by the products for which SFMC had exclusive contracts.

Ignoring foreclosure, SFMC contends that Methodist could simply have operated an ASC to compete for outpatient surgery patients. Methodist, however, does not have an ASC and the significant financial and ***regulatory*** barriers (including applying to state ***regulatory*** agencies for a certificate of need)**[\*349]** to creating an ASC ensure that such an alternative would not be cost-effective or realistic. (Ex. 233 at ¶¶ 396-402; MF ¶ 245.); [*Actavis PLC, 787 F.3d at 655-56*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G38-K6G1-F04K-J0G4-00000-00&context=) & n.30.

SFMC contends that Methodist's minority interest in the Central Illinois Endoscopy Center (CIE) is somehow relevant on this front. But endoscopy procedures are not within the definition of outpatient surgery.[[66]](#footnote-65)23 (MF ¶ 30.)

**B. SFMC's Exclusive Dealing Caused *Antitrust* Injury**

SFMC's exclusive contracts have caused ***antitrust*** injury. An ***antitrust*** injury is an "injury of the type the ***antitrust*** laws were intended to prevent and that flows from that which makes defendants' acts unlawful." [*Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=). In other words, an ***antitrust*** injury must result from the defendant's interference with the freedom to compete and its remedy must further the goal of increased competition. *See* [*U.S. Gypsum Co. v. Ind. Gas Co., 350 F.3d 623, 627 (7th Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4B31-BKD0-0038-X2HS-00000-00&context=). In general, an ***antitrust*** plaintiff must prove that challenged conduct affected the prices, quantity, or quality of goods or services. *See id.*

In**[\*350]** this case, the record establishes that SFMC's exclusive contracts had a significant negative impact on competition by, among other things, subjecting the consuming public to increased prices, reduced choice, inferior quality, and heightened entry barriers. SFMC's exclusive contracts also caused financial harm to Methodist by depriving it of sales and revenue. These distinct injuries both flow from SFMC's interference with the competitive process.

In its motion, SFMC does not challenge that it possess substantial market power, offer any procompetitive justifications for its exclusive arrangements, or claim that its conduct did not injure Methodist.[[67]](#footnote-66)24 Nor does SFMC dispute that record evidence overwhelmingly shows payors, employers, and customers want broad networks and a choice of hospitals or that the lack of such choice is itself a competitive injury to customers. (Ex. 233 at ¶¶ 80-93; MF ¶¶ 71, 73, 109, 111, 123, 146, 148, 158, 161, 178, 217, 234-35); *see* [*ZF Meritor, 696 F.3d at 289*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56P1-2KG1-F04K-K1YW-00000-00&context=) (rejecting purported procompetitive effects when evidence showed that purchasers preferred nonexclusive contracts). Even though ***antitrust*** injury has been established, SFMC contends that (1) Methodist has not identified a specific**[\*351]** foregone investment; and (2) SFMC's expert has an alternative theory regarding the price effect of an open network. (Mem. at 75-81.) These arguments are without merit.

**1. SFMC's exclusive arrangements impaired Methodist's ability to invest in its personnel and facilities**

By foreclosing over 50% of the relevant market, SFMC impaired Methodist's ability and opportunities to invest, which in turn injured consumers by delaying Methodist's growth.[[68]](#footnote-67)25 As explained by Dr. Capps and admitted by SFMC, agreements that foreclose Methodist from a substantial portion of the market reduce its ability to constrain SFMC's market power by diminishing Methodist's customer base and, thus, its economies of scale. (Answer ¶ 98; MF ¶ 299.) The reduced customer base lowers**[\*352]** returns and increases costs, winch results in less incentive and opportunity to invest. (*Id.*)

[TEXT REDACTED BY THE COURT]

• [TEXT REDACTED BY THE COURT] (Ex. 235 at ¶167.)

• [TEXT REDACTED BY THE COURT] *Id.* at ¶170.)

Nevertheless, SFMC argues Methodist's impaired investment options are speculative because Dr. Capps fails to identify a specific foregone investment resulting from SFMC's exclusive contracts. (Mem. at 76.) But Dr. Capps identifies physician recruitment and capital improvements as investments that were impaired by SFMC's conduct. (MF ¶ 299.)

The factual record contains testimony and documents from Methodist and SFMC executives, as well as an independent consultant,**[\*353]** regarding the impact of SFMC's exclusive dealing on investment opportunities. Regarding physician recruitment the record shows:

• In a December 21, 2009 presentation to the Methodist board, Michael Bryant stated "[t]he major factor hi recruiting and employing specialty physicians is the lack of volume at Methodist, without the Blue Cross contract." Meeting minutes state that "[t]he issue of not being part of the Blue Cross contract and [OSF] blocking our access to volume was discussed to be key to our future growth and success." (MF ¶ 301.)

• A February 2010 Methodist presentation listed lack of volume as a factor causing "[difficulty hi recruiting quality candidates" and listed seven specialties that Methodist lacked or in which it did not have a sufficient number of physicians. Methodist executive Tim McComiack testified that he could recall instances in which a lack of volume was a factor in physicians leaving. (MF ¶ 302.)

• Mr. Schoeplein of OSF testified that one of the reasons OSF needed exclusivity is "to be able to have [the] opportunity to recruit and retain specialist and subspecialties [and] . . . possess the volume to achieve that." (MF ¶ 303.)

SFMC's exclusive contracts impaired Methodist's**[\*354]** ability to make capital improvements:

• To the significant capital improvements, Methodist needed [TEXT REDACTED BY THE COURT] (MF ¶ 297.)

• In 2009, Methodist consult Kaufman Hall concluded [TEXT REDACTED BY THE COURT] (MF ¶ 297.)

By foreclosing Methodist from the key commercial payors, SFMC lowered Methodist's investment incentives. Faced with lower revenue and higher costs, it was perfectly rational for Methodist to invest less. Moreover, the likely effect of an end to SFMC's exclusionary conduct is that Methodist would have enhanced investment incentives to increase its capacity and output which would erode SFMC's market power. (MF ¶ 299.)

The substantial negative impact of SFMC's exclusive arrangements on Methodist's ability and incentive to invest is demonstrated by evidence in the record and the analysis by Dr. Capps. *See* [*Insignia Sys., 661 F. Supp. 2d at 1056*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4XC3-G8R0-TXFR-42H7-00000-00&context=) (denying summary judgment where the plaintiff's expert found that exclusive contracts had an adverse impact on a rival's ability to compete because a reduction in demand in the rival's services increases the rival's costs of expansion). This evidence, which must be accepted as true for purposes of SFMC's motion, demonstrates that SFMC's exclusionary contracts**[\*355]** did cause ***antitrust*** injury.

**2. SFMC's exclusive arrangements harmed consumers by increasing healthcare costs and restricting consumer choice**

The impairment of a competitors' ability to constrain the exercise of market power allows a dominant firm like SFMC to maintain supracompetitive prices or restrict output. On a similar basis, if the costs of competing firms are raised, the associated reduction in capability to constrain will allow the defendant to increase prices.

The best and most straightforward way to establish harm to competition is direct evidence that the exclusive dealing caused prices to rise and/or output to fall relative to a but-for world in which the defendant did not employ exclusive dealing contracts. *See* [*Insignia Sys., 661 F. Supp. 2d at 1055-56*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4XC3-G8R0-TXFR-42H7-00000-00&context=); [*JamSports & Entm't, LLC v. Paradama Prods., 336 F. Supp. 2d 824, 836-37 (N.D. Ill. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4D56-2H00-0038-Y4V6-00000-00&context=) (denying summary judgment when jury could conclude that end of anticompetitive conduct would result in increased output and lower costs); [*Appleton Papers, 35 F. Supp. 2d at 1147*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3VVY-94G0-0038-Y1XG-00000-00&context=). Ample record evidence supports the proposition that SFMC had high prices and no better quality than Methodist. (MF ¶¶ 103, 108, 115, 134, 160-62, 190, 203, 230-31, 262-68, 272-77.) An economic analysis of the billing and claims data established that (1) SFMC sustained its high market share while also sustaining high prices that**[\*356]** are not explained by superior quality or efficiencies, and (2) consumers would have saved over $28 million absent SFMC's exclusionary conduct. (MF ¶¶ 265-67, 271.)

SFMC argues this does not constitute evidence of consumer harm because Dr. Capps did not account for Professor Willig's "open network premium." (Mem. at 77-81.) SFMC contends that Dr. Capps relied on only a single document in rejecting the open network premium. SFMC ignores a dozen pages of Dr. Capps' rebuttal report in which he explains that the "open network premium" theory is flawed in many respects, including methodologically, and is contrary to the factual record. (Ex. 234 at ¶¶ 414-43, Figs. 35-43.).

Compelling evidence demonstrates the lack of open network premiums. [TEXT REDACTED BY THE COURT] (Ex. 234 at ¶¶ 415, 418-19, Fig. 35.) [TEXT REDACTED BY THE COURT] (Ex. 234. at ¶¶ 422-23, Fig. 37.) Also, [TEXT REDACTED BY THE COURT]; and when SFMC joined the UHC network Methodist did not raise prices.[[69]](#footnote-68)26 (MF ¶¶ 232, 239.)

At most, SFMC's argument illustrates an expert disagreement (although the facts support Methodist's expert only). Such disputes do not warrant summary judgment. *See* [*Appleton Papers, 35 F. Supp. 2d at 1147*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3VVY-94G0-0038-Y1XG-00000-00&context=)**[\*357]** (denying summary judgment where the defendant attacked the validity of plaintiff's economic expert with its own expert on the grounds that the "episode only underscores what is clear from the record evidence in this case: the existence of ***antitrust*** injury, like the existence of ***antitrust*** violation, is a hotly disputed issue of fact.").

**3. SFMC's exclusive dealing arrangements lack procompetitive benefits**

An analysis of exclusive dealing usually requires an examination of potential procompetitive benefits, so it is significant that SFMC's motion is devoid of any meaningful discussion of such benefits. SFMC cites to cases that acknowledge exclusive dealing arrangements are capable of providing procompetitive benefits such as assurances of supply, price stability, and sales outlets. But SFMC does not provide any support from the record showing how ***its*** exclusive arrangements provided any of those benefits. This was no oversight by SFMC. The record lacks such evidence.

SFMC also states that vertical exclusive agreements can be procompetitive "when they reflect the result of competition between firms to be the exclusive supplier of a product or service for a particular customer." (*Id.* at 47.) SFMC refers**[\*358]** to a situation where a payor contracts with multiple providers, but not all providers wishing to participate. Such negotiations require providers to compete against one another to participate in the payor's limited network. Even when a payor contracts with most or all providers, the threat or possibility of exclusion from the network may prevent providers from exercising any market power they may possess. *See* F.T.C. & U.S. Dep't of Justice, *Improving Health Care: A Dose of Competition*, Ch. 4 at 15 n.78 (2004); (Ex. 234 at ¶ 84.). In this case, SFMC's conduct had the opposite effect.

For example, SFMC's liability expert describes how SFMC's conduct insulated it from this competitive process. [TEXT REDACTED BY THE COURT] (Ex. 235 at ¶ 119 (emphasis added).) In other words, Methodist's exclusion from the network is not the result of competition on the merits, which is focused on the business that a customer (*e.g.*, BCBS) transacts with the seller (*e.g.*, Methodist). Here, SFMC's exclusionary conduct restricted the business that the customer (*i.e.*, payors) transacts with another seller (*i.e.*, Methodist). SFMC removes Methodist from the competitive process before Methodist can even begin to**[\*359]** negotiate with BCBS. SFMC injures the competitive process because the payor (*e.g.*, BCBS) no longer has a credible threat (*e.g.*, Methodist) to counterbalance SFMC's leverage. *See Improving Health Care*, Ch. 1 at 4 (stating that "[w]ithout such credible threats, however, providers have less incentive to bid aggressively, and even managed care organizations with large market shares may have less ability to obtain lower prices.").

In short, the record demonstrates that SFMC's exclusionary contracts have caused significant anticompetitive effects (*e.g.*, high prices, reduced choice, raised entry barriers, etc.). SFMC offers not a single substantiated countervailing procompetitive benefit. This is insufficient under the rule of reason to warrant summary judgment for SFMC.

**C. Government Payors Are Properly Excluded From The Relevant Product Market**

As it did in its unsuccessful motion for judgment on the pleadings, SFMC argues that Methodist's product markets improperly exclude government payors. SFMC's argument once again fails to address the Supreme Court's holding that "[T]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between**[\*360]** the product itself and the substitutes for it" and makes no case that patients covered by commercial and government insurance are in fact reasonably interchangeable. [*Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H870-003B-S01T-00000-00&context=).

This Court has recognized that SFMC judicially admitted that government patients are not adequate substitutes for commercially insured patients, that government payors pay significantly less than commercial payors, that hospitals including SFMC depend on commercial payments to offset government payments that do not cover costs, and that "the ability of a hospital provider to compete for commercially insured patients . . . is a key determinant of a hospital's overall profitability, ability to invest, and long-term sustainability." [*Methodist Health Servs., 2015 U.S. Dist. LEXIS 37887, 2015 WL 1399229, at \*3, 7*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FKT-6HJ1-F04D-7277-00000-00&context=); (Answer ¶¶ 93-94, 98.) SFMC's answers to these allegations are binding judicial admissions. *See* [*Solon v. Gary Cmty. Sch. Corp., 180 F.3d 844, 858 (7th Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WR3-TG70-0038-X25P-00000-00&context=). "Judicial admissions are formal concessions in the pleadings . . . that are binding upon the party making them . . . [and which] have the effect of withdrawing a fact from contention." [*Solon, 180 F.3d at 858*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WR3-TG70-0038-X25P-00000-00&context=) (internal quotation marks omitted). The judicial admission that patients covered by government insurers are not adequate substitutes for commercially insured patients again prevents SFMC from now taking a contrary**[\*361]** position. *See* [*Solon, 180 F.3d at 858*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WR3-TG70-0038-X25P-00000-00&context=). The Court denied SFMC leave to amend these admissions. (Minute Entry of May 26, 2015; MF ¶ 31.) Thus, SFMC's argument still fails. *See* [*ProMedica Health Sys. v. F.T.C., 749 F.3d 559, 568 (6th Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5C1S-8461-F04K-P038-00000-00&context=) (holding defendant to product market concessions that it made in its answer).

Further, the Court recognized that Methodist might be able to provide evidence showing that government and commercial patients are not reasonably interchangeable including that government payments were less than provider costs, that government payors did not constrain the prices providers charged to commercial health insurers, and that providers can increase prices solely on commercial insurers. [*Methodist Health Servs., 2015 U.S. Dist. LEXIS 37887, 2015 WL 1399229, at \*7*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FKT-6HJ1-F04D-7277-00000-00&context=). The discovery record establishes all of these facts. (MF ¶¶ 31-36.) Methodist and SFMC receive substantially less per patient from Medicare and Medicaid than they do from commercial payors. (MF ¶ 32.) Payments from government patients do not cover the cost of providing care to their patients; [TEXT REDACTED BY THE COURT] (MF ¶¶ 33-35.) As a result, hospitals focus on commercial payments and rely on them to offset low payments from government programs. (MF ¶¶ 22, 35.) Moreover, measurements of "payor mix," a hospital's proportion of government and commercial patients,**[\*362]** are an important indicator of financial success. (MF ¶¶ 20-21.)

In addition, Medicare and Medicaid do not negotiate their rates. (MF ¶ 36.); *see* [*In re ProMedica Health Sys., Inc., No. 9346, 2012 FTC LEXIS 60, 2012 WL 1155392, at \*4 (F.T.C. Mar. 28, 2012)*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:55BD-43N0-01KP-4010-00000-00&context=) ("Reimbursement rates for patients covered [by government insurance] are set by the government, are not subject to negotiation by the hospitals, and are generally lower than hospitals' costs of providing care."). Hence only commercial payors are susceptible to market power. [*Minn. Ass'n of Nurse Anesthetists v. Unity Hosp., 5 F. Supp. 2d 694, 702 (D. Minn. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SP7-DPG0-0038-Y42B-00000-00&context=) (holding that because Medicare and Medicaid prices are fixed by the government "Defendants cannot exercise any potential market power to raise the price" in those cases); [*F.T.C. v. Freeman Hosp., 911 F. Supp. 1213, 1224 (W.D. Mo. 1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-JYM0-001T-54YB-00000-00&context=) ("Because reimbursement amounts for Medicare and Medicaid patients are dictated by the government, the exercise of monopoly power through higher prices has an adverse effect only on private-pay patients.")

Taking into account all of these facts, Methodist's expert concluded that the product markets do not include patients covered by government payors. (Ex. 233 at ¶¶ 381-87, Fig. 42.) Significantly, SFMC's experts do not dispute this. The absence of expert support is particularly telling when SFMC has previously taken the position that defining the relevant market requires expert testimony. (Ex. 237 at**[\*363]** No. 2 (SFMC's Supplemental or Corrected Objections and Responses to Methodist's Amended First Set of Interrogatories (July 22, 2013))).

SFMC ignores this record and the apparent concession of their experts and instead offers the same case law it cited before. [*Little Rock Card. Clinic PA v. Baptist Health, 591 F.3d 591 (8th Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XDY-BF40-YB0V-M007-00000-00&context=) and [*Marion Healthcare LLC v. Southern Illinois Healthcare, No. 12-cv-871, 2013 U.S. Dist. LEXIS 120722, 2013 WL 4510168 (S.D. Ill. Aug. 26, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:596V-5NT1-F04D-70BM-00000-00&context=). These cases, however, dismissed complaints that failed to allege any facts to show that government patients and commercial patients were not reasonably interchangeable. [*Little Rock, 591 F.3d at 597*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XDY-BF40-YB0V-M007-00000-00&context=); [*Marion Healthcare, 2013 U.S. Dist. LEXIS 120722, 2013 WL 4510168, at \*10*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:596V-5NT1-F04D-70BM-00000-00&context=). Here discovery is complete and Methodist has developed compelling record evidence supporting the allegations of the complaint, reinforcing SFMC's admissions, and further demonstrating that government payors are not adequate substitutes for commercial payors. SFMC does not even create a factual issue on this point.

**IV. SUMMARY JUDGMENT IS IMPROPER FOR THE STATE LAW CLAIMS**

SFMC submits the same unsupported arguments it unsuccessfully made in its motion for judgment on the pleadings. SFMC contends that Methodist's state law claims fail because its federal ***antitrust*** claims fail, without asserting any independent basis for their dismissal. Because SFMC's motion with respect to Methodist's**[\*364]** federal ***antitrust*** claims should be denied, so should its motion with respect to Methodist's state law claims.

**A. Methodist's Illinois Consumer Fraud Act Claim**

SFMC's only independent basis for judgment on Methodist's claim under the Illinois Consumer Fraud Act ("ICFA") is that Methodist "did not cite a single public policy in its Complaint that OSF's conduct purportedly violate[d] separate from the ***antitrust*** laws." (Mem. at 85.) SFMC is wrong; violation of a public policy is not a prerequisite for a viable ICFA claim at all. When determining whether conduct is unfair under the ICFA, Illinois courts consider: "(1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers." [*Robinson v. Toyota Motor Credit Corp., 201 Ill. 2d 403, 775 N.E.2d 951, 961, 266 Ill. Dec. 879 (Ill. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45WX-J160-0039-41DH-00000-00&context=). An unfair practice does not have to meet all three prongs: "[a] practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." *Id.* (internal quotation marks omitted).[[70]](#footnote-69)27

Here, in addition to the oppressive practices demonstrated by SFMC insisting upon exclusive contracts despite the preferences of payors, Methodist has shown that SFMC's conduct significantly harms consumers through a reduction in choice and that consumer were directly harmed by more than $28 million by SFMC's exclusionary conduct. (Ex. 233 at ¶¶ 80-93; MF ¶¶ 71, 73, 109, 111, 123, 146, 148, 158, 161, 178, 217, 234-35, 269-71.) Such evidence is sufficient to establish a violation of the ICFA. *See* [*Demitro v. Gen. Motors Acceptance Corp., 388 Ill. App. 3d 15, 902 N.E.2d 1163, 1168-69, 327 Ill. Dec. 777 (Ill. App. Ct. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VPD-1FW0-TXFS-N2P6-00000-00&context=); [*People ex rel. Hartigan v. Knecht Sers., Inc., 216 Ill. App. 3d 843, 575 N.E.2d 1378, 1386-87, 159 Ill. Dec. 318 (Ill. App. Ct. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-4020-003D-H3TC-00000-00&context=).

**B. SFMC's Assertion Of The Competitor's Privilege Is Not A Basis For Summary Judgment On Methodist's Claims For Tortious Interference**

SFMC does not contend that Methodist failed to establish its claims for tortious interference; instead, it contends that the "competitor's privilege" defense shields it from liability. However, the privilege does not apply to a competitor, such as SFMC, that has unfairly competed, acted with malice, created an unlawful restraint of trade, or employed improper competitive strategies (*e.g.* fraud, deceit, disparagement, or intimidation). *See, e.g.,* [*Fishman v. Estate of Wirtz, 807 F.2d 520, 547 (7th Cir.1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XNK0-0039-P2B6-00000-00&context=) (privilege not applicable where defendant interfered through "an unfair and anticompetitive act"); **[\*366]**[*Ken—Pin, Inc. v. Vantage Bowling Corp., No. 02-cv-7991, 2004 U.S. Dist. LEXIS 1050, 2004 WL 783092, at \*8 (N.D. Ill. Jan. 20, 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BK8-34H0-0038-Y2G7-00000-00&context=) ("A party that has behaved unfairly, or used 'wrongful' means, is ineligible for the competitive privilege even if it acted purely with competitive motive."); [*Labor Ready, Inc. v. Williams Staffing, L.L.C., 149 F. Supp. 2d 398, 411 (N.D. Ill. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:438B-M9C0-0038-Y25F-00000-00&context=) (privilege not applicable where defendant "employ[ed] wrongful means" or where its actions "create[d] or continue[d] . . . an unlawful restraint on trade").[[71]](#footnote-70)28

SFMC's ***antitrust*** violations alone are sufficient reasons to void the privilege. [*DSM Desotech Inc. v. 3D Sys. Corp., No. 08-cv-1531, 2009 U.S. Dist. LEXIS 5980, 2009 WL 174989, at \*14 (N.D. Ill. Jan. 26, 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VGP-G8W0-TXFP-T1SK-00000-00&context=). However, even in the absence of such claims, the underlying facts—that SFMC intimidated and threatened insurers with withdrawal from their networks and outrageous pricing penalties if they did not exclude Methodist, depriving the insurers of affordable access to certain pediatric services and preventing their subscribers from receiving such care—establish that SFMC used wrongful means and acted with malice. [*Karlberg European Tanspa, Inc. v. JKJoseph Kratz Vettriebsgesellschaft mbH, No. 87-cv-20458, 1991 U.S. Dist. LEXIS 20526, 1991 WL 352524, at \*9 (N.D. Ill. Sept. 30, 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-9YJ0-001T-71FN-00000-00&context=) (denying summary judgment when jury could conclude competitor's privilege did not apply because of evidence that defendant threatened and coerced suppliers**[\*367]** not to deal with plaintiff) (*e.g.*, MF ¶¶ 248-54.). At the very least, SFMC's conduct presents disputed questions of material fact regarding the tortious interference claims which should be decided by a jury.

**CONCLUSION**

For all the reasons noted above, Defendant's Motion for Summary Judgment should be denied.

Dated: December 11, 2015

Respectfully submitted,

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**METHODIST HEALTH SERVICES CORPORATION**

**EXHIBIT 233**

**EXPERT REPORT OF CORY S. CAPPS, PHD**

**June 12, 2015**

**HIGHLY CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER**

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**III.B.2. Outpatient surgery**

(66) Outpatient surgery, or ambulatory surgery, refers to surgical procedures**[\*368]** that do not require an overnight stay in a hospital. Medical advances, such as minimally invasive or laparoscopic surgery techniques, have reduced the risk, complexity, and invasiveness of surgery, such that a wider array of surgeries can be performed in the outpatient setting.[[73]](#footnote-72)38 A wide variety of procedures can now be performed on an outpatient basis including colonoscopies, endoscopies, arthroscopies, various eye procedures, musculoskeletal procedures, and other procedures such as carpal tunnel surgery.[[74]](#footnote-73)39 In the 1990s, the number of outpatient surgeries surpassed inpatient surgeries, and outpatient surgery continues to grow.[[75]](#footnote-74)40

(67) [TEXT REDACTED BY THE COURT][[76]](#footnote-75)41

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(69) For purposes of this report, I define OP surgeries using Healthcare Cost and Utilization Project's (HCUP) surgery flag software. I identify OP surgeries based on HCUP's "narrow" definition. This definition covers**[\*369]** invasive surgical procedures that are generally performed in an operating room and often require anesthesia. The definition excludes procedures carried out for diagnostic purposes (e.g., certain types of biopsy and endoscopy procedures). HCUP defines a "narrow" invasive surgical procedure as "[a]n invasive therapeutic surgical procedure involving incision, excision, manipulation, or suturing of tissue that penetrates or breaks the skin; typically requires use of an operating room; and also requires regional anesthesia, general anesthesia, or sedation to control pain."[[77]](#footnote-76)42

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**III.D.1.e. SFMC's exclusive and near-exclusive inpatient services**

(105) There are a number of inpatient services that, within the Tri-County area, are solely or almost solely provided by SFMC. Most of these relate to**[\*370]** the areas of neonatology services, certain transplants, Level 1 trauma services and Level 1 pediatric trauma services, and certain advanced cardiac and neurological services.[[82]](#footnote-81)113 In addition, SFMC includes Children's Hospital of Illinois (CHOI), which accounts for about 20% of SFMC's 616 beds. There are a number of services for which, although more than one Tri-County hospital provides the service *to adults*, only SFMC provides the service *to children* (taken below to be patients aged 14 or younger).

(106) Figure 12 summarizes the extent of services provided exclusively or nearly exclusively at SFMC (i.e., not available or minimally available at Methodist, Proctor, or Pekin). With respect to patients of all ages, inpatient services for which 95% to 100% of 2011-2013 discharges occurred at SFMC accounted for 10.6% of SFMC's commercial inpatient days. Examples of such services include DRG 228 (Other cardiothoracic procedures with major complicating condition), DRG 790 (Extreme immaturity or respiratory distress syndrome, neonate), and DRG 955 (Craniotomy for multiple significant trauma).

(107) With respect to patients aged 14 and under, inpatient services for which 95% to 100% of discharges from 2011-2013 occurred at SFMC accounted for 16.1% of SFMC's commercial inpatient days. Examples include DRG 101 (Seizures without major complicating condition), and DRG 639 (Diabetes without complicating or major complicating condition).

(108) Combining**[\*372]** the two categories—exclusivity/near-exclusivity with respect to all patients and exclusivity/near-exclusivity with respect to patients aged 14 and under—18.3% of SFMC's commercial inpatient days are attributable to inpatient services for which SFMC is the exclusive (100% of discharges) or near-exclusive (>/= 95% of discharges) provider.[[83]](#footnote-82)114

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(118) BCBSIL's PPO product is substantially larger than its HMO product. For example, based on billing data for SFMC and Methodist, in 2012, BCBSIL's PPO accounted for 5,219 inpatient admissions at SFMC and Methodist combined,**[\*373]** as compared with 258 inpatient admissions for the HMO product.[[88]](#footnote-87)135 That is, the BCBSIL PPO is roughly twenty times as large as the BCBSIL HMO. In addition, the BCBSIL PPO product is the single largest commercial health insurance product in the Peoria area: in 2012, it accounted for 39% of SFMC's commercial inpatient admissions and the same percentage of SFMC's commercial inpatient revenue.

(119) [TEXT REDACTED BY THE COURT][[89]](#footnote-88)136

(120) [TEXT REDACTED BY THE COURT][[90]](#footnote-89)137 [TEXT REDACTED BY THE COURT]

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**Figure 17. Combined commercial inpatient discharges and payments at SFMC and Methodist, 2012**

[*Go to table9*](#Table9)



Source: 2012 SFMC and Methodist billing data.

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**VIII.D. Methodist's benefit match program**

(545) Methodist has maintained, since 2006 at the latest, a benefit match program (BMP).[[91]](#footnote-90)702 Methodist's BMP allows patients to use inpatient, outpatient, and diagnostic services at Methodist and Proctor hospitals, even if Methodist and Proctor are "out-of-network" under the individual's insurance plan.[[92]](#footnote-91)703 Most Blue Cross/Blue Shield PPO members qualify for the Methodist Matching Plan, but Medicaid, Medicare, HMOs, and Caterpillar insurance plans are not eligible; thus, out-of-pocket co-payments would still be required for services received from Methodist.[[93]](#footnote-92)704 Qualifying individuals have no out-of-network penalties on inpatient and outpatient hospital services performed at Methodist and Proctor; however, the program does not include benefit match physician fees.[[94]](#footnote-93)705 Calvin MacKay (former CFO of Methodist) explained the program in his deposition: "Our physicians, MMG, were part of the Blue Cross PPO. Always have been. Always will be. The hospital did not have a PPO contract. And so . .**[\*375]** . if patients were to come, we would match or mirror their benefits as if they were in network."[[95]](#footnote-94)706

(546) [TEXT REDACTED BY THE COURT]

**Table1 (**[*Return to related document text*](#Table1_insert)**)**

|  |  |
| --- | --- |
| I. INTRODUCTION |  |
|  |  |
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| A. The Parties |  |
| 1. OSF |  |
| 2. UPM |  |
|  |  |
| B. Sources of Patient Volume |  |
| 1. Medicare**[\*58]** and Medicaid |  |
| 2. Commercial Health Plan Coverage |  |
|  |  |
| C. Commercial Health Plan Contracting |  |
| 1. Network Construction and Access to Patients |  |
| 2. UPM's Commercial Health Plan Contracting Strategies |  |
|  |  |
| D. UPM Has Access to Multiple Channels of Distribution for Commercial |  |
| Patients |  |
| 1. UPM Offers Its Own Exclusive Methodist First Choice Network to |  |
| Employer Self-Funded Plans |  |
| 2. UPM Was An In-Network Provider for Health Plans Operated by |  |
| National Commercial Insurers |  |
| a. United Healthcare |  |
| b. Coventry Healthcare |  |
| c. Blue Cross/Blue Shield HMO |  |
| (1) The HMO Has Not Succeeded Because of UPM's |  |
| High Prices |  |
| (2) The OSF-BCBS PPO Contract Did Not Prohibit |  |
| UPM From Lowering the Price of the HMO |  |
| d. Caterpillar |  |
| 3. UPM Offered a "Matching Program" to Compete for BCBS PPO |  |
| Patients on an Out-of Network Basis |  |
| 4. Peoria Employers Offered Their Employees Choices Between OSF |  |
| and UPM-Centered Health Plans |  |
|  |  |
| E. The Four Challenged OSF Agreements |  |
| 1. Blue Cross/Blue Shield PPO |  |
| a. During the Relevant Time, UPM Has Competed With OSF |  |
| For Inclusion in the BCBS PPO Every Time the Contract |  |
| Was Up for Renewal |  |
| b. The OSF/BCBS PPO Agreements Did Not Prohibit ASO |  |
| Accounts From Adding UPM as an In-Network Provider |  |
| 2. Humana |  |
| 3. Health Alliance Medical Plan |  |
| 4. Aetna |  |
|  |  |
| F. Expert**[\*59]** Reports |  |
|  |  |
| III. ARGUMENT |  |
|  |  |
| A. Standard of Review |  |
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| B. The Federal ***Antitrust*** Law Claims Fail Because There Is No Evidence of |  |
| Substantial Foreclosure |  |
| 1. Standard of Liability for Exclusive Contracts. |  |
| a. UPM's Sherman Act Claims |  |
| b. Exclusive Agreements are Presumptively Lawful |  |
| c. The Substantial Foreclosure Requirement |  |
| 2. UPM Cannot Establish Substantial Foreclosure Because It Had |  |
| Ample Distribution Channels For Its Services. |  |
| 3. UPM's Matching Program Defeats Any Claim of Substantial |  |
| Foreclosure |  |
| 4. The Alleged Exclusive Contracts Foreclosed, At Most, Less Than |  |
| 20% of the Market for Inpatient Hospital Services |  |
| a. UPM's Claim that OSF's Exclusive Contracts Foreclosed |  |
| 52-54.6% of the Alleged Relevant Market is Insupportable |  |
| b. Calculation of Foreclosure Percentages |  |
| c. UPM's Foreclosure Percentages Include Fully Insured |  |
| BCBS PPO and Other Patients Whom It Actually Treated |  |
| d. UPM Was Not Foreclosed From Treating Patients Enrolled |  |
| in Self-Funded Employer BCBS PPO Plans |  |
| e. UPM's Humana Foreclosure Percentages Improperly |  |
| Include OSF's Own Employees and Their Dependents |  |
| f. UPM Was Not Foreclosed From Treating HAMP Patients |  |
| g. UPM Cannot Include the Caterpillar PPO in its Foreclosure |  |
| Tables Because No Caterpillar Claim Was Pled**[\*60]** |  |
| h. The Sum of the BCBS, Humana, Caterpillar, and HAMP |  |
| Adjustments Demonstrate That There Is No Substantial |  |
| Foreclosure |  |
| 5. There is No Meaningful Foreclosure for Outpatient Surgical |  |
| Services |  |
| 6. UPM Was Able to Compete for the Alleged Exclusive BCBS PPO |  |
| Contract |  |
|  |  |
| C. The Federal ***Antitrust*** Claims Fail Because UPM Cannot Demonstrate |  |
| ***Antitrust*** Injury |  |
| 1. UPM Has Not Identified Any Investment That It Did Not Make |  |
| Due to OSF's Conduct |  |
| 2. Methodist's Allegations that Consumers Would Have Paid Less for |  |
| Healthcare Absent OSF's Conduct is Not Supported by the Record |  |
| Evidence. |  |
| 3. Capps' Failure to Account for an Open Network Premium Renders |  |
| His Conclusions Unsupportable |  |
|  |  |
| D. The Federal ***Antitrust*** Claims Fail Because UPM Improperly Excludes |  |
| Government Payers From Its Relevant Markets |  |
|  |  |
| E. The Remaining State Law Claim Fail As a Matter of Law |  |
| 1. Illinois State ***Antitrust*** Statutes Follow Federal Law in Exclusive |  |
| Dealing Claims |  |
| 2. The Illinois Consumer Fraud Act Claim Fails For Lack of Proof of |  |
| Federal ***Antitrust*** Violations |  |
| 3. The Tortious Interference Claims Are Barred by the Competitor |  |
| Privilege |  |
|  |  |
| IV. CONCLUSION |  |

**Table1 (**[*Return to related document text*](#Table1_insert)**)**

**Table2 (**[*Return to related document text*](#Table2_insert)**)**

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| **Cases** |  |
|  |  |
| [*A-Abart Elec. Supply v. Emerson Elec. Co., 956 F.2d 1399, 1405 (7th*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5F20-008H-V03P-00000-00&context=) |  |
| Cir. 1992) |  |
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| **[\*61]**[*Agnew v. National Collegiate Athletic Assoc., 683 F.3d 328, 335 (7th*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55X7-KYR1-F04K-R0GK-00000-00&context=) |  |
| Cir. 2012) |  |
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| [*Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=) |  |
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| [*B&H Medical, LLC v. AB Administration, Inc., 526 F.3d 257, 265-66*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SFR-W7N0-TXFX-838J-00000-00&context=) |  |
| (6th Cir. 2008) |  |
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| [*Balaklaw v. Lovell, 14 F.3d 793, 799 (2d Cir. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8YV0-003B-P2WY-00000-00&context=) |  |
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| [*Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 237-38 (1st*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XX40-003B-G0JD-00000-00&context=) |  |
| Cir. 1983) |  |
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| [*Batson v. Live Nation Entm't. Inc., 746 F.3d 827, 830-831 (7th Cir.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BTT-V1F1-F04K-R000-00000-00&context=) |  |
| 2014) |  |
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| [*Bepco, Inc. v. Allied-Signal, Inc., 106 F. Supp. 2d 814, 828*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:40KY-KWP0-0038-Y0PK-00000-00&context=) |  |
| (M.D.N.C. 2000) |  |
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| [*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=) |  |
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| [*Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111, 1119*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4T0M-YNG0-TX4N-G1C5-00000-00&context=) |  |
| (10th Cir. 2008) |  |
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| *Capital Options Invest., Inc. v. Goldberg Bros. Commodities, Inc.*, |  |
| [*958 F.2d 186, 189 (7th Cir. 1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5220-008H-V31Y-00000-00&context=) |  |
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| (N.D. Cal. 2012) *rev'd on other grounds* No. C-10-4429 EMC, |  |
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| (C.D. Ill. 1987) |  |
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| [*Dos Santos v. Columbus-Cueno-Cabrini Med. Ctr., 684 F.2d 1346, 1355*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-28D0-003B-G519-00000-00&context=) |  |
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| [*2014 U.S. Dist. LEXIS 1850 at \*25-26 (N.D. Ill. Jan. 8, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5B7M-DS51-F04D-730S-00000-00&context=) |  |
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| [*Imaging Ctr., Inc. v. W. Md. Health Sys., Inc., 158 Fed. Appx. 413*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HT6-DSM0-0038-X4YW-00000-00&context=), |  |
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| *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, |  |
| [*227 Ill. 2d 381, 882 N.E.2d 1011, 1019, 317 Ill. Dec. 855 (Ill. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RSK-7FS0-TXFS-P1VJ-00000-00&context=) |  |
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| [*Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 710*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-WT90-003B-G31J-00000-00&context=) |  |
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| Aug. 26, 2013) |  |
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| 2011) |  |
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| 2003) |  |
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| Cir. 2011) |  |
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| Cir. 1996) |  |
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| [*Thomas Consol. Indus. v. Koster Group, Inc., 93 Fed. Appx. 926, 928*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BY4-2270-0038-X1NW-00000-00&context=) |  |
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| 2000), *rev'd on other* grounds, [*253 F.3d 34, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43CK-3HW0-0038-X4RT-00000-00&context=) |  |
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| [*540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BFM-T0F0-004C-001J-00000-00&context=) |  |
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| 2001) |  |
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| **Statutes** |  |
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| *15 U.S.C. § 1* |  |

**Table2 (**[*Return to related document text*](#Table2_insert)**)**

**Table3 (**[*Return to related document text*](#Table3_insert)**)**

| **Payer** | **Admissions** | **Share** | **Total payments** | **Share** |
| --- | --- | --- | --- | --- |
| BCBSIL PPO | 4,470 | 28.8% | $72,374,552 | 29.0% |
| Caterpillar FPO | 2,807 | 18.1% | $29,919,356 | 12.0% |
| Humana | 1,621 | 10.5% | $18,559,800 | 5.6% |
| OSF Health Plan/OSF Dan (Humana)[1] | 978 | 6.3% | $17,537,988 | 7.0% |
| United River Valley | 537 | 3.5% | $14,099,784 | 5.5% |
| United | 430 | 2.8% | $9,680,674 | 40% |
| Health Allance Medical Plans | 397 | 2.6% | $10,573,656 | 42% |
| BCUSIL HMO | 250 | 1.6% | $3,359,738 | 1.3% |
| Aetna | 232 | 1.5% | $4,001,559 | 19% |
| Caterpillar HMO | 197 | 1.3% | $2,031,191 | 0.6% |
| BCBSIL Other | 166 | 1.1% | $3,925,409 | 1.5% |
| **[\*129]**Coventry | 118 | 0.8% | $1,945,496 | 0.8% |
| All altier commercial | 3,304 | 21.3% | $63,460,512 | 25.4% |

**Table3 (**[*Return to related document text*](#Table3_insert)**)**

**Table4 (**[*Return to related document text*](#Table4_insert)**)**

| **Payer** | **Admissions** | **Share** | **Total payments** | **Share** |
| --- | --- | --- | --- | --- |
| BCBSIL PPO | 5,219 | 32.8% | $108,654,169 | 34.4% |
| Caterpillar PPO | 2,225 | 14.0% | $30,488,542 | 9.7% |
| Humana | 2,118 | 13.3% | $32,548,110 | 10.3% |
| Health Alliance Medical Plans | 772 | 4.9% | $19,237,489 | 6.1% |
| United River Valley | 595 | 3.7% | $13,587,424 | 4.3% |
| United | 568 | 3.6% | $14,666,819 | 4.6% |
| Caterpillar HMO | 515 | 3.2% | $6,109,626 | 1.9% |
| Coventry | 482 | 3.0% | $9,584,640 | 3.0% |
| BCBSIL HMO | 258 | 1.6% | $6,557,337 | 2.1% |
| Aetna | 225 | 1.4% | $4,409,318 | 1.4% |
| OSF Health Plan/OSF Dan | 168 | 1.1% | $3,454,655 | 1.1% |
| BCBS Other | 153 | 1.0% | $3,254,728 | 1.0% |
| All other commercial | 2,597 | 16.3% | $62,968,041 | 20.0% |

**Table4 (**[*Return to related document text*](#Table4_insert)**)**

**Table5 (**[*Return to related document text*](#Table5_insert)**)**

| **Payer** | **2009** |
| --- | --- |
| UPM Alleged Foreclosure | 54.6% |
| Percentage Based on |  |
| Payments |  |
| Adjustment to Exclude | -4.6% |
| Patients that UPM Whom |  |
| UPM Actually Treated |  |
| Outside of the BCBS PPO |  |
| ASO membership**[\*143]** |  |
| Adjustment to Exclude BCBS | -18.1% |
| PPO ASO Members |  |
| Adjustment to Eliminate OSF | -4.8% |
| Employee Health Plan |  |
| Members |  |
| [TEXT REDACTED BY THE COURT] | [TEXT REDACTED BY THE COURT] |
| [TEXT REDACTED BY THE COURT] | [TEXT REDACTED BY THE COURT] |
| Total Adjusted Foreclosure | 15.1% |

**Table5 (**[*Return to related document text*](#Table5_insert)**)**

**Table6 (**[*Return to related document text*](#Table6_insert)**)**

| **Payer** | **2012** |
| --- | --- |
| UPM Alleged Foreclosure | 52% |
| Percentage Based on |  |
| Payments |  |
| Adjustment to Exclude | -3.6% |
| Patients that UPM Whom |  |
| UPM Actually Treated |  |
| Outside of the BCBS PPO |  |
| ASO membership |  |
| Adjustment to Exclude BCBS | -21.8% |
| PPO ASO Members |  |
| Adjustment to Eliminate OSF | -4.8% |
| Employee Health Plan |  |
| Members |  |
| [TEXT REDACTED BY THE COURT] | [TEXT REDACTED BY THE COURT] |
| [TEXT REDACTED BY THE COURT] | [TEXT REDACTED BY THE COURT] |
| Total Adjusted Foreclosure | 15.7% |

**Table6 (**[*Return to related document text*](#Table6_insert)**)**

**Table7 (**[*Return to related document text*](#Table7_insert)**)**

|  |  |
| --- | --- |
| INTRODUCTION |  |
|  |  |
| STATEMENT OF FACTS |  |
|  |  |
| I. UNDISPUTED MATERIAL FACTS |  |
|  |  |
| II. DISPUTED MATERIAL FACTS |  |
|  |  |
| III. UNDISPUTED NON-MATERIAL FACTS |  |
|  |  |
| IV. DISPUTED NO-MATERIAL FACTS |  |
|  |  |
| V. METHODIST'S ADDITIONAL UNDISPUTED MATERIAL FACTS |  |
|  |  |
| A. Parties |  |
|  |  |
| 1. Methodist Health Services Corporation |  |
|  |  |
| 2. OSF Healthcare System d/b/a Saint Francis Medical Center |  |
|  |  |
| B. Commercial Health Insurance Background |  |
|  |  |
| 1. Types of health plans |  |
|  |  |
| 2. Significance of being in network |  |
|  |  |
| 3. Key differences between government and commercial |  |
| insurers |  |
|  |  |
| C. Market Definition |  |
|  |  |
| 1. Relevant geographic market |  |
|  |  |
| a. SFMC recognized the Tri-County Area as a distinct |  |
| market and Methodist as its primary competitor |  |
|  |  |
| b. Patients prefer not to travel for healthcare |  |
|  |  |
| 2. Relevant product market |  |
|  |  |
| D. SFMC Interactions With Commercial Payors |  |
|  |  |
| 1. SFMC contracting strategy |  |
|  |  |
| 2. OSF required exclusivity |  |
|  |  |
| 3. OSF leveraged its system in contract negotiations |  |
|  |  |
| 4. OSF would not offer non-exclusive proposals in Peoria |  |
|  |  |
| E. Blue Cross Blue Shield Of Illinois |  |
|  |  |
| 1. Significance of BCBS to SFMC |  |
|  |  |
| 2. Significance of SFMC to BCBS |  |
|  |  |
| 3. BCBS's desire for an open network |  |
|  |  |
| 4. History**[\*169]** of OSF contracting with BCBS |  |
|  |  |
| 5. 2005/2006 Negotiations |  |
|  |  |
| 6. 2008 Negotiations |  |
|  |  |
| 7. Interactions with BCBS in 2009 |  |
|  |  |
| 8. Interactions with BCBS from 2010 to 2011 |  |
|  |  |
| 9. Interactions with BCBS in 2012 |  |
|  |  |
| 10. BCBS interactions with Methodist |  |
|  |  |
| 11. BCBS HMO product |  |
|  |  |
| F. Caterpillar |  |
|  |  |
| 1. CAT had concerns with SFMC's high cost, low quality, |  |
| and lack of transparency |  |
|  |  |
| 2. OSF attempted to block CAT's decision to open up its |  |
| networks |  |
|  |  |
| G. Humana |  |
|  |  |
| 1. Events preceding Humana's acquisition of OSF |  |
| HealthPlans |  |
|  |  |
| 2. Negotiations regarding network construction between OSF |  |
| and Humana |  |
|  |  |
| 3. An open network was a deal breaker for OSF |  |
|  |  |
| 4. The final provider agreement between Humana and OSF |  |
| excluded Methodist |  |
|  |  |
| 5. Subsequent negotiations between Humana and OSF |  |
|  |  |
| H. HAMP |  |
|  |  |
| 1. OSF's acquisition of Carle Clinic in Bloomington, Illinois |  |
|  |  |
| 2. Methodist's exclusion from HAMP's network |  |
|  |  |
| 3. 2009 provider agreement between HAMP and OSF |  |
|  |  |
| I. AETNA |  |
|  |  |
| J. Other Payors |  |
|  |  |
| K. Barriers to Entry |  |
|  |  |
| L. SFMC's Additional Anticompetitive Conduct |  |
|  |  |
| 1. Children's Hospital of Illinois |  |
|  |  |
| M. Competitive Harm |  |
|  |  |
| 1. SFMC's prices are higher than Methodist's despite use of |  |
|  |  |
| exclusive contracts |  |
|  |  |
| 2. SFMC's casemix-adjusted prices are higher than other |  |
| Illinois teaching hospitals' |  |
|  |  |
| 3. Payors recognized that SFMC charged high prices**[\*170]** |  |
|  |  |
| 4. SFMC's higher prices are not justified by providing higher |  |
| quality care than Methodist |  |
|  |  |
| 5. A shift in volume from higher-priced SFMC to lowerpriced |  |
| Methodist would result in significant savings for |  |
| consumers |  |
|  |  |
| 6. Payors do not experience better quality care at SFMC |  |
|  |  |
| 7. SFMC's internal documents illustrate its struggle with |  |
| quality |  |
|  |  |
| 8. SFMC struggled with capacity and access |  |
|  |  |
| N. Foreclosure |  |
|  |  |
| O. Damages |  |
|  |  |
| 1. Lost profit |  |
|  |  |
| 2. Lost opportunities |  |
|  |  |
| 3. Physician recruitment |  |
|  |  |
| 4. Mitigation |  |
|  |  |
| ARGUMENT |  |
|  |  |
| I. STANDARD OF REVIEW |  |
|  |  |
| II. SMFC'S EXCLUSIVE CONTRACTS VIOLATE THE SHERMAN ACT |  |
|  |  |
| A. SFMC's Exclusive Dealing Arrangements Warrant ***Antitrust*** |  |
| Scrutiny |  |
|  |  |
| B. Exclusive Dealing Arrangements Are Analyzed Under the Rule of |  |
| Reason |  |
|  |  |
| III. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY |  |
| JUDGMENT ON METHODIST'S SHERMAN ACT CLAIMS |  |
|  |  |
| A. SFMC's Exclusionary Contracts Substantially Foreclosed The |  |
| Relevant Markets |  |
|  |  |
| 1. Methodist is foreclosed from the BCBS PPO contract |  |
|  |  |
| a. SFMC's anticompetitive conduct and market power |  |
| prevented Methodist from competing for the BCBS |  |
| PPO contract |  |
|  |  |
| i. SFMC refused to consider BCBS's repeated |  |
| requests to include Methodist in the PPO |  |
|  |  |
| ii. SFMC leveraged its dominant market |  |
| position to thwart BCBS's desire to include |  |
| Methodist in its PPO |  |
|  |  |
| iii.**[\*171]** The duration of SFMC's contracts did not |  |
| impact their severe anticompetitive effects |  |
|  |  |
| b. The matching program is not a substitute for innetwork |  |
| status |  |
|  |  |
| 2. The alternative distribution channels proffered by SFMC |  |
| do not demonstrate lack of foreclosure |  |
|  |  |
| 3. Methodist's calculation of foreclosure percentages is |  |
| accurate |  |
|  |  |
| a. Methodist's data sources for its calculation are |  |
| proper |  |
|  |  |
| b. The foreclosure percentage properly includes |  |
| patients treated at Methodist on an out-of-network |  |
| basis |  |
|  |  |
| c. The foreclosure percentage correctly includes |  |
| patients and employers with self-funded BCBS PPO |  |
| contracts |  |
|  |  |
| d. OSF employees are properly part of the foreclosure |  |
| percentage |  |
|  |  |
| e. Even crediting SFMC's arguments, the effect on |  |
| Methodist's calculated foreclosure percentage is |  |
| minimal |  |
|  |  |
| f. Methodist was foreclosed from HAMP |  |
|  |  |
| g. Methodist may offer evidence regarding CAT |  |
|  |  |
| h. SFMC's exclusive contracts foreclosed Methodist |  |
| from competing for patients covered by Humana |  |
| and Aetna |  |
|  |  |
| 4. SFMC substantially foreclosed the outpatient market |  |
|  |  |
| B. SFMC's Exclusive Dealing Caused ***Antitrust*** Injury |  |
|  |  |
| 1. SFMC's exclusive arrangements impaired Methodist's |  |
| ability to invest in its personnel and facilities |  |
|  |  |
| 2. SFMC's exclusive arrangements harmed consumers by |  |
| increasing healthcare**[\*172]** costs and restricting consumer choice |  |
|  |  |
| 3. SFMC's exclusive dealing arrangements lack |  |
| procompetitive benefits |  |
|  |  |
| C. Government Payors Are Properly Excluded From The Relevant |  |
| Product Market |  |
|  |  |
| IV. SUMMARY JUDGMENT IS IMPROPER FOR THE STATE LAW |  |
| CLAIMS |  |
|  |  |
| A. Methodist's Illinois Consumer Fraud Act Claim |  |
|  |  |
| B. SFMC's Assertion Of The Competitor's Privilege Is Not A Basis |  |
| For Summary Judgment On Methodist's Claims For Tortious |  |
| Interference |  |
|  |  |
| CONCLUSION |  |

**Table7 (**[*Return to related document text*](#Table7_insert)**)**

**Table8 (**[*Return to related document text*](#Table8_insert)**)**

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| [*20 ILCS 3960*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C65-YT41-6YS3-D0GD-00000-00&context=) | 87 |
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| **Rules** |  |
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| *"Foreclosure," and Consumer Harm*, |  |
| [*70* ***Antitrust*** *L.J. 311 (2002)*](https://advance.lexis.com/api/document?collection=legalnews&id=urn:contentItem:47P2-GJ70-00C2-M244-00000-00&context=) | 112 |
|  |  |
| F.T.C. & U.S. Dep't of Justice, *Improving* |  |
| *Health Care A Dose of Competition* |  |
| (2004) | 145, 146 |

**Table8 (**[*Return to related document text*](#Table8_insert)**)**

**Table9 (**[*Return to related document text*](#Table9_insert)**)**

| **Payer** | **Admissions** | **Share** | **Total payments** | **Share** |
| --- | --- | --- | --- | --- |
| BCBSIL PPO | 5,219 | 32.8% | $108,654,169 | 34.4% |
| Caterpillar PPO | 2,225 | 14.0% | $30,488,542 | 9.7% |
| Humana | 2,118 | 13.3% | $32,548,110 | 10.3% |
| Health Alliance Medical Plans | 772 | 4.9% | $19,237,489 | 6.1% |
| United River Valley | 595 | 3.7% | $13,587,424 | 4.3% |
| United | 568 | 3.6% | $14,666,819 | 4.6% |
| Caterpillar HMO | 515 | 3.2% | $6,109,626 | 1.9% |
| Coventry | 482 | 3.0% | $9,584,640 | 3.0% |
| BCBSIL HMO | 258 | 1.6% | $6,557,337 | 2.1% |
| Aetna | 225 | 1.4% | $4,409,318 | 1.4% |
| OSF Health Plan/OSF**[\*374]** Dan | 168 | 1.1% | $3,454,655 | 1.1% |
| BCBS Other | 153 | 1.0% | $3,254,728 | 1.0% |
| All other commercial | 2,597 | 16.3% | $62,968,041 | 20.0% |

**Table9 (**[*Return to related document text*](#Table9_insert)**)**

**End of Document**

1. 1The parties in this case are the parent companies that own the hospitals. *See* Dkt. To simplify, the Court refers to the hospitals and their corporate management interchangeably, unless there is a relevant distinction, in which case the Court will note it. [↑](#footnote-ref-0)
2. 2The parties have also filed motions to file their briefing under seal. ECF Nos. 151, 164, 165, 174. Those motions are granted except to the extent the Court relies on factual background in resolving the motion for summary judgment. *See infra* Section II for further discussion. Further, Methodist has filed a motion to clarify the record following St. Francis' reply. ECF No. 172. The Court has reviewed that motion and it is GRANTED, although the Court has focused its analysis on the parties' summary judgment briefing. [↑](#footnote-ref-1)
3. 3In 2013, 30 percent of St. Francis' discharges were covered by commercial insurance as opposed to 62 percent by government insurance. In that year, 28 percent of Methodist's discharges were commercially insured and 66 percent were governmentally insured. Also in 2013, St. Francis' received 47 percent of its payments from private payers and 52 percent from public payers. Methodist's numbers were 40 percent and 60 percent. [↑](#footnote-ref-2)
4. 4All agree that the relevant geographic area in this case includes the counties of Peoria, Tazewell, and Woodford. The parties refer to this region as the "tri-county area." [↑](#footnote-ref-3)
5. 5Methodist and Proctor are now both owned by UnityPoint Health. [↑](#footnote-ref-4)
6. 6St. Francis has recently been added to the BCBS HMO network, but was not for much of the time relevant to this case. [↑](#footnote-ref-5)
7. 7While Capps' report only accounts for admissions at St. Francis and Methodist, the Court treats the figures as an adequate proxy for the entire geographic market. [↑](#footnote-ref-6)
8. 8St. Francis contends that evidence related to foreclosure of Caterpillar employees may not be considered because, essentially, no Caterpillar "claim" was pled. As the Court reads the complaint, the ***antitrust*** claims in this case arise out of St. Francis' allegedly unlawful conduct, and its dealing with Caterpillar is evidence of that conduct, not a separate claim that must have been pled. In any event, the course and scope of discovery should have alerted St. Francis to the fact that St. Francis had previously formed exclusive contracts with Caterpillar, and therefore it cannot claim to be surprised that those contracts are at issue in this case. *See* [*Schmidt v. Eagle Waste & Recycling, Inc., 599 F.3d 626, 632 (7th Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y2M-TJ40-YB0V-K028-00000-00&context=). [↑](#footnote-ref-7)
9. 9There is some dispute between the parties about whether the 38 percent tertiary services price increase combined with the general smaller price increase actually shows an open network premium. All the evidence in the record shows that such a premium exists, generally. It is therefore Methodist's burden to show that prices went down when the network opened up to competition. The parties have not clearly shown, either way, whether the two-tiered pricing increase represents an overall increase or decrease to Caterpillar. (The evidence Methodist relies on shows a Caterpillar employee's forecast for a change in "total spend" from between an increase in four percent and a decrease in two percent. It is not clear why Methodist has not provided a comparison between OSF exclusive Caterpillar spending and open-network Caterpillar spending.) *See* Resp. Ex. 156, ECF No. 159-11. [↑](#footnote-ref-8)
10. 10The match program applied to the Blue Cross Blue Shield PPO—by far the largest and most important source of commercial payments in the market. [↑](#footnote-ref-9)
11. 11Of course, as noted above, ***section 2*** claims also require a plaintiff to prove that the defendant possesses monopoly power or substantial market power. St. Francis has conceded for purposes of this motion that**[\*25]** it possesses market power. [↑](#footnote-ref-10)
12. 12The concept measures the increase in demand for a substitute good Y if the price of X is increased by some marginal amount. *See* [*Brown Shoe, 370 U.S. at 325*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H870-003B-S01T-00000-00&context=). [↑](#footnote-ref-11)
13. 13The parties agree that the relevant geographic market comprises the 6 hospitals in the tri-county area. [↑](#footnote-ref-12)
14. 14If the Court did not count OSF employees in the overall product market, it would also have to eliminate Methodist employees because Methodist also is the exclusive provider for its employees' health plan. Both OSF and Methodist are major Peoria employers, and although OSF is larger, the difference is not material in this case. [↑](#footnote-ref-13)
15. 15The figure is probably close to 15 percent, which represents Capps' estimate minus patients treated at Methodist minus BCBS PPO ASO patients minus Caterpillar patients minus OSF employees. [↑](#footnote-ref-14)
16. 16This represents Capps' estimate minus the patients Methodist actually treated minus BCBS PPO ASO patients minus OSF employees. [↑](#footnote-ref-15)
17. 17The exclusivity provision for Humana is slightly different, but not materially so. [↑](#footnote-ref-16)
18. 18The Court need not address Capps' cramped and internally inconsistent definition of outpatient surgical services, which excludes, for example, any endoscopy or colonoscopy or any non-invasive diagnostic imaging. Methodist owns 49 percent of the Central Illinois Endoscopy Center,**[\*47]** and Capps' narrower definition of outpatient surgery therefore excludes the CIEC from foreclosure calculation. In other words, had Capps stuck to his original definition of outpatient surgery, the evidence would show far less foreclosure because the BCBS PPO contract did not prevent BCBS from including the CIEC in any of its provider network. [↑](#footnote-ref-17)
19. 19The parties have submitted detailed briefing regarding the documents they have requested to remain under seal, complete with affidavits from non-party counsel providing analysis of each document requested to be sealed. *See e.g*. Pl.'s Am. Mot. For Leave to File Under Seal, Exs. AS, BK, BL, BN, ECF Nos. 164-47,65, 66, 68. The parties have complied with the expectations set out in *Baxter* that parties who move to seal documents should "analyze in detail, document by document,**[\*55]** the propriety of secrecy, providing reasons and legal citations." [*Baxter Int'l, 297 F.3d at 548*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4698-PW20-0038-X453-00000-00&context=). [↑](#footnote-ref-18)
20. 20These documents are attached as Exhibits to this Order and will be identified as Court's Partially Unsealed Def.'s Mem. Supp. Mot. Summ. J., Ex. 1, and Court's Partially Unsealed Pl.'s Resp., Ex. 2. [↑](#footnote-ref-19)
21. 21The document shall be identified as Court's Partially Unsealed Capps Report, Ex. 3. [↑](#footnote-ref-20)
22. 1For purposes of this motion, OSF accepts as true the portions of the allegations of the Complaint that support this Statement of Undisputed Facts. Nothing in this Statement of Undisputed Facts, however, shall be deemed to modify OSF's Answer to the Complaint. [↑](#footnote-ref-21)
23. 2For purposes of this motion, OSF refers to certain statements made in the Capps Report, however, OSF does not waive its right to contest the Capps Report's assertions and arguments, including its characterization of the facts. [↑](#footnote-ref-22)
24. 3[TEXT REDACTED BY THE COURT] (Jefferson Dep. Dep. at 24:1-25:9).**[\*88]** [↑](#footnote-ref-23)
25. 4[TEXT REDACTED BY THE COURT] [↑](#footnote-ref-24)
26. 5While UPM argues that United and the BCBS HMO were not truly "exclusive" because the contracts did not expressly exclude OSF's participation, this is a distinction without a difference. Regardless of the terms of the contract, the fact is that UPM negotiated rates on the basis that it was an in-network provider for these payers, and OSF was not. [↑](#footnote-ref-25)
27. 6Consistent with the remainder of the record, UPM's table of "Large Payers" at the time did not include Aetna. [↑](#footnote-ref-26)
28. 7Of course, this list ignores**[\*118]** entirely the many other means UPM had to attract employers and patients, including but not limited to a major limitation to the scope of the OSF/BCBS PPO semi-exclusive agreement, which is discussed in Section III.B.4.d. [↑](#footnote-ref-27)
29. 8This is even more compelling when one considers the fact that the SFMC BCBS PPO agreement did not restrict, in any manner whatsoever, access to UPM's outpatient facilities. *See* Sec. III.B.5, *infra*. [↑](#footnote-ref-28)
30. 9The Caterpillar PPO contract does not form the basis of any claim in UPM's Complaint. UPM is not entitled to amend its Complaint via the Capps Report. *See* Sec. III.B.4.g, *infra*. [↑](#footnote-ref-29)
31. 1013.6% results from adding the values for Humana (6.6%) and**[\*130]** OSF Health Plan (7.0%) which Humana purchased the previous year. [↑](#footnote-ref-30)
32. 11The row in the relevant tables in the Willig Report titled "Patients that Actually Went to Methodist" includes BCBS PPO ASO members. To avoid double-counting in adding the adjustment for patients actually seen to the BCBS PPO ASO adjustment, subtract lines 1 and 2 from "Three Corrections Combined." The "Three Corrections Combined" line eliminates the potential for double-counting in summing the impact of three adjustments together. [↑](#footnote-ref-31)
33. 12Again, the network composition rate clauses in the OSF/BCBS PPO clauses guaranteed rates, and only prohibited BCBS from adding UPM to the PPO network without renegotiating its rates with OSF. [↑](#footnote-ref-32)
34. 13Again, the rates OSF offered to BCBS for SFMC reflect the anticipated volume SFMC would receive as one of two Peoria in-network hospitals in the region. Accordingly, [TEXT REDACTED BY THE COURT] [↑](#footnote-ref-33)
35. 14HAMP is not part of the 2009 foreclosure figure. [↑](#footnote-ref-34)
36. 15Notably, UPM seeks damages from its exclusion from the Caterpillar PPO network in 2009 -- the same year in which Caterpillar was offering an HMO product that was exclusive to UPM. Caterpillar then provided its employees with a choice between the UPM HMO and the OSF PPO, and UPM and OSF competed to have the employees choose their respective plan. Again, this case seeks to negate that prior competition through its claim that UPM was entitled to be in-network for every Caterpillar (and every other commercial insurer's) health plan. [↑](#footnote-ref-35)
37. 16The $2.25 million claim consists of approximately $1.8 million in**[\*142]** claimed damages for inpatient hospital services and approximately $450,000 in claimed damages for outpatient surgical services. [↑](#footnote-ref-36)
38. 17Caterpillar is not listed in the 2012 foreclosure table because UPM has been an in-network provider in the Caterpillar PPO since July 2010. [TEXT REDACTED BY THE COURT] [↑](#footnote-ref-37)
39. 18[TEXT REDACTED BY THE COURT] A competitor's lost profits, alone, are insufficient to show ***antitrust*** injury. [*Midwest Gas Servs., Inc. v. Ind. Gas Co., 317 F.3d 703, 713 (7th Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:47RT-5S10-0038-X02X-00000-00&context=) (quoting [*Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333) (1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=). As explained in Part III.C, Methodist has failed to show this requisite harm to competition. [↑](#footnote-ref-38)
40. 19[TEXT REDACTED BY THE COURT] Exh. 75 (Capps Rebuttal Rep.) ¶¶ 527, 532. [TEXT REDACTED BY THE COURT] *Id.* at ¶ 532 & fig.53. [↑](#footnote-ref-39)
41. 20[TEXT REDACTED BY THE COURT] [↑](#footnote-ref-40)
42. 21Capps admitted at his deposition that there is a mathematical point at which an OSF price increase for an open network would defeat any claimed consumer savings, but he did not calculate this number. Exh. 84 (Capps Dep. 49:13-50:4). [↑](#footnote-ref-41)
43. 22Capps also pointed to the fact that OSF did not impose a price increase on Aetna when it agreed to open the network in 2014. Exh. 84 (Capps Dep. at 40:17-41:7). But Aetna was a miniscule player whose prices were already significantly above its competitors, reflecting Aetna's weak bargaining position as a marginal health insurer in Peoria. SMF ¶ 224. [↑](#footnote-ref-42)
44. 1More than 50 of SFMC's undisputed facts are not supported by their citations. However, to advance this litigation, Methodist has not disputed certain of these facts. The following admitted material facts are not supported by SFMC's citations: 43, 45, 48, 55, 66, 98, 99, 111, 112, 120, 122, 136, 148, 176, 177, 178, 181, 205 and 218. [↑](#footnote-ref-43)
45. 2A violation of ***Section 1*** consists of three elements: (1) the existence of a contract, combination, or conspiracy among two or more separate entities that (2) unreasonably restrains trade and (3) affects interstate or foreign commerce. *See* [*Standard Oil Co. v. United States, 221 U.S. 1, 58, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8XR0-003B-H0BC-00000-00&context=). [↑](#footnote-ref-44)
46. [3](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56P1-2KG1-F04K-K1YW-00000-00&context=)[A monopolization claim consists of two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966). An attempted monopolization claim consists of three elements: (1) specific intent to control prices or destroy competition, (2) predatory or anticompetitive conduct, and (3) a dangerous probability of success. *Spectrum Sports v. McQuillan*, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993).](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56P1-2KG1-F04K-K1YW-00000-00&context=) [↑](#footnote-ref-45)
47. 4*See* [*Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 393-95 (7th Cir. 1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VWT0-003B-G00F-00000-00&context=); [*Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield, 373 F.3d 57, 65-67 (1st Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CPF-49N0-0038-X3XG-00000-00&context=). [↑](#footnote-ref-46)
48. 5*See* [*Dentsply Int'l, 399 F.3d at 187*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=) ("Behavior that otherwise might comply with ***antitrust*** law may be impermissibly exclusionary when practiced by a monopolist."); [*Microsoft Corp., 253 F.3d at 70*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43CK-3HW0-0038-X4RT-00000-00&context=) (holding that the defendant could violate ***Section 2*** of the Sherman Act, even though the district court found no liability under ***Section 1***). [↑](#footnote-ref-47)
49. 6SFMC does not contest the existence of: (1) a contract or agreement; (2) substantial market power; (3) specific intent to control prices or destroy competition; (4) dangerous probability**[\*305]** of success; and (5) a relevant geographic market. SFMC's failure to raise these issues precludes them from being a basis for summary judgment. *See* [*Cloe v. City of Indianapolis, 712 F.3d 1171, 1182 (7th Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5855-4FY1-F04K-R0XS-00000-00&context=) ("As a general matter, if the moving party does not raise an issue in support of its motion for summary judgment, the nonmoving party is not required to present evidence on that point, and the district court should not rely on that ground in its decision."); [*Rivers v. Cent. Ill. Arena Mgmt., 129 F. Supp. 3d 643, 2015 WL 5332226, at \*3 n.3 (C.D. Ill. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GXJ-9YP1-F04D-7078-00000-00&context=) (stating arguments asserted only in reply briefs are waived). [↑](#footnote-ref-48)
50. 7*See, e.g.,* [*B&H Med., L.L.C. v. ABP Admin., Inc., 526 F.3d 257, 266 (6th Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SFR-W7N0-TXFX-838J-00000-00&context=) (noting 30-40% foreclosure causes ***antitrust*** concern); ***Theme Promotions, Inc. v. News Am. Mktg. FSI, 546 F.3d 991, 1003 (9th Cir. 2008)*** (holding 40-60% was substantial); [*Stop & Shop Supermarket Co., 373 F.3d at 68*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CPF-49N0-0038-X3XG-00000-00&context=) (finding above 30-40% foreclosure causes concern); [*Microsoft Corp., 253 F.3d at 70*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43CK-3HW0-0038-X4RT-00000-00&context=) (stating roughly 40% foreclosure levels are substantial); [*Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1301-04 (9th Cir. 1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-35D0-003B-G3JJ-00000-00&context=) (holding 24% foreclosure was substantial); [*Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Inc., No. 05-CV-12024, 2009 U.S. Dist. LEXIS 108858, 2009 WL 4061631, at \*6 (D. Mass. Nov. 20, 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7X58-00R0-YB0N-800D-00000-00&context=) (denying summary judgment where there was disputed evidence of 32-39% foreclosure); [*Yeager's Fuel, Inc. v. Pa. Power & Light Co., 953 F. Supp. 617, 663 (E.D. Pa. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-HSV0-00B1-F2RW-00000-00&context=) (denying summary judgment where market was 21% foreclosed); *see also* Competitive Impact Statement, *United States v. United Reg'l Health Care Sys.*, No. 7:11-cv-00030, ECF No. 4 at 11 (N.D. Tex. Feb. 25, 2011) (successfully challenging hospital's exclusive arrangements foreclosing 35-40% of the commercial payor market). [↑](#footnote-ref-49)
51. 8*See* ABA Section of ***Antitrust*** Law, ***Antitrust*** Law Developments, at 215 (7th ed. 2012) ("Since *Tampa Electric*, courts have steadily moved away from a strict focus on foreclosure percentage to a more nuanced analysis of whether the arrangement threatens to create or enhance market power and therefore lead to an anticompetitive outcome."); Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, [*70* ***Antitrust*** *L.J. 311, 313 (2002)*](https://advance.lexis.com/api/document?collection=legalnews&id=urn:contentItem:47P2-GJ70-00C2-M244-00000-00&context=) ("By increasing the focus on market power, rather than the degree of foreclosure, the more recent cases had done much to harmonize exclusive dealing analysis with more general analysis of restraint of trade under**[\*308]** the rule of reason."). [↑](#footnote-ref-50)
52. 9For purposes of its foreclosure argument, SFMC concedes that Methodist has properly defined the relevant market. (Mem. at 48-49.) SFMC also does not contest whether it possessed substantial market power in the relevant markets. [↑](#footnote-ref-51)
53. 10SFMC cites to discussion of a single email from 2009 as evidence that BCBS's requests for an open network were only a negotiating strategy to get lower prices from SFMC. (SFMC Statement of Undisputed Facts ("SFF") ¶ 157.) As set out above, SFMC's fact is disputed and BCBS's preferred contracting strategy was to have open networks. Further, the overwhelming amount of record evidence shows that BCBS preferred including Methodist as an in-network provider over obtaining lower prices from SFMC. (MF ¶¶ 110, 115-17, 121, 123, 135-37, 146.) [↑](#footnote-ref-52)
54. 11A more detailed discussion regarding SFMC's higher prices is set forth below in Section III.B.2. [↑](#footnote-ref-53)
55. 12*See, e.g.,* [*ProMedica Health Sys., Inc. v. F.T.C., 749 F. 3d 559, 562 (6th Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5C1S-8461-F04K-P038-00000-00&context=) ("If a provider becomes so dominant in a particular market that no MCO can walk away from it and remain competitive, however, then that provider can demand—and more to the point receive—monopoly rates (*i.e.*, prices significantly higher than what the MCOs would pay in a competitive market)."). [↑](#footnote-ref-54)
56. 13Similarly, the chart from a Methodist presentation to Moody's that SFMC also relies on does not present a full picture of the foreclosure of the market because it does not account for the relative size of the payors. [↑](#footnote-ref-55)
57. 14Regardless of contract rights, as a practical matter employers cannot switch**[\*326]** frequently or readily because of concerns about disruption to their employees. Dr. Capps described disruption as "taking what [patients] are currently doing with their healthcare and saying you have to do something different now, whether it's changing their doctor or otherwise." (MF ¶ 13.) [↑](#footnote-ref-56)
58. 15SFMC does not contest the existence of entry barriers in the relevant market, which include, among other things: (a) substantial capital costs; and (b) the Certificate of Need process required by the Illinois' Health Facilities and Services Review Board for any application to build or expand a hospital. (Ex. 233 at ¶¶ 396-402.) [↑](#footnote-ref-57)
59. 16SFMC and Methodist are responsible for an overwhelming majority of admissions of all Tri-County hospitals. In 2013 Methodist and SFMC accounted for 82% of all inpatient admissions and 83% of all inpatient days of the six hospitals in the Tri-County Area. (Ex. 233 at Fig. 15.) The percentage of admissions attributable to the insurers from whom Methodist is foreclosed would have to vary immensely at the other four hospitals to have any significant effect on the overall level of foreclosure. [↑](#footnote-ref-58)
60. 17If the foreclosed portion of SFMC and Methodist's business is 52% and they represent 82% of all admissions of the six Tri-County hospitals (according to 2013 data), the foreclosed portion of all hospitals business (under the patently untrue assumption that no BCBS PPO, Humana, HAMP, or Aetna patients go to the other four hospitals) is 52% multiplied by 82%, or approximately 43%. [↑](#footnote-ref-59)
61. 18Methodist does not claim any entitlement to damages for such patients, except to the extent that a hypothetical in-network payment would have varied from the out-of-network payment that Methodist received. (Ex. 233 at ¶¶ 519-20, 542.) [↑](#footnote-ref-60)
62. 19Even if SFMC is correct that patients who were treated at Methodist on an out-of-network basis should not**[\*336]** be included in the foreclosure percentage, SFMC's expert has not properly calculated the percent of total payments affected. (Ex. 234 at ¶ 357 n. 327.) Professor Willig incorrectly calculated this number based on BCBS charges and not BCBS payments. (*Id.*) Accounting for this error, the appropriate percentage is 2.5%. Therefore, even if SFMC were correct, the effect on the foreclosure percentage calculated by Methodist is not material. [↑](#footnote-ref-61)
63. 20As with out-of-network patients treated at Methodist, Methodist is not claiming any damages related to patients covered by BCBS ASO contracts who were in fact treated at Methodist. (Ex. 234 ¶ 232.) [↑](#footnote-ref-62)
64. 21Again, Methodist does not claim any damages with relation to SFMC employees, but only that they comprise a part of the market from which it is foreclosed. (Ex. 234 at ¶ 357.) [↑](#footnote-ref-63)
65. 22SFMC misstates the record when it insists that it never imposed exclusivity with regard to outpatient facilities. [TEXT REDACTED BY THE COURT] (MF ¶ 186.) [↑](#footnote-ref-64)
66. 23Neither SFMC nor its experts have challenged this definition of the outpatient surgery market. Therefore the procedures performed at CIE are not within the outpatient surgery market and Methodist cannot use its involvement in CIE to compete in that market. [↑](#footnote-ref-65)
67. 24In addition, SFMC's motion does not challenge Methodist's standing to assert the ***antitrust*** claims at issue. As a result, Methodist is not required to present evidence to establish that point. [*Cloe, 712 F.3d at 1182*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5855-4FY1-F04K-R0XS-00000-00&context=). Even so, Methodist clearly has ***antitrust*** standing. *See* [*Appleton Papers, 35 F. Supp. 2d at 1147*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3VVY-94G0-0038-Y1XG-00000-00&context=) ("Courts have consistently held that competitors frozen out by exclusive dealing arrangements have suffered an ***antitrust*** injury and possess ***antitrust*** standing to sue for redress of this injury."). [↑](#footnote-ref-66)
68. 25"Suppose an established manufacturer has long held a dominant position but is starting to lose market share to an aggressive young rival. A set of strategically planned exclusive-dealing contracts may slow the rival's expansion by requiring it to develop alternative outlets for its product, or rely at least temporarily on inferior or more expensive outlets. Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth." Philip Areeda & Herbert Hovenkamp. ***Antitrust*** Law ¶ 1802c (2015). [↑](#footnote-ref-67)
69. 26[TEXT REDACTED BY THE COURT] (MF ¶ 232.) [↑](#footnote-ref-68)
70. 27*See e.g.* [*Ashkanazy v. I. Rokeach & Sons, Inc., 757 F. Supp. 1527, 1558 (N.D. Ill. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-FW50-001T-72S6-00000-00&context=) ("behavior that is lawful under ***antitrust*** standards may still transgress the Consumer Fraud Act if it's shown to be unfair or violative of the Deceptive Trade Practices**[\*365]** Act.") [↑](#footnote-ref-69)
71. 28SFMC's cited authority reiterates this well-established standard. *See, e.g.,* [*A-Abart Elec. Supply, Inc. v. Emerson Elec. Co., 956 F.2d 1399, 1404-05 (7th Cir. 1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5F20-008H-V03P-00000-00&context=); [*Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc., 227 Ill. 2d 381, 882 N.E.2d 1011, 1019, 317 Ill. Dec. 855 (Ill. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RSK-7FS0-TXFS-P1VJ-00000-00&context=). [↑](#footnote-ref-70)
72. 37Centers for Medicare & Medicaid Services, "Find out If You're an Inpatient or an Outpatient—It Affects What You Pay," [*http://www.medicare.gov/what-medicare-covers/part-a/inpatient-or-outpatient.html*](http://www.medicare.gov/what-medicare-covers/part-a/inpatient-or-outpatient.html). [↑](#footnote-ref-71)
73. 38Karen A. Cullen, Margaret J. Hall, and Aleksandr Golosinskiy, *Ambulatory Surgery in the United States*, 2006, vol. 11 National Health Statistics Reports, Revised (National Center for Health Statistics, 2009), 1-2. [↑](#footnote-ref-72)
74. 39[TEXT REDACTED BY THE COURT] [↑](#footnote-ref-73)
75. 40[TEXT REDACTED BY THE COURT] [↑](#footnote-ref-74)
76. 41[TEXT REDACTED BY THE COURT] [↑](#footnote-ref-75)
77. 42Healthcare Cost and Utilization Project, "Surgery Flag Software," 2015, [*https://www.hcupus.ahrq.gov/toolssoftware/surgflags/surgeryflags.jsp*](https://www.hcupus.ahrq.gov/toolssoftware/surgflags/surgeryflags.jsp). [↑](#footnote-ref-76)
78. 109[TEXT REDACTED BY THE COURT] [↑](#footnote-ref-77)
79. 110[TEXT REDACTED BY THE COURT] [↑](#footnote-ref-78)
80. 111[TEXT REDACTED BY THE COURT] [↑](#footnote-ref-79)
81. 112[TEXT REDACTED BY THE COURT] [↑](#footnote-ref-80)
82. 113Deposition of Robert Sehring, Feb. 20, 2015, 84-85. ("A. Certainly there are many services that OSF provides in the tertiary/quaternary area or the Children's Hospital that Methodist does not provide, and there are also services that Methodist does have, such as behavioral health, they did at one point have some cancer treatments that they provided that were more exclusive . . . . I believe [that at SFMC] there is a host of upper level neurology, neurosciences services as well as cardio -- cardiovascular services that are at the upper end of the tertiary/quaternary care. I couldn't cite the specific ones, but I do believe that there are a number of different areas where -- and, again, being a**[\*371]** tertiary/quaternary academic medical center that would be included under OSF Saint Francis that Methodist does not provide.") With respect to trauma services, *see* Illinois Department of Public Health, "State-designated Trauma Centers by Region," [*http://www.idph.state.il.us/ems/traumaregions.htm*](http://www.idph.state.il.us/ems/traumaregions.htm) . [↑](#footnote-ref-81)
83. 114If SFMC is the exclusive/near-exclusive provider of a service with respect to all patients, it is necessarily so with respect to patients aged 14 and under. As a result, some of the volume reflected in the bottom two "14 and under" panels of Figure 12 is also included in the top two panels. [↑](#footnote-ref-82)
84. 131[TEXT REDACTED BY THE COURT] [↑](#footnote-ref-83)
85. 132[TEXT REDACTED BY THE COURT] [↑](#footnote-ref-84)
86. 133[TEXT REDACTED BY THE COURT] [↑](#footnote-ref-85)
87. 134[TEXT REDACTED BY THE COURT] [↑](#footnote-ref-86)
88. 135The billing data SFMC produced in this case extend only through September 2013. Thus, full year data are only available for 2012. [↑](#footnote-ref-87)
89. 136[TEXT REDACTED BY THE COURT] [↑](#footnote-ref-88)
90. 137[TEXT REDACTED BY THE COURT] [↑](#footnote-ref-89)
91. 702UnityPoint Health, "The UnityPoint Health - Methodist | Proctor Matching Program," [*https://www.unitypoint.org/peoria/matching-program.aspx*](https://www.unitypoint.org/peoria/matching-program.aspx) ; Deposition of Deborah Davis, Feb. 19, 2015, 154-156. ("Q. During the time 2006 forward, has Methodist used benefit match programs? A. Yes, with Blue Cross. Q. And how does the Blue Cross benefit match program work? A. It works that if a patient — a Blue Cross PPO, certain Blue Cross PPO members come, they can have services at Methodist and we'll match their in-network benefit. . . . Q. And the benefit match program eliminates that cost differential for the patient? A. Yes. Q. How long has Methodist had a Blue Cross benefit match program? A. Oh, I don't know. It's been a few years now. I can't recall exactly when we started that.") [↑](#footnote-ref-90)
92. 703UnityPoint Health, "The UnityPoint Health - Methodist | Proctor Matching Program," [*https://www.unitypoint.org/peoria/matching-program.aspx*](https://www.unitypoint.org/peoria/matching-program.aspx) . [↑](#footnote-ref-91)
93. 704*Id.* [↑](#footnote-ref-92)
94. 705*Id.* [↑](#footnote-ref-93)
95. 706Deposition of Calvin MacKay, Feb. 11, 2015, 66. [↑](#footnote-ref-94)