   CautionAs of: August 8, 2018 7:23 PM Z



# [***Universal Hosp. Servs. v. Hill-Rom Holdings, Inc.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HCY-27W1-F04F-C2DG-00000-00&context=)

United States District Court for the Western District of Texas, San Antonio Division

October 15, 2015, Decided; October 15, 2015, Filed

CIVIL ACTION NO. SA-15-CA-32-FB

**Reporter**

2015 U.S. Dist. LEXIS 154154 \*; 2015 WL 6994438

UNIVERSAL HOSPITAL SERVICES, INC., Plaintiff, v. HILL-ROM HOLDINGS, INC.; HILL-ROM COMPANY, INC.; and HILL-ROM SERVICES, INC., Defendants.

**Subsequent History:** Stay lifted by [*Universal Hosp. Servs. v. Hill-Rom Holdings, Inc., 2015 U.S. Dist. LEXIS 154155 (W.D. Tex., Oct. 15, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HCY-27W1-F04F-C2DH-00000-00&context=)

**Core Terms**

alleges, ***antitrust***, geographic, rental market, rental, monopolization, exclusionary, regional, monopoly, markets, competitor, bundling, anticompetitive, contracts, sole-source, customers, barriers, market share, leveraging, submarkets, consumer, anticompetitive conduct, discounts, courts, foreclosure, argues, pleaded, motion to dismiss, ***antitrust*** claim, monopoly power

**Counsel:** **[\*1]**For Universal Hospital Services, Inc., Plaintiff: R. Laurence Macon, LEAD ATTORNEY, Akin, Gump, Strauss, Hauer & Feld, LLP, San Antonio, TX; Janie Ann Shannon, Akin, Gump, Strauss, Hauer & Feld, L.L.P., San Antonio, TX; Richard L. Wyatt, Jr., PRO HAC VICE, Hunton & Williams LLP, Washington, DC; Ryan P. Phair, Hunton & Williams LLP, Washington, DC.

For Hill-Rom Holdings, Inc., Hill-Rom Company, Inc., Hill-Rom Services, Inc., Defendants: Ricardo G. Cedillo, LEAD ATTORNEY, Davis, Cedillo & Mendoza, San Antonio, TX; Gregory L. Curtner, Jacob K. Danziger, Robert J. Wierenga, Suzanne L. Wahl, Schiff Hardin LLP, Ann Arbor, MI; Mark W. Kiehne, Ryan J. Tucker, Davis, Cedillo & Mendoza, Inc., San Antonio, TX.

**Judges:** FRED BIERY, CHIEF UNITED STATES DISTRICT JUDGE.

**Opinion by:** FRED BIERY

**Opinion**

**ORDER REGARDING DEFENDANTS' MOTION TO DISMISS**

Before the Court are Defendants' Motion to Dismiss (docket no. 37), plaintiff's response (docket no. 47) and defendants' reply (docket no. 48). After careful consideration, the Court is of the opinion the motion should be denied.

BACKGROUND

This is a national ***antitrust*** case involving medical equipment rental supply and service companies. The plaintiff (hereinafter referred to as "Universal")**[\*2]** filed suit against its competitor (collectively referred to as "Hill-Rom") in federal court in the San Antonio Division of the Western District of Texas. Universal contends Hill-Rom violated various federal and state anti-competition laws, including illegal bundling of products, predatory pricing, refusal to deal and attempting to monopolize the industry. In response to these allegations, Hill-Rom has filed a motion to dismiss under [*Federal Rule of Civil Procedure 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) arguing Universal's allegations are insufficient and it has failed to allege sufficient facts to support its claims. The parties fully briefed the issues and the motion is ready for disposition.

**STANDARD OF REVIEW**

[*Federal Rule of Civil Procedure 8(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=) requires a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A motion under [*Federal Rule of Civil Procedure 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) requests a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." In deciding a motion to dismiss under [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), a court generally accepts as true all allegations contained within the complaint. [*Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S70-NFC0-003B-R50S-00000-00&context=). However, a court is not bound to accept legal conclusions couched as factual allegations. [*Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6840-0039-N31S-00000-00&context=). Although all reasonable inferences will be resolved in favor of the plaintiff, the plaintiff**[\*3]** must plead "specific facts, not mere conclusory allegations." [*Tuchman v. DSC Commc'ns Corp., 14 F.3d 1061, 1067 (5th Cir. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8230-003B-P4CX-00000-00&context=). The plaintiff must plead sufficient facts to state a claim for relief which is factually plausible. [*Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=); [*Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [*Iqbal, 556 U.S. at 678*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=). Although a plaintiff's factual allegations need to establish the defendant is probably liable, they must establish more than a "sheer possibility" that a defendant has acted unlawfully. *Id.* Determining plausibility is a "context-specific task," that must be performed in light of a court's "judicial experience and common sense." [*Id. at 679*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=). "Although there is no heightened pleading standard in an ***antitrust*** case," *see* [*Twombly, 550 U.S. at 570*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=), the Fifth Circuit is "wary of predatory pricing allegations as 'mistaken inferences in [predatory pricing] cases . . . are especially costly, because they chill the very conduct the ***antitrust*** laws are designed to protect.'" [*Felder's Collision Parts, Inc. v. All Star Adver. Agency, Inc., 777 F.3d 756, 760 (5th Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F5G-WMH1-F04K-N000-00000-00&context=) (alteration in original) (quoting [*Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 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=), *petition for cert. filed* Apr. 29, 2015).

**DISCUSSION**

I. Universal has Sufficiently Alleged Relevant Geographic Market

Hill-Rom contends Universal has failed to allege facts necessary**[\*4]** to support its asserted relevant geographic market. ***Antitrust*** plaintiffs are required to plead facts identifying "the relevant geographic market." [*Apani Sw., Inc. v. Coca-Cola Enter., Inc., 300 F.3d 620, 625-26 (5th Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46H1-XT60-0038-X0RH-00000-00&context=). An ***antitrust*** plaintiff must define the relevant geographic market by providing facts which identify the area of "effective competition" for the product in question, which "must be charted by careful selection of the market area in which the seller operates and to which buyers can practicably turn for supplies." [*Id. at 626*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46H1-XT60-0038-X0RH-00000-00&context=). In *Apani*, the Fifth Circuit affirmed dismissal of an ***antitrust*** claim because the "alleged geographic market did not correspond to the commercial realities of the industry and was not economically significant." [*Id. at 628*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46H1-XT60-0038-X0RH-00000-00&context=).

Hill-Rom challenges Universal's identification of the relevant geographic market for patient handling equipment ("PHE") and moveable medical equipment ("MME") rentals in support of its monopolization claim under *Section 2 of the Sherman Act*, and exclusionary bundling claims 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=) and *Section 1 of the Sherman Act*. Hill-Rom argues there are "two flaws in Universal's geographic market allegations: (1) Universal alleged the existence of both a national market and regional sub-markets without ever alleging facts specifying**[\*5]** which of those 'alternative' markets are relevant or why; and (2) Universal never actually identified any of the regional markets that it claims are relevant." Taking the allegations in Universal's complaint as true and resolving all factual inferences in Universal's favor, Universal's definition is not facially unsustainable.

Universal alleges the relevant geographic market for PHE and MME rentals is the United States and that Hill-Rom manufactures and rents such products in all fifty states under rental agreements with group purchasing organizations, hospital associations, and integrated hospital delivery networks. The complaint states that this national market exists for customers whose rental needs are not time sensitive or where the costs associated with shipping equipment are not cost prohibitive. For customers whose needs are time sensitive, Universal alleges that regional geographic sub-markets exist. Universal states that these submarkets for time-sensitive rentals have a radius of ninety miles which is centered around regional distribution centers owned and operated by both Hill-Rom and Universal. *See* docket no. 1, Complaint at ¶¶ 33-34, 43, 47-48, 51-54, 120, 127.

Universal's**[\*6]** complaint comports with [*Apani*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46H1-XT60-0038-X0RH-00000-00&context=) because it specifically sets forth how the alleged national and regional geographic market correspond to the commercial realities of the PHE and MME medical equipment rental industry and why they are economically significant to the alleged conduct of Hill-Rom. Universal therefore has pleaded facts demonstrating that its asserted geographic market allegations are relevant to the claims of predatory pricing raised in connection to the products at issue in this case. As explained by the Fifth Circuit:

When determining whether a geographic market corresponds to commercial realities, courts have taken into account practical considerations such as the size, cumbersomeness, and other characteristics of the relevant product. In addition, determinants that affect the behavior of market participants may also be considered such as ***regulatory*** constraints impeding the free flow of competing goods into the area, perishability of products and transportation barriers.

[*Apani, 300 F.3d at 626*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46H1-XT60-0038-X0RH-00000-00&context=). To the extent Hill-Rom argues Universal has failed to show "which of [the] 'alternative' markets are relevant or why," Universal made specific factual allegations to distinguish between the national market**[\*7]** and the regional submarkets based on timing and shipping considerations. For the regional submarkets for time sensitive rentals, Universal provides a number of specific facts which further define the contours of the relevant regional submarkets. For example, Universal alleges that these regional submarkets center around distribution centers owned and operated by both Hill-Rom and Universal which are generally located within a ninety-mile radius of where customers are located. Universal alleges this close proximity to customers is necessary because most rental agreements require suppliers to deliver PHE and MME rentals in a time-sensitive manner, typically within a two to four hour window of the time the order was placed plus drive-time. *See* docket no. 1, Complaint at ¶ 33; *see also* [*Hornsby Oil Co. v. Champion Spark Plug Co., 714 F.2d 1384, 1394 (5th Cir. 1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YDV0-003B-G470-00000-00&context=) ("Whether ascertaining the scope of a geographic market or submarket, such economic and physical barriers to expansion as transportation costs, delivery limitations and customer convenience and preference must be considered.").

Hill-Rom relies upon [*Consul, Ltd. v. Transco Energy Co., 805 F.2d 490, 493-96 (4th Cir. 1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XWY0-0039-P2P4-00000-00&context=), *cert. denied*, *481 U.S. 1050, 107 S. Ct. 2182, 95 L. Ed. 2d 838 (1987)*, to support its argument that Universal's allegations of a national market and regional submarkets are "relevant only in the abstract." In *Consul****[\*8]***, the Fourth Circuit found that certain natural gas properties did not constitute a properly pleaded relevant geographic market under *Section 2 of the Sherman Act*. [*Id. at 495-96*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XWY0-0039-P2P4-00000-00&context=). In ruling on pending summary judgment motions, the Court explained that, "[w]hile the market should be demonstrable in other than purely hypothetical terms," it need "not be measurable in 'metes and bounds.'" [*Id. at 496*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XWY0-0039-P2P4-00000-00&context=) (quoting [*Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 611, 73 S. Ct. 872, 97 L. Ed. 1277 (1953))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JFX0-003B-S0B7-00000-00&context=). Instead, there need only "be a reason to believe that the geographic market covers the defendant's activities in a way which would encompass the area of effective competition between the parties. *Id.* In applying the law to the facts, the Court determined that "there is no way to measure [defendant] Transco 's market power in an area as ethereal as 'sources of natural gas not owned by Transco but in close proximity to their pipeline and which would not be available to [plaintiff] Consul as a broker under Transco's policies.'" [*Id. at 496*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XWY0-0039-P2P4-00000-00&context=).

At the pleading stage, Universal need only identify a geographic market which could meet this criteria. [*Apani Sw., Inc., 300 F.3d at 626*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46H1-XT60-0038-X0RH-00000-00&context=). In this case, the Court believes Universal has done so by specifically pleading that both parties are lessors of PHE and MME medical equipment in the geographic areas identified in the complaint**[\*9]** and their competition is tied to those areas. In contrast to the abstract identification of the relevant market source in [*Consul,*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XWY0-0039-P2P4-00000-00&context=) this is not a situation where the defendant can operate anywhere along the regional submarkets and the plaintiff is in the business of generating revenue from wherever it nationally exists. Instead, Universal delineated the geographic limits of the relevant markets: it discusses the PHE and MME medical equipment rental industry in specific terms; it unequivocally states that the national market contains regional submarket contours based on timing and shipping considerations; and it makes conclusive statements that Universal competes with Hill-Rom in both markets. In sum, Universal has pleaded facts inherent in the market which link the parties' competition to particular geographic areas for purposes of Universal's ***antitrust*** claims. Universal has, therefore, pleaded that the relevant geographic market is demonstrable in other than purely hypothetical terms sufficient to survive Hill-Rom's motion to dismiss. *See* [*Consul, 805 F.2d at 496*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XWY0-0039-P2P4-00000-00&context=) (stating that relevant geographic market must be "demonstrable in other than purely hypothetical terms").

Hill-Rom cites [*Sidibe v. Sutter Health, 4 F. Supp. 3d 1160, 1175 (N.D. Cal. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59SP-J081-F04C-T3DD-00000-00&context=), for the proposition that**[\*10]** Universal "has not identified any regional submarket that it claims is relevant to this case." Hill-Rom contends Universal has merely described a "methodology for drawing possible submarket boundaries: draw a circle with a radius of ninety miles around distribution centers owned by both Hill-Rom and Universal." In [*Sidibe,*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59SP-J081-F04C-T3DD-00000-00&context=) the Court found that members of health plans failed to plausibly define any relevant "Inpatient Hospital Services" geographic markets, which precluded their putative class claims against a non-profit corporation which operated a chain of hospitals alleging unreasonable restraint of trade, tying, and monopolization in violation of the Sherman Act. [*Id. at 1176*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59SP-J081-F04C-T3DD-00000-00&context=). The Court explained:

The problem is not that the geographical markets for Inpatient Hospital Services are necessarily invalid or pleaded to generally. The problem is that plaintiffs fail to identify many of the local markets at all. They identify six countywide markets, but that is insufficient because their claims are not limited to those markets. Even if they were, except for Alameda County, plaintiffs provide no factual support for drawing boundaries at the county lines.

[*Id.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59SP-J081-F04C-T3DD-00000-00&context=) In this case, the allegations do more than provide**[\*11]** a methodology for drawing boundaries at certain geographical markers such as "the county lines." Universal denotes a specific submarket supported by economically significant bounds which address where customers turn for PHE and MME medical rental equipment. To this end, Universal provides factual support for drawing boundaries at a ninety-mile radius around these regional distribution centers based on timing and shipping considerations. If Universal had alleged only that "Arkansas and several surrounding states" or "various regional markets in California and Oregon" constituted a relevant geographic market, without more, the complaint would likely be subject to dismissal. However, Universal alleges far more. It identifies an actual physical location (*i.e.*, regional distribution centers), specified a radius around this actual physical location (*i.e.*, ninety miles), and explained why time and shipping considerations give rise to the regional submarkets centered around these distribution centers for time-sensitive rentals. No such facts outlining the contour of the relevant regional submarkets were alleged in the case cited by Hill-Rom. In other words, unlike the plaintiffs in [*Sidibe*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59SP-J081-F04C-T3DD-00000-00&context=)**[\*12]**, Universal has pleaded "the geographic range of the relevant market" with sufficient specificity to survive the motion to dismiss. *See* [*Orchard Supply Hardware LLC v. Home Depot USA, Inc., 939 F.Supp.2d 1002, 1010 (N.D. Cal. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:585X-YWS1-F04C-T289-00000-00&context=) (finding relevant geographic market may be sufficiently alleged by pleading "the geographic range of the relevant market[s] with . . . specificity"). The Court finds Universal has sufficiently alleged the relevant geographic market.

II. Counts II and III: Attempted Monopolization of the PHE and MME Markets

A. Universal's Allegations in Support of its Attempted Monopolization Claims are Sufficient

Hill-Rom contends Universal's allegations do not establish the elements of a *Sherman Act, section 2*, attempted PHE and MME monopolization claims. Attempted monopolization generally arises "when the danger of monopolization is clear and present, but before a full blown monopolization has necessarily been accomplished." [*Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 541-42 (9th Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7ND0-008H-V1BD-00000-00&context=). As Hill-Rom notes, this claim requires Universal to plead that (1) Hill-Rom has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) has a dangerous probability of achieving monopoly power. [*Spectrum Sports, Inc. 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:3S5B-0D20-003B-R505-00000-00&context=).

1. Universal has Sufficiently Alleged Hill-Rom Engaged in Predatory or Anticompetitive Conduct

Predatory or anticompetitive conduct is conduct which "tends to impair the opportunities of rivals [and] either does not further competition on the merits**[\*13]** or does so in an unnecessarily restrictive way." [*Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B390-0039-N4JD-00000-00&context=). To this end, exclusionary conduct is typically "conduct, other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appear[s] capable of making a significant contribution to creating . . . monopoly power." [*Taylor Pub. Co. v. Jostens, Inc., 216 F.3d 465, 475 (5th Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:40PY-6NY0-0038-X2D4-00000-00&context=).

Universal's complaint details Hill-Rom's alleged multi-faceted scheme to eliminate competition and exclude rivals in the PHE and MME rental markets and the resulting harm to competition. Docket no. 1, Complaint at ¶¶ 73-92. Universal alleges that Hill-Rom s the dominant global manufacturer of standard hospital beds ("SHB"), with a market share between 70% to 90%, which, according to the complaint, it has built through a long history of anticompetitive actions, including monopoly leveraging and exclusionary bundling practices. *Id.* at ¶¶ 12-14. Universal alleges Hill-Rom is now using monopoly leveraging and exclusionary bundling practices with the PHE and MME rental markets. *Id.* at ¶¶ 16-19.

Specifically, Universal alleges that instead of competing on the merits against Universal and others in this market, Hill-Rom opted to improperly "leverage" its SHB monopoly by negotiating long-term,**[\*14]** sole-source agreements with group purchasing organizations ("GPOs")—the six largest of which control an estimated 90% of all hospital medical equipment purchases and rentals—and related hospital associations. *Id.* at ¶¶ 20-25. According to the complaint, these agreements condition steep discounts and rebates on the sale of SHBs on "ironclad" commitments to use Hill-Rom exclusively for their members' PHE and MME rental needs. Docket no. 1, Complaint at ¶ 56. Universal maintains the conditional discounts and rebates offered on Hill-Rom's monopoly products—SHBs—are so steep, moreover, that they drop the price of Hill-Rom's and Universal's PHE and MME rentals below their cost, thereby eliminating efficient competitors, such as Universal, from the market. *Id.* at ¶¶ 21, 76. The complaint further asserts that if Hill-Rom's strategy is allowed to continue, there will "simply be no room" for any competitor in the PHE and MME rental markets, no matter how efficient, to compete with Hill-Rom's ability to leverage its SHB market power in this manner. *Id.* at ¶¶ 93-110. Universal alleges that, to supplement these anticompetitive tactics, Hill-Rom has engaged in an aggressive campaign to mislead and**[\*15]** threaten Universal's customers and thereby interfere with Universal's current and prospective customer relationships. *Id.* In sum, according to the complaint, this "multi-faceted monopoly leveraging and exclusionary bundling campaign is a transparent attempt by Hill-Rom to use its existing monopoly position in the SHB market to acquire another monopoly by eliminating competition in the adjacent PHE and MME rental markets. Docket no. 1, Complaint at ¶¶ 73-92. The Court finds Universal has sufficiently pleaded the conduct prong of an attempted monopolization claim at the pleadings stage.[[1]](#footnote-0)1

Hill-Rom argues Universal's attempted monopolization claim must be segregated into exclusive dealing and bundling allegations, and that the anticompetitive effect of each must be considered separately. This approach fails to consider the "character and effect" of Hill-Rom's alleged overarching anticompetitive scheme, which is "not to be judged by dismembering it and viewing its separate parts, but only**[\*16]** by looking at it as a whole." [*Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H8B0-003B-S01X-00000-00&context=). An ***antitrust*** plaintiff should "be given the full benefit of proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Id., see also* [*Associated Radio Serv. Co. v. Page Airways, Inc., 624 F.2d 1342, 1356 (5th Cir. 1980)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9R70-0039-W29P-00000-00&context=) ("[N]o one of the instances of improper conduct, standing alone, would lead to *[Sherman Act] section 2* liability. Taken together, however, they show a pattern of exclusionary behavior sufficient to support the jury's verdict.").

Hill Rom relies on [*Pacific Bell Tel. Co. v. Linkline Commc'ns, 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=), in support of its argument that Universal's allegations must be viewed in the disjunctive. However, the principles set forth in [*Linkline*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VPF-5H70-TXFX-11YJ-00000-00&context=) have been limited to "price squeeze" cases.[[2]](#footnote-1)2 In any event, courts have recognized that *Linkline* did not overrule the "long established principles concerning the viability of claims alleging an overall scheme." [*In re Neurontin* ***Antitrust*** *Litig., No. 02-1390, 2009 U.S. Dist. LEXIS 77475, 2009 WL 2751029, at \*16 (D.N.J. Aug. 28, 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4X4G-7SM0-TXFR-F32S-00000-00&context=); *see also* [*ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 286-89 (3d Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56P1-2KG1-F04K-K1YW-00000-00&context=); [*Church & Dwight Co. v. Mayer Labs, Inc., No. 10-cv-4429, 2011 U.S. Dist. LEXIS 35969, 2011 WL 1225912, at \*9-10, \*16 (N.D. Cal. Apr. 1, 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:52J7-3T71-652H-72BF-00000-00&context=).

Hill-Rom also suggests that each underlying action must separately constitute an ***antitrust*** violation. The independent viability of any one anticompetitive**[\*17]** claim is not in and of itself necessary to establish a violation under *Section 2 of the Sherman Act*. [*Associated Radio Serv. Co., 624 F.2d at 1356*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9R70-0039-W29P-00000-00&context=); *see also* [*In re High Fructose Corn Syrup* ***Antitrust*** *Litig., 295 F.3d 651, 655 (7th Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:463F-SH40-0038-X19S-00000-00&context=) (cautioning courts to avoid "trap" of "suppos[ing] that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot"). Rather, at least one court in this circuit has held under *Continental Ore* and its progeny that the anticompetitive conduct element of a Section 2 claim is satisfied when a plaintiff alleges the aggregate effect of a defendant's anticompetitive practices is reduced competition and creation or maintenance of a monopoly. [*Z-Tel Commc'ns, Inc. v. SBC Commc'ns, Inc., 331 F.Supp.2d 513, 535 (E.D. Tex. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4D34-NJT0-0038-Y42F-00000-00&context=). Accordingly, Universal's allegations must be viewed collectively.

Hill-Rom also argues Universal has not adequately alleged that Hill-Rom conditioned steep discounts and rebates on its monopoly product (SHBs) on ironclad commitments to use Hill-Rom for all PHE and MME rentals as part of "sole-source" contracts. However, the complaint sufficiently alleges that "Hill-Rom has started leveraging its market power in the Standard Hospital Bed market by negotiating sole-source agreements with national group purchasing organizations and hospital networks that contain steep discounts and rebates on the sale of Standard**[\*18]** Hospital Beds bundled with ironclad commitments to use Hill-Rom for their PHE and MME rental needs" and that these discounts and rebates are so steep that they are below both Hill-Rom's and Universal's cost of providing PHE and MME rentals. Docket no. 1, Complaint at ¶¶ 21, 75-81.

Hill-Rom additionally challenges Universal's characterization of the agreements containing conditional discounts. The company argues that some of Universal's descriptions do not make the alleged *quid pro quo* sufficiently clear for each individual example. Universal, however, sufficiently alleges each agreement provided "substantial discounts and/or rebates on the sale of Standard Hospital Beds that are strictly contingent on sole-source commitments to use Hill-Rom for their members' PHE and MME Rental needs." *Id.* at ¶ 69; *see also id.* at ¶¶ 66-68 (identifying dates that three of Hill-Rom's bundled, sole-source agreements were signed and each agreement's length).

Finally, Hill-Rom challenges Universal's failure to quote specific terms and cite specific relevant sections of Hill-Rom's alleged anticompetitive agreements. At the pleading stage, prior to discovery, an ***antitrust*** plaintiff is not required to quote**[\*19]** specific terms and cite the pertinent sections of what are often highly confidential agreements, as are the GPO contracts in this case. *See* [*Twombly, 550 U.S. at 588*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=) ("[I]n ***antitrust*** cases, where proof is largely in the hands of the alleged conspirators, . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly). The Court declines Hill-Rom's request to rule otherwise in this instance.

2. Universal has Sufficiently Alleged Hill-Rom had a Specific Intent to Monopolize

Hill-Rom next contends that Universal has failed to allege a specific intent to monopolize the PHE and MME markets. Specific intent may be inferred from evidence of anticompetitive conduct. *See* [*Aspen Skiing Co., 472 U.S. at 603*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B390-0039-N4JD-00000-00&context=) ("Improper exclusion . . . is always deliberately intended."); [*E.I. Du Pont De Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 453 (4th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:52C4-7DJ1-JCNH-X08V-00000-00&context=) (finding specific intent to monopolize based on inference from evidence of anticompetitive conduct). Because the Court has found that Universal plausibly alleged anticompetitive conduct as part of its attempted monopolization claim, it is entitled to the inference of Hill-Rom's specific intent. *See* [*In re Pool Prods. Distribution Mkt.* ***Antitrust*** *Litig., 940 F.Supp.2d 367, 391 (E.D. La. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:585M-JYR1-F04D-C308-00000-00&context=) ("Because plaintiffs have plausibly alleged anticompetitive agreements, the Court finds that plaintiffs have plausibly alleged that [defendant] had**[\*20]** a specific intent to monopolize").

Additionally, Universal has alleged specific facts to support its allegation that Hill-Rom acted with the specific intent to monopolize the PHE and MME rental markets. Docket no. 1, Complaint at ¶¶ 18-20, 63-64, 71-72, 122,129. For example, Universal alleges Hill-Rom's president and ECO told Wall Street investors that Hill-Rom intended to "leverage" its dominant position in the SHB market to move into adjacent markets because "nobody else" could compete with Hill-Rom if it did so. *Id.* at ¶¶ 18-19, 63-64. He allegedly emphasized that Hill-Rom was "investing a lot of time and resources" into this strategy, *id.* at ¶ 19, and subsequently reported that its efforts were successful. *Id.* at ¶ 71. At the pleading stage, at least one court has indicated that these types of public statements are sufficient to give rise to an inference of intent. *See* [*Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 101-02 (2d Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SF1-MSY0-0038-X3WT-00000-00&context=) ("[D]efendants' intent can be derived from their words" particularly where defendants' officials have "frequently affirmed their stated goal" to monopolize or prevent competition."). In addition, Universal alleges that Hill-Rom acted on its stated strategy by citing to three long-term, sole source agreements which "offered substantial**[\*21]** financial incentives, including discounts and/or rebates, in return for an exclusive agreement to rent all or substantially all of their PHE and MME rental needs from Hill-Rom." *Id.* at ¶ 65. Although Hill-Rom characterizes its CEO's statements as merely expressing a legitimate desire "to win customers" by "offering better deals than its competitors" and thereby expand its business, Universal has sufficiently alleged this conduct was not motivated by a valid business justification sufficient to survive Hill-Rom's motion to dismiss. *See* [*Tops, Mkt., 142 F.3d at 101-02*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SF1-MSY0-0038-X3WT-00000-00&context=) (finding specific intent where jury "could find that this conduct was not motivated by a valid business justification.").

3. Universal has Sufficiently Alleged a Dangerous Probability of Achieving Monopoly Power

Hill-Rom also argues that Universal has failed to show a dangerous probability that Hill-Rom will leverage its market power in the SHB market to achieve monopoly power in the adjacent PHE and MME rental markets. Specifically, Hill-Rom contends Universal has failed to allege facts demonstrating that Hill-Rom has a dangerous probability of succeeding in its alleged attempts to use monopoly leveraging, exclusionary bundling, and other anticompetitive**[\*22]** strategies to monopolize the PHE and MME rental markets.

The Court finds the allegations in Universal's complaint sufficient to establish the market conditions are such that Hill-Rom has a dangerous probability of acquiring a monopoly in the PHE and MME rental markets if it continues leveraging its existing monopoly in the SHB market. The complaint alleges that Hill-Rom "is a monopolist already" with 70% to 90% of the SHB market and it is Hill-Rom's status as an existing monopolist that which makes its anticompetitive strategy likely to be so successful, particularly given how much "time and resources" it is investing into its new strategy. *See* Docket no. 1, Complaint at ¶¶ 64-65, 71. Similarly, Universal alleges that if Hill-Rom did not have such power, it would not have been able to coerce key GPOs and others into long-term, sole-source contracts. [*Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 74 (2d Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YFR0-001B-K2K8-00000-00&context=) ("[S]ince the complaint alleges both exclusionary conduct and the existence of monopoly power, the third element, a dangerous probability of success, may be inferred.").

Universal further alleges the highly concentrated nature of the GPO "gateway" to customers is also a unique market condition and barrier to entry which provides Hill-Rom with the**[\*23]** ability to tip the market very rapidly in its favor. *See* [*United States v. Dentsply Int'l, Inc., 399 F.3d 195 (3d Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=) (finding allegations sufficient where attempted at monopolization has ability to tip market very rapidly). The complaint maintains that the six largest GPO's control 90% of all hospital medical equipment purchases and rentals across the country. Docket no. 1, Complaint at ¶¶ 55-57. Universal maintains that if Universal is suddenly excluded from these traditionally multi-source GPO contracts and all of them are converted into sole-source contracts with Hill-Rom it would dramatically and quite rapidly alter the competitive dynamics of the markets and result in Hill-Rom acquiring another monopoly in "short order." *Id.* at ¶¶ 57, 82; *see also* [*Kolon Indus., 2012 U.S. Dist. LEXIS 48722, 2012 WL 1155218, at \*17*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55BM-PS11-F04F-F2BJ-00000-00&context=) (holding that "if a monopolist ties up the [middleman], there is no practical way [for a competitor] to reach the customers and effectively compete."). According to the complaint, Hill-Rom itself acknowledges that the industry is "significantly dependent o major contracts with GPOs" and that any failure to be included in these agreements would have a "material adverse effect on its business, including capital and rental revenue." Docket no. 1, Complaint at ¶ 57 (quoting Hill-Rom filings with**[\*24]** the Securities and Exchange Commission).

For example, Universal alleges that, after smaller GPOs succumbed to Hill-Rom's attempted monopoly leveraging and exclusionary strategy and agreed to Hill-Rom's sole-source demand on PHE and MME rentals, the market shifted instantaneously, with Universal losing up to 15% of the national market and as much as 66% in the regional market "almost overnight." *Id.* at ¶¶ 23, 81. Universal maintains that, if even one of the other five GPOs likewise "succumbed to such anticompetitive tactics" when their contracts come up for renewal, as Hill-Rom is allegedly pressuring them to do, *id.* at ¶¶ 72, 88, it would further create a cascade effect and "quickly" tip the market in Hill-Rom's favor "even more" than it has already. *Id.* at ¶¶ 72, 82-86, 122.

The Court finds the alleged trend and speed of this "tipping" dynamic, both of which are set forth in detail in Universal's complaint, are sufficient to establish at the pleading stage that Universal has sufficiently stated a claim that there would be a dangerous probability of Hill-Rom monopolizing the PHE and MME rental markets. *See e.g.,* [*Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 490 (5th Cir. 1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-X0T0-003B-G4HS-00000-00&context=) (noting that "consolidation trend in the market" is relevant consideration**[\*25]** in dangerous probability assessment); [*Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 319 (3d Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PKD-KMP0-TXFX-52CY-00000-00&context=) (finding allegations of dangerous probability of success to be present where complaint alleged market was experiencing "rapid growth" and competitor was extending its anticompetitive practices into that emerging market); [*Nobody in Particular Presents, Inc. v. Clear Channel Commc 'ns, Inc., 311 F. Supp. 2d 1048, 1103 (D. Co. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4C3S-3710-0038-Y00R-00000-00&context=) ("[W]hen the defendant's market share grows significantly in a short period of time, while the market share of its major competitors shrinks significantly in a short period of time, a probability of monopolization may exist.").

Universal's complaint also alleges that substantial barriers to entry also exist in both the PHE and MME rental markets which support its allegation that Hill-Rom's anticompetitive strategies may prove effective. [*Domed Stadium Hotel, Inc., 732 F.2d at 490*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-X0T0-003B-G4HS-00000-00&context=) (noting that "high barriers to entry" is factor for consideration in determining whether there is dangerous probability of success); [*In re Pool Prods., 940 F. Supp. 2d at 387*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:585M-JYR1-F04D-C308-00000-00&context=) (noting that "barriers to entry" should be considered when determining whether there is dangerous probability of success). Universal alleges the barriers to entry in the PHE and MME rental markets include the need to build out extensive distribution networks to compete for and meet rental customers' delivery demands, which requires extensive capital investment. *See* Docket**[\*26]** no. 1, Complaint at ¶¶ 32-34; *see* [*Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1059 (8th Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YWD-0000-0038-X1FX-00000-00&context=) ("A significant barrier to entry may exist when large amounts of capital would be required.").

Universal's complaint also alleges massive barriers to entry exist in the SHB market where Hill-Rom enjoys a market share as high as 90%. Universal further maintains this, in turn, impacts the PHE and MME rental markets because any potential entrant in the PHE and MME rental markets must necessarily purchase beds in the SHB market first and, if it were to attempt to compete with Hill-Rom's alleged exclusionary bundling strategy, it would need to offer both products. Docket no. 1, Complaint at ¶¶ 41, 73. The complaint alleges these barriers to entry include: (1) "the capital-intensive nature of the [SHB market]; (2) "Hill-Rom's entrenched monopoly and history of anticompetitive tactics"; (3) "Hill-Rom's patents and aggressive patent enforcement"; (4) "standardization, and the restraining switching costs arising from network effects; (5) "the extensive nature of the ***regulatory*** regime applicable to medical equipment"; and (6) "the increasing need to have a global market presence to compete in any aspect of the market." *Id.* Taking the allegations in Universal's**[\*27]** complaint as true, these barriers to entry are relevant to the likelihood that Hill-Rom may be able to successfully leverage its SHB monopoly into the PHE and MME rental markets. Finally, courts have held that allegations of exclusionary agreements create additional barriers to entry in the relevant markets in and of themselves. *See* [*In re Pool Prods., 940 F. Supp. 2d at 386*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:585M-JYR1-F04D-C308-00000-00&context=) ("Plaintiffs also allege that Pool's exclusionary agreements with manufacturers have created an entry barrier in the distribution market."); [*Catch Curve, Inc. v. Venali, Inc., 519 F. Supp. 2d 1028, 1035 (CD. Cal. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R4N-SPS0-TXFP-C1Y0-00000-00&context=) (finding that plaintiff had sufficiently alleged "substantial barriers into the relevant product market, including without limitation those created by the allegedly anticompetitive conduct.") (internal quotation omitted).

Finally, the Fifth Circuit has cautioned that courts should not rely on "hindsight" but rather "examine the probability of success at the time the acts occur." [*Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980, 992 (5th Cir. 1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YVB0-003B-G1NP-00000-00&context=). This distinction is significant because, according to the Universal's complaint, the GPO contracts only come up for renewal approximately every three years, docket no. 1, Complaint at ¶ 59, and since Hill-Rom adopted its new alleged exclusionary bundling strategy it has captured the "lion's share" of the market which is currently up for**[\*28]** bid. [*Id. at 60*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YFR0-001B-K2K8-00000-00&context=).

Moreover, Hill-Rom does not dispute that Hill-Rom has a legally sufficient market share in the regional PHE and MME rental markets-as much as 66%-to establish a dangerous probability of success under its formalistic analysis of market share alone. Similarly, in the national PHE rental market, the complaint alleges that Hill-Rom "accounts for at least 35% of the PHE Rentals" market. *Id.* at ¶ 44. This too is a legally sufficient market share at the pleadings state, particularly in light of the other factors established above. *See* [*In re Pool Prods., 940 F. Supp. 2d at 386-87*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:585M-JYR1-F04D-C308-00000-00&context=) (recognizing 33% market share is sufficient for an attempted monopolization cause of action); *see also* [*Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc., 679 F.2d 516, 521, 533-34 (5th Cir. 1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2HR0-003B-G159-00000-00&context=) (remanding attempted monopolization claim for trial even though maximum possible market shares were 25% and 17% for national cornstarch and national corn syrup markets), *cert. denied*, *460 U.S. 1082, 103 S. Ct. 1770, 76 L. Ed. 2d 344 (1983)*.

Hill-Rom also challenges Universal's complaint as insufficient for failing to make any allegation regarding Hill-Rom's alleged share of the MME rental market. Universal alleges it is "a leading provider in the market, but competes vigorously with Hill-Rom." Docket no. 1, Complaint at ¶ 49. Universal also alleges that Hill-Rom is increasing its market share due to Hill-Rom's**[\*29]** anticompetitive practices. *Id.* "At the motion to dismiss stage, with discovery still to be completed, the plaintiff does not have to allege an exact, percentage-based market share." [*Scooter Store, Inc. v. Spinlife. Com., 777 F. Supp.2d 1102, 1117 (S.D. Ohio 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:52GX-9521-652J-F0PK-00000-00&context=). Universal's allegations, along with other structural factors within the MME market described in Universal's complaint, is sufficient at the pleading stage to state a claim that there is a dangerous probability that Hill-Rom is "able seriously to attempt the achievement of monopoly status." *Id.*

III. Count I: Monopolization of the SHB Market

In Count I of its complaint, Universal maintains that Hill-Rom used anticompetitive conduct to maintain its monopoly in the SHB market in violation of *section 2 of the Sherman Act*. Hill-Rom contends this claim must be dismissed because Universal has failed to allege sufficient facts to show that it has proper standing and that Hill-Rom maintained its monopoly power in the SHB market through anticompetitive conduct. For the reasons set forth below, the Court finds that Hill-Rom's arguments are without merit.

A. Universal has Sufficiently Alleged Facts to Demonstrate it has ***Antitrust*** Standing

Hill-Rom seeks dismissal of Universal's ***antitrust*** claim asserted in count one of the complaint**[\*30]** on the ground that Universal has not pleaded an ***antitrust*** injury. Failure to plead ***antitrust*** injury would preclude Universal from establishing "***antitrust*** standing." [*Doctor's Hosp., Inc. v. Southeast Med. Alliance, Inc., 123 F.3d 301, 305 (5th Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHM-YVC0-00B1-D0FV-00000-00&context=). Hill-Rom argues that Universal is not directly injured by Hill-Rom's alleged monopolization of the SHB market and therefore does not possess ***antitrust*** standing.

The Fifth Circuit has distinguished between ***antitrust*** injury and injury to competition. *See e.g.,* [*Doctor's Hosp., Inc., 123 F.3d at 305*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHM-YVC0-00B1-D0FV-00000-00&context=); *Walker v. U-Haul Co., 747 F.2d 1011, 1016 (5th Cir. 1984)*; [*Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980, 986 n.6 (5th Cir. 1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YVB0-003B-G1NP-00000-00&context=). ***Antitrust*** injury exists when (1) the injury was of the type ***antitrust*** laws were intended to prevent and (2) the injury "flows" or was caused by that which makes the defendant's conduct unlawful. [*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89, 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=). Injury to competition, on the other hand, while often a necessary component to substantive liability, need not be pleaded for a plaintiff's ***antitrust*** claims to survive a motion to dismiss. [*Doctor's Hosp., Inc., 123 F.3d at 305*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHM-YVC0-00B1-D0FV-00000-00&context=). "In this Circuit, ***antitrust*** injury for standing purposes is viewed from the perspective of the plaintiff's position in the marketplace, not from the merits-related perspective of the impact of a defendant's conduct on overall competition." [*Vaughn Med. Equip Repair Serv, L.L.C. v. Jordan Reses Supply Co., Civil Action No. 10-00124, 2010 U.S. Dist. LEXIS 88958, 2010 WL 3488244, at \*12 (W.D. La. Aug. 26, 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:50WX-64G1-652H-T0VJ-00000-00&context=) (citing [*Doctor's Hosp., Inc., 123 F.3d at 305*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHM-YVC0-00B1-D0FV-00000-00&context=)). Therefore, to state a claim under the Sherman Act, "a plaintiff, in addition to stating an ***antitrust*** violation, must allege facts**[\*31]** sufficient to show ***antitrust*** injury." *Id.* (citing [*In re Tamoxifen* ***Antitrust*** *Litig., 466 F.3d 187, 219 (2d Cir. 2006))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4KR5-1WN0-0038-X3VR-00000-00&context=).

As support for its assertion that Universal has not pleaded ***antitrust*** injury, Hill-Rom cites to the Fifth Circuit decision in [*Norris v. Hearst Trust, 500 F.3d 454, 466 (5th Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PPG-X8K0-TXFX-72BX-00000-00&context=). Hill-Rom's reading of *Norris* requires an ***antitrust*** plaintiff "to prove that it was either a competitor or consumer in a market in order to have standing to bring an ***antitrust*** claim related to that market." Docket no. 37, Motion to Dismiss at p. 5. Under Hill-Rom's suggested interpretation of *Norris*, only through pleading that Universal was a competitor or consumer in the standard hospital bed market can Universal establish the requisite ***antitrust*** injury.

The Fifth Circuit has not held as a matter of law that ***antitrust*** standing is limited to competitors and consumers exclusively. Rather, it has recognized that the Sherman Act is "comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices." [*American Cent. E. Tex. Gas Co. v. Unio Pac. Res. Grp., Inc., 93 F. App'x 1, 7 (5th Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BJW-FYV0-0038-X28N-00000-00&context=) (quoting [*Blue Shield v. McCready, 457 U.S. 465, 472, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5FV0-003B-S4KH-00000-00&context=). In *American Central*, the Fifth Circuit rejected the argument that plaintiff lacked standing because it was a distributor, not a competitor. *Id.* The Court held that "[c]ompetitor status is not required to establish standing" and "[r]elief for ***antitrust*** claims is not confined to consumers,**[\*32]** or to purchasers, or to competitors, or to sellers." *Id.*

Additionally, at least one District Court in this Circuit has rejected Hill-Rom's argument that *Norris* proposes that the ***antitrust*** requirement is met only when an injury is inflicted on a business consumer or competitor of a defendant. [*Vaughn Med. Equip. Repair Serv., L.L.C. v. Jordan Reses Supply Co., Civil Action No. 10-00124, 2010 U.S. Dist. LEXIS 88958, 2010 WL 3488244, at 12 (E.D. La. Aug. 26, 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:50WX-64G1-652H-T0VJ-00000-00&context=). The Court in *Vaughn* explained:

Such a reading of *Norris* is inaccurate. It drastically oversimplifies the question of whether the defendants' activities resulted in ***antitrust*** injury. In that case, the Fifth Circuit was commenting less on the dynamics of anticompetitive conduct and more on which parties are most likely to bring suit under the federal ***antitrust*** laws. Thus, it was focused on the third element of the standing injury—the issue of whether the plaintiff is a proper party to an ***antitrust*** claim. *See* [*Norris, 500 F.3d at 466*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PPG-X8K0-TXFX-72BX-00000-00&context=) (noting that consumers and competitors are appropriate parties to bring ***antitrust*** claims because they are often the only parties injured by the harm to competition caused by ***antitrust*** violations). The Fifth Circuit was not stating a bright-line rule for gauging the occurrence of an ***antitrust*** injury. While it is typically consumers and competitors who suffer as a result of calculated anticompetitive**[\*33]** conduct, this fact alone does not reflexively manifest an ***antitrust*** injury.

*Id.*

Universal does not seek recognition of its injuries as either a consumer or current competitor of Hill-Rom's SHB products. Nevertheless, Universal's alleged losses and competitive disadvantage resulting from its alleged exclusion from the PHE and MME medical equipment rental market fall within the conceptual bounds of ***antitrust*** injury. Universal alleges "Hill-Rom's strategy of leveraging its market power in the sale of SHB market to drive out competition in the PHE and MME rental markets is anticompetitive and a violation of ***antitrust*** laws." Docket no. 1, Complaint at ¶ 73. Universal also asserts that "by engaging in such conduct, Hill-Rom can not only protect its existing monopoly in SHBs by eliminating potential new entrants, but it can also diversify, grow revenue, and increase market share by taking over the adjacent PHE and MME rental markets." *Id.* Universal suggests it is a would-be provider of SHBs and a direct competitor of Hill-Rom in the PHE and MME rental market. Universal further alleges that Hill-Rom exploited its market power in the SHB market to weaken Universal as a competitor in the PHE and**[\*34]** MME rental markets. Universal also asserts that Hill-Rom provided its products at a lower price by bundling SHB rentals with PHE and MME rentals. These are the types of injuries that the ***antitrust*** laws were intended to prevent. And, because Universal has pleaded that its purported injuries flow directly from Hill-Rom's allegedly exclusionary conduct, the ***antitrust*** injury analysis is also satisfied. *See* [*Brunswick Corp., 429 U.S. at 488-89*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=). Universal has therefore adequately alleged ***antitrust*** standing.

B. Universal has Sufficiently Alleged Facts that Hill-Rom Engaged in Exclusionary Conduct

Hill-Rom next argues Universal has failed to adequately allege a dangerous probability of success on its attempted monopolization of the SHB market and PHE and MME rental markets claims. As indicated above, although there is no heightened pleading standard in an ***antitrust*** case, *see* [*Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=), a plaintiff must nonetheless allege that there is a substantial danger that the defendant's conduct, if allowed to continue, will harm consumers. [*Felder's Collision Parts, Inc. v. All star Advertising Agency, Inc., 777 F.3d 756, 760 (5th Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F5G-WMH1-F04K-N000-00000-00&context=); *see also* [*Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XDD0-003B-R3PV-00000-00&context=); [*American Academic Suppliers, Inc. v. Beckley-Cardy, Inc., 922 F.2d 1317, 1319 (7th Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GXN0-008H-V0N3-00000-00&context=). This sequence is highly unlikely unless the defendant already has monopoly power—the power to charge a price higher than the competitive price without inducing**[\*35]** so rapid and great an expansion of output from competing firms as to make the super-competitive price untenable. [*Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589, 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=). If it does not have such power, it will not be able to recoup the losses sustained in pricing below cost by later raising its price above the competitive level. *Id.* "In that event, the below-cost pricing will only benefit, and not harm, consumers, either in the long run or in the short run." [*American Academic Suppliers, Inc., 922 F.2d at 1319*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GXN0-008H-V0N3-00000-00&context=). A "nonconclusory allegation that a defendant holds a predominant share of the relevant market will usually satisfy the monopoly power element of a monopolization claim." [*In re Pool Prods. Distribution Market* ***Antitrust*** *Litig., 940 F.Supp.2d 367, 382 (E.D. La. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:585M-JYR1-F04D-C308-00000-00&context=) (citing [*United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1986))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G490-003B-S2W3-00000-00&context=).

Universal sufficiently alleged in a nonconclusory manner that Hill-Rom possesses monopoly power in the SHB market and has willfully maintained its power through the use of exclusionary conduct. With regard to monopoly power, Universal alleges that Hill-Rom maintains a 70% to 90% share of the SHB market. Docket no. 1, Complaint at ¶¶ 12, 18, 37, 64, 114. A 70% to 90% market share allegation is sufficient to establish that Hill-Rom possesses monopoly power for a claim under *Section 2 of the Sherman Act*. *See e.g,* [*Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 981 (5th Cir. 1977)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0PX0-0039-M2FV-00000-00&context=) (finding that share of relevant market which consisted of market control of between 71% and 76% for particular**[\*36]** foreign automobiles was sufficient to establish monopoly power); [*In re Pool Prods Distribution Market* ***Antitrust*** *Litig., 940 F.Supp.2d at 382*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:585M-JYR1-F04D-C308-00000-00&context=) (noting that caselaw generally supports conclusion that 70% market share is adequate at pleading stage).

With respect to exclusionary conduct, Universal alleges that Hill-Rom is harming customers by maintaining its SHB monopoly through exclusionary bundling techniques and other tactics, such as misleading customers about contractual requirements and threatening them with penalties for noncompliance. Docket no. 1, Complaint at ¶¶ 14, 21, 73-86, 93-110. Universal specifically contends that these tactics are designed in part to eliminate rental market competitors in the SHB market. *Id.* at ¶¶ 25, 73. By engaging in such conduct, Universal maintains "Hill-Rom can not only protect its existing monopoly in SHBs by eliminating potential new entrants, it can also diversity, grow revenue and increase market share by taking over the adjacent PHE and MME rental markets." *Id.* at ¶ 73. In sum, Universal alleges:

Hill-Rom's contracts contain multiple terms that, standing alone, are anticompetitive. But these terms in combination cause much greater harm, as the net result of a monopolist combining a discounted bundle and a sole-source**[\*37]** agreement that includes its monopoly product is that it eliminates competition in the PHE and MME rental markets.

*Id.* at ¶ 74. When combined with substantial barriers to entry as discussed above, this is sufficient to state a *Sherman Act, § 2* violation at the pleading stage. *See* [*Novell, 505 F.3d at 316*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PX5-6T30-TXFX-63DH-00000-00&context=); [*Dentsply Int'l, Inc., 399 F.3d at 181*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=).

IV. Count IV: Exclusionary Bundling Under Section 3 of the Clayton Act

Hill-Rom argues Universal has failed to state a claim for exclusionary bundling in violation of [*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=). Specifically, Hill-Rom contends Universal has failed to allege facts demonstrating "substantial market foreclosure" in the PHE and MME markets.[[3]](#footnote-2)3 To determine whether the allegedly foreclosed competition is "substantial," the Supreme Court has instructed courts to consider "the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which preemption of that share of the market might have an effective competition therein." [*Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 329, 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=). In making this determination, courts have utilized a "qualitative-substantiality" approach for ascertaining foreclosure, which includes considerations of the "percentage of market**[\*38]** foreclosed by defendant, barriers to entry, terms of the agreement regarding duration, ability to terminate the agreement, other available distribution channels, whether the purchaser is an end user, the nature of the product, actual competitive impacts, justifications, and the seller's market power." [*Apani v. Coca-Cola Enters., Inc., 128 F. Supp. 2d 988, 994 (N.D. Tex. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4284-MHM0-0038-Y2RG-00000-00&context=), *aff'd*, [*300 F.3d 620 (5th Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46H1-XT60-0038-X0RH-00000-00&context=). By adopting this multi-factor qualitative-substantiality approach over the prior test, which considered only the percentage of the relevant market foreclosed, the Fifth Circuit joined other circuits which have determined that the impact on the market analysis should involve a cumulative assessment of the defendant's actions, not just a determination of the percentage of the market foreclosed. [*Id. at 994-95*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4284-MHM0-0038-Y2RG-00000-00&context=) (citing [*Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253 (5th Cir. 1988))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1N70-001B-K1R9-00000-00&context=).

Universal's complaint establishes the substantiality of the alleged foreclosure in both the national and regional PHE and MME rental markets at the pleading stage. Many of the qualitative-substantiality factors have been set forth above, including Hill-Rom's market power, the barriers to entry in the PHE and MME rental markets, the importance of the GPO distribution channel and market, and the anticompetitive effects and consumer harm allegedly associated with Hill-Rom's strategy. The remaining two qualitative substantiality factors cited by Hill-Rom—the substantiality of market foreclosure and the case of termination of the sole-source GPO contracts—are also supported by Universal's allegations of substantial foreclosure.

A. Universal's Allegations Regarding a Significant Percentage are Sufficient

Universal alleges a significant percentage of the regional and national markets has been foreclosed by Hill-Rom's exclusive deals and that the extent of the alleged foreclosure is likely to rapidly tip both markets entirely. The complaint alleges that Hill-Rom's monopoly leveraging and exclusionary bundling campaign has foreclosed Universal from at least 12-15% of the national PHE and MME rental**[\*40]** markets and up to 66% of some regional markets. Docket no. 1, Complaint at ¶ 81 ("[T]he exclusive nature of the HGP and HCA Agreements alone foreclose competition in at least 12-15% of the national market and as much as 66% in regional markets where HPG/HCA have a large presence."). Courts have held that foreclosure rates as high as 66% are sufficient to state a claim 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=). *See* [*R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362, 388 (M.D.N.C. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45SS-SFN0-0038-Y47B-00000-00&context=) (collecting cases and noting that 50% market foreclosure "as a level at which courts routinely condemn foreclosure"). Accordingly, Universal has stated a claim with respect to the regional markets.

Regarding the national markets, Hill-Rom argues that a foreclosure rate of 12%-15% falls short of the 30%-40% foreclosure rate which Hill-Rom alleges to be required. The cases Hill-Rom cites which required a greater percentage of market foreclosure arose on summary judgment in circumstances where the defendant's contracts had been in place for several years and there were no allegations that the defendant would enter into additional exclusive agreements. *See* [*B&H Med., LLC v. ABP Admin., Inc., 526 F.3d 257, 261 (6th Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SFR-W7N0-TXFX-838J-00000-00&context=) (challenging on summary judgment exclusive dealing arrangement which had been in place for ten years); [*Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield, 373 F.3d 57, 59 (1st Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CPF-49N0-0038-X3XG-00000-00&context=) (plaintiffs brought suit after challenged**[\*41]** contracts had been place for year and one half and summary judgment decision and appeal occurred six years after contracts were initiated). Courts, however, have found market shares in the teens to be sufficient to state a claim 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=).

Additionally, the Supreme Court was clear in *Tampa Electric Company* that considerations of the likely future impact on the market should be included in determining the substantiality of the market foreclosure. The Court explained that "[t]o determine substantiality in a given case, it is necessary to weigh . . . the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." [*365 U.S. at 329*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HKK0-003B-S3Y4-00000-00&context=); *see also* [*Apani, 128 F. Supp. 2d at 994*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4284-MHM0-0038-Y2RG-00000-00&context=). As discussed above, Universal alleges the likely future impact of Hill-Rom's monopoly leveraging and exclusionary bundling will be to quickly foreclose an even greater percentage of the national and regional PHE and MME rental markets pursuant to a rapid market "tipping" theory, particularly given the concentration in "the all-important" GPO distribution channel. *See* Docket no. 1, Complaint at ¶ 82 ("If Hill-Rom's anticompetitive conduct is allowed to continue, Universal and other competitors**[\*42]** will be substantially and quickly foreclosed from more and more of the market until Hill-Rom is able to eliminate substantially all competition.").

B. Universal's Allegations Regarding Exclusive, Sole-Source Contracts are Sufficient

Universal has also sufficiently alleged that Hill-Rom's exclusive, sole-source contracts are long term and difficult to terminate. The complaint alleges that Hill-Rom's sole-source contracts have far longer terms than industry standard—five to ten years instead of the more typical three-year term—and are designed such that its competitors will be forced to close distribution centers in the regional markets, thereby stifling any potential future competition. *See* Docket no. 1, Complaint at ¶ 59 ("Traditionally, GPO contracts come up for renewal and rebidding every three years."); *id.* ¶¶ 66-67 (discussing five-year agreements with HPG/HCA); id. ¶ 68 (discussing ten-year agreement with Providence); *id.* ¶¶ 84, 90 (describing effect on competitors' ability to operate in markets where Hill-Rom has sole-source agreement).

Hill-Rom does not challenge the sufficiency of these allegations but instead argues Universal alleges nothing about the ability to terminate the**[\*43]** contracts. Universal, however, alleges that Hill-Rom's exclusive agreements are "ironclad" and, with respect to the sole-source agreements, are enforced through substantial penalties assessed if the customer "go[es] off-contract" or purchases from another supplier. *Id.* at 21 ("Hill-Rom has started leveraging its market power in the Standard Hospital Bed market by negotiating sole-source agreements with national group purchasing organizations and hospital networks that contain steep discounts and rebates on the sale of Standard Hospital Beds bundled with ironclad commitments to use Hill-Rom for their PHE and MME rental needs."); *id.* at ¶ 80 ("The exclusionary nature of GPO contracts is reinforced by commitment requirements and loyalty discounts contained therein. Customers are substantially penalized if they go "off-contract" to purchase or rent medical equipment from other medical suppliers that are not approved under the operative supply agreements."). In addition, the complaint alleges that Hill-Rom has threatened to enforce these penalty provisions when customers have expressed the desire to use a different supplier. *Id.* at ¶¶ 98-108.

Hill-Rom points out that these contracts can be terminated on**[\*44]** short notice. Nonetheless, as a practical matter, the complaint alleges that the conditional discounts and rebates offered by Hill-Rom in exchange for the sole-source condition are sufficiently steep to create "an irresistible bundle." Docket no. 1, Complaint at ¶ 83. In these circumstances, courts have held that such agreements are not economically capable of termination as a practical matter. [*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=) ("[A] jury could very well conclude that in spite of the legal ease with which the relationship can be terminated, the [customers] had a strong economic incentive to adhere to the terms of the [agreements], and therefore were not free to walk away from the agreements and purchase products from the supplier of their choice."); [*Dentsply Int'l, Inc., 399 F.3d at 194*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FJR-03C0-0038-X0VM-00000-00&context=) ("[I]n spite of the legal ease with which the relationship can be terminated, the dealers have a strong economic incentive to continue carrying [defendant's product]."). The Court finds Universal's allegations are sufficient under the qualitative-substantiality analysis at the pleading stage.

V. Count V: Exclusionary Bundling in Violation of Section 1 of the Sherman Act

Hill-Rom next argues Universal has not sufficiently alleged that Hill-Rom's conduct violates *Section 1 of the Sherman Act*.[[4]](#footnote-3)4**[\*45]** Specifically, Hill-Rom contends Universal has failed to allege facts showing an injury to competition. Universal in its complaint maintains that Hill-Rom's alleged anticompetitive scheme has caused, and will continue to cause, harm to competition. Docket no. 1, Complaint at ¶¶ 26, 76-79, 83-88, 89-92. For example, among other things, the complaint alleges that competition is harmed by a reduction of consumer choice in the PHE and MME rental markets. *Id.* at ¶¶ 83, 87, 92. This reduction in consumer choice is evidence of harm to competition in the PHE and MME markets. *See* [*Total Renal Care, Inc. v. W. Nephrology & Metabolic Bone Disease, P.C., No. 08-cv-513, 2009 U.S. Dist. LEXIS 80821, 2009 WL 2596493, at \*6 (D. Colo. Aug. 21, 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4X61-WSP0-TXFP-D28X-00000-00&context=) ("Reduced consumer choice as a result of monopolistic behavior is the sort of harm to competition that the ***antitrust*** laws were intended to prevent."); *see also* [*Deborah Heart & Lung Ctr. v. Penn Presbyterian Med. Ctr., No. 11-1290, 2011 U.S. Dist. LEXIS 149664, 2011 WL 6935276, at \*8 (D.N.J. Dec. 30, 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:54KT-BWK1-F04D-W1NW-00000-00&context=) (finding that allegation of reduction in consumer choice was sufficient to show harm to competition). Additionally, courts have found that an alleged combination of a defendant's exclusive volume discounts with loyalty conditions could violate *Section 1 of the Sherman Act*. [*Retractable Techs., Inc. v. Becton, Dickinson & Co., No. 2:08-cv-16, 2013 U.S. Dist. LEXIS 116747, 2013 WL 5366104, at \*2 (E.D. Tex. Sept. 19, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:595N-KJR1-F04F-C1D6-00000-00&context=); [*Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Ltd., No. 1:05-cv-12024-PBS, 2009 U.S. Dist. LEXIS 108858, [WL] at \*5 (D. Mass. Nov. 20, 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7X58-00R0-YB0N-800D-00000-00&context=). For these and the reasons set forth in the preceding sections, the Court finds that Universal has sufficiently alleged that Hill-Rom's exclusionary bundling arrangements unreasonably restrain trade in violation of *Sherman Act, Section 1*.

VI. Count VI: Violations of Texas State ***Antitrust*** Law

Hill-Rom further argues Universal's claims under the Texas Free Enterprise and ***Antitrust*** Act ("TFEAA") fail for the same reasons as its**[\*46]** federal ***antitrust*** claims. Each provision of the TFEAA is modeled after a corresponding provision of federal ***antitrust*** law. [*Apani v. Coca-Cola Enters., Inc., 300 F.3d 620, 628 (5th Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46H1-XT60-0038-X0RH-00000-00&context=) (citations omitted). Texas courts "are statutorily instructed to interpret the TFEAA in harmony with federal judicial interpretations of equivalent federal laws." *Id.* (citing [*Tex. Bus. & Comm. Code Ann. § 15.04*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DDJ-B5X1-6MP4-015X-00000-00&context=) (Vernon 1983)). Because this Court's analysis shall be equally applicable to all of Universal's ***antitrust*** claims, and because this Court found that Universal has adequately alleged actionable ***antitrust*** conduct under federal law, Universal has also adequately alleged ***antitrust*** claims under the TFEAA.

VII. Count VII: Tortious Interference with Business Relationships

Hill-Rom challenges Universal's claim for tortious interference with business relations because Universal did not allege an underlying wrongful or illegal act given that its allegations of "false representations" do not rise to the level of the independent tort of fraud. Memorandum, docket no. 37-2, at 30 n.24. In a footnote, Hill-Rom appears to acknowledge the possibility that Universal might have alleged an ***antitrust*** violation as the underlying illegal act, but maintains that Universal failed to do so. Universal's complaint, however,**[\*47]** specifically alleges that Hill-Rom's unlawful anticompetitive conduct serves as the underlying wrongful act supporting Universal's tortious interference claim. Complaint, Docket no. 1 at ¶¶ 153-54. Courts have indicated that a competitor is not privileged to violate the ***antitrust*** laws in its attempt to interfere with another's business relationships. *See* [*Stewart Glass & Mirror, Inc. v. U.S.A. Glas, Inc., 940 F. Supp. 1026, 1038-39 (E.D. Tex. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-C770-006F-P36X-00000-00&context=) (denying motion to dismiss where plaintiffs alleged an illegal boycott as underlying unlawful act supporting tortious interference claim finding that "[w]hile defendants are privileged to win business from plaintiffs on the basis of quality or prices, defendants are not permitted to interfere with plaintiffs' business on the basis of alleged illegal agreements."); *see also* [*Prudential Ins. Co. of Am. v. Financial Review Servs., Inc., 29 S.W.3d 74, 81 (Tex. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:40M0-KGC0-0039-4099-00000-00&context=) ("A party may not exercise an otherwise legitimate privilege by resort to illegal or tortious means" because "methods tortious in themselves are of course unjustified and liability is appropriate where the plaintiff's contract rights are invaded by . . . unfair competition."). In this case, the Court finds that Universal has adequately alleged that Hill-Rom engaged in an unlawful anticompetitive scheme and that the tortious nature of Hill-Rom's sole-source, bundled agreements**[\*48]** has interfered with Universal's business relationships. For the reasons set forth above, Hill-Rom's motion to dismiss is denied.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss (docket no. 37) is DENIED.

It is so ORDERED.

SIGNED this 15 day of October, 2015.

/s/ Fred Biery

FRED BIERY

CHIEF UNITED STATES DISTRICT JUDGE

**End of Document**

1. 1Hill-Rom advances the "discount attribution" test while Universal contends the "rule of reason" most aptly applies in this situation. The Court finds Universal's pleading sufficient under either analysis. [↑](#footnote-ref-0)
2. 2See [*Church, 2011 U.S. Dist. LEXIS 35969, 2011 WL 1225912, at \*9-10*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:52J7-3T71-652H-72BF-00000-00&context=) (distinguishing exclusionary conduct at issue with "price-based" or "price-squeeze" claims at issue in Linkline wherein "pricing itself operates as an exclusionary tool"). [↑](#footnote-ref-1)
3. 3In order to make a claim 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=), a plaintiff must (1) identify the relevant product market; (2) identify the relevant geographic market; and (3) show that "competition foreclosed by the agreement constitutes a substantial share of the relevant market." [*Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327-28, 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 first two factors have been met. Hill-Rom does not dispute that Universal has identified the relevant product market and, as discussed above, Universal has alleged an adequate relevant geographic market.**[\*39]** [↑](#footnote-ref-2)
4. 4In challenging the sufficiency of Universal's allegations with respect to this claim, Hill-Rom primarily incorporates by reference its arguments from other sections of its memorandum in support of its motion and does not contend there are significant issues which are not addressed elsewhere in its arguments. [↑](#footnote-ref-3)