

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ANTHONY COLUCCI; and
VANESSA LORRAINE SKIPPER,

Plaintiffs,

v.

Case No. 6:21-cv-681-RBD-GJK

HEALTH FIRST, INC.,

Defendant.

ORDER

Before the Court are:

1. Defendant's Motion to Dismiss Counts II and III of the Second Amended Class Action Complaint (Doc. 56 ("Motion")); and
2. Plaintiffs' Response in Opposition to Defendant's Motion to Dismiss (Doc. 62).

The Motion is due to be granted in part and denied in part.

BACKGROUND¹

In this antitrust case, Plaintiffs allege that Defendant engages in anticompetitive practices in the acute health care market in Brevard County,

¹ These factual allegations are presented in the light most favorable to Plaintiffs and taken as true for the purpose of this Motion. *See Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003).

Florida (“Brevard”). (Doc. 53, ¶ 2.) Defendant owns four hospitals in Brevard and dominates the acute care market, partially through purported intimidation tactics that induce exclusive referrals. (*Id.* ¶¶ 7, 42.)

Plaintiffs further allege that Defendant conspired with AdventistHealth (“Adventist”) to divide the sale of inpatient and emergency room acute care in the relevant market and allege direct evidence of this: a written agreement in 2019; many inpatients arbitrarily forced to travel to Adventist hospitals outside Brevard; Defendant allowing surgeons to use only Adventist when they request higher levels of care, despite different requests or inadequacy of Adventist; Adventist declining to purchase a cancer center in Brevard and despite not receiving an offer, Defendant expressing interest in the center; and Defendant executing a letter of intent to collaborate with Adventist in providing urgent care throughout Brevard. (*Id.* ¶¶ 2-3, 79-93.)

Plaintiffs also allege these circumstantial “plus factors” they claim show unlawful horizontal market division: by owning thirty percent of Defendant, Adventist has a motive not to compete; Adventist has two seats on Defendant’s Board of Directors (“Board”), which also allow opportunities to discuss division; Defendant’s market structure, created through intimidation tactics, makes avoiding competition by Adventist more likely; Adventist likely chose to partially own Defendant because empirical analysis shows that approach to be more

beneficial to increasing prices; and, despite quickly expanding throughout Florida, Adventist has not purchased hospitals in Brevard. (*Id.* ¶¶ 94–110.)

So Plaintiffs brought a Second Amended Complaint (“SAC”) asserting: (1) monopolization of the Brevard acute care relevant market; (2) horizontal market division in restraint of trade; (3) restraining competition via sale of partial ownership; (4) exclusive dealing in restraint of trade; and (5) violation of the Florida Antitrust Act. (*Id.* ¶¶ 132–66.) Defendant successfully moved to dismiss what was Count III (now Count II) in the First Amended Complaint (“FAC”). (*See* Docs. 26, 48.) The Court found that Plaintiffs did not adequately plead a claim for horizontal market division. (Doc. 48, pp. 8–10.) Now Defendant again moves to dismiss Count II and the newly asserted Count III, arguing they fail to state a claim. (Doc. 56.) Plaintiffs oppose. (Doc. 62.) The matter is ripe.

STANDARDS

A plaintiff must plead “a short and plain statement of the claim.” Fed. R. Civ. P. 8(a)(2). On a motion to dismiss under Rule 12(b)(6), the Court limits its consideration to “the well-pleaded factual allegations.” *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004). The factual allegations must “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court must accept the factual allegations as true and construe them “in the light most favorable” to the plaintiff. *See United Techs. Corp. v. Mazer*,

556 F.3d 1260, 1269 (11th Cir. 2009). But this “tenet . . . is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ANALYSIS

I. Count II: Horizontal Market Division

First, Plaintiffs allege that Defendant violated § 1 of the Sherman Act through horizontal market division. (Doc. 53, ¶¶ 140–46.) Defendant argues these allegations do not satisfy *Twombly* because they neither establish an illegal conspiracy nor allow for an inference of one. (Doc. 56, p. 9.) Plaintiffs respond that their allegations and “plus factors” are sufficient. (Doc. 62, pp. 3–5.) The Court agrees with Plaintiffs.

Under the Sherman Act, “horizontal price fixing” is per se illegal. *Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327, 1334 (11th Cir. 2010). Plaintiffs who plead an agreement to create horizontal price restraints must allege facts “suggestive enough to render a § 1 conspiracy plausible.” *Id.* at 1343 (cleaned up). Conscious parallelism is insufficient, so a plaintiff must plead the existence of “plus factors” that render the “evidence more probative of conspiracy.” *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co.*, 917 F.3d 1249, 1262 (11th Cir. 2019) (cleaned up). “[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.” *United States v. Patten*, 226 U.S. 525, 544 (1913); see *Quality Auto*, 917 F.3d

at 1263 n.15.

The SAC includes new allegations not included in the FAC: (1) Defendant and Adventist signed a written agreement in 2019 purportedly to engage in horizontal market division; and (2) Defendant executed a letter of intent with Adventist to provide urgent care throughout Brevard. (Doc. 53, ¶¶ 80, 93.) Plaintiffs also allege other facts for the first time, including that Defendant restricts patients needing “higher care” to receiving treatment in Adventist hospitals and that despite aggressive expansion in the recent years, Adventist has declined to enter Brevard. (*Id.* ¶¶ 82-93.) Taking these allegations as true, Plaintiffs have alleged “enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” *Twombly*, 550 U.S. at 556; *see Mayor & City Council of Baltimore v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013). So this portion of Defendant’s Motion is due to be denied.

II. Count III: Restraining Competition

Next, Plaintiffs allege that Defendant violated § 7 of the Clayton Act by selling at least thirty percent of its shares to Adventist and ceding two seats on its Board, substantially lessening the competition. (Doc. 53, ¶ 149.) Defendant first argues this claim is improperly asserted against Defendant because § 7 targets the *acquirer* – Adventist. (Doc. 56, p. 21.) Plaintiffs respond that Defendant “acquired control over Adventist’s business and anti-competitive posture,” which is

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