UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEDICAL DIAGNOSTIC IMAGING, PLLC; :
RADIOLOGY ASSOCIATES OF :
POUGHKEEPSIE, PLLC; and GARY :
GROSSMAN, :
Plaintiffs, :
:
v. : 06-cv-7764 (WWE)
:
CARECORE NATIONAL, LLC; CARECORE :
MANAGEMENT SERVICES, INC.; NEW YORK:
MEDICAL IMAGING IPA, INC.; NYMI IPA-O, :
LLC; NUMI IPA-M, LLC; CCN-HI IPA, LLC; :
CCN-WNY IPA, LLC, JOEL CANTER M.D.; :
DRA IMAGING, P.C.; and HUDSON VALLEY :
RADIOLOGISTS, P.C., and CYBER IMAGING,:
PLLC, :
Defendants. :

MEMORANDUM OF DECISION ON
MOTIONS FOR SUMMARY JUDGMENT

In this action, plaintiffs Medical Diagnostic Imaging, PLLC ("MDI"), Radiology Associates of Poughkeepsie, PLLC ("RAP"), and Gary Grossman assert that their exclusion from the limited network of radiology practices fostered by Carecore National LLC and its subsidiaries, predecessors or affiliates (collectively "CareCore") and Dr. Joel Canter, DRA Imaging, P.C., and Cyber Imaging and Hudson Valley Radiologists ("HVR") (collectively the "DRA Defendants") violated Sections 1 and 2 of the Sherman Antitrust Act.[1] Specifically, plaintiffs have alleged that defendants (1) violated Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, by entering into contracts and

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[1]The CareCore defendants include CareCore Management Services, New York Medical Imaging IPA, Inc.; NYMI IPA-O, LLC; NYMI IPA-M, LLC; CCN-HI IPA, LLC; CCN IPA, INC. and CCN-WNY IPA, LLC.

combinations and engaging in a conspiracy of a per se unreasonable restraint of trade in outpatient diagnostic imaging services; and (2) violated Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, by conspiring to monopolize the provision of outpatient diagnostic imaging services to patients who are subscribers of and covered by major managed care heath benefit plans in Dutchess County and other geographic markets.

CareCore and the DRA Defendants have each filed separate motions for summary judgment. Plaintiffs have filed a cross motion for summary judgment. For the following reasons, the motions filed by CareCore and plaintiffs will be denied; and the motion filed by the DRA Defendants will be granted in part and denied in part.

Background

The parties have submitted statements of facts with supporting exhibits that reveal the following factual background.

Plaintiff Gary Grossman is radiologist in Dutchess County, New York, a principal in RAP, and the sole owner of plaintiff MDI. MDI is one of three freestanding outpatient diagnostic imaging companies in Dutchess County.

Defendant DRA Imaging and Open MRI of Fishkill are the two other freestanding imaging companies in Dutchess County. Defendant DRA Imaging, which has two outpatient diagnostic facilities in Dutchess County, participates in the risk networks managed by CareCore for Aetna HMO, Health Net and Oxford.

Defendant HVR provides radiology services under written contracts with area hospitals on both an in-patient and outpatient basis. DRA Imaging and HVR are competitors of MDI, RAP and Dr. Grossman in the market for providing outpatient diagnostic imaging services in Dutchess County.

The owners of defendant Cyber Imaging are the six senior shareholders of DRA Imaging: Dr. Victor Gaines, Dr. Joel Canter, Dr. Jack Hentel, Dr. Russ Karp, Dr. Rich Friedland, and Dr. Zev Goldstein.

Defendant Dr. Canter was a founder of DRA Imaging and a shareholder and officer of DRA Imaging during the period from 2003 through the end of 2007. He was also a founder of HVR, a shareholder and officer of HVR during the period 2003 through December 31, 2007. He is an owner of CareCore, and he was founder and owner of its predecessor, New York Medical Imaging, PLLC. Prior to January 1, 2008, Dr. Canter held positions at CareCore as president of the Management Committee, vice chairman of the Management Committee, and a member of the Management Committee, the Class A Advisory Committee, and the Medical Advisory Committee. He was not a CareCore employee.

Outpatient diagnostic imaging services are paid for by both governmental third-party payers such as Medicare and private payers such as health insurance companies and managed care organizations. The parties agree that the relationships that radiologists and outpatient radiology practices build with referring physicians is important to the success of an outpatient radiology practice.

Defendant CareCore was formed by five groups of practicing radiologists to offer managed care organizations in the Hudson Valley radiology benefits management services. At the writing of the briefs in this action, defendant CareCore had 36 radiology groups as owners. CareCore offers to assume a managed care organization's insurance risk for non-emergency patient diagnostic imaging services ("Risk Contracts"). Generally, these two-to-three year Risk Contracts require managed

care organizations to pay CareCore a fixed amount per member, per month to cover outpatient diagnostic imaging services for its subscribers. CareCore maintains that it helps the managed care organization assemble a network of participating radiology providers and manages radiology benefits through rigorous quality assurance programs. CareCore also enters into administrative services contracts in which CareCore manages utilization and quality for the payer.

CareCore asserts that the success of any risk-based contract is the ability to assemble an appropriate network of radiology providers. CareCore represents that its network must of sufficient size and geographic diversity to satisfy the access-to-care and waiting-time requirements of the health plans and the New York State Health Department. CareCore's first operating agreement provided:

> Members have initially been divided into four geographic groups based upon the location of each Member's respective office(s) . . . . A Member shall only be assigned to one geographic group regardless of whether such Member has offices in more than one area. Each respective geographic group shall be represented by three (3) persons (each a "Manager") on the Management Committee provided, if a geographic group is comprised of less than three (3) Members, the number of Managers representing such group shall equal the number of Members in such group . . . .

CareCare has Risk Contracts with such insurance companies as Oxford Health Plan, Inc. ("Oxford"), Aetna U.S. Healthcare, Health Insurance Plan of Greater New York ("HIP"), and Health Net of New York, Inc. ("Health Net"). CareCore's contracts with managed care organizations must be approved by the New York State Insurance Department before they can be implemented.

In September 2003, RAP and MDI submitted an application to CareCore to become an approved provider of outpatient diagnostic imaging services to subscribers

covered by the CareCore/Oxford Diagnostic Imaging Program.

On December 15, CareCore's Management Committee determined to decline approval of the application. As the reason for the denial, CareCore stated that the "imaging services available through the current and participating providers in the geographic area where your facility is situated meet or exceed the patient accessibility requirements." At that time, DRA Imaging was the only free-standing diagnostic imaging facility offering high end imaging in Poughkeepsie that participated in the CareCore/Oxford Diagnostic Imaging Program.

In September 2004, CareCore entered into a contract with Health Net to provide for outpatient diagnostic imaging services for its plan members. DRA Imaging negotiated to have CareCore not allow MDI inclusion in the network for Health Net during the initial three-year term of the agreement, which expired August 31, 2007. In exchange, DRA Imaging gave a substantial discount on its reimbursements. Prior to the commencement of this contract, MDI and RAP were participating providers in the Health Net network; Health Net had not considered non-renewal of MDI and RAP.

In January 2005, MDI applied to become a participating provider in CareCore's risk contract networks for Oxford, Aetna, and Health Net. In a letter dated March 8, 2005, CareCore informed MDI that it could not be enrolled in the Oxford or Health Net networks because "the imaging services available through the current participating providers in the geographic area" where MDI's facility is situated met or exceeded the patient accessibility requirements. The letter also stated that MDI's application for participation in the Aetna network was denied because, at that time, Aetna was not contracted with CareCore to provide services in Dutchess County.

In April 2005, CareCore and DRA Imaging engaged in discussions regarding a proposed CareCore/Aetna Agreement. Mark Newton, Chief Financial Officer of DRA Imaging and HVR, wrote the following internal email to Dr. Gaines relative to what he termed the "aetna/carecore deal:"

> The CareCore deal as offered is a three year commitment. And it only applies to radiology practices, not imaging done in non radiology doctor offices. HVU will probably get a better reimbursement for Cts from Aetna than we will through CareCore/Aetna, and HVU won't be subject to CareCore's rules such as having a radiologist present. Until Aetna and CareCore are able to apply these rules to non radiologists, the only thing it's doing for rads is cutting their pay. I think CareCore's promise of exclusivity is a red herring. We'd be worse off with a practice based on exclusive deals of 80% than a practice without HMO Aetna. Exclusivity is good at fair rates, or if it puts the competition out of business thereby improving our ability to negotiate superior fee schedules with the payers. Aetna is looking for an 11% cut in pay, and with the help of CareCore, the only thing we get in return is the unenforceable promise that it will steer patients away from MD Imaging, or if we don't take the deal the threat that it'll steer patients away from us. I'd like to think we have more bargaining power than that. Our existing Aetna patients will scream if they're told they can't use DRA any more because we wouldn't accept an 11% cut in pay. I'd like to push CareCore a little harder. We don't know if CareCore can get more money out of Aetna or not, and we don't know how much CareCore keeps. Let's at least counter the 80% before accepting.

On June 17, 2005, CareCore informed DRA Imaging that its management committee had approved DRA Imaging's Hopewell Junction and Hudson, New York facilities for participation in the Oxford, Aetna and Health Net programs. Hopewell Junction is in Dutchess County approximately 13 miles from MDI's site in Poughkeepsie.

In April 2006, Health Net advised MDI that pursuant to its 2004 contract with CareCore, Health Net was "non-renewing" MDI's participating provider agreement effective June 1, 2006.

That same month, DRA Imaging submitted an application for CareCore to

include another one of its sites in Hopewell Junction in the networks for Oxford, Aetna and Health Net. A letter dated May 9, 2006 informed DRA Imaging that its request for the new Hopewell Junction site was approved.

DISCUSSION

A motion for summary judgment will be granted where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. American Int'l Group, Inc. v. London American Int'l Corp., 664 F. 2d 348, 351 (2d Cir. 1981). In determining whether a genuine factual issue exists, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Bryant v. Maffucci, 923 F. 2d 979, 982 (2d Cir. 1991).

If a nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, then summary judgment is appropriate. Celotex Corp., 477 U.S. at 323. If the nonmoving party submits evidence which is "merely colorable," legally sufficient opposition to the motion for summary judgment is not met. Anderson, 477 U.S. at 249.

Standing

Defendants assert that plaintiffs have no standing because they lack antitrust injury.

The doctrine of Article III standing requires a litigant to demonstrate that (1) the

litigant must have suffered actual or threatened injury as a result of the illegal conduct of the defendant, (2) the injury is fairly traceable to the challenged action, and (3) the injury is redressable by a favorable decision. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982). A plaintiff's harm must be actual or imminent, not conjectural or hypothetical. Port Washington Teachers' Assoc. v. Bd. of Educ. of the Port Washington Union Free Sch. Dist., 478 F.3d 494, 498 (2d Cir. 2007).

The focus of an antitrust injury is on whether the challenged conduct has actually caused harm to the plaintiff that is the type of injury contemplated by the antitrust laws. Blue Tree Hotels Inv. v. Starwood Hotels & Resorts, 369 F.3d 212, 220 (2d Cir. 2004). A plaintiff can recover only if the loss stems from a competition-reducing effect of defendants' conduct. Dyer v. V.P. Records Retail Outlet, Inc., 2008 WL 2876494,*6 (S.D.N.Y. 2008). In addition, the plaintiff must show that it is a proper party according to the "efficient enforcer" factors: (1) whether the violation was a direct or remote cause of the injury; (2) whether there is an identifiable class of other persons whose self-interest would normally lead them to sue for the violation; (3) whether the injury was speculative; and (4) whether there is a risk that other plaintiffs would be entitled to recover duplicative damages or that damages would be difficult to apportion among possible victims of antitrust injury. Port Dock & Stone Corp. v. Oldcastle Northeast, Inc., 507 F.3d 117, 123 (2d Cir. 2007).

Defendants maintain that plaintiffs have asserted only competitor-based harms rather than competition-based harms and that plaintiffs cannot advance an antitrust challenge to an entity that it seeks to join. A plaintiff cannot establish an antitrust injury

when the aim of the lawsuit is to join the alleged cartel rather than disband it. Daniel v. American Bd. of Emergency Medicine, 428 F.3d 408, 440 (2d Cir. 2005). However, plaintiffs have submitted evidence, including an expert report, that supports their assertion of reduced competition, including decreased consumer choice and barriers to entrance in the field for other radiologists. Plaintiffs request relief in the form of damages as well as structural relief to restore free competition. Even if plaintiffs advance a theory of damages based on what they would have earned if they were part of the CareCore network, it does not follow that their claim seeks merely to force their acceptance into that network. The Court is satisfied that an antitrust injury is present.

The “efficient enforcer” factors favor standing. See Palmyra Park Hosp. Inc. v. Phoebe Putney Memorial Hosp., 604 F.3d 1291, 1304 (11th Cir. 2010) (competitor in the field may be best suited as efficient enforcer). As to the first factor, directness of injury, plaintiffs submit that their injuries stem from the direct harm caused by effects of CareCore’s network and its alleged anticompetitive conduct, including its ability to steer patients to its preferred providers within Dutchess County. This factor supports the plaintiffs' standing.

The second factor concerns the plaintiffs’ motivation. As a provider of radiology services within Dutchess County, plaintiffs represent a class of entities that are motivated to enforce the antitrust laws because they are harmed by the anticompetitive conduct.

The third factor is speculativeness. Based upon the allegations of the complaint, the antitrust injury does not appear remote or speculative, and plaintiffs’ expert report — which the Court has had to the opportunity to review at this stage of the proceedings

— describes various theories of anticompetitive effects. The potential for duplicative recovery is minimal since plaintiffs' proof will entail a showing of losses stemming from the alleged anticompetitive effects.

Section 1 Violation

Plaintiffs allege that defendants have violated Section 1 of the Sherman Antitrust Act, which provides: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1. A plaintiff must prove a Section 1 violation by establishing: (1) a combination or some form of concerted action between at least two legally distinct economic entities; and (2) that the agreement constituted an unreasonable restraint of trade either per se or under the rule of reason. Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 542 (2d Cir. 1993). A per se standard is applied to a circumscribed number of cases where the offensive action is so harmful to competition and lacking in any redeeming procompetitive value that it is considered illegal without further examination. Broadcast Music, Inc. v. CBS, 441 U.S. 1, 8 (1979). Per se violations include horizontal and vertical price-fixing, division of market into territories, tying arrangements and some group boycotts involving concerted refusals to deal with a competitor. Capital Imaging Assocs., P.C., 996 F.2d at 543.

The parties do not appear to dispute that the first element is met at least for purposes of the standard on summary judgment. However, the parties disagree whether the alleged offensive conduct should be reviewed under rule of reason or per se analysis.

Plaintiffs contend that defendants' alleged offensive conduct — market allocation resulting in price fixing and group boycott by agreement of direct competitors — constitute per se Section 1 violations. However, the Supreme Court has cautioned that per se analyses should be applied sparingly to restraints imposed where the economic impact of certain practices may not be immediately obvious. Per se liability is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality. Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006).

Generally, courts within the Second Circuit have analyzed exclusive agreement networks in the health care context under the rule of reason. See Drug Emporium, Inc. v. Blue Cross of Western New York, Inc., 104 F. Supp. 2d 184, 188 (W.D.N.Y. 2000) (citing cases). As various courts have recognized, exclusive agreement networks can work procompetitive benefits in the healthcare field, and thus, it follows that such cases as the instant action are not susceptible to presumptive findings of anticompetitive effects without any industry study. See Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc., 123 F.3d 301, 309 (5th Cir. 1997); Levine v. Central Florida Med. Affiliates, Inc., 72 F.3d 1538, 1551 (11th Cir. 1996).

Plaintiffs attempt to characterize defendants' conduct as a per se unlawful market allocation scheme or group boycott. A horizontal agreement among competitors to eliminate competition by allocating markets is a per se violation of Section 1. United States v. Topco, 405 U.S. 596, 608 (1972). However, alleged market allocation schemes are analyzed under the rule of reason if either the goods or services that are subject to the market allocation could not be otherwise provided; or if defendants are

essentially creating a new product. New York v. St. Francis Hosp., 94 F. Supp. 2d 399, 416 (S.D.N.Y. 2000).

CareCore is a physician network joint venture, comprising physicians or physician groups that "contract with plans to provide physician services to plan subscribers at pre-determined prices, and the physician participants in the network agree to controls aimed at containing costs and assuring the appropriate and efficient provision of high quality physician services." U.S. Dep't of Justice & Federal Trade Comm'n, *Statements of Antitrust Enforcement Policy in Health Care,* Stmnt. 8 (1996). Conduct by joint ventures holds the promise of increasing efficiency and is therefore generally accorded rule of reason review. Major League Baseball v. Salvino, Inc., 542 F.3d 290, 315 (2d Cir. 2008).

In this instance, rule of reason analysis is appropriate because CareCore offered managed care organizations customized programs such as risk contracts to transfer the risk associated with diagnostic imaging overutilization, which could not be afforded otherwise through individual practices. By contrast, St. Francis Hosp. held that per se analysis was appropriate because the hospitals agreed not to compete against one another for the provision of similar services, which effectively limited consumer choices and provided no new product. 94 F. Supp. 2d at 417.

Plaintiffs' assertion of a group boycott or concerted refusal to deal also fails the relevant standard for per se analysis. In Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co., the Supreme Court explained that mere exclusion from a cooperative does not alone imply anticompetitive animus, thereby raising a probability of anticompetitive effects. 472 U.S. 284, 296 (1985). Generally, per se boycott cases

exhibit three characteristics: (1) defendants with a dominant position in the relevant market, (2) a denial of something such as a supply, facility or market necessary for a competitor to compete effectively; and (3) the absence of any plausible contention that the challenged behavior enhances efficiency and competition. Rossi v. Standard Roofing, Inc., 156 F.3d 452, 463 (3d Cir. 1998). As previously discussed, in this instance, the conduct by CareCore does potentially provide procompetitive effects by providing managed care organizations efficient management of radiology imaging, and thus, the economic impact of the offensive conduct is not clear.

Under the rule of reason, the plaintiff bears the initial burden of showing that the challenged action had an actual adverse effect on competition as a whole in the relevant market. Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997). As the Second Circuit explained, a plaintiff may satisfy this burden by offering proof of actual detrimental effects, such as output reduction, or that defendants possess such market power that the offensive conduct has the capacity for adverse effects on competition and that other grounds exist indicating that defendant's behavior will harm competition market-wide. K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 129 (2d. Cir. 1995).

"Market power" is the ability to raise prices significantly above the competitive level without losing all of the entity's business. CDC Technologies, Inc. v. IDEXX Laboratories, Inc., 186 F.3d 74, 81 (2d Cir. 1999). Market power may be shown by evidence of conduct that indicates a defendant's power to control prices or exclude competition. Broadway Delivery Corp. v. United Parcel Serv., 651 F.2d 122, 126-27 (2d Cir. 1981). Market share may be used as a proxy for market power. K.M.B.

Warehouse Distribs., Inc., 61 F.3d at 129.

If a plaintiff is successful in showing actual detrimental effects, defendant must then establish the redeeming procompetitive virtues of the practice. CDC Technologies, Inc., 186 F.3d at 81. If defendant establishes such virtues, plaintiff must show that the procompetitive effect could be achieved through an alternative means that is less restrictive of competition. Id.

Plaintiffs have submitted expert evidence in support of their position that defendants' conduct has a detrimental effect on competition for outpatient diagnostic imaging services in Dutchess County. Plaintiffs' expert, an economist, sets forth that CareCore retained a market share of 38% to 49% of the outpatient diagnostic imaging business in Dutchess County over the period from 2005 to 2007. He maintains that CareCore's exclusion of providers that compete with its in-network providers harms competition and results in less innovation, less consumer choice and lower quality care. Meanwhile, defendants proffer competing expert evidence that asserts, inter alia, that CareCore's conduct has benefitted payers and consumers through reduction in costs, and that CareCore only represents 4.2% of the outpatient diagnostic imaging business in Dutchess County. In light of the competing expert interpretations of the proper calculation of the relevant market share, the alleged adverse effects and asserted procompetitive effects, the Court is faced with genuine issues of disputed fact and will deny summary judgment.

Section 2

Plaintiffs advance claims that defendants are liable for monopolization, attempted monopolization, and conspiracy to monopolize in violation of Section 2 of the

Sherman Antitrust Act. Plaintiffs assert that summary judgment should enter on their assertion that defendants' conduct constitutes a conspiracy to monopolize. Defendants maintain that plaintiffs do not have sufficient proof that a violation of Section 2 occurred.

Section 2 provides, in relevant part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be guilty of a felony . . . .

A claim of actual monopolization requires proof of (1) monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident. United States v. Grinnell, 384 U.S. 563, 570-71 (1966). "Monopoly power" is defined as the ability to "price substantially above the competitive level" for a significant period of time without erosion by new entry or expansion. AD/SAT, Div. Of Skylight, Inc. v. Assoc. Press, 181 F.3d 216, 226-27 (2d Cir. 1999).

Attempted monopolization requires a showing that (1) defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

Conspiracy to monopolize requires a plaintiff to prove (1) the existence of a combination or conspiracy, (2) an overt act in furtherance of the conspiracy, and (3) specific intent to monopolize. Volvo North America Corp. v. Men's Int'l Prof. Tennis Council, 857 F.2d 55, 58-59 (2d Cir. 1988). Although rigorous proof of a relevant market and the likelihood of monopolization is not required in the Second Circuit, such

factors may have significant bearing on whether the requisite specific intent to monopolize is present. Emigra Group, LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP, 612 F. Supp. 2d 330, 363 (S.D.N.Y. 2009).

Defendants maintain that summary judgment is appropriate because plaintiffs cannot establish the requisite market share to support the Section 2 claims. A court may infer monopoly power from a high market share. Grinnell, 384 U.S. at 571; see also Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d 566, 570 (2d Cir. 1990) (sufficient market share is a threshold showing because it is the primary indicator of the dangerous probability of success). Courts should consider market power in the context of additional market characteristics, such as the strength of the competition, the probable development of the industry, barriers to entry, nature of anticompetitive conduct, and the consumer demand. Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 98 (2d Cir. 1998).

Nevertheless, a plaintiff will have difficulty in establishing the dangerous probability element where a defendant holds less than a 40% share of a market, unless other factors indicate the market share figures understate the market power held by defendant. AD/SAT, Div. Of Skylight, Inc., 181 F.3d at 229. A “market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power." Broadway Delivery Corp. v. United Parcel Serv. of America, Inc., 651 F.2d 122, 129 (2d Cir. 1981).

In this instance, plaintiffs’ expert proffers that defendants’ market power is enhanced by CareCore’s ability to use its administrative contracts to steer patients to its

preferred providers, and by what he terms, the effects of "one-stop shopping," or the principle that physicians prefer to refer patients to send patients to facilities that participate in all networks of the major insurers. Defendants' expert disputes these theories of enhanced market power. Accordingly, the expert opinions raise disputed issues of fact as to the extent of defendants' market power.

Further, construing the evidence in favor of plaintiffs, the Court finds that disputed issues of fact also exist as to whether defendants acted with the requisite specific intent. Summary judgment will be denied on the Section 2 claims.

HVR and Cyber Imaging as Proper Defendants

Defendants maintain that HVR, Cyber Imaging and Dr. Canter cannot be held liable because plaintiffs have offered no evidence that these defendants had involvement in the alleged antitrust violations. Specifically, defendants assert that none of the emails indicate any involvement by HVR or Cyber Imaging. Defendants acknowledge that Cyber Imaging does have a 0.63% ownership stake in CareCore.

Plaintiffs counter that the test is not whether HVR, Cyber Imaging and Dr. Canter did not have sufficient control of CareCore for liability to attach. Plaintiffs maintain that proper question is whether these defendants made agreements with others to exclude or restrict competition. Plaintiffs point out that HVR and Cyber Imaging are co-owned in part by Dr. Canter, who was a member of two CareCore committees that made the final determinations to exclude MDI from participation. However, plaintiffs have not adduced any evidence giving rise to an inference that these defendants were involved in any anticompetitive agreement with CareCore. Accordingly, summary judgment will be granted in these defendants' favor.

Dr. Canter

Defendants assert that Dr. Canter cannot be held liable for any of the alleged antitrust violations because an officer or employee cannot conspire with his company absent proof that his recommendation or decision was incorrect for the employer. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984) (Sherman Act does not reach conduct that is unilateral). However, where individuals within a single entity pursue an economic interest separate from that entity, such individuals are considered legally capable of conspiring for purposes of furthering their personal interests rather than that of the corporation. Solla v. Aetna Health Plans of New York Inc., 14 F. Supp. 2d 252, 257 (E.D.N.Y. 1998).

Dr. Canter retained ownership interests in CareCore and DRA, and therefore, there exists an inference that he had an independent personal stake in the exclusion of MDI from the CareCore network. Nevertheless, plaintiffs have not adduced evidence evincing that Dr. Canter entered into a conspiracy to exclude MDI for his own purposes. Plaintiffs set forth that Dr. Canter was a member of CareCore committees that had the final determination to exclude MDI. However, as the Second Circuit explained:

> The mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred. A plaintiff must prove that the defendants illegally conspired.... [T]his means that a plaintiff — to withstand defendants' summary judgment motion — must present evidence that casts doubt on inferences of independent (not combined) action or proper conduct by defendants.

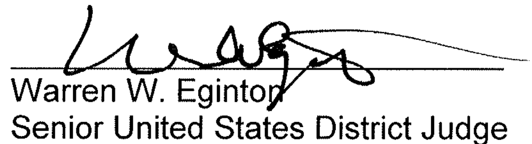
Capital Imaging Assocs., P.C. , 996 F.2d at 545. Here, no evidence suggests that Dr. Canter agreed with any other defendant to exclude MDI. In fact, as plaintiffs acknowledge in their statement of facts, Dr. Canter was not in attendance during the

committee meetings that considered MDI's application. Accordingly, summary judgment will be granted in Dr. Canter's favor.

CONCLUSION

For the foregoing reason, CareCore's motion for summary judgment is DENIED; the DRA Defendants' motion for summary judgment is GRANTED as to defendants HVR, Cyber Imaging and Dr. Canter and otherwise DENIED; and plaintiffs' motion for summary judgment is DENIED.

Dated at White Plains, New York, this 26 day of October, 2010.



Warren W. Eginton
Senior United States District Judge