

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GUMWOOD HP SHOPPING PARTNERS, L.P.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CAUSE NO. 3:11-CV-268 JD
	)	
SIMON PROPERTY GROUP, INC.	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Now before the Court is Defendant Simon Property Group, Inc.’s Motion to Dismiss [DE 24] Plaintiff Gumwood HP Shopping Partners, L.P.’s amended complaint. The Court referred this motion to Magistrate Judge Christopher Nuechterlein, who prepared a Report and Recommendation, recommending that Simon’s motion to dismiss be denied [DE 44]. Simon objects to that recommendation and asks the Court to grant its motion to dismiss [DE 45]. For the reasons that follow, the Court holds that Gumwood has sufficiently alleged an unlawful tying arrangement, which sustains the allegations in both counts of the amended complaint. Therefore, the Court overrules Simon’s Objection, adopts the Report and Recommendations (with modified reasoning), and denies the Motion to Dismiss.

I. BACKGROUND

A. Factual Allegations in the Amended Complaint

Gumwood is the owner and landlord of Heritage Square, a “lifestyle shopping center located in Mishawaka, Indiana.” DE 23 at 1. Simon is the largest public U.S. real estate company and operates regional malls, outlet centers, and lifestyle centers throughout the United States,

including some of the most profitable malls or shopping centers. In 1979, it opened the University Park Mall, self-described as “the only super-regional mall serving South Bend/Mishawaka and Southern Michigan” and allegedly has been the dominant retail platform in the area since then.

In 2005 and 2006, Gumwood began to negotiate with national retailers to bring various tenants to its new Heritage Square development. It secured lease agreements with Ann Taylor LOFT and Coldwater Creek, and was poised to strike deals with Charming Shoppes’ Lane Bryant, J. Jill and others. *Id.* at 4–5. Many of Gumwood’s signed or potential tenants had co-tenancy requirements, meaning that they could back out of any deal (or insist upon more favorable terms) if Gumwood could not secure leases with certain other tenants. *Id.* at 5. The most important tenants for Heritage Square were Ann Taylor and Coldwater Creek; these, along with Chico’s, are described as “the life blood of every lifestyle center on earth.” *Id.* at 5–6. Without these, other desirable tenants would be less willing to open stores at the shopping center. *Id.*

Heritage Square’s initial success in wooing key retailers presented two problems for Simon. First, it “brought head-to-head competition [for retailers who would normally be in a super-regional mall] for the first time in the 29-year history of University Park Mall.” *Id.* at 4 (alterations in original). This meant that Heritage Square’s “anticipated tenant mix could create a significant threat to” Simon’s shopper base. *Id.* at 6. Second, it threatened Simon’s own development plans. At the same time Gumwood was developing Heritage Square, Simon was preparing to open an open-air lifestyle component to the University Park Mall, called the Village at University Park. *Id.* at 3. Simon worried that if Ann Taylor and Coldwater Creek started

construction at Heritage Square, tenants would quickly abandon Simon's Village development.

Id. at 6. A Simon executive explained the domino effect:

This is a house of cards. If Loft starts construction (they have already picked up a building permit), so will Coldwater and the whole streetscape falls apart. Stick a fork in it because it will be done. *We need to do whatever we need to do to keep Loft from starting construction* and find Coldwater a place to open this year. If we do, our Village will be a homerun. If not, R.I.P.

Id.

According to the complaint, Simon pursued this strategy by pressuring Ann Taylor and other retailers to either back out of leases at Heritage Square or decline to sign leases in the first place. By 2008, Simon had successfully convinced Ann Taylor to open a LOFT store at the Village at University Park rather than at Heritage Square. *Id.* at 16. The amended complaint describes Simon's strategy and tactics with Ann Taylor in significant detail. *Id.* at 11–16. The strategy was to “create leverage with renewals on more mature accounts and integration with Chelsea” (a “leading owner, developer and manager of Premium Outlet centers in the U.S. and Asia” acquired by Simon in 2004, *id.* at 6).

Tactically, this meant Simon would require a positive decision by Ann Taylor to open a LOFT at University Park before it would move forward with key renewals in other markets. *Id.* at 12. According to Simon executives, the “prime centers to kill if the [University Park] negotiations go south” were Woodbury Common Premium Outlets near New York City (“one of the largest contiguous outlet centers in the world” and “a major attraction for foreign tourists and a premier location for retailers”) and Lenox Square in Atlanta (“one of the most profitable retail centers in the country” and “a premier site for retailers”). *Id.* at 12. Gumwood alleges that Simon did, in fact, threaten not to renew Ann Taylor's leases at Woodbury and Dadeland Mall

(“Miami’s premier, fashion-forward shopping center and a highly desirable location for retailers”), and “withheld renewal documentation from Ann Taylor for certain top-tier centers while pressuring it to not open at Heritage Square.” *Id.* at 13. Simon allegedly chose these centers because it “knew [they] were especially important to Ann Taylor” but had nothing to lose because they “all had plenty of demand and limited space such that Ann Taylor could be replaced with another tenant at the time.” *Id.* at 13.

When these tactics had not succeeded by early 2008, Simon’s CEO decided to “go nuclear” and reminded Ann Taylor of the fact that they were “in the process of proceeding with documentation for almost 50 renewals and over 25 new factory and full-price stores.” *Id.* at 15. A Simon executive informed Ann Taylor that the “negative ramifications would continue.” *Id.* at 16. Later that year, Ann Taylor and Simon agreed to a package deal, including an agreement to open a LOFT at University Park and a renewal of Ann Taylor’s space at Dadeland. *Id.*

Gumwood also alleges that Simon pressured other retailers in similar ways and that Lane Bryant and J. Jill both decided not to lease at Heritage Square due to threats from Simon. Simon also attempted (unsuccessfully) to convince Coldwater Creek to back out of its lease at Heritage Square and instead open a store at another Simon property outside the South Bend/Mishawaka region. *Id.* at 16–18. However, there are no allegations that Simon used other lease renewals to pressure Coldwater Creek.

Finally, in addition to the retail clients directly pressured by Simon, Gumwood alleges that numerous other potential tenants have refrained from leasing at Heritage Square because it does not have a sufficiently desirable tenant mix. *Id.* at 22. Thus, Gumwood alleges that by preventing Ann Taylor and other retailers from opening at Heritage Square, Simon has achieved

its goal of eliminating Heritage Square as a viable competitor. *Id.* The lack of “a sufficiently competitive alternative to Simon’s University Park Mall,” in turn, allegedly allows Simon to charge higher than market rates for retail space at its properties, harming competition and consumers in the area. *Id.*

B. Procedural History

In 2011, Gumwood filed the instant case, a two count complaint claiming that Simon’s conduct violated the Sherman Antitrust Act by unreasonably restraining trade and using anticompetitive tactics in an attempt to retain its monopoly over the market “consisting of leasable space in enclosed regional malls, lifestyle centers, or select specialty centers in the South Bend/Mishawaka region.” *Id.* at 21. Simon moved to dismiss the complaint in its entirety, arguing that Gumwood has not alleged a plausible market or alleged conduct that could be considered exclusionary or anticompetitive because it has not alleged a “substantial foreclosure of competition” or other plausible competitive harm. *See* DE 24. The undersigned referred the motion to Magistrate Judge Christopher Neuchterlein for the preparation of a report and recommendation. *See* DE 43.

Shortly thereafter, Judge Nuechterlein issued his Report and Recommendation, recommending that the motion to dismiss be denied. Regarding Count I, he first reasoned that Gumwood has alleged plausible geographic and product markets, and that any challenge to those allegations must await factual development. Then he concluded that the claims do not fail for lack of “substantial foreclosure.” He reasoned that Simon’s successful interference with the leases for Ann Taylor and others had foreclosed Gumwood’s primary tenant (Ann Taylor LOFT) as well as another significant tenant (Charming Shoppes’ Lane Bryant), which in turn “decreased

competition in the market for high-end upscale retail space.” *Id.* at 8. He concluded that Heritage Square’s “partial exclusion in market of retail shopping centers” is adequate competitive harm to sustain the complaint. Finally, he concluded that the allegations of anticompetitive conduct are sufficient at this stage of the litigation, even if Gumwood might not in the end prove that Simon engaged in anticompetitive conduct. *Id.* at 10. Regarding Count II, Judge Nuechterlein concluded that because Simon had challenged the restraint of trade claim on the same grounds as it had the monopolization claim, the motion should also fail for the same reasons. *Id.* at 10.

Simon timely objected to the Report and Recommendation, arguing that the magistrate judge had identified the correct legal standards but misapplied them to the allegations in the amended complaint in this case. *See* DE 45. It does not challenge the magistrate judge’s recommendation regarding the alleged relevant market. Proceeding under the assumption that Gumwood’s primary contention is that Simon’s lease agreements with Ann Taylor and Charming Shoppes were contracts for exclusive dealing in the relevant market, Simon argues that foreclosing two tenants from Heritage Square cannot plausibly be considered a “substantial foreclosure of competition” and that there is insufficient harm to competition (as opposed to mere harm to its competitor, Gumwood) to justify invocation of the antitrust laws. *Id.* Further, it argues that its conduct in this case—which it describes as simply winning a fierce competition for important retail tenants—cannot be considered anticompetitive because securing such tenants for its own development at University Park is certainly a legitimate business purpose.

Gumwood responds by defending its “exclusive dealing” theory and the magistrate judge’s recommendations. *See* DE 50. It also points out that “exclusive dealing” is not the only theory of anticompetitive conduct evident in the amended complaint and argues that it is also

bringing a “tying” claim and objecting to Simon’s overall course of conduct. *Id.* Simon replied reiterating the arguments it made in its motion and objections, and also argued that Gumwood had not stated a tying claim because it had not adequately alleged that Simon had sufficient market power in another market to force tenants like Ann Taylor to lease with it in the relevant market in this case. *See* DE 53.

II. STANDARD OF REVIEW

The court referred Simon’s motion to dismiss to the magistrate judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). Under those rules, the district court has discretion to accept, reject, or modify, in whole or in part, the findings or recommendations of the magistrate judge. The district court must undertake a *de novo* review “only of those portions of the magistrate judge’s disposition to which specific written objection is made.” *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999); *Goffman v. Gross*, 59 F.3d 668, 671 (7th Cir. 1995). If no objection or only a partial objection is made, the court reviews the unobjected portions for clear error. *Id.*

Here, the magistrate judge recommended that the Court deny Simon’s motion to dismiss, reasoning that Gumwood has plausibly alleged claims under Sections 1 and 2 of the Sherman Antitrust Act. Simon has objected to the recommendation and asked the Court to reject it and dismiss Gumwood’s complaint in its entirety. Accordingly, the court reviews those claims *de novo*. Simon has not objected to every aspect of the report, however, so the Court reviews unobjected to portions for clear error only, and noted in the analysis below.

III. ANALYSIS

Gumwood alleges both monopolization in violation of Section 2 of the Sherman Antitrust

Act and unlawful restraint of trade in violation Section 1 of the Sherman Antitrust Act. *See* 15 U.S.C. §§ 1, 2. Simon argues that both claims should be dismissed for the same reason, namely that they don't plausibly allege the exclusionary conduct or harm to competition required to make them cognizable under antitrust law. Following the approach used by the magistrate judge and the parties' briefs, the Court first analyzes the Section 2 monopolization claims and then turns to the Section 1 restraint of trade claims.

A. Motion to Dismiss Standard

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal if the complaint fails to set forth a claim upon which relief can be granted. Generally speaking, courts faced with a Rule 12(b)(6) motion must inquire whether the complaint satisfies the "notice-pleading" standard. Under that test, "a complaint must provide a 'short and plain statement of the claim showing that the pleader is entitled to relief,' which is sufficient to provide the defendant with 'fair notice' of the claim and its basis." *Maddox v. Love*, 655 F.3d 709, 718 (7th Cir. 2011) (citing *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (quoting Fed. R. Civ. P. 8(a)(2))). In evaluating the sufficiency of a claim under the notice-pleading standard, "we construe [the complaint] in the light most favorable to the nonmoving party, accept well-pleaded facts as true, and draw all inferences in her favor." *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1146 (7th Cir. 2010).

But while notice-pleading remains the rule, the Supreme Court has promulgated a "two-pronged approach" to the consideration of a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citing *Twombly*). In *Twombly*, the Court first announced the new plausibility approach in the context of a large antitrust litigation, favorably citing to the Seventh Circuit's

observation in *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) that “the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.” *See Twombly*, 550 U.S. at 558 (quoting *Car Carriers*). After *Twombly* and *Iqbal*, the court begins “by identifying pleadings that, because they are no more than conclusions, are *not* entitled to the assumption of truth.” *Id.* (emphasis added). This includes legal conclusions couched as factual allegations, *see Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 465 (7th Cir. 2010), as well as “threadbare recitals of a cause of action's elements, supported by mere conclusory statements[.]” *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 555). Next, “[w]hen there *are* well-pleaded factual allegations, a court should assume their veracity and then determine whether they *plausibly* give rise to an entitlement to relief.” *Id.* (emphasis added).

“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*, 129 S.Ct. at 1949. Accordingly, while the plaintiff need not plead “detailed factual allegations[.]” *see Reynolds*, 623 F.3d at 1146 (citing *Iqbal*), the complaint “must actually *suggest* that the plaintiff has a right to relief, by providing allegations that raise a right to relief above the speculative level.” *Maddox*, 655 F.3d at 718. “But a plaintiff's claim need not be probable, only plausible: ‘a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.’” *Indep. Trust Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 935 (7th Cir. 2012) (quoting *Twombly*, 550 U.S. at 556). “To meet this plausibility standard, the complaint must supply

‘enough fact to raise a reasonable expectation that discovery will reveal evidence’ supporting the plaintiff’s allegations.” *Id.* Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense, *see Iqbal*, 129 S.Ct. at 1950.

B. Count I: Gumwood Plausibly Alleges Claims for Monopolization and Attempted Monopolization

Gumwood alleges that for many years Simon has had a monopoly or near monopoly, and that it employed anti-competitive tactics in an effort to kill Gumwood’s Heritage Square, which was the first real challenge to Simon’s monopoly of the South Bend/Mishawaka market in nearly 30 years. According to Gumwood, Simon used these tactics to monopolize or attempt to monopolize the market. To prove monopolization, Gumwood must show “(1) the possession of 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. Grinnel Corp.*, 384 U.S. 563, 570–71 (1966). To establish the second element, a plaintiff must establish that the acquisition or maintenance of the monopoly power was achieved “by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes.” *Aspen Skiing*, 472 U.S. at 595–96. Similarly, to prove attempted monopolization, a plaintiff must demonstrate that the defendant engaged in anti-competitive conduct, and (in lieu of a completed monopoly) the specific intent to monopolize and a dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). Thus, under either theory, monopoly power (or a dangerous probability of achieving it) is by itself not enough to violate Section 2 of the Sherman Act: that power must be accompanied by exclusionary or anti-competitive conduct.

1. Relevant Market

Preliminary, the Court notes that in its motion to dismiss the amended complaint, Simon argued that Gumwood had failed to allege a plausible relevant market because many courts have rejected treating leasable retail space in regional shopping malls as a distinct market from other leasable retail space. The magistrate judge disagreed, noting that none of the shopping-mall market cases that Simon relies upon were decided at the motion to dismiss stage and that Gumwood has plausibly alleged a market (or sub-market) consisting of leasable retail space for high-end specialty stores in enclosed regional malls and lifestyle shopping centers. *See* DE 44 at 7. Simon does not object to this portion of the magistrate judge's report and recommendation, so the recommendation on this point is reviewed only for clear error. *Johnson*, 170 F.3d at 734.

The Court finds no clear error in the magistrate judge's ruling that Gumwood alleged a plausible market. While the definition of a relevant market is an essential element of claims under Section 2 of the Sherman Antitrust Act (as well as Section 1) because it is necessary in order to measure the effect of conduct on competition in that market, it is also quite clearly a question of fact that cannot be so neatly generalized. *See Kaiser Aluminum & Chemical Corp. v. F.T.C.*, 652 F.2d 1324, 1329 (7th Cir. 1981).¹ Given the general consensus among the authority that Simon cites, Gumwood may have a difficult time proving that the relatively narrow product

¹The Supreme Court has explained:

The varying circumstances of each case determine the result. In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce," monopolization of which may be illegal.

United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 394-95 (1956).

market it has alleged is in fact the relevant market for antitrust inquiry. But the complaint is sufficient to pass the motion to dismiss hurdle.

2. Anticompetitive Conduct Generally

In the Seventh Circuit, exclusionary, predatory, or anticompetitive conduct is “conduct that is in itself an independent violation of the antitrust laws or that has no legitimate business justification other than to destroy or damage competition.” *The Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532, 541 (7th Cir. 1986). Where defendant has engaged in unlawful restraint of trade that would independently violate Section 1 of the Sherman Antitrust Act, it is well established that it also violates Section 2 if it acquires or maintains a monopoly by means of that restraint of trade. *United States v. Griffith*, 334 U.S. 100, 106 (1948). There is no plausible allegation that the mere fact that Simon successfully leased retail space to Ann Taylor, Charming Shoppes, and others was anticompetitive in the sense that it lacked a “legitimate business justification other than to destroy or damage competition.” *See Great Escape*, 791 F.2d at 541. Simon is in the business of leasing retail space at its shopping center. It is perfectly acceptable for Simon to pursue its business lawfully. The question for the Court is whether the *means* that Gumwood has alleged Simon used are plausibly unlawful.

Simon disputes that Gumwood has alleged any conduct that could plausibly be considered exclusionary. Simon characterizes Gumwood’s allegations of exclusionary conduct as “exclusive dealing” between Simon and certain tenants, specifically Ann Taylor LOFT and Charming Shoppes’ Lane Bryant. The magistrate judge largely accepted this characterization, but reasoned that Gumwood had plausibly alleged the elements of an exclusive dealing claim. Gumwood argues that the magistrate judge was correct, but also points out that the allegations

support other theories of anti-competitive conduct, particularly a tying claim. While the Court respectfully disagrees that Gumwood has made out a claim for exclusive dealing, its allegations are nonetheless sufficient to state a tying claim and therefore withstand Simon's motion to dismiss.

3. Exclusive Dealing

Exclusive dealing occurs when a supplier and a distributor agree that the distributor will carry only that supplier's products. *See Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 392 (7th Cir. 1984). "The objection to exclusive-dealing agreements is that they deny outlets to a competitor during the term of the agreement." *Id.* at 393. Such an agreement is only considered anticompetitive if it unreasonably restrains trade, however, because "[t]he exclusion of competitors is cause for antitrust concern only if it impairs the health of the competitive process itself." *Id.* at 394. Therefore, to prove that an exclusive dealing agreement is unreasonable, a plaintiff must prove that the exclusion is significant enough to warrant anti-trust scrutiny by showing that "the agreement in question results in a substantial foreclosure of competition." *Don Santos v. Columbia-Cuneo-Cabrini Med. Ctr.*, 684 F.2d 1346, 1352 (7th Cir. 1982); *Microsoft Corp.*, 253 F.3d at 69 ("Because an exclusive deal affecting a small fraction of a market clearly cannot have the requisite harmful effect on competition, the requirement of a significant degree of foreclosure serves a useful screening function."). Even a significant exclusion, however, will not be considered anticompetitive unless the plaintiff can also show the necessary harm to competition: for example, *Roland Machinery* required the plaintiff to prove that the exclusive dealing arrangement in question was "likely to keep at least one significant competitor of the defendant from doing business in a relevant market," and that "the probable

(not certain) effect of the exclusion will be to raise prices above (and therefore reduce output below) the competitive level, or otherwise injure competition.” 749 F.2d at 394.

Viewing the alleged conduct as exclusive dealing means that there is an alleged agreement between Simon and certain key tenants that those tenants will only purchase the relevant product (leasable space in super-regional malls, lifestyle centers, and similar outlets in the South Bend/Mishawaka region) from Simon. Gumwood contends that this exclusive dealing arrangement is anticompetitive because it cannot function as a fully competitive alternative to Simon without key tenants such as LOFT. Competition is thereby harmed because Simon will continue to lease its space at supracompetitive prices or on less-favorable terms than it could get away with if there was a bona fide competitor in the market.

Simon argues that Gumwood has not alleged either a substantial foreclosure of competition or that the alleged exclusive dealing agreement is likely to keep a significant competitor out of the relevant market. The magistrate judge reasoned that Gumwood had cleared these hurdles at the pleading stage by alleging that it was foreclosed from offering its leasable space to its primary tenant, LOFT, as well as Charming Shoppes. This, he concluded “resulted in Heritage Square’s partial exclusion in the market of retail shopping centers.” *See* DE 44 at 9. As a result, “Simon has raised its rents above the competitive level.” *Id.*

The parties vigorously contest the magistrate judges recommendations, but the conduct in this case is not properly analyzed under the rubrics of exclusive dealing agreements for a separate, and more fundamental, reason: based on the allegations, there was no exclusive dealing arrangement in the first place. As Simon correctly points out in its reply brief, exclusive dealing is traditionally concerned with agreements where one party (a distributor, for example) agrees to

deal exclusively with another (a supplier) in an anticipated stream of future transactions.

Competition is harmed when such an exclusive deal prevents other suppliers from breaking into (or maintaining a competitive presence in) the market, giving the exclusive supplier market power it would not otherwise have. *See, e.g., FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953) (four companies signed approximately 75 percent of the nation’s motion picture theaters to exclusive-dealing contracts for advertisements to be displayed along with the films); *Don Santos*, 684 F.2d 1346 (exclusive dealing between anesthesiology physician practice and hospital); *Roland Machinery Co.*, 749 F.2d 380 (exclusive dealership agreement between construction-equipment manufacturer and dealer).

Here, in contrast, the disputed “exclusive dealing” arrangements consist of single transactions for leases of retail space. There are no allegations that the retailers in question have agreed, implicitly or explicitly, to refrain from dealing with other shopping centers during the course of that lease or afterwards. Rather, Gumwood contends that Simon pressured LOFT, Charming Shoppes, and others to sign (or renew) leases at University Park and that *as a practical effect* of those leases—that is, because neither retailer has any desire to open a store at more than one location in the relevant market—Gumwood is unable to lease its space to the same retailers. This is not an exclusive dealing at all, it is merely a single decision to lease, and “every decision to purchase goods or services results in winners and losers as the decision to buy always excludes other potential suppliers.” *Kochert v. Greater LaFayette Health Serv.*, 372 F.Supp.2d 509, 516 (N.D. Ind. 2004). Simply: when a purchaser (or lessee, in this case) requires only a single product, it makes no sense to label as an exclusive dealing agreement the decision to purchase that product from one supplier rather than another. The *de facto* exclusive nature of a

retail lease in a small market is not an independently unlawful restraint of trade under the antitrust laws. To hold otherwise would be to forbid a dominant firm to compete for valuable contracts simply because the loser in that competition will be “excluded” from the opportunity to secure the same contract. As Gumwood admits, such “competition for the contract” is encouraged by the antitrust laws, not proscribed. *See* DE 50 at 12 (citing *Paddock Publications, Inc. v. Chicago Tribune*, 103 F.3d 42, 45 (7th Cir. 1996)).

This conclusion means that the Court does not agree that the alleged conduct in this case can be classified as an exclusive dealing arrangement. It does not, however, mean that Gumwood has failed to allege anticompetitive conduct altogether, because Gumwood also argues that Simon was only able to secure leases for LOFT and Lane Bryant stores by threatening negative repercussions in other markets.

4. Tying

Although not addressed by the magistrate judge or by Simon in its initial objections, in its response brief Gumwood also argues that Simon’s alleged conduct can be classified as an anticompetitive tying arrangement. Gumwood claims that Simon has unlawfully tied the purchase of leasable space in premium shopping centers in other parts of the country (the tying product) to the purchase of leasable space in its University Park shopping center (the tied product). In the case of Ann Taylor, Gumwood specifically alleges that Simon threatened not to move forward with renewals of leases with Ann Taylor in some of Simon’s most attractive properties, including Woodbury Common Premium Outlets, a large contiguous outlet center near New York City; Lenox Square, an upscale enclosed super regional mall in Atlanta, Georgia; and Dadeland Mall, an upscale super regional mall in Miami, Florida. It alleges that this caused Ann

Taylor to decide not to lease space for a LOFT store at its preferred location—Gumwood’s Heritage Square—and instead sign a lease at above market rates at the less desirable University Park property. As a result, Gumwood’s shopping center lacks the tenant mix necessary to remain a sufficiently competitive alternative to Simon’s University Park Mall and thus both Gumwood and competition in the relevant market have been harmed.

The Supreme Court has “concluded that the essential characteristic of an invalid tying arrangement lies in the seller’s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such ‘forcing’ is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.” *Jefferson Parish Hospital v. Hyde*, 466 U.S. 2, 12 (1984). Under Section 1 of the Sherman Act, tying may be unlawful *per se* (meaning that no further inquiry is necessary into actual anti-competitive effect on the tied market) or under standard antitrust principles and subject to the Rule of Reason (balancing the costs and benefits to competition of the challenged action). To demonstrate that a tying arrangement is unlawful *per se*, a plaintiff alleging an invalid tying arrangement must prove four elements: (1) two separate products have been tied together; (2) the tying seller has sufficient economic power in the market for the tying product to restrain free competition in the tied product market; (3) the tie affects a non-insubstantial amount of interstate commerce in the tied product; and (4) the tying seller has an economic interest in the sales of the tied product. *Reifert v. South Cent. Wisconsin MLS Corp.*, 450 F.3d 312, 317 (7th Cir. 2006) (citing *Carl Sandburg Vill. Condo. Ass’n No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203, 207–08

(7th Cir. 1985)).²

The conduct alleged in this case, if proven to be true, appears to implicate the very concerns that *Jefferson Parish Hospital* and *Carl Sandburg* identified with tying arrangements and their potential effect on competition. Simon has allegedly used its substantial market power in various other markets (or an aggregation of power from several markets) to turn back the threat that Gumwood's Heritage Square development posed to its allegedly longstanding monopoly in the South Bend/Mishawaka region. This has allegedly resulted in Simon's continued ability to charge above market rents due to a lack of adequate competition in the area.

Applying the elements of a *per se* tying claim to the allegations in this case, the first and fourth elements are easily met. With respect to the first, leasable retail space in enclosed malls and lifestyle centers in the South Bend/Mishawaka region is unquestionably a separate product from similar retail space in Atlanta or Miami, or from outlet center retail space in New York.

With respect to the fourth, here, as "[i]n the usual tying arrangement, it is not difficult to establish the economic interest element because the seller of the tying product is also the seller of

²The Seventh Circuit has also noted that "[o]ne of the threshold criteria that a plaintiff must satisfy under both the *per se* and rule of reason analyses in order to show that such an extension of the seller's market power may pose a threat of economic harm and an unlawful restraint of trade is that there is a substantial danger that the tying seller will acquire market power in the tied product market." *Carl Sandburg*, 758 F.2d at 210 (citing *Jefferson Parish Hosp.*, 466 U.S. at 38–39 (O'Connor, J., concurring in the judgment)). It is not clear whether this is an additional element in our circuit: early decisions avoided the question, *see, e.g., Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712, 718 (7th Cir. 1987) (noting that previous pronouncements on this principal appeared to be dicta and that a requirement of a threat of market power in the tied market has not been endorsed by a majority of the Supreme Court), and it was not mentioned in more recent tying decisions such as *Reifert* or *Sheridan v. Marathon Petroleum Co. LLC*, 530 F.3d 590 (2008). In any event, the question is premature at this point because Gumwood has alleged that Simon has in fact obtained (or retained) market power in the relevant tied market.

the tied product.” *Carl Sandburg*, 758 F.2d at 208.

In its reply brief, Simon argues that Gumwood’s tying claim fails on the second and third prongs of the tying inquiry. According to Simon, Gumwood has not alleged market power in the tying markets because it has not properly alleged definitions of those markets. The Court disagrees. While Gumwood’s allegations with respect to the three distinct tying markets do not provide much detail regarding the geographic scope of those markets, they are sufficient to put Simon on notice of the claims against it and to survive a motion to dismiss. Geographically, the complaint describes markets in the New York City, Atlanta, and Miami areas. It is difficult to imagine that the relevant geographic area could be *larger* than those described, given the relatively local nature of retail shopping; were factual development to reveal a more localized market in one or more of these regions, it would only strengthen the plausibility of the market power allegations.

With regard to the alleged tying product markets, looking at the complaint as a whole, it is fair to infer that the relevant product markets in which Simon operates its Miami and Atlanta properties is similar to the relevant product market alleged in the South Bend/Mishawaka area—leasable retail space in enclosed malls, lifestyle centers, and other venues that attract the same high-end retailers. Similarly, the Court infers that the relevant product market in New York is the market for leasable space in outlet centers. These assumptions and inferences may turn out to be too generous, but until then it is premature to determine what the proper market definition is. *See Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1329 (7th Cir. 1981) (under Clayton Act, definition of relevant markets is a question of fact); *Forsythe v. Humana, Inc.*, 114 F.3d 1467, 1476 (9th Cir. 1997) (“[T]he definition of the relevant market is a factual inquiry for

the jury.”).

In addition, the Court notes that “market power” over the alleged tying product need not mean dominance of the market, and may be inferred from the tying products’ desirability or uniqueness. *See Fortner Enterprises, Inc. v. United States Steel Corp.* (Fortner I), 394 U.S. 495, 503 (1969). The allegations regarding each of the tying locations suggest that some special attribute or particular slice of the market may be in play: Woodbury Common Premium Outlets is “one of the largest contiguous outlet centers in the world. [Its] proximity to New York City makes it a major attraction for foreign tourists and a premier location for retailers (DE 23 ¶ 74); Lenox Square is allegedly an “*upscale* enclosed super regional mall,” which “attracts a significant amount of foreign shoppers and tourists,” making it “one of the most profitable retail centers in the country” (DE 23 ¶ 75); Dadeland Mall is allegedly “Miami’s premier, fashion-forward shopping center and a highly desirable location for retailers” (DE 23 ¶ 78). Again, the evidence may or may not support these allegations of the importance of Simon’s various retail locations to Ann Taylor or others, but at this point to Court must assume it will.

Perhaps more importantly, Gumwood has also alleged that Simon *did* in fact hold renewals at these allegedly desirable locations hostage and successfully convinced Ann Taylor and others to purchase a product (a lease at University Park Mall) “that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.” *Jefferson Parish Hosp.*, 466 U.S. at 12. This allegation (if true, which is assumed at this stage) supports an inference that Simon had the requisite market power in one or more of the other markets (or perhaps in the aggregate) to force the purchase of a tied product in the South Bend/Mishawaka market. The evidence, of course, may prove otherwise: if the relevant markets in Miami, Atlanta,

or New York are fully competitive, national customers such as Ann Taylor could simply choose other locations in those markets and could not be forced at all.

This leaves the third element of the tying analysis. “[A] tying arrangement violates antitrust law only if ‘a substantial volume of commerce is foreclosed’ because of the tie.” *Reifert*, 450 F.3d at 317 (quoting *Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 16). This element, in turn, breaks “into two sub-questions: (1) Is there at least one competitor in the tied product market other than the favored seller; and (2) Is the quantity of interstate commerce affected not-insubstantial.” *Id.* at 318 (explaining also that “[w]here there is no competition in the tied market, there can be no antitrust violation”). Here, there is no question that there is competition in the tying market—though Gumwood alleges that as a result of Simon’s conduct it is not, or will not long remain, sufficiently competitive to affect the market.

With regard to the second sub-question, another court has explained: “The requirement that a ‘substantial volume’ of commerce in the tied product market be affected by the tie does not look to the percentage or share of the tied market affected. Rather, ‘the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie.’” *State of Ill. ex rel. Hartigan v. Panhandle E. Pipe Line Co.*, 730 F. Supp. 826, 931 (C.D. Ill. 1990) (quoting *Fortner I*, 394 U.S. at 501). Here, although Gumwood does not specifically allege the amount of the stream of rental revenue from Ann Taylor and other retailers that has been foreclosed to it as a result of the alleged ties, the Court will assume, at this stage, that the amount is not *de minimis*. See *Forner I*, 394 at 501–502 (holding that a annual revenue of \$190,000 was not “paltry or ‘insubstantial’”); *Tic-X-Press, Inc. v. Omni Promotions Co. of Georgia*, 815 F.2d 1407, 1420

(11th Cir. 1987) (“While \$10,091.07 is not an overwhelmingly large amount . . . , it is certainly more than de minimis.”)

Although Simon does not specifically address the amount of interstate commerce affected by the alleged tying arrangement, it suggests that the allegations here fall short of the requisite competitive harm as a matter of law. Quoting *Jefferson Parish Hosp. Dist. No. 2*, it argues that “a tied sale to a single customer cannot support a tying claim,” because “the resultant impact on competition would not be sufficient to warrant the concern of antitrust law.” 446 U.S. at 16. There are a couple of problems with this argument. First, although Gumwood’s complaint focuses mainly on detailed allegations of Simon’s coercion of Ann Taylor, the tying allegations are not limited to a single purchaser: Gumwood also alleges that Simon used “threats to refuse lease renewals and new deals at desirable Simon properties” to force Charming Shoppes to abandon plans to open a Lane Bryant at Heritage Square (DE 23 ¶ 127), and used “similar anticompetitive tactics” to force other retailers to lease with Simon. If Gumwood proves these allegations, it will have shown more than a “single purchaser” was affected.

Second, the quoted language is dicta (*Jefferson Parish Hospital* did not involve such a single product tie) that is meant to illustrate the necessity of a significant effect or foreclosure before the invocation of the antitrust laws is warranted. As the Ninth Circuit has perceptively noted, “[r]ead with reference to [previous decisions], the Court’s statement in *Jefferson Parish* means simply that, on the facts of that case, where a single purchaser represented neither a substantial dollar-volume nor a substantial portion of the relevant market, the foreclosure of a single sale would be *de minimis*.” *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1425 (9th Cir. 1995). The court went on to explain:

A broader reading of the Court's statement would be unwarranted, and would lead to aberrant results. Under [the defendant's] interpretation, a tying arrangement forcing a single sale worth millions of dollars would be perfectly legal, while an identical arrangement forcing multiple sales worth many times less would be subject to *per se* condemnation. We do not believe this is the rule that the Court intended.

Id. See also *Tic-X-Press*, 815 F.2d at 1420 (approving a tying claim involving single purchaser).

The Court agrees with *Datagate*. In this case, even if Ann Taylor were the only purchaser allegedly forced to lease at University Park Mall, Gumwood might still prove that the volume of commerce affected by that single transaction was not insubstantial, especially in light of the additional degree of foreclosure allegedly affected by various co-tenancy requirements dependant on the presence of LOFT at Heritage Square.

For these reasons, the Court concludes that Gumwood's complaint sufficiently alleges that Simon engaged in *per se* unlawful tying arrangements by using its market power in highly desirable locations to force retailers to lease space at its University Park Mall shopping center, when those retailers would have preferred to lease elsewhere or on different terms. This tying, in turn, allegedly affected a not insubstantial volume of interstate commerce. Gumwood has thus alleged "anticompetitive conduct" sufficient for Count 1 to withstand Simon's motion to dismiss.

5. The Alleged Tying Plausibly Helped Simon Maintain It's Monopoly

Thus, Gumwood has stated a claim that Simon has tied leases of retail space in the South Bend/Mishawaka market to leases in other markets (in which it allegedly enjoys sufficient market power). This tying claim, as alleged, plausibly constitutes a *per se* unlawful restraint of trade actionable under Section 1 of the Sherman Act. See *Jefferson Parish*, 466 U.S. at 12. As noted, it follows that the conduct was also itself anticompetitive. See *Griffith*, 334 U.S. at 106. The only remaining question for the Section 2 monopolization claim is whether Gumwood has

plausibly alleged that Simon acquired or maintained its monopoly power (or specifically intended to do so, with a dangerous probability of succeeding) *by means of* that alleged unlawful tying. *See Aspen Skiing*, 472 U.S. at 595–96. In other words, did the alleged *per se* unlawful tying sufficiently impair Gumwood’s ability to compete in the tied market (South Bend/Mishawaka) that it could plausibly cause the alleged monopolization? If not, it may still be an unlawful restraint of trade under Section 1, but not unlawful monopolization under Section 2.³

While it briefly attempts to rebut Gumwood’s tying claim, it does not specifically address whether its tying (if establish) of retail leases in South Bend/Mishawaka to other markets could have significantly impaired Gumwood’s ability to compete. As noted, Simon’s argument focuses largely on whether its leases with Ann Taylor and Charming Shoppes satisfy the technical requirements of “exclusive dealing” as set out in *Roland Park* and other precedent. Its discussion of the elements of exclusive dealing does, however, raise the issue of whether the business that Simon foreclosed to Gumwood with its tying arrangements is substantial enough to impair Gumwood’s ability to compete.

In support of its “substantial foreclosure” argument, Simon points to the various “key tenants” identified in Gumwood’s complaint and projects “foreclosure percentages”: Gumwood lost one of three (33%) of the alleged “Core Group of Tenants” (LOFT, Coldwater Creek, and Chico’s); it lost only one of four (25%) of “The Four Horsemen” (LOFT, Coldwater Creek, Chico’s, and Talbots); and it lost (to Simon, at least) only three of the twelve (25%) “potential

³See Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 651i (3d ed. 2007) (discussing the relationship between Section 1 and Section 2 claims and noting that a tying violation under Section 1 that affects only a small percentage of sales in the tied market may not significantly impair the opportunities of rivals in that market and therefore may not always give rise to a monopolization claim under Section 2).

key tenants” identified anywhere in the complaint. Simon argues that, in fact, Gumwood remains a vigorously competitive force in the market.

Simon points out that in the context of exclusive dealing claims under Section 1, “[c]ourts routinely observe that ‘foreclosure levels are unlikely to be of concern where they are less than 30 to 40 percent.’ *B&H Med., LLC v. ABP Adm’rs, Inc.*, 526 F.3d 257, 266 (6th Cir. 2008) (quoting *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 68 (1st Cir. 2004) (analyzing Section 1 claims)). Assuming, without deciding, that this is a useful standard by which to evaluate the effect of an unlawful tying arrangement for Section 2 purposes, the fact that the arguably low foreclosure levels in this case are *unlikely* to be of concern means only that Gumwood may have a difficult time *proving* that Simon’s alleged tying arrangements helped it maintain its monopoly by significantly impairing its ability to compete in the market. Notably, the “substantial foreclosure” cases that Simon cites were not decided in the context of a motion to dismiss, but based on actual evidence of the effect that purportedly exclusionary conduct had on the market.

Gumwood has alleged that it is, in fact, significantly impaired in its ability to compete because Simon has strategically prevented it from signing leases with some of its most important prospective tenants. As a result of the alleged “domino effect,” Gumwood allegedly cannot make itself sufficiently attractive to other tenants and Simon is able to maintain its dominance of the market and continue to charge supracompetitive rents for less favorable terms. It has alleged that it has lost several other potential tenants (in addition to those directly foreclosed by Simon’s alleged tying arrangements) because it lacked a competitive tenant mix. At this stage, the Court need not determine whether Gumwood’s claims are probable, merely that they are plausible. The

Court cannot say that Gumwood’s “domino effect” allegations are implausible—the opinions of Simon’s own executives, if accurately reported in the complaint, suggest otherwise— or conclude, without evidence, that Gumwood is still vigorously competing in the market. Therefore, the Court concludes that not only has Gumwood alleged conduct that could independently constitute an unreasonable restraint of trade in violation Section 1 of the Sherman Act, but that it has also alleged that Simon acquired or maintained monopoly power by means of that restraint of trade.

C. Count II: Gumwood Also States a Claim for Unlawful Restraint of Trade.

In order to state a violation of Section 1 of the Sherman Antitrust Act, a plaintiff must allege “(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury.” *Denny’s Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993). Simon challenges only the second element, arguing that Gumwood has not alleged that Simon restrained trade unreasonably because it has not plausibly alleged that Simon’s conduct substantially foreclosed Gumwood from the market or harmed competition. The Court has already concluded, however, that Gumwood has plausibly alleged that Simon acquired or maintained its monopoly in the relevant market by means of a *per se* unlawful tying arrangement. As noted above, that plausibly alleged tying arrangement is an independent *per se* violation Section 1. *See Jefferson Parish*, 466 U.S. at 12. Therefore, Gumwood’s Section 1 claim also survives Simon’s motion to dismiss for the same reasons discussed above.

IV. CONCLUSION

The question before the Court on a motion to dismiss a complaint for failure to state a

claim is not whether the claim will succeed—or whether success is probable or even likely—merely that the claim is plausible. The Court holds only that Gumwood has alleged the elements of a *per se* unlawful tying claim in support of its alleged monopolization and unlawful restraint of trade. It expresses no opinion on the likelihood that Gumwood will be able to prove that Simon’s conduct violated the antitrust laws. For the reasons discussed, the Court **ADOPTS** the magistrate judge’s Report and Recommendation [DE 44] and **DENIES** Defendant, Simon Property Group, Inc.’s Motion to Dismiss [DE 24]. Defendant’s Motion for Oral Argument [DE 46] is **DISMISSED AS MOOT**. The Court **DIRECTS** the Clerk to restrict access to this order to the parties for 30 days so that the parties might request that it be sealed or redacted to avoid the disclosure of potentially confidential information. **Any such request must be made by motion within 14 days of the date of service of this order, and any response must be filed within 7 days of service of such motion.**

SO ORDERED.

ENTERED: March 13, 2013

/s/ JON E. DEGUILIO
Judge
United States District Court