UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE MEDICAL CENTER AT ELIZABETH PLACE, Plaintiff,	:	Case No. 3:12-cv-26
vs.	:	Judge Timothy S. Black
PREMIER HEALTH PARTNERS, *et al.*, Defendants.	:	

SEALED ORDER[1]
GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS PLAINTIFF'S CLAIM LACKS THE NECESSARY PLURALITY OF ACTORS (Doc. 131)

This civil action is before the Court on Defendants' motion for summary judgment that Plaintiff's claim lacks the necessary plurality of actors (Doc. 131) and the parties' responsive memoranda (Docs. 139, 155).[2]

I. BACKGROUND FACTS[3]

Plaintiff claims that Defendants designed and implemented an unlawful plan to deny Plaintiff access to supply (managed care contracts and physicians) and demand (physician referrals) that Plaintiff needed to compete as a 26-bed adult acute-care hospital in Dayton, Ohio.

---

[1] Pursuant to S.D. Ohio Civ. R. 79.3 and paragraph 14 of the Stipulated Protective Order (Doc. 43), this Order contains citations to exhibits, deposition testimony, and other documents produced in this case that have been designated "Confidential" or "Highly Confidential – Outside Counsels Eyes Only." Accordingly, this Order is docketed under seal.

[2] Defendants include Premier Health Partners, Atrium Health System, Catholic Health Initiatives, MedAmerica Health Systems Corporation, Samaritan Health Partners, and UVMC (collectively "Defendants").

[3] *See also* the parties' undisputed facts at Doc. 131, Ex. 1 and Doc. 139, Ex. 1.

This alleged plan secured the cooperation and agreement of members of the Defendants' Joint Operating Agreement ("JOA") and their subsidiary Hospitals, *i.e.*, nearly all of the health insurers operating in Dayton, as well as certain independent medical professionals, with the oversight of Defendant Premier Health Partners.

II. STANDARD OF REVIEW

A motion for summary judgment should be granted if the evidence submitted to the Court demonstrates that there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party has the burden of showing the absence of genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. *Celotex*, 477 U.S. at 323. All facts and inferences must be construed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

A party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248 (1986).

III. ANALYSIS

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

Although the Sherman Act, by its terms, prohibits every agreement "in restraint of trade," the United States Supreme Court recognizes that Congress intended to outlaw only "unreasonable restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

> [T]o establish a claim under Section 1, the plaintiff must establish that the defendants contracted, combined or conspired among each other, that the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets, that the objects of any conduct pursuant to that contract or conspiracy were illegal and that the plaintiff was injured as a proximate result of that conspiracy.

Crane & Shovel Sales Corp. v. Buckyrus-Erie Co., 854 F.2d 802, 805 (6th Cir. 1988).

A threshold requirement of the Sherman Act is that the challenged agreement be entered into by multiple parties. 15 U.S.C. § 1. Conduct by a single entity is not covered by Section 1 -- the statute applies only to joint conduct. *Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752, 767-68 (1983).

> [A]n internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that Section 1 was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.

Id. at 769.

Defendants argue that they are a single entity incapable of conspiracy. Plaintiff maintains that a genuine dispute exists as to whether Defendants are a single entity for purposes of the conduct challenged here.

A. Ownership

First, Plaintiff maintains that Defendants are not a single entity because they do not share ownership assets.

In *Copperweld*, the Supreme Court found that a parent and its subsidiary constituted a single entity for purposes of Section 1 liability. 467 U.S. at 771, 777. Plaintiff argues that the Sixth Circuit has constrained its application of *Copperweld* to control that comes from ownership. *See, e.g., Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435 (6th Cir. 2008). Although the Supreme Court in *Copperweld* explicitly limited its holding to the facts presented (a corporate parent and its wholly owned subsidiary), the Supreme Court stated that "substance, not form, should determine whether a separately incorporated entity is capable of conspiring under Section 1." 467 U.S. at 773 n.21.

Federal courts have used this mantra to extend *Copperweld* to situations other than that of parents and wholly owned subsidiaries, including corporations sharing no common corporate ownership. Indeed, the Supreme Court precedent eschews any bright-line rule regarding asset ownership, emphasizing function, not form, and how the parties actually operate. *Id.*[4]

[4] *See also Am. Needle Inc. v. National Football League*, 560 U.S. 183, 191 (2010) ("We have long held that concerted action under Section 1 does not turn simply on whether the parties involved are legally distinct entities. Instead, we have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.").

> This inquiry is sometimes described as asking whether the alleged conspirators are a single entity. That is perhaps a misdescription, however, because the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination …, or conspiracy" is concerted action – that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination …, or conspiracy" amongst "separate economic actors pursuing separate economic interests" such that the agreement "deprives the marketplace of independent centers of decisionmaking" and therefore of "diversity of entrepreneurial interests."

Am. Needle, Inc. v. National Football League, 560 U.S. 183, 195 (2010).

In *Copperweld*, the Supreme Court found that although a parent corporation and its wholly owned subsidiary are "separate" for the purposes of incorporation or formal title, they are controlled by a single center of decisionmaking and they control a single aggregation of economic power. Joint conduct by two such entities does not "depriv[e] the marketplace of independent centers of decisionmaking," and, as a result, an agreement between them does not constitute a "contract, combination … or conspiracy" for the purposes of Section 1. 467 U.S. at 769.

> Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged Section 1 violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture. The question is whether the agreement joins together "independent centers of decisionmaking."

Id. If it does, the entities are capable of conspiring under Section 1, and the court must decide whether the restraint is an unreasonable and therefore illegal one." *Am Needle*,

Inc., 560 U.S. at 196.[5]

For example, in *Healthamerica Pennsylvania, Inc. v. Susquehanna Health Sys.*, the defendant hospitals entered into the Alliance Agreement (akin to the JOA) forming the non-profit organization Alliance to manage the delivery of their healthcare services (akin to Premier). 278 F. Supp. 2d 423, 427-28 (M.D. Penn. July 2, 2003).[6] Due to the religious affiliation of one hospital (like Good Samaritan Hospital ("GSH") in the Premier health system), the hospitals did not merge, and "[e]ach party to the Alliance Agreement retain[ed] its respective separate legal identity and the ownership of all of its assets, real and personal, tangible and intangible, and … continue[d] to be governed by its respective Board of Directors subject to…the Alliance Agreement." *Id.* at 428, 435 n.8. After the "Alliance Agreement, [the hospitals] and their Affiliates ceased being competitors." *Id.* at 427. Plaintiff's argument that Defendants are not a single entity mirrors the losing argument from the plaintiff in *Susquehanna*: "[Plaintiff]

[5] Plaintiff argues that *American Needle* rejected the two arguments Defendants advance: (1) that contractual control is sufficient to demonstrate that the Defendants are a single entity; and (2) the analysis involves a single binary choice as to the enterprise as a whole and in all circumstances. This Court finds, however, that Plaintiff misinterprets *American Needle*, which held that "it is not dispositive that the teams have organized and own a legally separate entity that centralizes the management of their intellectual property …. Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged § 1 violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structure joint venture. The question is whether the agreement [*i.e.*, the alleged conspiracy] joins together 'independent centers of decision making.'" *Id.* at 197 (emphasis added). *See, e.g., City of Mt. Pleasant, Iowa v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 275 (8th Cir. 1988) ("The thrust of the holding [in *Copperweld*] is that economic reality, not corporate form, should control the decision of whether related entities can conspire.").

[6] Despite the fact that *Susquehanna* is strikingly analogous to the instant case, Plaintiff fails to even mention it in its briefing.

HealthAmerica asserts that *Copperweld* is inapplicable because the Alliance is nothing more than a joint operating agreement created by separate and independent hospital systems." *Id.* at 433.[7]

Like in *Susquehanna*, the JOA Participants retained title (ownership) of their assets, and the parties did not technically merge, in order to allow Samaritan Health Partners ("SHP") and GSH to retain their Catholic identity, but delegated operational, strategic, and financial control to Premier. 278 F. Supp. 2d at 435 n. 8. (*See also* Doc. Doc. 131, Ex. 7 (JOA) at §§ 3.1, 7.4). Accordingly, contractual control is sufficient to demonstrate that the Defendants are a single entity. The fact that Premier is "a corporate shell with no assets, income, expenses, or liability [and] [t]hus, there is no shared ownership of assets used in the Joint Venture" is immaterial and does not create a genuine dispute of material fact.

B. Actual and Potential Competitors

Next, Plaintiff argues that Defendants are "actual and potential competitors," so they cannot be a single entity. Finding parties to be "actual and potential competitors" for Section 1 purposes requires the alleged conspiracy to be "amongst separate economic

[7] Another example is *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), where several agricultural cooperatives that were owned by the same farmers were sued for violations of Section 1 of the Sherman Act. *Id.* at 24-25. The Supreme Court held that the three cooperatives were "in practical effect" one "organization," even though the controlling farmers "have formally organized themselves into three separate legal entities." *Id.* at 29. "To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect" insofar as "use of separate corporations had [no] economic significance." *Id.*

actors pursuing separate economic interests, such that the agreement deprives the marketplace of … actual or potential competition." *Am. Needle*, 560 U.S at 195.

Specifically, Plaintiff argues that a project related to the creation of Defendants' 2010-2015 Strategic Plan ("the H*Works Project"), exposed the fact that Defendants wanted to become more than an "'aggregation of parts' and to advance toward a structure characterized by more strategic integration, coordination, 'systems thinking,' and market leverage." (Doc. 143, Ex. 36 at 3). Pearce Fleming, the H*Works consultant handling the project, was a neutral facilitator in a number of live group interviews involving some of Defendants' senior management.[8] Mr. Fleming asked participants sets of open-ended questions in a group interview setting. (Doc. 128, Ex. 16 at 25-26, 53, 206). The individual responses during those group interviews were recorded in part in Mr. Fleming's handwritten notes. (*Id.* at 35-36, 53, 136, 203, 206). All of the statements upon which Plaintiff relies are from Mr. Fleming's handwritten notes. (*Id.*) Plaintiff maintains that the commentary given by senior management relates to the issue of separateness and the competitive dynamic among the hospitals. For example, the first statement in Fleming's notes is: "We do compete with each other. Collaboration is nice

[8] The group interviews involved a sample of people affiliated with Premier's Board of Trustees, Premier Corporate Services, and Defendant Hospitals UVMC, Atrium, GSH, and MVH. Mary Boosalis, Premier COO, testified that the interviewees included: the vice president of operations, the chief medical officer, the chief of staff for the physicians, a MVH board member, "an orthopod who was in active practice at Miami Valley," a neuro-interventionlist, the vice president of nursing, a person in finance," an obstetrician, a cardiologist, and an emergency room doctor from a third-party entity that contracted with MVH for emergency room services. (Doc. 128, Ex. 4 at 139-44).

to have but not a mandate." (Doc. 143, Ex. 39 at 1). Based on the group interviews, Fleming presented Key Findings, including:

- "PHP partners do not collaborate or act as a system today, more often PHP partners find themselves competing with each other"
- "PHP does not have an identity as a collaborative group, rather act as a confederacy that collaborates in a few area (i.e., supplies, financing/access to capital, electronic medical records)"
- "PHP does not think of itself as integrated organization"
- "Fear [of] the smaller hospitals that the larger Dayton based hospitals will 'steal' the patients if they are referred to services"
- "It is easier to compete with each other than with PHP competitors"
- "PHP Partners compete with each other for market share"

(Doc. 144, Ex. 8 at 8-9).

However, these excerpts reflect incomplete, anonymous personal opinions given orally and spontaneously in response to Mr. Fleming's questions. (Doc. 128, Ex. 16 at 14-15, 142, 206-08, 223). The statements do not provide any indication whether the anonymous speaker held an informed opinion on the topic, and they lack any context or qualifications that may have been part of the statements. (*Id.* at 207-09, 223). The incomplete statements are inadmissible, anonymous hearsay and speculation that cannot defeat a well-supported motion for summary judgment. *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 927-28 (6th Cir. 1999).[9]

For example, in *Wesley Health Sys. v. Forrest County Bd. of Supervisors*, the plaintiff offered employee testimony to show that defendants were not a single entity.

[9] *See also Pearce v. Faurecia Exhaust Sys., Inc.*, 529 F. App'x 454, 458 (6th Cir. 2013) ("[c]onclusory allegations, speculation, and unsubstantiated assertions are not evidence, and are not enough to defeat a well-supported motion for summary judgment").

No. 2:12cv59, 2014 U.S. Dist. LEXIS 7764, at *30-31 (S.D. Miss. Jan. 22, 2014). However, the court found that the employees' statements regarding their understanding of the defendants' relationship were "not sufficient to create a genuine factual dispute over [defendant hospital's] control of [defendant ambulance company.] Most of it is inadmissible hearsay or speculation." *Id.* at 31. "At best, these witnesses were guessing as to [defendant hospital's] control of [defendant ambulance company]." *Id.* The evidence here is even more speculative than in *Wesley*, because the statements in *Wesley* were not anonymous; instead, they were from defendant's CEO and several of the defendant's employees. *Id.* at 30-31. Ultimately, the facts anonymously alleged here, even if true, are immaterial because it is the economic integration of Defendants, not the form, that is determinative for the antitrust analysis.

Although Premier's members previously competed with one another, they ceased competing upon joining Premier and becoming subject to Premier's control. *Susquehanna*, 278 F. Supp. 2d at 427. Since Defendants are a single, unified economic unit, regardless of a perception of, or even actual, intra-corporate competition, Defendants are not and cannot be "actual or potential [economic] competitors." *Am. Needle*, 560 U.S. at 195, 197 (the key issue is whether the members of the firm are "pursuing separate economic interests" such that "agreements among them . . . suddenly bring together economic power that was previously pursuing divergent goals.").

Here, Defendants are not competitors because they are not separate economic actors – all of the money goes to one bottom line – the Network Net Income.[10] *See, e.g.*, *Texaco Inc. v. Dagher*, 547 U.S. 1, 6 (2006) (although General Motors' separate divisions compete with one another in a colloquial sense (Buick v. Chevrolet), there is no actual or potential competition in an antitrust sense because there is only one economic actor – GM). The conduct here in the instant case is akin to the conduct that the Supreme Court stated in *American Needle* is not covered by Section 1: "internally coordinated conduct of a corporation and one of its unincorporated divisions, because a division within a corporate structure pursues the common interests of the whole, and therefore coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests." 560 U.S. at 195-196. In *American Needle*, the 32 NFL teams each had distinct economic interests and corporate consciousnesses, while Defendants here have a unity of economic interests (Network Net Income) whose actions are guided or determined by one corporate consciousness.

C. Public Disclosures of Separateness

Next, Plaintiff argues that Defendants made statements in public disclosures that support a finding that Defendants are separate.

[10] (*See also* Doc. 129, Ex. 1 at ¶¶ 11-12 (all income or loss from all activities is combined into a single net income, i.e., one bottom line – the Network Net Income); Doc. 131, Ex. 2 (JOA) at § 1.31 (defining "Network Net Income" as the combined net income from Premier and all Hospital participants for all system activities).

1. IRS Form 990s

Plaintiff argues that according to Defendants' Form 990s, Premier is a corporate shell with no assets, income, expenses, or liability. (Doc. 147, Ex. 1 at Premier 00100806-28 (2006); Ex. 2 at Premier00101268-88 (2007); Ex. 4 at Premier 00101640-68 (2008); Ex. 7 at Premier 00101987-2020 (2009); Ex. 11 at Premier 00102374-406 (2010); and Ex. 14 at Premier 00102813-52 (2011)). Specifically, Plaintiff points out that MedAmerica's subsidiary, Miami Valley Hospital ("MVH"), stated in its 2005 Form 990 that the current JOA members – CHI, MedAmerica, and AHS "have agreed to jointly operate separate healthcare systems pursuant to the terms of a joint operating agreement." (Doc. 146, Ex. 30 at Premier 00100511) (emphasis added). However, the Court finds that this brief summary description in tax documents, which refers and defers to the JOA, fails to show that Defendants do not function as a unified economic actor. *See, e.g., Am. Needle*, 560 U.S. at 196 ("The NFL teams do not possess either the unitary decision making quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and independently managed business."). The JOA itself, and how the parties actually function under the JOA, are what controls. *Susquehanna*, 278 F. Supp. 2d at 435 ("Although the organizational form employed here is unique, the court finds that the Alliance functions as a single entity.").

Next, Plaintiff alleges that the Form 990s state that Defendants give an incentive bonus for executives that is based in part on "Individual Objectives or Outcomes." (Doc.

143, Ex. 10 at Premier 00101877). Each executive has a scorecard used to determine incentive bonuses and one component of the scorecard involves financial performance, which includes assessment of the individual hospital's financial performance. (Doc. 128, Ex. 29 at 21-23). Although the incentive may create internal competition, all of the money earned goes to the Network Net Income, so hospital performance does not affect the percentage of the Network Net Income allocated to the Defendants. (*Id.* at 22, 102-103).

Accordingly, the IRS Form 990s do not establish a disputed issue of fact regarding Defendants' status as a unified economic actor.

2. Statements in Bond Documents

Next, Plaintiff argues that Defendants are separate actors because in the 2011 offering for $100 million in revenue bonds, MedAmerica disclosed that the bond proceeds were solely for the benefit of MVH and that only MedAmerica and MVH would be obligated under the bonds. (Doc. 148, Ex. 15 at Premier 217151). The bond memorandum also disclosed that "[b]oth the [Miami Valley] Hospital and the other parties to the JOA continue to own their respective assets and to remain liable for their respective liabilities including their long-term debt." (*Id.*) While these statements are undisputed, as the operator, Premier must authorize the debt. (Doc. 139, Ex. 1 at 17, ¶ 14) (admitted by Plaintiff) (the JOA makes Premier the operator for the system's activities and gives Premier the power and authority over all system activities). Specifically: (a) Premier has, and exercises, control over the Defendants' debt incurrence,

including this specific MedAmerica bond; (b) Premier controls Defendants' financial plan; and (c) Premier may use any resources, facilities, or supplies of any of the Defendants for system activities. (*Id*.)

Since the bonds were issued for improvements at MVH, all of the Defendants will benefit from the improvements because there is only one bottom line -- the Network Net Income. The bond proceeds are part of "non operating income or loss" and therefore subject to the Allocation of Network Net Income for the system. (Doc. 131, Ex. 2). The bond memorandum explains that "the net income or loss derived from the operations managed by Premier (together with non-operating income or loss) is apportioned between [JOA members] in accordance with a formula set forth in the JOA." (Doc. 148, Ex. 15 at Premier217200). Additionally, the Defendants work together to ensure that each meets its bond requirements. For example, MedAmerica guaranteed Atrium's bond obligations. (Doc. 139, Ex. 1 at 27-28, ¶ 33). *Susquehanana* involved a similar scenario: "While the hospitals technically have separate bond covenants, they work together to ensure that each meets the requirements of its own bond covenant." 278 F. Supp. 2d at 435.

The managed care function that is at the heart of Plaintiff's allegations is wholly controlled by Premier. Plaintiff admits that Premier: (1) negotiates and enters into payor contracts that bind all of the Hospital Participants (Doc. 155, Ex. A at ¶¶ 28-30); and (2) manages all relationships with payors, including all managed care companies (*Id*.) In fact: (1) Premier allocates the system's income and losses to the hospitals' four parent holding companies based upon the JOA's predetermined formula, with all of the income

or loss from all of the Defendants' system activities being combined into a single net income (*i.e.*, one bottom line, the Network Net Income) (Doc. 155, Ex. A at ¶¶ 9-12); (2) the combined net income is allocated each year based upon the pre-determined percentage shares in the JOA, independent of the particular revenue or profitability of any single Hospital Participant (*Id.*, Ex. A at ¶¶ 9-13); (3) Premier develops and approves the strategic planning, business plans and budgets for all the Hospital Participants, and the Hospital Participants must comply with and implement those plans and budgets, and the strategic planning and budgeting for all of the Hospital Participants are combined (*Id.*, Ex. A at ¶¶ 19-23); and (4) Premier assesses costs to the hospitals for implementing new technologies and programs (and those costs are shared by the hospitals) (*Id.* at ¶ 31). Accordingly, the JOA is structured and functions such that Premier and the Hospital Participants are one economic actor, with Premier in control of the health system's relevant decision making and activities.

For example, in *Wesley*, 2014 U.S. Dist. LEXIS 7764, the court found that the facts were sufficient to show that, under both their agreement and in practice, the defendant hospital and defendant ambulance company were a single economic unit and the hospital controlled the ambulance company. The court held that "the alleged conspirators must be 'separate economic actors pursuing separate economic interests'" in order to be capable of conspiring under Section 1. *Id.* at 27. The court found "there is no genuine issue of material fact as to whether [defendant hospital] and [defendant ambulance company] constitute 'separate economic actors pursuing separate economic

interests.' The evidence demonstrates that [hospital] controls [the ambulance company]. They are, therefore, incapable of conspiring under Section 1 of the Sherman Act." *Id.* at 33 (quoting *Am. Needle*, 560 U.S. at 196). Similarly, Plaintiff fails to offer any material facts to prove that Defendants "constitute separate economic actors pursuing separate economic interests," or that Premier does not control the Defendants with respect to the alleged conspiracy. Plaintiff has admitted or failed to deny the facts that show Premier and the Hospital Participants are one economic actor controlled by Premier.

D. Conduct

Plaintiff also argues that the evidence documents conduct in the market that supports a finding of separateness among the Defendants.

Specifically, Plaintiff argues that when the contract with MVH and GSH expired, Premier kept Atrium's contract with Anthem, which was separate, in place. (Doc. 128, Ex. 33 at 41-42). Anthem contracts separately with MVH and GSH, UVMC, and Atrium. (Doc. 146, Ex. 17 at Premier 00049063-49065). In fact, Defendants 2011 negotiation strategy with Anthem included determining "which PHP entities are included in the negotiations…hospitals, subsidiaries, joint ventures, primary care physicians, specialists?" (Doc. 146, Ex. 21). However, simply because a contract is in the name of a Defendant does not mean that the Defendant is separate from the Premier system for purposes of a Section 1 analysis. For example, once Atrium joined the JOA, the income stemming from its Anthem contract – whether in the name of Premier, Atrium, or any other Defendant – becomes Network Net Income under the JOA and is annually

distributed to all Defendants pursuant to the JOA's formula. (Doc. 155, Ex. A at ¶¶ 28-29) (Plaintiff admitted that Premier negotiates and manages all relationships with payers).

Next, Plaintiff argues that a September 22, 2010 internal GSH document acknowledges that "historically and through today, all system hospitals operated independently regarding orthopedic strategy." (Doc. 146, Ex. 5 at Premier 00005390). Furthermore, Plaintiff argues that the May 27, 2004 minutes from the MRH (Atrium) Board of Directors meeting state that the medical staffs at each Defendant Hospital "remain separate, with individual credentialing processes taking place at each individual hospital." (Doc. 148, Ex. 9 at Premier 00176425-176426). However, these documents only show that the Hospitals' orthopedic plans were not the same and that the Hospitals' medical staffs are separate and have individual credentialing processes. This case involves managed care contracting, not orthopedic strategy, and the undisputed evidence supports a finding that Premier has the ultimate control over these activities, including developing and overseeing implementation of the strategic plans, budgets, and business plans of the system and the Defendants. Moreover, in accordance with the JOA, decisions on medical staff admission, privileges, and memberships are still subject to the credentialing criteria approved by Premier's board, and Premier has the authority to consolidate the medical staffs. (Doc. 131, Ex. 7 (JOA) at §§ 5.1(h), 6.4).[11]

[11] *Copperweld* emphasized that there does not need to be complete control of decision making by one party – instead, certain authority and tasks can be given to autonomous units. 467 U.S. at 771.

Plaintiff also argues that a 2005 internal GSH report states: "Good Samaritan, a Catholic non-profit hospital, has multiple affiliations. On a national level, the Hospital is a member of Catholic Health Initiatives (CHI) …. On a local level, the hospital is part of SHP [which CHI wholly owns]. In addition, GSH is a member of Premier Health Partners, which is a joint operating company with Miami Valley Hospital." (Doc. 146, Ex. 19 at Premier 52178). Still, this report does not refute any of the admitted facts that demonstrate that Defendants are controlled by a single center of decision making.

Finally, Plaintiff argues that courts have repeatedly found instances in which members of a legally single entity violated Section 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerned activity. For example, in *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), a group of mattress manufacturers operated and controlled Sealy, Inc., a company that licensed the Sealy trademark to the manufacturers, and dictated that each operate within a specific geographic area. *Id.* at 352-353. The Court explained that although Sealy "should be considered a single entity as to the functions provided by Sealy associated with the R&D and national promotion of the product" the Supreme Court considered the challenged conduct – the exclusive territory each manufacturer received – a function with relation to the shared assets and therefore not a single entity. *Id.* at 354. However, *Sealey* is distinguishable because, like in *American Needle*, the defendants had separate economic interests. The issue was whether Sealy (a licensor to sell products under the Sealy brand) conspired with its licensees to allocate exclusive territory among its licensees. *Sealey*,

388 U.S. at 351. The Supreme Court found that the territorial arrangements were among the licensees, not Sealy, because it was the licensees "who, through select members, guaranteed or withheld and had the power to terminate licenses for inadequate performance." *Id.* at 353-54. The Court referenced Sealy's lack of control over the individual licensees, noting how a licensee "could make and sell his private label products anywhere he might choose" and it "appears, without resale price collaboration or enforcement." *Id.* at 352, 357 n.3. Therefore, Sealy did not have control over the operation so that individual licensees pursued separate economic interests.

Unlike the facts in *Sealy*, Premier controls the Defendants' operations, and GSH, for example, is not allowed to "make and sell" services outside of Premier whenever and wherever it chooses. In fact, it cannot "sell" any services outside of Premier, and all of its profits and losses must go to Premier and are allocated to the hospital divisions based upon the formula in the JOA, i.e., the Allocation of Network Net Income. (Doc. 155, Ex. A at ¶¶ 9-12 (admitted by MCEP); Doc. 131, Ex. 7 (JOA) at § 7.2 (Allocation of Network Net Income).

Accordingly, Defendants' conduct in the market does not support a finding of separateness.

E. Joint Venture

Finally, the evidence supports a finding that Premier is a joint venture. A joint venture between two competitors is a single entity for antitrust purposes. *Dagher*, 547 U.S. at 6. "When 'persons who would otherwise be competitors pool their capital and

share the risks of loss as well as the opportunities for profit … such joint ventures [are] regarded as a single firm competing with other sellers in the market.'" *Id.* ("the pricing policy challenged here amounts to little more than the price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products"). *See also Stanislaus Food Products Co. v. USS-POSCO Indus.*, No. 09-0560, 2010 U.S. Dist. LEXIS 92236, at *56, 60-62, 96 (E.D. Cal. Sept. 3, 2010) (recognizing that *Dagher* "extended *Copperweld* to joint ventures," and granting defendants' motion to dismiss because "[a]n economically integrated joint venture is a 'single entity' under *Copperweld* which is incapable of 'conspiring' for purposes of the Sherman Act."). Like in *Dagher*, Defendants, through the JOA, "agreed to pool their resources and share the risks of and profits from [the system's] activities." 547 U.S. at 3, 6 ("Throughout [the joint venture's] existence, [defendants] shared in the profits of [the joint venture's] activities in their role as investors, not competitors.").

Not only is Premier a legitimate joint venture, but the challenged conduct in this case — managed care contracting and physician relations — is a core function of the Premier health system. *Id.* at 6 ("the pricing policy challenged here amount to little more than the price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products"). Since a "single entity" is incapable of conspiring for purposes of the Sherman Act, Plaintiff's claim fails as a matter of law.

IV. CONCLUSION

Accordingly, for these reasons, Defendants' motion for summary judgment that Plaintiff's claim lacks the necessary plurality of actors (Doc. 131) is **GRANTED**. Since Plaintiff has failed to meet the threshold requirement — that the challenged agreement be entered into by multiple parties — Plaintiff's antitrust claim fails as a matter of law. There is no genuine dispute as to any material fact, and Defendants are entitled to entry of judgment as a matter of law. The Clerk shall enter judgment accordingly, whereupon this case shall be **CLOSED** in this Court.[12]

IT IS SO ORDERED.

Date: 10/20/14

s/ Timothy S. Black
Timothy S. Black
United States District Judge

[12] The outstanding motions for summary judgment (Docs. 129, 130, 132, 133) are terminated as moot, as is Defendants' motion to continue the trial date (Doc. 161).