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No. 16-

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

SUTURE EXPRESS, INC.,

Petitioner,

v.

OWENS & MINOR DISTRIBUTION, INC.,
CARDINAL HEALTH 200, LLC,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits a defendant from using its power in the market for one product (the tying product) to coerce a buyer to purchase a second product (the tied product) that the buyer prefers to purchase elsewhere on different terms. A tying claim may be brought either as a “*per-se*” or “rule-of-reason” claim. The U.S. Court of Appeals for the Tenth Circuit below acknowledged a multi-circuit split on whether a rule-of-reason claim requires “a specific and detailed showing of market power” in the tying market. The questions presented are:

1. Whether, on a rule-of-reason tying claim, evidence that the tie increased prices or reduced quality in the tied market obviates the need for further inquiry into tying market power, or at a minimum reduces the amount of evidence from the tying market needed to establish tying market power.
2. Whether antitrust injury may be found where an appreciable number of buyers, even if not all buyers, of the tied product suffered harm.

PARTIES TO THE PROCEEDING

The following were parties to the proceeding before the U.S. Court of Appeals for the Tenth Circuit:

1. Suture Express, Inc., Petitioner in this Court, was the Plaintiff-Appellant below.

2. Owens & Minor Distribution, Inc., and Cardinal Health 200, LLC, Respondents in this Court, were the Defendants-Appellees below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner represents as follows:

Suture Express, Inc.'s parent company is Diamond Castle Holdings, LLC. No publicly held corporation owns 10% or more of the stock of Suture Express, Inc.

After filing its complaint in the U.S. District Court for the District of Kansas, Suture Express, Inc. transferred the claims that are the subject of the complaint to SE Plaintiff, LLC. A majority of the membership interests in SE Plaintiff, LLC is owned by DCH SE Plaintiff, Investor, LLC, which can therefore be considered the parent company of SE Plaintiff, LLC. No publicly held corporation owns 10% or more of the membership interests in SE Plaintiff, LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Suture Express, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

INTRODUCTION

“[T]he 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.” *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984). One species of tying arrangements is a bundled pricing penalty whereby the seller raises the unbundled price of one product so that the buyer is left with “no rational economic choice” but to purchase the bundle of both products from that seller, as compared to the alternative of purchasing one product from that seller and the second product from a different seller. *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 916 n.27 (9th Cir. 2008); *accord*, App. 10a. Such bundled pricing can have an “anticompetitive impact by excluding less diversified but more efficient producers.” *PeaceHealth*, 515 F.3d at 897.

Petitioner Suture Express is such a “less diversified but more efficient” firm in distributing sutures and endomechanical products (“suture-endo”), a subset of medical-surgical products. Respondents, two “broadline” distributors of both suture-endo *and* all other medical-surgical products (“other-med-surg”), recognized that Suture Express’s distribution model enabled it to charge lower prices and to provide higher quality suture-endo distribution relative to Respondents’

model. App. 150a (citing Sealed Joint Appendix, No. 16-3065, Doc. 10401904 (“C.A. App.”) 794); App. 152a (citing C.A. App. 3210). Indeed, Respondent Cardinal Health 200, LLC (“Cardinal”) conceded that Suture Express was the “Netflix” to Cardinal’s “Blockbuster.” App. 173a (quoting C.A. App. 798).

In response to the competitive threat from Suture Express, each Respondent bundled its pricing so as to prevent hospital customers from benefiting from Suture Express’ more efficient suture-endo distribution. Specifically, each Respondent set its price for other-med-surg distribution (the tying product) so that the price would increase prohibitively if the hospital customer purchased suture-endo distribution (the tied product) from Suture Express rather than from that Respondent. Hospitals were left with no rational economic choice but to buy suture-endo, along with other-med-surg, from one of the Respondents. Indeed, the Tenth Circuit below recognized a factual dispute concerning whether hospitals were coerced by Respondents’ bundled pricing. App. 24a. Through this coercion, Respondents were able to charge higher prices and to provide lower quality suture-endo distribution without losing customers to the lower-priced and higher-quality Suture Express.

The Tenth Circuit nonetheless affirmed a grant of summary judgment to Respondents on Suture Express’s rule-of-reason tying claim, holding that no reasonable juror could find that Respondents had tying market power. In doing so, the court acknowledged a well-developed circuit split concerning whether a “specific and detailed showing of [tying] market power” is required on a rule-of-reason tying claim. App. 15a.

On the one side of this circuit split, the First, Third, and Ninth Circuits hold that a plaintiff asserting a

rule-of-reason tying claim may proceed by showing “an *actual* anticompetitive effect in the *tied* product market,” without the need for a further inquiry into tying market power. *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 799 (1st Cir. 1988) (Breyer, J.) (emphasis in original); *see also Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 511 (3d Cir. 1998) (similar); *PeaceHealth*, 515 F.3d at 915 (so holding on a *per-se* claim at the summary-judgment stage).

On the other side of this circuit split, the Eleventh Circuit holds that a plaintiff asserting a rule-of-reason claim must not only show “anticompetitive effects in the tied market,” but must additionally and separately demonstrate that “the seller ha[s] sufficient market power in the tying product market.” *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1503 (11th Cir. 1985). The Tenth Circuit’s decision below sided with the Eleventh Circuit, holding that “tied market effects can be appropriate evidence of tying market power in a rule of reason case, *though it cannot be dispositive*” even for purposes of determining whether the plaintiff’s claim can withstand summary judgment. App. 17a (emphasis added). The Fifth Circuit has suggested yet a third approach, under which tied market effects reduce but do not obviate the need for further inquiry into tying market power. *Breaux Bros. Farms, Inc. v. Teche Sugar Co.*, 21 F.3d 83, 88 (5th Cir. 1994)

The Tenth Circuit mistakenly viewed this circuit conflict as not implicated by the instant case because, according to the Tenth Circuit, “all parties here assumed that market power was required” in the tying market. App. 17a. Suture Express did assume that tying market power was required, but Suture Express argued that such power could be sufficiently shown based on

anticompetitive effects in the tied market. Redacted Uncited Preliminary Opening Brief, No. 16-3065, Doc. 10380015 (“C.A. Br.”) 40 (“The evidence of tied-market effects is sufficient for reasonable jurors to find that Defendants had power in the other-med-surg [*i.e.*, tying] market, and this Court need not proceed further to reject the district court’s holding on market power.”). That is exactly the position of circuits like the First Circuit in *Grappone*, the Third Circuit in *Brokerage Concepts*, and the Ninth Circuit in *PeaceHealth*. In short, some circuits require a showing beyond tied market effects, and some circuits do not.

This case is an ideal vehicle to resolve the split because the choice between approaches is outcome dispositive: Suture Express clearly satisfied the rule followed in the First, Third, and Ninth Circuits. Specifically, Suture Express presented substantial evidence (including from Respondents’ own files) that Respondents were compelling their customers to accept higher prices and lower quality in the tied market relative to Suture Express’s offering. *See, e.g.*, App. 150a (Respondent Cardinal: Suture Express is “lower priced” and provides “a perceived higher” level “of service.”) (quoting C.A. App. 794). And even if, along the lines of the Fifth Circuit’s approach, some additional evidence from the tying market were required (albeit less than would be required on a *per-se* claim), Suture Express supplied that as well, including proof that Respondents’ shares of the tying market were 32-38% and 27-31%, respectively.

If left intact, the Tenth Circuit’s decision will allow inefficient incumbents in health care and other markets to use bundled pricing to exclude more efficient new entrants specializing in the tied product, even when there is concrete proof that customers were subjected

to higher prices and lower quality for the tied product. Certiorari should be granted.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 851 F.3d 1029 (10th Cir. 2017), and reproduced at App. 1a-30a. The opinion of the U.S. District Court for the District of Kansas granting summary judgment to Respondents is unreported, but is available in redacted form at No. 12-2760-DDC-KGS, 2016 WL 1377342 (D. Kan. Apr. 7, 2016), and reproduced at App. 31a-115a. The district court's opinion granting in part and denying in part Respondents' motion to dismiss is reported at 963 F. Supp. 2d 1212 (D. Kan. 2013), and reproduced at App. 116a-148a.

JURISDICTION

The Tenth Circuit issued its opinion on March 14, 2017. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act provides in relevant part: "Every 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.

STATEMENT

1. Hospitals need a range of medical-surgical products to serve their patients. There are approximately thirty categories of products, which can be aggregated into two: (1) suture-endo; and (2) other-med-surg. App. 33a. Suture-endo differ from other-med-surg in numerous ways, including that suture-endo are smaller, lighter, and higher value, App. 3a; C.A.

App. 1297, and timely delivery of complete suture-endo orders (“fill rate”) is especially important because it affects whether surgeries can be performed as scheduled, App. 4a; C.A. App. 453, 769.

Before 1998, Respondents Owens & Minor Distribution, Inc. (“O&M”) and Cardinal were the only nationwide distributors of other-med-surg and suture-endo to hospitals. Because they distributed both other-med-surg and suture-endo, they were known as “broadline” distributors. App. 3a; C.A. App. 1293. Aside from limited examples of hospitals purchasing products directly from a manufacturer or taking distribution from a regional (as opposed to nationwide) broadline distributor, hospitals typically took distribution from one of the Respondents after the Respondent acquired the products from manufacturers. C.A. App. 1295.

Because many other-med-surg products (*e.g.*, bedpans and intravenous fluid bags) are heavy and/or bulky, each Respondent employed a “Regional Warehouses/Trucks Model” that used numerous warehouses throughout the country, and transported products by truck from a warehouse to the hospital customer. App. 3a. Cardinal had approximately 48 warehouses, and O&M 43. *Ibid.* The Regional Warehouses/Trucks Model required a substantial investment in “building or leasing one or more [warehouses] and leasing or purchasing delivery trucks.” App. 59a.

In 1998, Petitioner Suture Express opened its own distribution business, but instead of competing as a broadline distributor, Suture Express specialized in distributing only suture-endo, using an innovative “Centralized Warehouse/Planes Model.” This model took advantage of the fact that, because suture-endo (*e.g.*, surgical sutures used for wound closure) are

smaller, lighter, and higher value than other-med-surg, a specialist focusing just on suture-endo can distribute the products by plane to hospitals from a single centralized warehouse, and need not invest in the multiple warehouses and trucks needed to distribute other-med-surg. App. 4a. Furthermore, Suture Express's centralized warehouse could be located where real estate is cheap, could be run by fewer employees than would be needed to operate dozens of warehouses, and could stock a comprehensive line-up of suture-endo because there would be no need to devote shelf space to other-med-surg. *Ibid.* The combination of a well-stocked warehouse and overnight plane delivery would enable Suture Express to deliver complete orders on time, thus achieving a high fill rate.

Indeed, Suture Express had a "fill rate higher than 99%, which is often higher than the rates achieved by O&M and Cardinal for [suture-endo]." *Ibid.* (citing C.A. App. 1127-29). And Suture Express's lower costs allowed it to charge hospitals significantly lower prices for suture-endo distribution than O&M and Cardinal were charging. *See, e.g.*, App. 150a (quoting C.A. App. 794); App. 152a (citing C.A. App. 3210).

"Between 1998 and about 2008, Suture Express successfully grew its business." App. 40a. An internal Cardinal document observed: "We are at risk" because Suture Express is "lower priced" and provides "a perceived higher" level "of service." App. 150a (quoting C.A. App. 794). O&M similarly recognized that Suture Express had lower prices and higher fill rates. App. 152a (citing C.A. App. 3210). As Cardinal colorfully put it, Suture Express was the "Netflix" to Cardinal's "Blockbuster." App. 173a (quoting C.A. App. 798).

O&M and Cardinal responded with bundled pricing. Specifically, they increased prohibitively the price of other-med-surg if the hospital purchased suture-endo from Suture Express:

For instance, before the bundling terms were put into effect, one hospital would typically buy about \$750,000 worth of suture-endo per year and about \$7,000,000 of other med-surg. Buying the former from Suture Express and the latter from Cardinal would save the hospital about \$18,750. But with the bundling term added, Cardinal would increase the hospital's other-med-surg markup by one percent if it did not also buy its suture-endo from Cardinal. Since this would translate into a \$70,000 increase on the hospital's other-med-surg, the [approximately] \$18,000 in suture-endo savings would not be worth the price of doing business with Suture Express.

App. 8a-9a. Indeed, the increase was so severe in this example that Cardinal was charging more to distribute other-med-surg alone than to distribute both other-med-surg *and* suture-endo together. See C.A. App. 2615.

“Though these packages took different forms, the overarching result was that the customer would pay more (usually one percent more) for its other-med-surg orders unless it also ordered its suture-endo through the same distributor.” App. 7a. See also App. 43a (Suture Express’s expert “Professor Elhauge concluded that between 2006 and 2013, O&M made about 98% of its suture and endo sales and Cardinal made about 71% of its suture and endo sales under a contract containing one of the contractual terms

described above—that is, one that makes pricing contingent on the purchase of suture and endo distribution through them.”¹ During this period, O&M and Cardinal enjoyed substantial market shares in the other-med-surg market, with O&M’s ranging from 32-38% and Cardinal’s from 27-31%; the remaining shares were taken up by a third nationwide distributor named Medline and several regional distributors. C.A. App. 353.²

Respondents’ bundled pricing succeeded in thwarting Suture Express. As Cardinal observed, “[w]e are mitigating this risk [posed by Suture Express] with every new contract we sign requiring” the purchase of “suture and endo.” App. 150a (quoting C.A. App. 794). O&M similarly stated that it has “had some success

¹ Respondents stuck with bundled pricing even as they experimented with a model like Suture Express’s. While both Respondents continued mainly to use the Regional Warehouses/Trucks Model to distribute suture-endo, they each created a centralized warehouse for certain suture-endo products and used the centralized warehouse to distribute those products directly to hospitals and/or to resupply their regional warehouses. *See, e.g.*, App. 51a. Tellingly, even though shipment of suture-endo directly from the centralized warehouse to the hospital customer would deprive the Respondent of the supposed efficiency of transporting suture-endo and other-med-surg “on the same truck,” *see infra*, at 10-11, Respondents did not adjust the pricing of other-med-surg when suture-endo was shipped directly from the centralized warehouse to the hospital customer, *see* App. 157a, which undermines Respondents’ claim that the supposed “same truck” efficiency really exists.

² The Tenth Circuit stated that “Medline ... used similar bundling packages.” App. 8a n.3. In fact, an internal Medline email filed under seal below at C.A. App. 830 (and discussed at Plaintiff-Appellant Suture Express, Inc.’s Sealed Reply Brief, No 16-3065, Doc. 10405348, at 19) explained that Medline’s terms were significantly *different* from Respondents’ terms.

defending against Suture Express by bundling” O&M’s “pricing.” App. 150a (quoting C.A. App. 704). Suture Express’s expert witness, Professor Einer Elhauge of Harvard Law School, compared Suture Express’s performance among hospitals subject to Respondents’ bundling terms with Suture Express’s performance among hospitals not subject to Respondents’ bundling terms, and found that Suture Express had only a 2-6% share of the former, compared to a 13-41% market share of the latter. App. 44a.

Respondents’ contemporaneous internal documents expressly described their bundled pricing as imposing a “penalty” on hospitals, App. 8a, in order to “defen[d] against Suture Express,” App. 150a (quoting C.A. App. 704). During this litigation, however, Respondents have disregarded those documents and argued that their bundled pricing actually *benefits* hospital customers because, “[b]y adding suture and endo products to the truck with the other med-surg products, [Respondents] realize efficiencies.” App. 98a (district court opinion summarizing Respondents’ argument). But this explanation is absent from Respondents’ contemporaneous documents, and indeed those documents refute it. For example, some of Respondents’ contracts did not impose a bundled pricing penalty when the hospital customer purchased suture-endo directly from a manufacturer (instead imposing the penalty only when the hospital purchased suture-endo from Suture Express), even though such a direct purchase from a manufacturer would cause the same supposed efficiency “loss” to Respondents because the suture-endo would not be on

the same truck with other-med-surg. App. 156a-57a (discussing C.A. App. 577); *see also supra*, at 9 n.1.³

2. Suture Express filed this action in the U.S. District Court for the District of Kansas, asserting, *inter alia*, a *per-se* tying claim under Section 1 of the Sherman Act and a rule-of-reason tying claim under that same section. Respondents moved to dismiss. The district court (Rogers, J.) dismissed the *per-se* claim but sustained the rule-of-reason claim.

On the *per-se* claim, the court ruled that each Respondent's approximately 30% share of the tying market was insufficient for a *per-se* claim, relying upon *Jefferson Parish*, 466 U.S. at 26-29, and *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611-13 (1953), which held that similar shares (30% and 40%, respectively) could not support a *per-se* claim. *See* App. 123a-24a.

However, the district court sustained Suture Express's rule-of-reason claim. The court held that Suture Express had pleaded Respondents possessed market power in the tying (other-med-surg) market. App. 126a. The court further held that antitrust injury from Respondents' tying was pleaded by allegations "that [Respondents'] tying arrangements reduce the level of competition in the distribution of sutures and endo products; that they limit a customer's choice of sutures and endo products; and that they deprive customers of

³ Additionally, there was substantial evidence that costs to distribute suture-endo were lower for Suture Express than for both O&M and Cardinal, even after including any alleged cost reduction from joint distribution. *See, e.g.*, App. 156a-57a (discussing C.A. App. 1181 and 3210). These findings make sense: A single specialized warehouse with express air delivery can accomplish suture-endo distribution at lower cost and higher speed than forty-plus warehouses with trucking can.

advantages in delivery costs and procedures.” App. 130a.

3. After discovery and expert disclosures, Respondents moved for summary judgment. The district court (Crabtree, J.) granted the motion.⁴

The court did not consider the legal import of evidence that Respondents were able to impose lower quality and higher prices on hospital customers in the tied (suture-endo) market. As to other evidence of market power from the tying (other-med-surg) market, the court acknowledged O&M’s 32-38% and Cardinal’s 27-31% shares of the tying market, but held that no reasonable juror could find Respondents had power in that market because the court viewed it as “rife with competitive rivals who are growing and expanding their business while Cardinal and O&M’s market shares have declined or remained relatively flat.” App. 88a.⁵

⁴ By the summary-judgment phase, Judge Rogers retired and the case was reassigned to Judge Crabtree. Suture Express filed its own motion for partial summary judgment, which the district court denied, a ruling Suture Express did not contest on appeal.

⁵ The court acknowledged factual disputes on two other elements of Suture Express’s rule-of-reason tying claim: “whether two separate products [i.e., suture-endo distribution and other-med-surg distribution] are involved,” App. 69a-70a, and “whether [Respondents] have conditioned the sale of other med-surg distribution on the sale of suture and endo distribution,” App. 79a. The court did not address the fourth element: “a not insubstantial amount of interstate commerce in the tied product is affected.” App. 69a (citation and quotation marks omitted). The evidence on that element included Professor Elhauge’s finding that a substantial percentage of hospitals nationwide was economically compelled by Respondents’ bundling terms to purchase suture-endo from a Respondent rather than from Suture Express. App. 25a; C.A. App. 417-18.

The court next held that reasonable jurors could not find antitrust injury in the sense that customers (and not just Suture Express as a competitor) were harmed by Respondents' bundled pricing. The court reasoned, *inter alia*, that, while Suture Express had demonstrated that its suture-endo distribution prices were lower than Respondents' prices, Suture Express had not shown that its prices were lower than the prices of *distributors other than Respondents*. App. 94a.

Finally, the court held that reasonable jurors would be compelled to find that pro-competitive efficiencies justified respondents' bundling terms. The court accepted Respondents' assertion that they need only demonstrate that distribution of suture-endo and other-med-surg on the same truck will yield them some cost savings, even if such savings still leave them with higher costs than Suture Express. App. 99a; *but see, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) ("The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct.") (internal quotation marks omitted). The court thus failed to confront the evidence that Suture Express's costs to distribute suture-endo were lower than Respondents' costs to distribute suture-endo, even accounting for any alleged savings from joint distribution "on the same truck." *See supra*, at 10-11 & n.3.

4. The Tenth Circuit (Kelly, Lucero, Murphy, JJ.) affirmed, reaching only the market power and anti-trust injury issues, not the pro-competitive efficiencies issue.

The Tenth Circuit noted that "there may be situations in which a specific and detailed showing of market power may not be necessary in a section 1 Rule of Reason case," App. 15a (internal quotation marks

and citation omitted), and “acknowledge[d] that there is a circuit split about whether a tying case examined under the rule of reason presents such a situation,” App. 15a-16a; *see also* App. 16a n.5. The court then stated that it “need not weigh in on the dispute at this time, however, given that all parties here assumed that market power was required and therefore presented detailed evidence to support their positions.” App. 17a. In so stating, the court did not recognize that Suture Express had explicitly argued that “evidence of tied-market effects is sufficient for reasonable jurors to find that [Respondents] had power in the other-med-surg market, and this Court need not proceed further to reject the district court’s holding on market power.” C.A. Br. 40; *see also id.* at 34 (citing *PeaceHealth*, 515 F.3d at 914); *id.* at 41 (additionally and alternatively arguing that “the market power needed for a rule-of-reason claim is less than that needed for a *per-se* claim”) (citing *Breaux Bros. Farms*, 21 F.3d at 88).

The Tenth Circuit proceeded to affirm summary judgment for Respondents, holding principally that no reasonable juror could find that Respondents had tying market power. App. 24a.⁶ The court held that “tied market effects can be appropriate evidence of tying market power in a rule of reason case, *though it cannot be dispositive*” even in the sense of withstanding a summary judgment motion and moving the case to trial. App. 17a (emphasis added). Turning to other evidence beyond tied market effects, the court observed that tying market shares at or above 30%, such as those maintained by each Respondent here, “[p]erhaps” can

⁶ The court did acknowledge a factual dispute concerning whether Respondents’ hospital customers were coerced. App. 24a.

support a finding of market power on a rule-of-reason claim. App. 21a. But the court held that, even at the summary-judgment stage where Suture Express was the non-movant, such evidence of tying market power is “insufficient to counteract the other market realities present here that point to increased competition and lower prices” in the tying market. *Ibid.* According to the court, those “market realities” include that “Medline has more than doubled its med-surg sales between 2008 and 2014. Regional distributors have likewise grown. And all three parties compete with and have won and lost contracts to these other distributors.” App. 23a.⁷

The Tenth Circuit alternatively held that Respondents were entitled to summary judgment because no reasonable juror could find antitrust injury. App. 27a. The court recognized Suture Express’s evidence that “56-64% of the suture-endo market was restrained by their contracts from purchasing suture-endo from Suture Express,” and that “[t]hese foreclosed customers ended up paying \$36 million more for suture-endo than they would have had they bought from Suture Express.” App. 25a-26a. But the court rejected the idea that harm to an “appreciable number of buyers,” *Fortner Enters. v. U.S. Steel Corp.*, 394 U.S. 495, 504 (1969), suffices because, according to the court, App. 26 n.9, *Fortner* is limited to the issue of market

⁷ The court did not in this portion of its opinion confront the argument that competition in the other-med-surg market should not immunize tying conduct: “It could be ... that all the firms offering the bundle are inefficient producers of one of the product categories. This would make consumers worse off in a world without the more efficient specialist.” App. 22a (citing Brief for Amici Curiae Economists and Antitrust Scholars Joseph P. Bauer, *et al.* in Support of Appellant Urging Reversal, No. 16-3065, Doc. 10387555, at 10-14).

power as opposed to antitrust injury. The court thus concluded that Suture Express had failed to show harm “across the market.” App. 27a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE A CIRCUIT SPLIT ON WHETHER TIED MARKET EFFECTS OBLIATE OR AT MINIMUM REDUCE THE NEED FOR FURTHER INQUIRY INTO TYING MARKET POWER ON A RULE-OF-REASON TYING CLAIM UNDER SHERMAN ACT SECTION 1

Some circuits hold that tied market effects suffice for a rule-of-reason tying claim under Sherman Act Section 1, with no requirement that the plaintiff present further evidence of market power from the tying market. Other circuits, including now the Tenth Circuit, hold that such evidence of tied market effects is insufficient. This case furnishes an excellent vehicle to resolve the conflict, since Suture Express presented substantial evidence that Respondents’ bundled pricing enabled them to charge higher prices and to provide lower quality (relative to Suture Express) in the tied market without losing customers to Suture Express. Accordingly, certiorari should be granted.

A. Several Circuits Hold That Evidence Of Tied Market Effects Oblivates The Need For Further Inquiry Into Tying Market Power

Two circuits, the First and Third, have held that proof of tied market effects obviates the need for further inquiry into tying market power on a rule-of-reason claim. And the Ninth Circuit has so held even on a *per-se* claim at the summary-judgment stage.

In *Grappone*, the First Circuit considered a suit by a local automobile dealer against Subaru of New England, Inc. (“SNE”) based on SNE’s requirement that it would sell Subaru cars (the tying product) to a dealer only if the dealer also purchased spare Subaru parts (the tied product). 858 F.2d at 793. The court explained:

[T]ying ... hurt[s] the Buyer or consumer only when it first hurts firms seeking to sell the *tied* product. Only if the tie significantly reduces the opportunities to sell Product B, can the tie significantly increase the Seller’s power in respect to Product B And, insofar as tying impedes ‘competition on the merits,’ discouraging the search for innovation or efficiency, it does so in the *tied* product markets.

Id. at 796 (quoting *Jefferson Parish*, 466 U.S. at 14) (internal citation omitted; emphasis in original). The court interpreted this Court’s precedents to adopt a *per-se* rule that requires tying market power and little else to establish liability. *Ibid.* But the court observed that the *per-se* rule requires “*significant* [tying] ‘market power,’” *ibid.* (emphasis in original), and held that the plaintiff’s proof on its *per-se* claim was insufficient for the principal reason that SNE’s tying market share was in the low single digits—far lower than the approximately 30% share deemed insufficient for the *per-se* rule in *Jefferson Parish*, *see id.* at 797.

Turning to rule-of-reason analysis, however, the First Circuit focused on the tied market alone and held that a rule-of-reason plaintiff may proceed by showing “an *actual* anticompetitive effect in the *tied* product market.” *Id.* at 799 (emphasis in original). The court then held that there was no such effect on the facts

presented because, *inter alia*, no competing supplier of Subaru replacement parts had entered the market, *ibid.*, such that there were no prices to compare.⁸

The Third Circuit too has held that, in a rule-of-reason case, a plaintiff may rely exclusively on anticompetitive effects in the tied market (even though such evidence may be “difficult” to come by), and need not adduce additional evidence concerning the tying market:

Per se liability exists where the defendant is found to have appreciable market power in the tying market. In such cases, the ability to leverage this power to restrain trade in the tied market is presumed and no inquiry need be made into the actual prevailing market conditions in that market. Where appreciable tying market power cannot be shown, inquiry into the tied product market cannot be avoided, and the plaintiff therefore has the

⁸ Here, by contrast, Suture Express had not only entered the suture-endo market, but was providing suture-endo at lower prices and higher quality, before Respondents “defend[ed] against Suture Express by bundling [their] pricing.” App. 150a (quoting C.A. App. 704).

The First Circuit recognized that “anticompetitive effects” may in certain cases be “outweigh[ed]” by “procompetitive[] business justifications.” *Grappone*, 858 F.2d at 799. The Tenth Circuit did not reach that issue below, App. 27a, and reasonable jurors could find there are no such justifications, *see supra*, at 10-11 & n.3; *see also* C.A. App. 1072-73, 3549 (Professor Elhauge’s explanation that a prohibition on Respondents’ bundled pricing would not cause an increase in Respondents’ other-med-surg prices); *United States v. Microsoft Corp.*, 253 F.3d 34, 95 (D.C. Cir. 2001) (once the plaintiff shows actual effect on competition in the tied market, burden shifts to the defendant to offer procompetitive justifications).

more difficult burden of *showing that the arrangement violated the rule of reason because it unreasonably restrained competition in the tied product market.*

Brokerage Concepts, 140 F.3d at 511 (internal citations omitted; emphasis added).⁹

The Ninth Circuit similarly has held, in the context of a *per-se* claim, that a plaintiff may proceed, at least at the summary judgment stage, based on evidence of tied market effects. *See PeaceHealth*, 515 F.3d at 915. Whereas the First and Third Circuits phrase their approach as not requiring *any* showing of tying market power (and instead focusing on conditions in the tied market), the Ninth Circuit reaches an identical outcome by recognizing tying market power as an element but then deeming tied market effects to be sufficient evidence of tying market power. In *PeaceHealth*, defendant PeaceHealth provided tertiary health care (the tying product); a competing hospital, McKenzie, provided primary/secondary health care (the tied

⁹ The Sixth and Seventh Circuits appear to agree. *See Dig. Equip. Corp. v. Uniq Dig. Tech., Inc.*, 73 F.3d 756, 763 (7th Cir. 1996) (“The material dispute that called for a trial [in *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992)] was whether the change in policy enabled Kodak to extract *supra-competitive prices [in the tied market]* from customers who had already purchased its machines. Concrete evidence that it had done so entitled the plaintiffs to a trial, the Court held. Uniq has not supplied such evidence”) (emphasis added); *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 821 (6th Cir. 1997) (similar). These courts do so notwithstanding their view of the tying market power element as equally stringent on a rule-of-reason claim as on a *per-se* claim. *See Dig. Equip. Corp.*, 73 F.3d at 761 (“substantial market power is an indispensable ingredient of every claim under the Rule of Reason”); *PSI Repair Servs.*, 104 F.3d at 815 n.2 (similar).

product) but not tertiary care, brought a tying claim alleging that PeaceHealth's bundled pricing of tertiary and primary/secondary care "may have coerced some insurers to purchase primary and secondary services from PeaceHealth rather than from McKenzie." 515 F.3d at 914. The district court granted summary judgment to PeaceHealth, but the Ninth Circuit vacated, reasoning, *inter alia*, that "McKenzie provided some evidence that its prices on primary and secondary services were lower than PeaceHealth's prices on those services [W]hile not dispositive evidence of an illegal tie, it is a permissible inference that a rational customer would not purchase PeaceHealth's allegedly overpriced product in the absence of a tie." *Id.* at 915.¹⁰

This Court too has treated tied market effects as sufficient evidence of tying market power at the summary judgment stage, even on a *per-se* claim. See *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 477 (1992). The tying product in *Kodak* was replacement parts for Kodak photocopiers; the tied product was service for such photocopiers. *Id.* at 458. After "Kodak implemented a policy of selling replacement parts ... only to buyers of Kodak equipment who use Kodak service or repair their own machines," *ibid.*, independent service organizations

¹⁰ Unlike the Tenth Circuit below, the Ninth Circuit's use of "not dispositive" refers to the ultimate outcome after trial. This is apparent from the Ninth Circuit's recognition, at the summary-judgment stage, that such evidence supports a "permissible inference," *PeaceHealth*, 515 F.3d at 915, that the defendant had the requisite tying market power. The Ninth Circuit issued this holding concerning the Circuit's second element of a Section 1 tying claim, which combines market power and coercion. See *PeaceHealth*, 515 F.3d at 913 (asking whether "the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product").

("ISOs") that competed with Kodak in the tied (service) market filed a Sherman Act Section 1 tying claim, *id.* at 459. The ISOs presented evidence that they "provide service at a price substantially lower than Kodak does" and that "[s]ome customers found that the ISO service was of higher quality." *Id.* at 457. Kodak sought summary judgment on the theory that competition in the market for sale of original Kodak photocopiers, a market one step further upstream from the tying market (for sale or replacement parts of Kodak photocopiers), prevented any harm in the tied market (for service of Kodak photocopiers). *Id.* at 467. Rejecting that argument, this Court held that "[i]t is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition ... since [the ISOs] offer direct evidence that Kodak did so." *Id.* at 477; *see also id.* at 465 ("Under our prior precedents, this evidence would be sufficient to entitle respondents to a trial on their claim of market power.").¹¹

B. The Tenth And Eleventh Circuits Hold That Evidence Of Tied Market Effects Does Not Obviate Further Inquiry Into Tying Market Power

The Eleventh Circuit and now the Tenth Circuit in the decision below hold that evidence of tied market effects is insufficient on a rule-of-reason tying claim, and that additional evidence from the tying market is required.

¹¹ *See generally FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) ("proof of actual detrimental effects ...' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects'" (quoting 7 P. Areeda, *Antitrust Law* ¶ 1511, p. 429 (1986))).

Specifically, the Eleventh Circuit has held that a plaintiff must do more than show “anticompetitive effects in the tied market,” *Amey*, 758 F.2d at 1503. The plaintiff must additionally demonstrate—under what the Eleventh Circuit described as a separate element of the claim—that “the seller ha[s] sufficient market power in the tying product market.” *Ibid.*

The Tenth Circuit below, like the Eleventh Circuit, treated the Respondents’ ability to force its customers to purchase suture-endo from Respondents despite Suture Express’s lower prices and superior quality only as evidence to “be considered,” App. 19a—not as sufficient evidence to withstand summary judgment. *See also* App. 17a (describing this evidence as “appropriate” but not “dispositive” in the sense of allowing Suture Express to withstand summary judgment and go to trial).

To the extent the Tenth Circuit construed *PeaceHealth* and *Kodak* as relying on evidence beyond tied market price (or quality) differentials to hold that the defendant was not entitled to summary judgment, *see* App. 18a, the Tenth Circuit was incorrect. Although *PeaceHealth* happened to involve a monopolist in the tying market, *see* 515 F.3d at 915, the Ninth Circuit did not limit its discussion of tied market price differentials to that situation. And *Kodak* did not, as a factual matter, involve a monopolist in the relevant upstream market. Instead, this Court decided the case on the “premise ... that competition exists in the equipment market.” 504 U.S. at 465 n.10. In any event, both *PeaceHealth* and *Kodak* are *per-se* cases, and the Tenth Circuit did not confront the First and Third Circuits’ holdings that tied market effects are sufficient evidence on a rule-of-reason claim.

C. The Fifth Circuit Has Suggested That Tied Market Effects Reduce, But Do Not Obviate, Further Inquiry Into Tying Market Power

In *Breaux Bros. Farms*, 21 F.3d 83, the Fifth Circuit appears to have adopted a position between those described above: that tied market effects do not obviate the need for further inquiry into tying market power, but do reduce the amount of evidence (relative to that required on a *per-se* claim) needed to establish tying market power.

The court recognized the high level of tying market power required for a *per-se* claim: “The *per se* rule ... require[s] a finding of ‘significant market power’ in the tying market.” *Breaux Bros. Farms*, 21 F.3d at 86 (emphasis added). The court found the plaintiffs’ proof insufficient, since the defendants had no more than a 17.5% share in the tying market. *Id.* at 87.

Turning to the rule-of-reason claim, the court rejected the claim “because the tying arrangement did not hamper competition in the [tied] market.” *Id.* at 88. But the court also recognized that, if anticompetitive effects in the tied market had been demonstrated, some reduced showing of tying market power might still be required: “We need not explore whether Teche had sufficient market power in the [tying] market ... , under a rule of reason test, because the tying arrangement did not hamper competition in the [tied] market” *Id.* at 88.¹²

¹² To be sure, the Fifth Circuit’s position is not entirely clear, insofar as a footnote in the *per-se* section of the decision indicated that tied market evidence can be sufficient. See *Breaux Bros. Farms*, 21 F.3d at 87 n.3 (citing *Kodak*, 504 U.S. at 477).

D. This Case Is An Ideal Vehicle To Resolve The Split

This case is an ideal vehicle to resolve the split because Suture Express clearly satisfied the rule followed in the First, Third, and Ninth Circuits, as well as the approach suggested by the Fifth Circuit, and thus the selection of either of those rules instead of the Eleventh and Tenth Circuits' rule is outcome dispositive.

As to the First, Third, and Ninth Circuits' rule, Suture Express presented substantial evidence that Respondents, once they instituted bundled pricing, were able to charge higher prices and to provide lower quality in the tied market (relative to Suture Express) without losing customers to Suture Express. Respondents' own documents conceded that Suture Express was offering the tied product at a lower price and higher quality than Respondents were offering. See, e.g., App. 150a (Suture Express is "lower priced" and provides "a perceived higher" level "of service.") (quoting C.A. App. 794); App. 152a (citing C.A. App. 3210) (similar). Hospitals too bemoaned that they would "love" to buy suture-endo from Suture Express, but could not afford to do so because of the prohibitive increase in Respondents' other-med-surg prices that would be triggered by a purchase of suture-endo from Suture Express. App. 150a (quoting C.A. App. 3301).

This case is equally well-positioned for this Court to adopt the approach suggested by the Fifth Circuit, under which evidence from the tied market must be augmented by some additional evidence from the tying market, albeit less than would be required on a *per-se* claim (or was in fact required by the Tenth Circuit below). *First*, Suture Express showed that O&M's tying market share of 32-38% and Cardinal's tying

market share of 27-31%, App. 151a (citing C.A. App. 353), while perhaps just shy of the threshold for a *per-se* claim under *Jefferson Parish* and *Times-Picayune*, are nonetheless each substantial enough to support a rule-of-reason claim. *Second*, Suture Express adduced evidence of two barriers to entering the tying (other-med-surg) market: (a) the need to buy or lease a fleet of warehouses and trucks, App. 171a; C.A. App. 1297; and (b) the high switching costs that the largest hospitals face in switching from one other-med-surg distributor to another, App. 171a; C.A. App. 489, 1516, 3595. *Third*, Suture Express's expert found that, as to 77% of Respondents' customers, Respondents' bundled pricing resulted in below-cost pricing on suture-endo distribution under the "discount attribution test." App. 22a; C.A. App. 1009.¹³ The Tenth Circuit acknowledged a factual dispute on this test, but considered it relevant only to the coercion element of a tying claim, not to market power. App. 24a. But it is hard to imagine how a defendant can coerce without having market power, and the Ninth Circuit sensibly combines coercion and market power into a single element. *PeaceHealth*, 515 F.3d at 913 (asking whether "the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product").

¹³ Under the discount attribution test, "the full amount of the discounts given by the defendant on the bundle are allocated to the competitive [*i.e.*, tied] product or products. If the resulting price of the competitive product or products is below the defendant's incremental cost to produce them, the trier of fact may find that the bundled discount is exclusionary for the purpose of [Sherman Act] § 2." *PeaceHealth*, 515 F.3d at 906; see also *Collins Inkjet v. Eastman Kodak Co.*, 781 F.3d 264, 273 (6th Cir. 2015) (applying test to a Section 1 claim).

To be sure, the Tenth Circuit cited evidence it viewed as contradicting tying market power, App. 22a-24a, but that evidence was disputed and thus cannot control in a case like this one and *Kodak*, 504 U.S. at 468 & n.14, 479, at the summary judgment stage. For example, the Tenth Circuit held that “there is sufficient evidence here of actual competition [in the other-med-surg market] that precludes a finding of market exclusion. Medline has more than doubled its med-surg sales between 2008 and 2014. Regional distributors have likewise grown.” App. 23a. But the Tenth Circuit did not acknowledge that Respondents’ shares of the other-med-surg market were stable (indeed, O&M’s share *increased* from 33% in 2007 to 38% in 2012, App. 5a), and that Medline’s growth must therefore have come at the expense of regional distributors (not of Respondents). In any event, this portion of the Tenth Circuit’s opinion did not confront the explanation of *Amici Curiae* Economists and Antitrust Scholars below that competition among broad-line distributors does not allay antitrust concerns where “all the firms offering the bundle are inefficient producers of one of the product categories,” relative to “the more efficient specialist.” App. 22a (citing Brief for *Amici Curiae* Economists and Antitrust Scholars Joseph P. Bauer, *et al.*, in Support of Appellant Urging Reversal, No. 16-3065, Doc. 1038755 (“C.A. Amicus Br.”), at 10-14.

As explained, *supra*, at 3-4, the Tenth Circuit erroneously viewed the above-described circuit conflict as not implicated by this case because, according to the court, “all parties here assumed that market power was required.” App. 17a. Suture Express did assume that tying market power was required, but explicitly argued that such market power could be demonstrated, at least for purposes of withstanding sum-

mary judgment, based solely on anticompetitive effects in the tied market. C.A. Br. 40 (“The evidence of tied-market effects is sufficient for reasonable jurors to find that Defendants had power in the other-med-surg [*i.e.*, tying] market, and this Court need not proceed further to reject the district court’s holding on market power.”). That is exactly the position of the First, Third, and Ninth Circuits, even though they may use slightly different phrasing to describe the position; the Eleventh and (now) Tenth Circuits disagree. And Suture Express alternatively argued for the Fifth Circuit’s approach as well. *See* C.A. Br. 40-41 (“In any event, reasonable jurors could also find market power based on evidence from the tying (other-med-surg) market [T]he market power needed for a rule-of-reason claim is less than that needed for a *per-se* claim”) (citing *Breaux Bros. Farms*, 21 F.3d at 87).

II. THE TENTH CIRCUIT’S HOLDING ON ANTITRUST INJURY CONFLICTS WITH THIS COURT’S DECISION IN *FORTNER* AND A DECISION OF THE THIRD CIRCUIT

Antitrust injury is “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). As set forth above, ample evidence showed that Suture Express offered lower prices and higher quality for suture-endo distribution than did either Respondent. *See supra*, at 24.¹⁴ A class of hospitals

¹⁴ The Tenth Circuit’s antitrust injury analysis ignored consumer injury based on lower quality, discussing only higher price, App. 24a-27a, even though the court acknowledged earlier in its opinion that Suture Express had higher fill rates and that higher

actually filed suit against Respondents concerning the conduct at issue here and ultimately settled the case. See *Schuylkill Health Sys. v. Cardinal Health 200, LLC*, No. 12-cv-07065-JS (E.D. Pa.). And Suture Express's expert, Professor Elhauge, quantified the price-related harm to hospitals at \$36 million (pre-trebling) between 2007 and 2012. See App. 25a-26a.¹⁵

The Tenth Circuit did not dispute that some hospitals were harmed. Instead, the court held that *not enough* hospitals were harmed: Suture Express, the court found, did not show that "competition ... was harmed *across the market*." App. 27a (emphasis added). Specifically, the court stressed that "36-44% of the market was not constrained" by Defendants' bundling terms and, among the unrestrained, "less than half of that market purchased from Suture Express at its lower price." App. 26a (quotation marks omitted).

The Tenth Circuit's test of antitrust injury as requiring harm "across the market" conflicts with *Fortner*, 394 U.S. 495, which held that "appreciable restraint results whenever the seller can exert some power over some of the buyers in the market, even if

fill rates are "important to hospitals." App. 4a. Consumers can be harmed by lower quality just as they can be harmed by higher prices. See, e.g., *Kodak*, 504 U.S. at 465; *Collins Inkjet Corp.*, 781 F.3d at 272.

¹⁵ Professor Elhauge calculated this figure by: (1) identifying the percentage of hospitals that were restrained by Respondents' bundling terms, (2) using data on unrestrained customers (as to which Suture Express had a 13-41% share, App. 44a) to predict how many restrained hospitals would migrate to Suture Express if they became unrestrained; and (3) multiplying the quantity of those hospitals' suture-endo purchases by the price difference between Suture Express's price and Respondents' prices. See App. 94a; C.A. App. 420-21.

his power is not complete over them and over all other buyers in the market,” *id.* at 503, and accordingly that “the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to *any appreciable number of buyers* within the market.” *Id.* at 504 (emphasis added).¹⁶

The Tenth Circuit sought to distinguish *Fortner* as addressing “what constitutes ‘sufficient economic power’ in the tying market—not what counts as harm to competition in the tied market.” App. 26a n.9. But that distinction is unpersuasive. If a seller has economic power over only an appreciable number of (but not *all*) buyers, which *Fortner* clearly holds sufficient to state a claim, then it logically follows that only those buyers—not all buyers “across the market”—will be harmed.

Moreover, the Tenth Circuit’s attempt to limit *Fortner*’s test to market power and not antitrust injury conflicts with a decision of the Third Circuit, which applied a similarly-phrased test to antitrust injury. Specifically, the Third Circuit held that “we have no difficulty concluding that there was likewise sufficient evidence that Plaintiffs suffered *antitrust injury*” where the defendant’s “conduct unlawfully foreclosed a *substantial share* of the HD transmissions market, which would otherwise have been available for rivals, including Plaintiffs.” *ZF Meritor v. Eaton Corp.*, 696 F.3d 254, 289 (3d Cir. 2012) (emphasis added).

The percentage of buyers affected here surely qualifies as an “appreciable number.” *Suture Express*

¹⁶ If anything, the test should be more flexible on a rule-of-reason claim than on a *per-se* claim; *Fortner* addressed only a *per-se* claim. See 394 U.S. at 499-501.

demonstrated that 13-41% of hospitals in the restrained portion of the suture-endo market would have migrated to Suture Express but for the restraint and benefited from its lower prices and higher quality.¹⁷ The circuits have consistently held that similar or smaller percentages satisfy the “appreciable number” (or similar) requirement. *See, e.g., Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1347 (9th Cir. 1984) (“substantial volume in this context means only an amount greater than de minimis”) (internal quotation marks and citation omitted); *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39, 48 (5th Cir. 1976) (“When *Fortner* refers to ‘an appreciable number of buyers’, it does not mean ‘a substantial number.’”).

III. THE QUESTIONS PRESENTED HAVE GREAT NATIONAL IMPORTANCE BECAUSE THEY DETERMINE WHETHER CONSUMERS IN HEALTH CARE AND OTHER MARKETS WILL BENEFIT FROM EFFICIENT SPECIALIZATION

“[O]ne of the evils proscribed by the antitrust laws is the creation of entry barriers to potential competitors by requiring them to enter two markets

¹⁷ The Tenth Circuit suggested that it “raises questions,” App. 26a, that not *all* unrestrained customers chose (or, in the but-for world, not all newly unrestrained customers would choose) Suture Express. But questions raised on summary judgment cannot be resolved against the non-movant, *see, e.g., Kodak*, 504 U.S. at 456, especially when there are plausible answers: For example, while some hospitals may prefer “one-stop shopping” from a single source for both suture-endo and other-med-surg, others are willing to divert their suture-endo purchases to Suture Express to benefit from its lower prices and higher quality, as shown by the fact that Suture Express’s 13-41% share among unrestrained customers is significantly higher than its 2-6% share among restrained customers. App. 44a.

simultaneously.” *Kodak*, 504 U.S. at 485. Left intact, the Tenth Circuit’s decision allows Respondents to create exactly such a barrier: it means that, to compete, Suture Express would need to enter both the other-med-surg and the suture-endo distribution markets, incurring the substantial costs of buying or leasing a fleet of regional warehouses and trucks (the Regional Warehouses/Planes Model), and losing the efficiency benefits of a less costly model (the Centralized Warehouse/Planes Model) that can be used only for suture-endo but not other-med-surg distribution.

Professor Elhauge found, and the Tenth Circuit did not dispute (instead finding it legally insufficient, *see supra*, Point II), that hospitals coerced by Respondents’ bundled pricing “ended up paying \$36 million more for suture-endo than they would have had they bought from Suture Express [between 2007 and 2012].” App. 25a-26a. That harm has only continued in the years since 2012, and will continue in the future if the Tenth Circuit’s overly stringent versions of the market power and antitrust injury requirements are allowed to curtail Suture Express’s rule-of-reason claim at the summary judgment phase.

Several leading economists and antitrust scholars filed an *amicus* brief below in support of reversal, explaining that it is unsound as a matter of economics to endorse such an outcome simply because some degree of competition exists in the tying market. As *amici* explained, “if an entrant is more efficient than the incumbents in the tied market (e.g., sutures and endo products) but less efficient in the market for the tying product (e.g., other med-surg products), then tying the benefit of buying from the entrant would be lessened by the fact that customers have to pay a

higher price for the other med-surg products to benefit from the lower prices for suture and endo.” C.A. Amicus Br. 20; *see also, e.g.*, C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 Yale L. J. 1182, 1212 (2013) (“Where the innovative product is a serious existential threat to members of the oligopoly, the incentive to block or co-opt the entrant can (understandably) be strong.”).

Nor is suture-endo the only market in which incumbents have used tying or bundled pricing to exclude an innovative specialist. According to a 2011 report, at least one (Sanofi), and potentially a second (GlaxoSmithKline), manufacturer of a broad line of pediatric vaccines made bundled offerings of their vaccines (including a Meningitis vaccine) to physicians. *See* Kevin W. Caves & Hal. J. Singer, *Bundles in the Pharmaceutical Industry: A Case Study of Pediatric Vaccines* 19, available at <http://ssrn.com/abstract=1908306> (2011). The study found that “an analysis of actual contractual terms imposed by incumbent vaccine manufacturers indicates that single-product entrants attempting to penetrate the Meningitis vaccine market are placed at a significant competitive disadvantage by incumbents’ bundled pricing schemes,” *id.* at 60-61, and that, “[g]iven the high barriers to entry and expansion in pediatric vaccine markets, ... anticompetitive conduct may reduce consumer welfare substantially,” *id.* at 61.

Outside health care markets, too, incumbents have employed bundled pricing to exclude competition from specialists that provide only one product in the bundle. The American Bar Association recently cautioned that “bundled discounts offered by large firms with numerous product lines may impair competition in circumstances where the bundled discount cannot be

matched by smaller firms lacking broad product lines, regardless of whether the smaller firm is the more efficient producer of a particular product.” Am. Bar. Ass’n, Section of Antitrust Law, *Presidential Transition Report: The State of Antitrust Enforcement* 40 (Jan. 2017) (footnote omitted).

All of this underscores the pressing need for this Court to resolve the confusion among the circuits concerning how to draw the line between lawful bundled discounts that set prices based on true economies of scope, and unlawful bundled penalties that artificially inflate prices so as to exclude a more efficient specialist, to the detriment of consumers.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A

PUBLISH

**UNITED STATES COURT OF APPEALS
TENTH CIRCUIT**

[Filed 03/14/2017]

No. 16-3065

SUTURE EXPRESS, INC.,

Plaintiff-Appellant,

v.

OWENS & MINOR DISTRIBUTION, INC.;

CARDINAL HEALTH 200, LLC,

Defendants-Appellees.

**JOSEPH P. BAUER; WILLIAM S. CHOI;
JOSHUA P. DAVIS; JOHN B. KIRKWOOD;
IOANNIS LIANOS; BARRY NALEBUFF; IVAN REIDEL,**

Amici Curiae.

**Appeal From The United States District Court
For The District Of Kansas
(D.C. No. 2:12-CV-02760-DDC)**

Sanford I. Weisburst (Stephen R. Neuwirth, David M. Cooper, and Yelena Konanova of Quinn, Emanuel, Urquhart & Sullivan, LLP, New York, New York; Daniel M. Abuhoff, Michael Schaper, and Erica S. Weisgerber of Debevoise & Plimpton, L.L.P., New York,

New York; Sean Delphey of Quinn, Emanuel, Urquhart & Sullivan, L.L.P., Washington, D.C., with him on the briefs), New York, New York, for Plaintiff-Appellant.

Paula W. Render and Shari Ross Lahlou (Michael Sennett and Eric P. Berlin of Jones Day, Chicago, Illinois; Michelle K. Fischer of Jones Day, Cleveland, Ohio, and Clifton S. Elgarten and Luke van Houwelingen of Crowell & Moring, LLP, Washington, D.C., with them on the brief), for Defendants-Appellees.

David A. Balto, Bradley A. Wasser, and Matthew C. Lane of Law Offices of David A. Balto, Washington, D.C., for Amici Curiae.

Before KELLY, LUCERO, and MURPHY, Circuit Judges.

KELLY, Circuit Judge.

Plaintiff-Appellant Suture Express, Inc. appeals from the district court's entry of summary judgment in favor of Cardinal Health 200, LLC ("Cardinal") and Owens & Minor Distribution, Inc. ("O&M") under Section 1 of the Sherman Antitrust Act, Section 3 of the Clayton Act, and the Kansas Restraint of Trade Act ("KRTA"). See *Suture Express, Inc. v. Owens & Minor Distrib., Inc.*, No. 12-2760-DDC-KGS, 2016 WL 1377342 (D. Kan. Apr. 7, 2016). Finding jurisdiction under 28 U.S.C. § 1291, we affirm.

Background¹

¹ The majority of these background facts were stipulated by the parties and recounted in the district court's Pretrial Order. 7 J.A. 1291-1301. Because this is an appeal from the district court's grant of Cardinal and O&M's motion for summary judgment, to the extent facts are disputed we assume that any nonconclusory version presented by Suture Express is correct. *Multistate Legal*

A. The Business

Suture Express, Cardinal, and O&M compete in the medical-and-surgical (“med-surg”) supply and distribution market. Cardinal and O&M, along with one other company not part of this lawsuit, Medline Industries, Inc. (“Medline”), are national broadline distributors, meaning they contract with hospitals and other acute healthcare providers to distribute a full line of med-surg products. This includes about 30 categories, ranging from custom surgical kits, bedpans, and hospital gowns to IV sets and solutions, gloves, and needles and syringes. In total, Cardinal distributes more than 300,000 individual med-surg products, while O&M distributes more than 220,000. 7 J.A. 1380; 10 J.A. 1723 n.2. Many of these med-surg products are heavy or bulky, so Cardinal and O&M use a network of regional distribution centers to store the inventory and then use trucks to make deliveries to the hospitals. Cardinal operates 48 such distribution centers; O&M, 43.

In 1998, Suture Express entered the med-surg market. Instead of competing as another broadline distributor, however, Suture Express specialized in supplying only one category of med-surg: sutures. In 2002, it also began distributing endomechanical supplies, which are used for minimally invasive or laproscopic surgeries. These two product categories, together known as “suture-endo,” differ from other med-surg in that they are typically smaller and lighter. A box of sutures, for example, is smaller than a box of Kleenex tissues and weighs not much more than the empty box.

Studies, Inc. v. Harcourt Brace Jovanovich Legal & Profl Publ'ns, Inc., 63 F.3d 1540, 1545 (10th Cir. 1995) (citing *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992)).

Suture-endo products also have a high-dollar value relative to their size and weight, and there exists a broader variety of these products than of any other single category of med-surg.

Because of these distinctive characteristics of suture-endo, Suture Express utilized a different distribution model. Instead of using regional warehouses and delivering products by truck, Suture Express stocked all its inventory in a single warehouse in Lenexa, Kansas, and then contracted with FedEx to provide overnight delivery to ordering hospitals. By specializing in suture-endo, and by using this new distribution model, Suture Express was often able to have on hand a broader variety of suture-endo than did the broad-line distributors – who, after all, had many more product categories to keep stocked across many more warehouses.

This specialization also allowed Suture Express to achieve very high fill rates. A fill rate is the percentage of “filled” orders by a distributor on a timely basis. If a distributor timely ships nine of the ten items a customer orders, the fill rate for that order is 90%. Fill rates are important to hospitals because they can directly affect when services can be provided: if the suture-endo the hospital ordered yesterday did not come in today as expected, a surgeon might have to delay a surgery. Suture Express has maintained a fill rate higher than 99%, which is often higher than the rates achieved by O&M and Cardinal for the same product categories. *See* 6 J.A. 1127-29.

B. The Market

For purposes of this case, the relevant market is limited to the national distribution of med-surg products to acute care providers. *Suture Express*, 2016 WL

1377342, at *4. That market is divided into two broad categories: (1) suture-endo, which comprises roughly 10% of the overall med-surg market; and (2) “other-med-surg,” which includes everything else – the other 90%. This division is somewhat artificial because no acute care provider needs only suture-endo but not other-med-surg – or vice versa – but it is helpful since Suture Express mainly provides one category but not the other. 7 J.A. 1294.

According to Suture Express’s expert witness, Professor Einer Elhauge, the suture-endo market has grown over time, expanding from about \$1.97 billion in distribution revenues in 2007 to roughly \$2.36 billion in 2012. During that same time period, Suture Express was able to capture between 8% and 10% of the market. 23 J.A. 3069; 2 J.A. 352. In comparison, during these six years, Cardinal’s share of the suture-endo market declined from 30% to 26%, and O&M’s share grew from 40% to 42%. 2 J.A. 352.

In the other-med-surg market, Cardinal and O&M together accounted for the majority of sales to acute care providers. *Id.* at 353. Between 2007 and 2012, Cardinal’s share of other-med-surg sales decreased from 31% to 27%, while O&M’s share grew from 33% to 38%. *Id.*

Broadly speaking, the rest of the med-surg distribution market was generally controlled by (a) Medline, the third national broadline distributor, and (b) regional distributors, such as Seneca Medical, MMS, Inc., and the Claflin Company. These companies are not parties to the case, and their specific shares of the acute provider market are not clear. Their presence, however, is not insignificant. Medline, for instance, doubled the amount of its revenue coming from total med-surg sales between 2008 and 2012. In that last

year, the company's total med-surg revenues approximated roughly half of O&M's and about two-thirds of Cardinal's.² See 11 J.A. 1998, 2021. Likewise, its total suture-endo sales equated to nearly two-thirds of Suture Express's, and to roughly a quarter of Cardinal's and 15% of O&M's suture-endo sales to acute care providers. See *id.* at 1998; 23 J.A. 3069.

Some of the regional distributors have also grown their market shares – though, again, it is not clear from the record by how much or what percentage of the relevant markets they control. Seneca Medical, for example, distributes about 90,000 different products across 12 states, has grown by about 50% in the last half-decade, and controls about 15% of the med-surg market in its region. 8 J.A. 1416-24; see *Suture Express*, 2016 WL 1377342, at *10. Cardinal, O&M, and Suture Express have all won and lost contracts against Medline and certain regional distributors.

There are approximately 4800 acute care providers that are consumers in the med-surg market. 1 J.A. 48. They have three main choices in how they purchase medical supplies. First, they can contract directly with med-surg manufacturers and perform distribution functions themselves. Second, they can contract with distributors, allowing the hospital to place one or two main orders instead of many separate orders across manufacturers. Third, the hospitals and hospital systems can group together to consolidate purchasing power to negotiate favorable contracts with one or more distributors or manufacturers. Of course, these three options are not mutually exclusive.

² "Total" sales includes those made to both acute and non-acute care providers, rather than simply to acute care providers.

Most med-surg distributors use a “cost-plus markup” fee arrangement, by which the customer is charged the cost of the product plus a negotiated fixed percentage distribution fee. There can also be additional costs, and certain rebates, depending on the nature of the customer’s contract with the distributor(s) and/or manufacturer(s). Suture Express, for instance, typically charges a \$7 per day per location freight fee on top of its cost-plus markup.

Between 2007 and 2012, average markups decreased for Cardinal, O&M, and Suture Express, as well as for some of the regional distributors. This was true both in the other-med-surg and the suture-endo markets, though markups in the other-med-surg market were higher throughout the time period, even through the more substantial decline in that market. 2 J.A. 332. Within the suture-endo market specifically, Cardinal’s and O&M’s markups were always higher than Suture Express’s – though, again, all declined somewhat between 2007 and 2012. *Id.* at 361. Finally, overall profit margins for O&M and Cardinal have also declined since 2008. 11 J.A. 2023-24.

C. The Bundling Package

After Suture Express entered the suture-endo market and steadily grew its market share, Cardinal and O&M responded by instituting bundling packages in their contracts. Though these packages took different forms, the overarching result was that the customer would pay more (usually one percent more) for its other-med-surg orders unless it also ordered its suture-endo through the same distributor. For instance, some Cardinal contracts required the customer to purchase all its suture-endo from Cardinal or face markups on its other-med-surg orders; other contracts required the customer to purchase a certain

percentage (e.g., 95%) of all its med-surg from Cardinal or pay price markups. O&M instituted similar packages, making the price of other-med-surg increase if the customer did not also buy its suture-endo through O&M.³ However, in at least some of the contracts, if the hospital purchased its suture-endo directly from the manufacturer, no penalty would be charged; such purchases were exempted from the percentage requirement. *See* 6 J.A. 956; 5 J.A. 830.

Whether viewed as a bundling discount (as Cardinal and O&M officially describe it) or as a penalty (as Suture Express and some internal communications at Cardinal and O&M call it), the effect was that customers ended up paying more overall if they ordered suture-endo through Suture Express and other-med-surg through Cardinal / O&M than if they just ordered everything through their broadline distributor – even though Suture Express charged less for its suture-endo than did Cardinal or O&M. For instance, before the bundling terms were put into effect, one hospital would typically buy about \$750,000 worth of suture-endo per year and about \$7,000,000 of other-med-surg. Buying the former from Suture Express and the latter from Cardinal would save the hospital about \$18,750. But with the bundling term added, Cardinal would increase the hospital's other-med-surg markup by one percent if it did not also buy its suture-endo from Cardinal. Since this would translate into a \$70,000 increase on the hospital's other-med-surg, the \$18,000 in suture-endo savings would not be worth the price of

³ Medline, the other national broadline distributor who is not a party to this case, used similar bundling packages. So did many of the regional distributors, such as Seneca Medical and MMS.

doing business with Suture Express. 24 J.A. 3301; 18 J.A. 2615-16; 2 J.A. 400 n.234.

D. Suture Express's Claim and the Opinion Below

Suture Express sued Cardinal and O&M, alleging that their bundling arrangements constituted an illegal tying practice in violation of federal and state antitrust laws. On cross motions for summary judgment, the district court granted summary judgment for Cardinal and O&M. *Suture Express*, 2016 WL 1377342, at *36. The court held that Suture Express's federal claims failed as a matter of law because it could not establish that either Cardinal or O&M individually possessed sufficient market power in the other-med-surg market that would permit it to restrain trade in the suture-endo market. *Id.* at *25. Even were this not the case, however, the court also held that (a) Suture Express could not establish antitrust injury because it had not shown that competition itself had been harmed, *id.* at *26-28, and (b) Cardinal and O&M cited sufficient procompetitive justifications for the bundling arrangement to overcome any harm caused by any anticompetitive effects resulting from the bundle, *id.* at *28-32. As for the state law claim, the court ruled that Suture Express could not show antitrust injury or that Cardinal's or O&M's bundling practices were designed to impede competition.

On appeal, Suture Express argues that these conclusions were in error. According to Suture Express, the district court erred in its market power analysis by not considering the effects in the tied (suture-endo) market, by not appropriately considering Professor Elhauge's application of the discount-attribution test, by accepting that bundle-to-bundle competition is necessarily procompetitive, and by concluding that reasonable jurors could not find market power based

on evidence about the other-med-surg market. Aplt. Br. at 31-50. Likewise, Suture Express contends that reasonable jurors could find antitrust injury in the suture-endo market and that Cardinal's and O&M's bundling terms were not procompetitive. *Id.* at 50-61. And finally, Suture Express says that the district court erred in its KRTA analysis because reasonable jurors could find that Cardinal and O&M violated the state antitrust law regardless of whether they also violated federal law. *Id.* at 62.

Discussion

We review the district court's grant of summary judgment de novo, making all reasonable factual inferences in the light most favorable to the nonmovant, Suture Express. Fed. R. Civ. P. 56(a); *Multistate Legal Studies*, 63 F.3d at 1545 (citing *Eastman Kodak*, 504 U.S. at 456).

A. Section 1 of the Sherman Act

Section 1 of the Sherman Act prohibits unreasonable restraints of trade. *See* 15 U.S.C. § 1; *Law v. NCAA*, 134 F.3d 1010,1016 (10th Cir. 1998). Tying arrangements do not necessarily constitute illegal restraints. A tie-in exists when a seller conditions its sale of a product (the "tying" product) on the purchase of a second product (the "tied" product). *See Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28,31 (2006). In addition to outright refusals to sell two products separately, tie-ins can also include instances of discount bundling – when a seller charges less for a package of two products linked together than the sum of the prices at which it sells each product individually. *See* X Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1758 (3d ed. 2011) [hereinafter Areeda & Hovenkamp]; *see also Cascade Health Sols.*

v. PeaceHealth, 515 F.3d 883, 900-01 (9th Cir. 2007) (explaining differences and similarities between a package discount and a traditional tie).

Since tying arrangements can be used for good or for ill (i.e., can have procompetitive or anticompetitive effects), the arrangement itself is only problematic when it is used to unreasonably restrain trade. Indeed, “[b]uyers often find package sales attractive; a seller’s decision to offer such packages can merely be an attempt to compete effectively – conduct that is entirely consistent with the Sherman Act.” *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2,12 (1984), *abrogated on other grounds by Ill. Tool Works*, 547 U.S. at 31.

The Supreme Court has explained that illicit tying arrangements occur “when the seller has some special ability – usually called ‘market power’ – to force a purchaser to do something that he would not do in a competitive market.” *Id.* at 13-14. Thus, “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.” *Id.* at 12.

As with most other antitrust claims, tying arrangements can be analyzed using a *per se* rule or a rule of reason. *See id.* at 15-16, 18. The four elements of a *per se* tying violation are: (1) two separate products are involved; (2) the sale or agreement to sell one product is conditioned on the purchase of the other; (3) the seller has sufficient economic power in the tying product market to enable it to restrain trade in the tied product market; and (4) a “not insubstantial” amount of interstate commerce in the tied product is affected.

Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc., 131 F.3d 874, 886 (10th Cir. 1997) (citations omitted).

On Cardinal and O&M's initial motion to dismiss, the district court ruled that Suture Express could not establish a plausible per se tying violation but that it was free to move forward under the rule of reason. *See Suture Express, Inc. v. Cardinal Health 200, LLC*, 963 F. Supp. 2d 1212, 1219-20 (D. Kan. 2013). Under the rule of reason, the plaintiff has the burden of showing that the defendant "unreasonably restrained competition" in violation of the Sherman Act. *Hyde*, 466 U.S. at 29; *see also Fortner Enters., Inc. v. U.S. Steel Corp. (Fortner I)*, 394 U.S. 495, 499-500 (1969) ("A plaintiff can still prevail on the merits whenever he can prove, on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated."). This "necessarily involves an inquiry into the actual effect of the [tying arrangement] on competition." *Hyde*, 466 U.S. at 29.

Beyond this general proposition, caselaw on tying claims under the rule of reason is "amazingly sparse." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 482 (3d Cir. 1992) (en banc). Because the Supreme Court has continued to add more real-market analysis to the requirements of a per se tying claim, though, the rule of reason seems to be mainly different in degree, not necessarily in kind. *See Hyde*, 466 U.S. at 34 (O'Connor, J., concurring). One difference, however, is that the rule of reason is more receptive to procompetitive justifications for the tying arrangement and more willing to examine the effects of that arrangement in both the tying and tied markets. *See generally IX Areeda & Hovenkamp, supra*,

¶¶ 1728b-f, 1730b-c. And, as with the rule of reason in other contexts, there is a burden-shifting component to the analysis. First, the burden falls on the plaintiff to establish a prima facie showing of a substantially adverse effect on competition. If that occurs, then the burden shifts to the defendant to come forward with evidence of procompetitive justifications for the practice. Finally, the burden then shifts back to the plaintiff to rebut the defense by showing either that the proffered justification is illegitimate, that the challenged conduct is not necessary to achieve the legitimate objectives, or that the objectives can be achieved by other means that negatively affect competition far less. *See Law*, 134 F.3d at 1019 (explaining rule-of-reason burden shifting in horizontal price-fixing context); *see also United States v. Microsoft Corp.*, 253 F.3d 34,95-96 (D.C. Cir. 2001) (per curiam) (applying framework to Section 1 tying).

Suture Express argues that Cardinal's and O&M's bundling package meets all four elements of a per se tying claim – and thus, implicitly, that the arrangement unreasonably restrains competition and violates the rule of reason. First, the two product categories involved are other-med-surg (the “tying product”) and suture-endo (the “tied product”). Second, the agreement to sell other-med-surg at a favorable price is conditioned on the purchase of suture-endo. Third, Cardinal and O&M together comprise nearly 70% of the tying (other-med-surg) market, enabling them to restrain trade in the tied (suture-endo) market. Fourth, a significant amount of commerce in the suture-endo market is negatively affected since acute care providers cannot get the better deal at Suture Express due to the bundling packages.

Applying the rule of reason on summary judgment, the district court found genuine factual disputes on the first and second factors,⁴ but ruled for Cardinal and O&M on the third – that Suture Express could not prove that Cardinal or O&M individually possessed sufficient power in the other-med-surg market that would allow either of them to restrain trade in the suture-endo market. The court then went on to consider whether Suture Express had established anti-trust injury (no), whether any justifications for the bundling arrangement existed (yes), and the overall market effects of the bundle (procompetitive). We consider each finding in turn as necessary.

1. Market Power

“[I]n all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.” *Ill. Tool Works*, 547 U.S. at 46. Market power is the power “to force a purchaser to do something that he would not do in a competitive market,” *Hyde*, 466 U.S. at 14, and often takes the form of a seller’s ability “to raise price and restrict output,” *Eastman Kodak*, 504 U.S. at 464 (quoting *Fortner I*, 394 U.S. at 503). To demonstrate market power, a plaintiff “may show evidence of either power to control prices or the power to exclude competition.” *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 966 (10th Cir. 1990) (emphasis, internal quotation marks, and citation omitted). Importantly,

⁴ Again, under the rule of reason, the plaintiff bears the burden of showing that the restraint of trade is, on balance, unreasonable. See *Law*, 134 F.3d at 1019. Thus, the per se “elements” are in fact more akin to “factors” under this analysis, useful for providing a framework forward but perhaps not themselves actual requirements for a plaintiff to establish a prima facie case. See *Fortner I*, 394 U.S. at 499-500.

this power over price can take the form of a tying arrangement if the price could have been raised but the tie was demanded instead. *Fortner I*, 394 U.S. at 504.

Market power is important because if the defendant has substantial power in the tying market, then the tie has the potential of injuring competition by forcing consumers to take the tied product just to get the tying one. See *Hyde*, 466 U.S. at 12. Without power in the tying market, we would expect that a customer would not feel obliged to take the tie, as he could simply go elsewhere to buy the tying and tied products separately. *Town Sound & Custom Tops*, 959 F.2d at 476; *X Areeda & Hovenkamp*, *supra*, ¶ 1734a.

Though the majority of Supreme Court (and our) cases discussing the need to prove market power as part of a tying claim are *per se* cases, we see no reason why the same theoretical underpinning would not make the inquiry relevant under a rule of reason analysis. Even so, we note “that the Supreme Court has suggested that there may be situations in which a specific and detailed showing of market power may not be necessary in a section 1 Rule of Reason case.” *Reazin*, 899 F.2d at 966; see also *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447,460-61 (1986) (explaining in Section 5 Federal Trade Commission Act case that “[Once the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects . . . can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects” (internal quotation marks and citation omitted)). We also acknowledge that there is a circuit

split about whether a tying case examined under the rule of reason presents such a situation.⁵

⁵ Compare *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 511 (3d Cir. 1998) (“Where appreciable tying market power cannot be shown, inquiry into the tied product market cannot be avoided, and the plaintiff therefore has the more difficult burden of showing that the arrangement violated the rule of reason because it unreasonably restrained competition in the tied product market”), *Breaux Bros. Farms, Inc. v. Teche Sugar Co.*, 21 F.3d 83, 88 (5th Cir. 1994) (noting plaintiffs could prevail in absence of showing market power if they proved an “unreasonable restraint of trade”), and *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 799 (1st Cir. 1988) (Breyer, J.) (examining competitive effects under rule of reason after determining plaintiffs had not shown market power to satisfy per se rule), with *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 815 n.2 (6th Cir. 1997) (explaining that “market power in the tying product market is an indispensable requirement under either per se or rule-of-reason analysis” because the two theories have “merged[]”), *Dig. Equip. Corp. v. Uniq Dig. Techs., Inc.*, 73 F.3d 756, 761 (7th Cir. 1996) (“[S]ubstantial market power is an indispensable ingredient of every claim under the Rule of Reason.”), and *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502-03 (11th Cir. 1985) (listing per se elements in rule of reason analysis).

The Supreme Court’s most recent foray into tying analysis did not resolve the issue. In *Illinois Tool Works*, the Court held that a patent in the tying market would no longer be dispositive of market power for purposes of a per se tying claim, and therefore required a plaintiff to prove market power instead of simply relying on the presumption. 547 U.S. at 45. In abolishing that presumption, though, the Court did not necessarily abrogate the rule from *Hyde* applicable to the rule of reason: “When . . . the seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product, an anti-trust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market.” 466 U.S. at 17-18; see *id.* at 29.

We need not weigh in on the dispute at this time, however, given that all parties here assumed that market power was required and therefore presented detailed evidence to support their positions. See Aplt. Br. at 29; Aplee. Br. at 21; *cf. Reazin*, 899 F.2d at 968 n.24. Instead, we will simply assume without deciding that a showing of tying market power is required under the rule of reason.

With this said, we do think that tied market effects can be appropriate evidence of tying market power in a rule of reason case, though it cannot be dispositive. The Supreme Court suggested as much in *Eastman Kodak*, 504 U.S. at 477. In that case, Kodak sold photocopiers, and then also sold (a) replacement parts and (b) repair service. In response to independent service agents offering repair service at a lower price, Kodak restricted the sale of replacement parts to buyers who either also purchased the Kodak repair service or who repaired their own machines. The independent agents then sued Kodak, alleging the company unlawfully restrained competition by tying the sale of service (tied market) to the sale of the parts (tying market). Kodak responded that the arrangement could not be unlawful because it lacked market power in the tying (parts) market since if it raised prices there it would suffer corresponding losses in the photocopier market. The Supreme Court rejected this proposed legal rule and consequently denied summary judgment to Kodak, instead noting that it would at least be reasonable for a jury to infer that Kodak had market power “to raise prices and drive out competition in the aftermarket [i.e., (a) parts and (b) service], since respondents offer direct evidence that Kodak did so.”⁶ *Id.*

⁶ Justice Scalia dissented because (among other reasons) he thought the Court erred in accepting the plaintiffs’ market

Following *Eastman Kodak*, the Ninth Circuit considered evidence of tied-market effects in a Section 2 case, noting that the lower pricing of the tied good – there, primary and secondary health services – by the plaintiff was evidence of an illicit tying arrangement by the defendant, who had tied access to its tertiary health services (tying market) to purchase of its primary and secondary services (tied market). See *PeaceHealth*, 515 F.3d at 915. The court concluded that, “while not dispositive evidence of an illegal tie, it is a permissible inference that a rational customer would not purchase [the defendant’s] allegedly over-priced product in the absence of a tie.” *Id.*

As Cardinal and O&M point out, neither *Eastman Kodak* nor *PeaceHealth* are quite on all fours with this case because the defendants in those cases exercised a near-monopoly in the tying market. Aplee. Br. at 38-40; see *Eastman Kodak*, 504 U.S. at 464 (Kodak parts available almost “exclusively” from Kodak); *PeaceHealth*, 515 F.3d at 915 (“PeaceHealth was the only provider of tertiary services in the relevant geographic market.”). Thus, they contend, the direct evidence was used either as further support of coercion, as in *PeaceHealth*, or to reject an economic theory and proposed rule of law, as in *Eastman Kodak*, but it was not used to demonstrate market power.

definition and in its analysis of aftermarket effects in the per se claim. But, supporting the use of direct evidence under the rule of reason, he wrote: “I would instead evaluate the aftermarket tie alleged in this case under the rule of reason, where the tie’s *actual* anticompetitive effect in the tied product market, together with its potential economic benefits, can be fully captured in the analysis. Disposition of this case does not require such an examination, however, as [plaintiffs] apparently waived any rule-of-reason claim they may have had in the District Court.” *Eastman Kodak*, 504 U.S. at 502-03 (Scalia, J., dissenting) (citation omitted).

These distinctions, however, only confirm that we should not consider direct evidence of tied market effects as conclusive – a warning the Supreme Court has also issued. See *U.S. Steel Corp. v. Fortner Enters., Inc. (Fortner II)*, 429 U.S. 610, 618 (1977) (finding evidence that customers paid a noncompetitive price for the tied good insufficient by itself to support illicit tying claim). That the evidence is not dispositive, however, does not mean it should not be considered. See *PeaceHealth*, 515 F.3d at 915. Since market power is the power to “force a purchaser to do something that he would not do in a competitive market,” *Hyde*, 466 U.S. at 14, if a purchaser has indeed been coerced into doing something he would not normally do, why would it not follow that this coercion could be (though is not necessarily) because of market power in the tying market? And under the rule of reason, why should such evidence not at least be considered, especially when (as here) there exists a genuine issue of material fact as to coercion?⁷ See *Suture Express*, 2016 WL 1377342, at *17. We think it should be.

At last, then, we turn to the evidence presented in this case and to the district court’s consideration of it. The district court held that *Suture Express* had not met its burden of producing evidence that demonstrated Cardinal’s or O&M’s ability to exclude com-

⁷ Cardinal and O&M also argue that *PeaceHealth* is inapposite because the court’s discussion on direct effects in the tied market took place during its discussion of economic coercion – i.e., whether the sale of one product was conditioned on the purchase of another. Aplee. Br. at 40. This is true, but it does not mean the two elements were unrelated. In fact, they were: the Ninth Circuit described its inquiry as whether “the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product.” *PeaceHealth*, 515 F.3d at 913.

petition or control price. As to the first, the court found that neither of the companies could exclude competition in the tying market since there was evidence the opposite was occurring, with regional and national competitors growing and expanding during the pertinent time period. *See id.* at *24. Further, since Medline and the regional distributors also offered similar bundling packages, competition was not excluded in the tied market, either: it simply took the form of bundle-to-bundle competition. *Id.* (Though the district court did not label it as such, this is, of course, direct evidence of tied market effects.) These bundling packages, the court also found, did not result in prohibitively high switching costs for customers, which could be indicative of market exclusion. Though some customers noted that the cost of switching distributors required an investment of time and overhead, the court concluded that “the record is filled with examples of customers who, in fact, have switched distributors on a regular basis.” *Id.* at *22.

As for pricing, the court found that evidence of Cardinal’s and O&M’s declining profit margins in the other-med-surg market revealed that they did not have the ability to control prices in that market. *Id.* at *25. The court thought the evidence showing consolidation in the buyer (i.e., acute care provider) market instead demonstrated enhanced bargaining power, which could also help explain Cardinal’s and O&M’s inability to control pricing. In sum, the court wrote, “the undisputed facts demonstrate a market where O&M and Cardinal compete vigorously against Medline, certain regional distributors, and each other. And, after three or four years, O&M and Cardinal can retain only about half of their acute care customers. These facts preclude any triable dispute about defendants’ market power.” *Id.*

This is persuasive evidence of a lack of market power. Suture Express contends, though, that it is not enough to settle the question as a matter of law. For instance, it notes that tying market share is very relevant to the inquiry, and contends that even if 31% and 38% market shares (Cardinal's and O&M's high points, respectively) would not be enough to win under the per se rule, it should nevertheless be enough to survive summary judgment under the rule of reason. See Aplt. Br. at 40 (citing *Breaux Bros.*, 21 F.3d at 87).

Perhaps. Though the Supreme Court has noted that a hospital's 30% market share lacked the "kind of dominant market position that obviates the need for further inquiry into actual competitive conditions," *Hyde*, 466 U.S. at 27, courts have used that benchmark as a floor for plaintiffs seeking to prove a per se claim, e.g., *Grappone*, 858 F.2d at 796. In a rule of reason case, it is reasonable to conclude that other indicia can tip the balance in favor of a showing of market power, even if one begins with a lower showing of market share. See *Breaux Bros.*, 21 F.3d at 87-88 (allowing plaintiff to proceed under rule of reason when it showed that defendant controlled 17.5% of the tying market). But just as "market share alone is insufficient to establish market power," *Reazin*, 899 F.2d at 967 (citations omitted), it is also insufficient to counteract the other market realities present here that point to increased competition and lower prices.

Suture Express responds that this other evidence is actually misleading. First, it contends that Professor Elhauge's calculations that between 56% and 64% of the suture-endo market was bound by contracts with Cardinal and O&M and thus could not buy suture-endo from Suture Express constitute direct evidence of Cardinal's and O&M's power over price. See Aplt. Br.

at 37. This is because, it says, “in the but-for world without the challenged conduct,” buyers would have bought suture-endo from Suture Express and paid less. *Id.* at 38.

Second, Suture Express argues that bundle-to-bundle competition does not itself demonstrate an inability to raise prices or exclude competition. It could be, for instance, that all the firms offering the bundle are inefficient producers of one of the product categories. This would make consumers worse off in a world without the more efficient specialist. *See Amicus Br.* at 10-14.

Third, Suture Express points to Professor Elhauge’s analysis under the discount attribution test as demonstrating coercion and therefore market power. *Aplt. Br.* at 48-50. Under this test, the full amount of the bundled discount is allocated to the tied product, and if the resulting price of that product is below the defendant’s incremental cost to produce it, then the bundle is possibly coercive. *See PeaceHealth*, 515 F.3d at 909-10. Here, Professor Elhauge concluded that “77% of [Cardinal’s and O&M’s] customers with bundled penalties had incremental prices on Suture/Endo that were below cost.” 6 J.A. 1009.

We have problems accepting that these arguments reveal significantly probative evidence by which a jury could find that Cardinal or O&M has enjoyed market power. For instance, Suture Express’s contention that the acceptance of the package by 56-64% of the suture-endo market, though certainly evidence to consider, is ultimately unavailing. As the Supreme Court has explained, “this approach depends on the absence of other explanations for the willingness of buyers to purchase the package.” *Fortner II*, 429 U.S. at 618 n.10. And here, other explanations abound – such as

the fact that many of the acute care purchasers simply preferred consolidating their purchases and having fewer distributors to deal with. *See Suture Express*, 2016 WL 1377342, at *7-8 (providing examples of why hospitals switched between med-surg providers); 10 J.A. 1746 n.34 (deposition testimony of customers switching to broadline distributors for consolidation reasons); *see also It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676,688 (4th Cir. 2016) (“[T]he productive synergies created when sellers package complementary products . . . obviously saves distribution and consumer transaction costs.” (internal quotation marks and citation omitted)).

Additionally, that Suture Express and Cardinal / O&M charged different prices does not itself show power over price. To do that, one would have to look at the costs borne by each defendant and its margins. And since the entire reason that Suture Express's business model works is that it is able to distribute suture-endo alone at a lower cost than Cardinal and O&M can distribute other-med-surg and suture-endo together, it is logical that Cardinal's and O&M's costs would be higher. That is not a result of market power, but of different distribution models.

Nor does one have to accept the theoretical position that bundle-to-bundle competition necessarily creates a competitive market to conclude that there is sufficient evidence here of actual competition that precludes a finding of market exclusion. Medline has more than doubled its med-surg sales between 2008 and 2014. Regional distributors have likewise grown. And all three parties compete with and have won and lost contracts to these other distributors. A market in which competitors are growing and margins are

shrinking is inconsistent with the claim that Cardinal and O&M can exclude competition and control prices.

As for the discount attribution test, the district court found that there existed a genuine issue of fact regarding the conditioning element, and we do not disagree with that assessment. But it is this element, not market power, to which the discount attribution test would be applicable. And this is only if the test can properly be used to show coercion by a non-monopolist, a proposition for which we can find no support in the caselaw. *Cf. Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 270-74 (6th Cir. 2015) (applying test in Section 1 tying claim as “standard for coercion” to defendant with a 100% market share); *PeaceHealth*, 515 F.3d at 906 (applying test to near-monopolist in Section 2 attempted monopolization claim); *X Areeda & Hovenkamp*, *supra*, ¶ 1758a (describing discount attribution test as more effective than the buyer behavior test because the latter “does not measure coercion”). Though market power and coercion are of course related, that there is a factual dispute about one does not itself raise a dispute about the other.

In sum, we do not think a reasonable jury could conclude that either Cardinal or O&M possesses market power sufficient to force the tie. Even if there were a genuine issue as to market power, however, or even if a showing of market power were not required under the rule of reason, we do not think Suture Express has carried its burden of showing antitrust injury.

2. Antitrust Injury

As part of any claim under Section 1 of the Sherman Act, the plaintiff must establish “an injury of the type the antitrust laws were intended to prevent.” *Cohlmiia v. St. John Med. Ctr.*, 693 F.3d 1269, 1280 (10th Cir.

2012) (citation omitted). This means that the plaintiff must show the challenged restraint actually injured competition, not merely a competitor. *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 965 (10th Cir. 1994); *see also Law*, 134 F.3d at 1017.

Suture Express contends that Cardinal's and O&M's anticompetitive behavior did just this. As evidence that it was the suture-endo market as a whole that was harmed, Suture Express offers the report of its expert witness, who examined the contract terms for a number of the largest hospital systems serviced by Cardinal and O&M. Sales under these contracts comprised roughly half of all the other-med-surg sold by the two companies. *See* 2 J.A. 361-94.⁸ Professor Elhaug concluded that from 2007 to 2012, between 59% and 79% of suture-endo sales Cardinal made to acute care customers were under contracts that made pricing of other-med-surg contingent in some way on the purchase of suture-endo. *Id.* at 417. For O&M, those percentages ranged from 95% to 97%. *Id.* Multiplying these percentages by each company's share of the suture-endo market, Professor Elhaug calculated that Cardinal's bundling arrangements restrained between 18-22%, and O&M's between 38-42%, of the suture-endo market. Thus, according to Suture Express, 56-64% of the suture-endo market was restrained by their contracts from purchasing suture-endo from Suture Express. *Aplt. Br.* at 36. These foreclosed customers ended up paying \$36 million more for suture-

⁸ Professor Elhaug explained that he could not examine 100% of Cardinal's and O&M's contracts because of the arduousness of the task (there were thousands of individual contracts) and because neither defendant produced all of the agreements. 2 J.A. 362, 380-81.

endo than they would have had they bought from Suture Express. *Id.* at 19-20; 2 J.A. 420-21.

This, Suture Express says, is the crux of the antitrust harm inquiry, which it frames as “whether, in the but-for world without the challenged conduct, buyers would have paid less than they paid in the actual world with the conduct.” *Aplt. Br.* at 38. The answer, it provides, is yes: “Absent Defendants’ bundling terms, hospitals would have purchased from Suture Express at its lower price.” *Id.* at 35.

But there is a problem with this conclusion: it fails to note that the “but-for world” existed for almost half the market (since 36-44% of the market was not constrained), yet less than half of that market “purchased from Suture Express at its lower price.” In 2007, Suture Express accounted for only 16% of unrestrained suture-endo sales; that number increased to 41% in 2010, and fell to 24% in 2012. 2 J.A. 414; *Aplt. Br.* at 18. We note this not because we think that every unrestrained purchase would need to take advantage of the lower price offered by Suture Express for its harm theory to be viable, but because the formulation as presented raises questions about the “but-for world” it models compared to the real-world market that actually existed – and whether it was really competition that was harmed instead of simply one competitor.⁹

⁹ Suture Express points to *Fortner I* for the proposition that it need only show that “any appreciable number of buyers” is affected, not the entire market. *Aplt. Br.* at 36 (quoting 394 U.S. at 504). While (again) not suggesting that Suture Express must demonstrate harm to 100% of the suture-endo market, it is worth pointing out that this discussion by the Supreme Court concerned what constitutes “sufficient economic power” in the tying market – not what counts as harm to competition in the tied market. *See* 394 U.S. at 502-04.

Additionally, as the district court understood, simply comparing the average price and mark-ups between the three competitors fails to show that competition itself was harmed across the market. Suture Express, 2016 WL 1377342, at *27. Again, the record tends to show the opposite: overall med-surg revenues increased between 2007 and 2012, even as increased competition drove Cardinal's and O&M's profit margins down.

Accordingly, we do not think Suture Express has demonstrated substantially adverse effects on competition caused by Cardinal and O&M. What the Supreme Court said in a Section 2 context remains true here: "The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993). The evidence in this case – the decrease in markups charged, the consolidation of buyer power, the growth of regional competitors, the success of Medline – reveals a med-surg market that is becoming more, not less, competitive. There is simply not enough probative evidence for a jury to find that Cardinal's or O&M's bundling practices constitute an injury of the kind the antitrust laws are intended to prevent. Since we affirm the district court on this point, we need not continue on to an examination of procompetitive justifications offered to support the bundling practices.

B. Section 3 of the Clayton Act

Section 3 of the Clayton Act prohibits persons engaging in commerce from making a lease or sale of goods "where the effect of such lease, sale, or contract

for sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.” 15 U.S.C. § 14. Although the language differs from that of the Sherman Act, “at least for allegations of unlawful tying arrangements, the required showings under both [acts] are identical.” *Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290, 1299 (10th Cir. 1989). Because we conclude that its Sherman Act claim should not be reinstated, Suture Express’s Clayton Act claim likewise fails. Accordingly, we do not reach Cardinal and O&M’s argument that the Clayton Act does not even apply here because Suture Express has challenged their distribution services rather than any actual goods they provide. Aplee. Br. at 60 n.24.

C. Kansas Restraint of Trade Act

The Kansas Restraint of Trade Act prohibits all agreements or contracts “made with a view or which tend to prevent full and free competition in the . . . sale of articles imported into [Kansas]” and those “designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles.” Kan. Stat. Ann. § 50-112. Though the KRTA was originally enacted in 1897, Kansas courts have recognized that it “remains largely undeveloped.” *O’Brien v. Leegin Creative Leather Prods., Inc.*, 277 P.3d 1062, 1068 (Kan. 2012). The Kansas Supreme Court has, however, emphasized that its law is not the same as its federal counterparts. *Id.*

In the leading case interpreting the KRTA, the plaintiffs alleged vertical and horizontal price-fixing under Kan. Stat. Ann. §§ 50-101 and 51-112. *Id.* at 1067, 1070. In its analysis, the Kansas Supreme Court explained that the KRTA does not provide for the use of the rule of reason, *id.* at 1083, but that it still requires a showing of antitrust injury, *id.* at 1075.

Such an injury requirement, the court continued, was adopted “from federal antitrust jurisprudence” and “equates to the Kansas concept of causation, or the requirement that a plaintiff’s theory of damages . . . correspond to an economic effect that the statute or case law rule invoked as the basis for liability aims to prevent.” *Id.* (internal quotation marks and citation omitted). Thus, in the case before it, the court held that the plaintiffs had raised a genuine issue of material fact because they had shown “that consumers actually paid prices for [the defendant’s] goods inflated by its pricing combinations or arrangements with retailers.” *Id.* at 1078.

Here, as we have noted above, Suture Express has not carried its burden of showing a legally viable antitrust injury “of the type the antitrust laws were intended to prevent.” See *Cohlmia*, 693 F.3d at 1280. We do not think that result changes under the KRTA.

Finally, Suture Express points out that the Kansas statute prohibits not only agreements that actually harm full and free competition, but also acts that are made “with a view or which tend to prevent” such competition. Kan. Stat. Ann. § 50-112. This is true. As the *O’Brien* court recognized, “a plaintiff [under the KRTA] does not have to show that the arrangement actually succeeds in increasing prices.” 277 P.3d at 1075. But Suture Express has not met this burden, either. The documents it cites showing Cardinal’s and O&M’s internal discussions of the competitive threat Suture Express posed and their need to respond show only that the companies realized they needed to adapt to the changing market in order to compete more effectively. The communications do not raise a genuine issue of material fact about whether Cardinal or O&M

intended to prevent full and free competition – only that they themselves wanted to engage in it.

Conclusion

We AFFIRM the judgment of the district court. Viewing the evidence in the light most favorable to Suture Express, we do not think the company can survive summary judgment under Section 1 of the Sherman Act, Section 3 of the Clayton Act, or the Kansas Restraint of Trade Act. There simply is not enough probative evidence by which a reasonable jury could find that Cardinal's and O&M's bundling arrangement unreasonably restrained trade in violation of federal or state antitrust law.

Finally, we GRANT the parties' motions to seal the unredacted versions of their briefs and volumes 2-25 of the joint appendix. The common-law right of access to judicial records is "not absolute," and we may seal documents if the public's right of access is outweighed by competing interests. *JetAway Aviation, LLC v. Bd. of Cty. Comm'rs*, 754 F.3d 824, 826 (10th Cir. 2014). Simply because the judicial records are subject to a protective order in the district court, as they are here, does not mean that we must follow suit; instead, the parties must present "a real and substantial interest that justifies depriving the public of access to the records that inform our decision-making process." *Id.* (citation omitted). Cardinal, O&M, and Suture Express have done this. The joint appendix contains confidential documents, financial information, and contracts, the confidential nature of which outweighs the public's right of access.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

[Filed 04/07/16]

Case No. 12-2760-DDC-KGS

SUTURE EXPRESS, INC.,

Plaintiff,

v.

OWENS & MINOR DISTRIBUTION, INC.,
AND CARDINAL HEALTH 200, LLC,

Defendants.

AMENDED MEMORANDUM AND ORDER

NOTICE: On March 3, 2016, the Court entered a Sealed Memorandum and Order (Doc. 310) ruling on the parties' summary judgment motions. The Court also entered a Notice of Unsealing and Order (Doc. 312) that advised the parties that the Court intended to unseal the entire Memorandum and Order unless the parties filed a notice identifying the portions of the Memorandum and Order that qualify to remain under seal. In response to the Court's order, the parties filed a Joint Notice of Portions of Memorandum and Order to Redact (Doc. 318). The Court has considered the parties' submissions and issues this Amended Memorandum and Order. As identified below, the Court has removed certain references to specific customers and membership associations and confidential business information identified in the sealed version of the

Memorandum and Order because the parties have demonstrated that “countervailing interests heavily outweigh the public interests in access.” *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007) (citation and internal quotation marks omitted). Moreover, the Court does not find the identity of these entities and the specific confidential business information essential to its analysis. Instead, the Court references these entities and information generically in this publically-filed Amended Memorandum and Order. If the specific identities of the entities or confidential business information should become important to the analysis at some later stage of the proceedings, the sealed Memorandum and Order (Doc. 310) contains them.

This case arises under federal and state antitrust laws. Plaintiff Suture Express, Inc. (“Suture Express”) alleges that defendants Owens & Minor Distribution, Inc. (“O&M”) and Cardinal Health 200, LLC (“Cardinal”) have violated antitrust laws by tying and bundling the sale of suture and endomechanical (“endo”) distribution to the sale of other medical-surgical (“med-surg”) distribution. This matter comes before the Court on defendants O&M and Cardinal’s Motion for Summary Judgment (Doc. 253) and plaintiff Suture Express’ Partial Motion for Summary Judgment (Doc. 254). After considering the parties’ arguments, the Court grants defendants’ Motion for Summary Judgment and denies Suture Express’ Partial Motion for Summary Judgment.

I. Undisputed Facts

The following facts are either stipulated by the parties in the Pretrial Order (Doc. 251), or are uncontroverted.

Med-Surg Product Distribution

Med-surg products are single-use, disposable products that healthcare providers use on a regular basis. Thousands of med-surg products exist. They fall into about 30 categories that include, for example, custom surgical kits, packs and trays, IV sets and solutions, wound staples, gloves, bedpans, hospital gowns, woven and nonwoven goods, needles and syringes, sutures, endosurgical and endoscopic products, respiratory products, adhesives, bandages, dressings and sponges, and incontinence products.

Suture Express distributes only two categories of med-surg products to healthcare providers: sutures and endo products. Suture Express also provides distribution services to health care providers, including clinics, ambulatory surgery centers, and acute care facilities.

O&M and Cardinal are “broadline distributors” of med-surg products, which means that they distribute a full line of med-surg products in the 30 categories to healthcare providers. This includes suture and endo products. O&M and Cardinal are two of three national broadline distributors in the United States. The third national broadline distributor is Medline Industries, Inc. (“Medline”), which is not a party to this case. O&M and Cardinal, when measured by sales volume, are the two largest distributors of med-surg products to acute care providers in the United States. Cardinal currently distributes more than 300,000 med-surg products. O&M distributes more than 220,000 med-surg products.

Broadline Distributors

National broadline med-surg distributors, like O&M and Cardinal, acquire med-surg products in bulk from

the manufacturers of those products. They store, keep in inventory, and distribute those products to health-care providers through a network of distribution centers spread across the country. The distribution centers are large warehouse-like facilities that, typically, are located within several hours' drive from any given customer's hospital. O&M operates 43 distribution centers nationwide; Cardinal operates 48.

O&M and Cardinal staff each of their local distribution centers with warehouse personnel who pick, pack, and load products onto pallets and then onto trucks, which deliver the products to customers on a regular schedule. O&M and Cardinal use fleets of trucks to make those deliveries. Truck delivery is the primary delivery method that O&M, Cardinal, and other broad-line distributors use for med-surg distribution.

Distributors' Relationships With Purchasers

Healthcare providers may contract directly with one or more med-surg distributors. They typically have a primary distributor who provides the large majority of their med-surg needs. Some of O&M and Cardinal's contracts define "primary distributor" to mean that the customer purchases a contractually-specified percentage of med-surg (including suture and endo) from the distributor. Also, healthcare providers sometimes use secondary distributors to fill other product orders for a variety of reasons, including times when the primary distributor cannot provide a requested product.

Healthcare providers also may belong to one or more Group Purchasing Organizations ("GPOs"), Integrated Delivery Networks ("IDNs"), Regional Purchasing Cooperatives ("RPCs"), member alliances, or other buying groups that have consolidated the purchasing power of their members to negotiate contracts with

one or more med-surg distributors. The majority of acute healthcare providers are members of one or more GPOs. GPO members often purchase med-surg distribution from a distributor under the terms of the GPO's agreement with that distributor. And GPO agreements often include volume discount tiers. Acute healthcare providers evaluate, change, and join new GPOs in an effort to obtain more favorable contract terms with med-surg distributors.

RPCs and member alliances are coalitions of GPO members that join together to negotiate contract terms with med-surg distributors. RPCs, member alliances, or even individual hospitals sometimes negotiate for different terms than those found in GPO distribution contracts accessible to them. These groups may enter into a "local contract" with a med-surg distributor, which could represent an amendment to a national GPO contract or an entirely different contract.

Alternatively, some hospital systems use a self-distribution strategy. This means that they purchase products directly from manufacturers and perform distribution functions themselves. Self-distribution customers still may use outside distributors for services that they choose not to handle themselves. But some purchasers recognize the disadvantages of purchasing med-surg products directly from a manufacturer instead of using a distributor. Using a manufacturer instead of a distributor may increase a purchaser's administrative and staff costs because the purchaser must establish separate purchasing relationships with each manufacturer and manage receipt of separate shipments from each manufacturer. In contrast, a purchaser who uses a distributor can purchase multiple manufacturers' goods from that one

distributor and receive a shipment containing those goods from multiple manufacturers.¹

Some med-surg distributors testified in their depositions that healthcare providers have consolidated recently, thereby creating larger hospital systems. This has consolidated buying power, and, as some med-surg distributors testified, produced a more competitive marketplace.

Revenues

Med-surg distributors generate income from two sources: (1) funding paid by manufacturers (“vendor funding”); and (2) “markups,” or distribution fees paid by purchasers. Many manufacturers of med-surg products pay distributors various forms of vendor funding, and generally, it is paid as a percentage of the underlying product cost.

Med-surg distributors, including Cardinal, O&M, and Suture Express, acquire products from manufacturers at a standard list price. Then, they charge most customers on a cost-plus basis, which means that they add a negotiated, fixed percentage distribution fee (“cost-plus markup”) to the product cost agreed to by the customer and the manufacturer.² Sometimes, O&M and Cardinal include the cost of freight in their cost-plus markup. Certain regional distributors, such as Seneca Medical and MMS Inc., LLC, also offer cost-plus markup pricing. As an alternative, some broad-line distributors, including Cardinal and O&M, charge some customers a service fee based on the specific

¹ This description is a paraphrase of the parties’ Stipulated Fact No. 20 (Doc. 251-1 at 5).

² The parties recite these facts in Stipulated Fact No. 27 (Doc. 251-1 at 6).

distribution services received (“activity-based fee”). The services covered by med-surg distribution contracts differ from customer to customer.

Suture Express’ Entry into Suture and Endo Distribution

Suture Express opened its business in 1998. It developed a business model to respond to the differences between suture and endo distribution and other med-surg distribution. Sutures and endo products account for about 10% of the med-surg supplies distributed in the United States to acute care providers. No acute care providers need just sutures and endo products but no other med-surg products. And no acute care providers need other med-surg products but not sutures and endo products. However, more stock keeping units (SKUs) exist for sutures than any other category of med-surg products. And while suture and endo products are smaller and lighter than most other med-surg products, they have a high-dollar value relative to their size and weight. Because the products are lightweight and small volume—“low cube”—a distributor easily can ship them in a FedEx box to an acute care provider.

Suture Express has one, centralized warehouse located in Lenexa, Kansas. There, it stocks a large variety of suture and endo SKUs, including “slower moving” SKUs. It ships those products from its warehouse across the country via overnight delivery by FedEx (or by courier within the Kansas City metropolitan area). Suture Express imposes no requirements on its customers for order size or frequency. But typically it charges a separate freight fee. This fee is often \$7 per day/per location on top of its cost-plus markups. But Suture Express may charge some customers less, more, or not at all for freight. When the

\$7 per freight fee is added, it increases a customer's actual distribution costs above the cost-plus markup, adding, on average, one quarter of a percent (0.25 %) to the markup.

Suture Express achieves high "fill rates" for its customers. A "fill rate" represents the percentage of times that a distributor can fill a customer's order on a timely basis. For example, if a distributor ships nine of ten items a customer orders, then the fill rate for that particular customer is 90%. Many acute care customers demand high fill rates for suture and endo distribution. Historically, Suture Express has maintained a fill rate higher than 99%, and, in many instances, has higher fill rates than O&M and Cardinal.

Market Definitions and Market Share

Market definitions are an important piece of anti-trust analysis. Here, the parties largely agree on the summary judgment definitions of the relevant geographic and product markets. They agree that: (1) the geographic market is national in scope, that is, limited to the United States, and (2) the product market is for distribution of med-surg products to acute care customers (*i.e.*, hospitals).³

³ O&M and Cardinal do not dispute Suture Express' Statement of Fact No. 34: "For purposes of this case, the relevant markets are appropriately limited to distribution of Med-Surg products to acute care customers (*i.e.*, hospitals)." Doc. 269 at 21 (Suture Express' Memo. in Support of Partial Summary Judgment); Doc. 304 at 2 (stating that Suture Express' Statement of Fact No. 34 is not disputed for purposes of summary judgment).

O&M and Cardinal assert in their summary judgment motion that the relevant market is for distribution *services*, rather than the physical items themselves. Doc. 266 at 6; Doc. 303 at 6 (sealed corrected version). Suture Express disputes this statement of

Industry-wide med-surg (including suture and endo distribution) revenues increased year-over-year during the relevant period, 2007 to 2012. From 2007 to 2012, O&M's sales of other med-surg products accounted for 32–38% of the total distribution of other med-surg products to acute care customers. In 2012 (the last year for which data is available), O&M had 38% of those sales. O&M attributes over half its growth during these five years to acquisitions of two smaller distributors and the addition of two large hospital systems as customers. The remainder of O&M's growth came from acquiring new customers and organic growth from existing customers. From 2007 to 2012, O&M's sales accounted for 40–43% of the total sales of distribution of suture and endo products to acute care customers. In 2012 (the last year for which data is available), O&M had 42% of those sales.

From 2007 to 2012, Cardinal's sales accounted for 27–31% of the total distribution of other med-surg products to acute care customers. In 2012 (the last year for which data is available), Cardinal had 27% of those sales. From 2007 to 2012, Cardinal's sales accounted for 26–31% of the total distribution of suture and endo products to acute care customers. In

fact, arguing that the relevant market is for the distribution of physical items because med-surg distributors provide the actual products in addition to distribution-related services. Doc. 280 at 7. The Court views this statement of fact in the light most favorable to Suture Express, as it must when it considers defendants' motion for summary judgment. The Court therefore concludes that the relevant market is the distribution of med-surg products. Moreover, O&M and Cardinal fail to dispute that characterization of the relevant market in their response to Suture Express' motion for partial summary judgment.

2012 (the last year for which data is available), Cardinal had 26% of those sales.

Suture Express' market share in the suture and endo distribution market has varied between 8% and 10% from 2007 to 2012. In 2010, Suture Express' market share was 10% but decreased to 8% by 2012.

O&M and Cardinal's Implementation of Bundling Contract Terms

Between 1998 and about 2008, Suture Express successfully grew its business. Both O&M and Cardinal engaged in separate, internal communications about the increasing threat that Suture Express, because of its superior fill rates and low pricing, posed to their businesses. Around the same time, O&M and Cardinal adopted contractual terms that made pricing contingent on a customer's purchase of suture and endo distribution through them.

Cardinal implemented these contractual terms in different ways. In some contracts, Cardinal imposes markups on med-surg distribution unless the customer purchases 100% of its suture and endo products from Cardinal. Other Cardinal contracts give Cardinal the right to renegotiate the distribution markup and the payment terms provided in the contract if the customer stops buying its suture and endo products from Cardinal. Yet other agreements provide for higher markups on med-surg distribution if the customer reserves the right to purchase suture and endo products from other distributors. And, some agreements make markups on med-surg distribution contingent on the customer purchasing a certain percentage (in some cases, 95%) or a minimum dollar amount (specifically tailored to that customer) of all med-surg products from Cardinal. Suture Express' expert, Professor

Einer Elhauge, calculated that almost 70% of Cardinal's contracts included at least one of the following contract terms: (1) an 80%+ med-surg distribution purchase requirement, or (2) a suture and endo distribution volume purchase requirement.

Cardinal also included similar contract terms in standardized agreements that it negotiated with GPOs. Currently, Cardinal's standardized agreements with the five largest GPOs have contingent pricing terms or impose markups if the customer fails to purchase a certain percentage (in some cases 100%) of suture and endo distribution from Cardinal. Many of Cardinal's customers have not entered into individually-negotiated contracts. Instead, they have purchased med-surg distribution from Cardinal under a GPO standardized agreement.

O&M uses similar contract strategies. O&M includes contractual terms in its customer agreements that allow O&M to increase the price charged for other med-surg distribution if the customer switches suture and endo distribution to another distributor. For instance, one version of O&M's contracts imposed a markup on other med-surg distribution if the customer purchased suture and endo distribution from a distributor other than O&M. Other O&M agreements rendered markups on all med-surg distribution contingent on the customer purchasing a high percentage of med-surg distribution from O&M. Other O&M agreements required the customer to purchase a minimum amount (measured in dollars) of total med-surg distribution. That minimum amount was tailored to that particular customer so that the customer would violate the contract if it switched all of its suture and endo distribution to another distributor. And, in other

agreements, O&M made markups contingent on customers purchasing the top 10 Healthcare Products Information Services categories (which include suture and endo) from O&M. Based on his review of O&M contracts, Professor Elhaug opined that almost every agreement included a term allowing O&M to increase prices on other med-surg distribution if the customer switched its suture and endo distribution to another distributor, such as Suture Express.

O&M also included similar contract terms in standardized agreements that it negotiated with GPOs. Many O&M customers who did not enter into individually-negotiated contracts purchased med-surg distribution from O&M under a GPO standardized agreement. O&M's current standardized agreements with the five largest GPOs impose markups if the customer fails to purchase a certain percentage of suture and endo distribution from O&M.

Typically, O&M, Cardinal, and Suture Express' contracts with customers have three to five year terms. Many of O&M and Cardinal's contracts include provisions allowing the customer to terminate without cause after giving notice of six months or less. Although customers may have the ability to change distributors under their contracts, customers have described the process as a time consuming one and not insignificant. Those customers also recognize the overhead costs and investment required to switch distributors. Despite the complexity of switching distributors, about one-half of Cardinal's acute care customers continue to do business with Cardinal within three or four years of initiating the relationship. The same is true for O&M.

Effect of O&M and Cardinal's Contract Terms as Analyzed by Plaintiff's Expert

Suture Express' expert, Professor Elhauge, analyzed the contract terms for 102 of O&M and Cardinal's customers. He created this pool of sample contracts by identifying Cardinal's 50 largest customers and O&M's 52 largest customers. Together, these 102 customers account for 3,271 separate acute care facilities. The 50 Cardinal customers account for 53% of Cardinal's med-surg sales. And the 52 O&M customers account for 47% of O&M's med-surg sales. After reviewing these 102 contracts, Professor Elhauge concluded that between 2006 and 2013, O&M made about 98% of its suture and endo sales and Cardinal made about 71% of its suture and endo sales under a contract containing one of the contractual terms described above—that is, one that makes pricing contingent on the purchase of suture and endo distribution through them.

Professor Elhauge also analyzed cost data produced by Cardinal to calculate the minimum markup that an equally efficient suture and endo distributor would have to charge to remain in the market. Professor Elhauge then used data about the contingent pricing terms in Cardinal's contracts to determine how often Cardinal's incremental suture and endo markups fell below the minimum markups. To put it another way, Professor Elhauge examined how often the contract terms produced sales of suture and endo distribution products below cost. For Cardinal, he concluded that customers with contracts containing the bundling provision paid an incremental price lower than the minimum markup 67% of the time. For O&M customers⁴

⁴ O&M did not produce cost data sufficient for Professor Elhauge to perform a similar calculation for its markups. So,

with such contracts, Professor Elhauge opined that the resulting incremental price was lower than the minimum markup 85% of the time.

Professor Elhauge also applied an economic test to determine whether bundled discounts have the same economic effect as a tying arrangement. Applying that test, Professor Elhauge used sales data from Suture Express, Cardinal, and O&M to calculate whether purchases of Suture Express' suture and endo distribution by customers who purchased other med-surg distribution from O&M and Cardinal (*i.e.*, customers who "broke the bundle") are less than 10% of the sum of those purchases plus purchases of defendants' suture and endo distribution by customers who accepted the bundle.⁵ Professor Elhauge determined that this ratio ranged from 3% to 7%, depending on the year.

Professor Elhauge also examined Suture Express' performance among defendants' customers who had entered into contracts containing the bundling terms and compared them to customers who were not bound by contracts containing the bundling terms. Professor Elhauge determined that Suture Express' market share among customers who had entered into contracts with bundling terms ranged from 2% to 6% between 2006 and 2013, while its market share for customers not bound by the contractual bundling terms ranged from 13% to 41% for the same time period. From his conclusions, Suture Express' market

Professor Elhauge relied on Cardinal's cost data to perform the analysis for O&M.

⁵ See Doc. 262-1 at 148 (Elhauge report at ¶ 154) (explaining that Professor Elhauge used this formula because it is "a prominent economic test" used to determine if a bundled discount has the same economic effect as tying (citing X Areeda, Elhauge, & Hovenkamp, *Antitrust Law* ¶ 1758b (1996)).

share among customers not subject to the bundling terms (depending on the year) was four to 15 times greater than its share among customers who were subject to bundling terms.

Practical Effects of the Bundling Terms and Market Structure

O&M and Cardinal have acknowledged that the bundling terms successfully prevented Suture Express from selling suture and endo distribution to many of their customers. In a 2010 document, O&M noted that it has had some success defending against Suture Express by bundling pricing for suture and endo with other med-surg products. In another document, O&M recognized that customers subject to bundling will face higher prices if they choose to purchase suture and endo distribution from Suture Express. Cardinal identified “contract obligations” as a reason that one of its customers did not switch its business to Suture Express. Cardinal also described a situation when a customer agreed to stop purchasing suture and endo from Suture Express and move the business to Cardinal after Cardinal informed the customer of a “compliance issue.” The Court understands Cardinal’s reference to this “compliance issue” to mean that the customer was not complying with the bundling terms in its contract that required the customer to purchase suture and endo from Cardinal to obtain certain pricing on other med-surg distribution. Cardinal noted other situations when it had retained customers’ suture and endo distribution purchases because of contractual requirements that effectively prevented the customers from purchasing suture and endo distribution from other sources (including Suture Express).

Many customers have informed Suture Express that they understand that the bundling terms in

defendants' contracts prevent them from purchasing suture and endo distribution from Suture Express. Some customers stated that they could not purchase suture and endo distribution from Suture Express because their contracts with defendants effectively prevented them from doing so. Other customers moved their business away from Suture Express after signing contracts with defendants containing the bundling terms. And some customers informed Suture Express that any savings they realized by moving their business to Suture Express was offset by the costs they incurred under their contracts' bundling requirement. But, the bundling provisions notwithstanding, some customers subject to such contractual terms continued to purchase suture and endo distribution from Suture Express. For example, one Suture Express customer⁶ paid increased prices on its med-surg distribution purchased from Cardinal because it failed to abide by the suture and endo commitment requirement in its contract with Cardinal after it purchased suture and endo distribution from Suture Express.

Also, customers testified under subpoena about their decisions and how they made them when entering into contracts with O&M, Cardinal, and other distributors that contain bundling terms. For example, a hospital membership association⁷ entered into a contract with Cardinal in January 2008. Cardinal was the only distributor awarded a contract by this membership association at that time. Of the membership

⁶ The sealed version of this Memorandum and Order (Doc. 310) identifies this customer specifically.

⁷ The sealed version of this Memorandum and Order (Doc. 310) identifies this membership association specifically and the specific hospitals who are members of this association as described the following paragraphs.

association's 34 members, no more than 22 of them entered into the Cardinal contract. In December 2011, Medline beat Cardinal, O&M, and Suture Express to win a sole-source contract with this membership association.

One hospital, who is a member of this association and thus had the option to sign the membership association's med-surg distribution contracts, contracted with Cardinal until April 2012, when it switched to Medline as its primary distributor. In 2006, this hospital declined to move business to Suture Express from Cardinal because the move would produce minimal savings over its existing Cardinal contract. This existing contract called for an increase in the cost plus markup for med-surg distribution if the hospital failed to meet the 90% suture and endo purchase requirement.

A second hospital who is a member of this association also had the option to enter into the membership association med-surg distribution contracts or contract locally with a different distributor. This hospital signed the membership association contract with Cardinal for med-surg distribution services until 2012, when it moved its business to Medline. The hospital did not move its business to Suture Express because it made fiscal sense to purchase suture and endo through Medline based on the pricing structure of Medline's contract.

A third hospital⁸ is an equity member of a GPO and thus had committed to use a med-surg distributor authorized by the GPO. In 2008, this hospital had

⁸ The sealed version of this Memorandum and Order (Doc. 310) specifically identifies this hospital and the six additional hospitals described in the following six paragraphs.

the choice of four authorized med-surg distributors—O&M, Cardinal, Medline, or Suture Express. The hospital switched from Cardinal to O&M in 2008, after having switched from O&M to Cardinal in 2007. The hospital declined to move its suture and endo distribution to Suture Express because it wanted to consolidate services, and it recognized that moving the business would increase its costs under its existing contract with O&M.

A fourth hospital chose to contract with O&M instead of Cardinal, Medline, and Professional Hospital Supply (a regional distributor). The hospital was subject to bundling terms under its O&M contract, which it considered when making the decision not to move business to Suture Express. But that was not the “overriding reason” for the decision. Instead, this hospital decided to keep its business with O&M because of the benefits of having a local distributor.

A fifth hospital purchased suture and endo distribution from Suture Express and other med-surg from Medline until 2010, when it switched its med-surg distribution to O&M and was subject to a bundling term. In 2012, the hospital switched from O&M to Medline as its distributor for med-surg products, including suture and endo. When it made the switch, the hospital considered contract proposals from O&M, Cardinal, Medline, and Seneca (a regional distributor).

A sixth hospital understood that it had many options for contracting with med-surg distributors through its GPO. It even had switched GPOs to receive better contracting opportunities. In 2009, the hospital signed a contract with O&M through a regional purchasing group within its GPO. Before entering that contract, the hospital purchased suture and endo distribution from Suture Express. After signing the

contract with O&M, the hospital moved its suture and endo business to O&M because the contract required it to do so or incur increased markups. The contract also provided that the hospital could move suture and endo distribution back to Suture Express if O&M failed to comply with a 99% fill rate requirement.

A seventh hospital chose to contract with Cardinal in 2009, as its primary med-surg distributor, over Medline and O&M. The hospital considered purchasing suture and endo distribution from Suture Express but chose not to do so for efficiency reasons, and because it wanted to work with one single distribution channel. While the hospital's contract with Cardinal required it to purchase suture and endo distribution through Cardinal, the hospital testified that the bundling contractual terms were not necessarily a factor in its decision to keep its suture and endo distribution with Cardinal instead of Suture Express.

An eighth hospital implemented an expense reduction plan in 2009 or 2010, part of which involved reevaluating its med-surg distribution contract with Cardinal. The hospital solicited RFPs, and Cardinal, O&M, Medline, and Claflin (a regional distributor) responded. The hospital did not send an RFP to Suture Express because it decided to seek bids only from broadline distributors. The hospital awarded the contract to Cardinal because of its lower markup, better payment terms, and other considerations. The hospital purchased suture and endo from Suture Express before it entered the new agreement with Cardinal in 2010, but stopped doing so because it wanted to achieve the financial benefits of its Cardinal contract. The Cardinal contract included a bundling provision that required the hospital to repay part of Cardinal's

discount if the hospital failed to meet its suture and endo commitment.

A ninth hospital changed distributors from Medline and Suture Express to O&M in 2011. The hospital told Suture Express that it was moving its business to O&M in an effort to consolidate purchases, minimize inventory, and realize savings. The hospital's contract with O&M contained a bundling term that required it to purchase a certain volume of suture and endo from O&M, or incur price markups.

Broadline Distributors' Distribution of Suture and Endo and Value-Added Services

Broadline distributors, like O&M and Cardinal, provide economies of scale. This means that per-unit costs are lower when they distribute high volumes of med-surg products. Some common costs exist when O&M and Cardinal distribute suture and endo products and other med-surg products together by truck. As described above, suture and endo products account for about 10% of an acute care provider's total spending on med-surg products. Suture and endo products are smaller and lighter than most other med-surg products, and have high-dollar value relative to their size and weight. They also are more expensive than most other med-surg products, yielding higher revenue for distribution services priced on a cost-plus basis. In contrast, med-surg products that are bulky or heavy are more expensive to deliver, and they contribute relatively less revenue for the amount of space they consume on a distribution truck.

A broadline distributor's trucks make regular deliveries of med-surg products to its customers regardless whether the customers have ordered suture and endo through it. The distributor can add suture and endo

products to the customer's existing delivery without adding meaningful cost to that delivery because the same truck and driver, using virtually the same amount of fuel, will deliver the customer's med-surg products regardless of whether the load contains suture and endo products.

But O&M and Cardinal also recognize that some customers prefer more frequent deliveries of suture and endo products than other med-surg products. To that end, O&M and Cardinal have established distribution practices specific to suture and endo products. Cardinal has the National Suture Center, a separate, centralized distribution facility for suture and endo distribution. Cardinal set up this facility to improve customer service and reduce eroding sales to Suture Express. O&M operates a centralized facility that resupplies its local facilities and from which certain customers can order suture and endo products directly.

Broadline distributors, including O&M and Cardinal, also offer special services,⁹ such as inventory management that can help customers save money. But, in many cases, customers pay additional fees for these special services. Some broadline distributors, including O&M and Cardinal, offer logical- or low-unit-of-measure ("LUM") programs. Other broadline distributors, including O&M and Cardinal, offer just-in-time ("JIT") inventory replenishment programs that may require additional deliveries to customers. O&M and Cardinal also offer wound closure inventory management programs; they permit the distributor to work directly with the purchasing customer to manage their suture and endo inventory. Cardinal's Wound

⁹ Suture Express also offers similar services.

Closure Management Services program enables Cardinal to make recommendations to customers about the appropriate size, storage, and stocking locations for suture and endo inventory. Less than 1% of Cardinal's customers use this program. O&M's program—PANDAC—involves on-site cost containment and inventory management services for suture and endo and certain other med-surg products. About 20% of O&M's suture and endo customers use PANDAC. Some broadline distributors also provide same-day delivery to customers if they operate within specified driving distance of the nearest distribution center. However, requests for same-day deliveries are rare. Same-day deliveries also may cost more, and a distributor is able to fulfill a same-day request only if it already has the product in stock at its local distribution center.

Competition Among National and Regional Distributors

O&M and Cardinal have won and lost customers from and to one another. As already discussed, O&M and Cardinal also compete against a third national broadline distributor, Medline. Medline has grown its business in recent years. In early 2014, it acquired Professional Hospital Supply ("PHS"), a regional distributor located primarily in the western United States. Medline's med-surg product distribution to acute and non-acute providers has grown from less than \$2 billion in sales in 2008 to over \$5 billion in sales in 2014. These numbers exclude growth derived from Medline's acquisition of PHS. For suture and endo distribution only, Medline distributed about \$35 million to both acute and non-acute providers in 2008. By 2014, Medline's suture and endo distribution to both acute and non-acute providers increased to about \$220

million (not including PHS suture and endo distribution figures). Medline has won customers from O&M and Cardinal. Medline also has negotiated contracts with GPOs and regional buying groups. Suture Express also has won and lost contracts against Medline.

The three national broadline distributors also sometimes compete with regional med-surg distributors for business. Suture Express also has lost and won contracts against certain regional distributors. For example, Seneca Medical ("Seneca") is a regional distributor that distributes 90,000 different products from 1,500 different manufacturers. Seneca operates in 12 states out of six distribution centers. It has a fleet of more than 80 trucks and 30 account managers in the field. Since 2007, Seneca has opened three additional distribution centers. A Seneca representative estimated that in the last five or six years, Seneca has grown by 50%. The Seneca representative also estimated that Seneca's market share has grown to 50% (and as high as 75% market share in some geographic areas it serves), and that Seneca has a 15% to 16% share overall in the 12-state region that it serves. Seneca has won customers from O&M and Cardinal. Between January 2011 and May 2014, Seneca won several major health systems customers competing against Cardinal, O&M, and Medline.

MMS Inc., LLC ("MMS") is another regional full-line distributor. It has distribution centers in eight states and Guam. MMS provides same day service by distributing to its acute care customers located within a six hour drive of its distribution centers. The Claflin Company ("Claflin") is a regional distributor of med-surg supplies located in Providence, Rhode Island. It serves the New England region, and it has grown in the last 30 years by purchasing other distributors. In

2009, Claflin beat both O&M and Cardinal to win an estimated \$25 million med-surg distribution contract with a certain hospital.¹⁰ Before that, Cardinal had served as the distributor for that hospital for five years.

Before Medline acquired it in 2014, PHS operated as a regional acute care distributor. It had eight distribution centers in six states. Buffalo Hospital Supply is another distributor of med-surg products. It currently serves over 500 healthcare organizations, and it competes with O&M and Cardinal for business. DeKroyft-Metz & Co., Inc. ("DeKroyft") is another regional distributor based in Peoria, Illinois. It operates one distribution center that serves three states. Kreisers Inc. ("Kreisers") is a regional med-surg distributor located in Sioux Falls, South Dakota. It operates six distribution centers. Midland Medical Supply is a regional med-surg distributor located in Lincoln, Nebraska, with a customer base of nearly 600 clients that includes hospitals, clinics, doctor's offices, surgery centers, long term care homes, and medical and industrial laboratories. American Medical Depot is another regional med-surg distributor with two corporate offices—one in Florida and the other in Pennsylvania. It carries 350,000 products from over 2,000 suppliers.

In 2007, O&M bought the acute care business of McKesson Medical-Surgical ("McKesson"). McKesson operates a med-surg business unit that supplies med-surg products to physicians' offices, home care agencies, long-term care facilities, and surgery centers. It carries more than 200,000 med-surg products which

¹⁰ The sealed version of this Memorandum and Order (Doc. 310) identifies this hospital specifically.

it distributes from a network housed in more than 45 different locations. Although O&M now operates McKesson's acute care business, McKesson is not subject to a non-compete agreement that prevents it from reentering the acute-care market.

Also, Henry Schein Medical is a broadline distributor of med-surg products to primary care physicians and specialists, group practices, physician-owned labs, and ambulatory surgery centers. In 2006, it sold its hospital supply (which is the relevant market here). But all the parties in this case recognize Henry Schein Medical as a competitor in the non-acute and ambulatory care markets.

Competition from Manufacturers

As described above, some hospital systems use a self-distribution strategy. That is, they purchase products directly from manufacturers and perform distribution functions themselves. With self-distribution, an IDN or collective of hospitals uses its own distribution center or centers to distribute products to member hospitals. But self-distribution customers still may rely on outside distributors for services that they choose not to handle themselves.

O&M has lost at least two customers to self-distribution. Suture Express likewise identifies direct distribution from suture and endo manufacturers Johnson & Johnson (Ethicon) and Covidien as competition in the market. Ethicon and Covidien provide direct purchasing services to customers, and, in recent years, have offered changes in their pricing structure for customers making direct purchases.

Pricing in Distribution Contracts

Many factors may influence the distribution pricing that a distributor and acute care customer agree to in a contract. As already mentioned, GPOs tend to negotiate contracts with one or more med-surg distributors on behalf of their members. For several GPOs, the RFP and negotiation process is handled by GPO member advisory councils. Usually, this process starts with a GPO issuing an RFP, and then med-surg distributors respond. The RFP describes various contract terms and asks the distributors if they are willing to agree to those terms. The contract terms in the RFP are a starting point for negotiation.

Some RFPs from GPOs specifically have requested contract terms containing product category commitments from customers. But GPOs earn administrative fees in proportion to the total volume of med-surg distribution that passes through the distributors. For that reason, GPOs have an incentive to include volume commitments in med-surg distribution contracts.

Some, but not all, of the national and regional med-surg distributors include volume and product commitments in their customer contracts. A customer who purchases higher volumes from a distributor has greater leverage to obtain lower prices. Suture Express also includes volume commitments in its contracts. These contractual terms offer more favorable pricing in exchange for purchasing larger quantities of products. But such terms do not make pricing contingent on the purchase of another type of product, similar to the bundling provisions used by O&M and Cardinal.

Other national and regional broadline distributors have included in their contracts terms similar to the terms used by O&M and Cardinal, where pricing

depends on the customer's commitment to purchase a certain volume of suture and endo distribution. Medline includes in its agreements a price increase by one half point if a customer stops purchasing suture and endo distribution from Medline. The majority of Seneca's local agreements also include a percentage or other commitment to obtain suture and endo products and custom procedure trays from Seneca. Two distributors, MMS and Seneca, testified that they include suture and endo commitment terms in their contracts because the product category is important to their profitability and pricing.

Some of O&M and Cardinal's contracts contain a cost-plus markup fee for med-surg distribution that represents one blended rate for all med-surg product categories. Other of their contracts contain more than one cost-plus markup fee, with markup fees that may differ for certain specific product categories. Suture and endo products are two product categories that, sometimes, have a different distribution markup than the one that applies to med-surg product markups.

Suture Express' expert, Professor Elhauge, performed an analysis that concluded that defendants' markup to acute care facilities for other med-surg products has been over 50% higher than the distribution markup charged to acute care facilities for suture and endo products. But, when customers contracted with defendants on a "blended" rate for both types of distribution, defendants sometimes based the rate on the product mix, and charged lower rates when customers bought more suture and endo products.

Profits

On average, O&M and Cardinal's markups for the distribution of med-surg products were lower in 2013

than they were in 2008. Markups also have declined for regional distributors Seneca and MMS. And, on average, O&M and Cardinal's markups for the distribution of suture and endo products were lower in 2013 than they were in 2008. Professor Elhauge and Suture Express' former CEO concede that Suture Express restrains the prices that O&M and Cardinal can charge for suture and endo distribution services. Suture Express also acknowledges that competition has pushed the markups for suture and endo products down.

O&M and Cardinal's profit margins have declined since 2008. Cardinal's operating margins for distribution-only activity have decreased by about 80% from 2008 to the end of 2011. O&M's operating margins for med-surg distribution also have decreased by about 17% between 2008 and 2013. O&M and Cardinal's distribution services margins also declined during this period. Cardinal's distribution services margin (which is roughly seven to eight times greater than its operating margin) decreased by about 75% between 2008 and 2013. But O&M's distribution services margin (which is about 10 to 11 times greater than its operating margin) only decreased by about 8% from 2008 to 2013.¹¹ Suture Express' distribution services margin is

¹¹ The sealed version of this Memorandum and Order contains specific data for defendants' profit margins described in the above paragraph. Defendant O&M argued, persuasively, that revealing of this specific data could place it at a competitive disadvantage in the marketplace. The Court thus expresses this data in broader terms in the Amended Memorandum and Order. If that data should become relevant to issues in later proceedings, the sealed version of this Memorandum and Order recites this data specifically.

higher than either O&M or Cardinal's med-surg distribution services margins.

Barriers to Entry in the Market

A business seeking to enter the med-surg distribution market would incur large investment costs associated with that effort, including costs for building or leasing one or more distribution center(s) and leasing or purchasing delivery trucks. For example, O&M has distribution centers located throughout the country. Each distribution center distributes med-surg products within a geographic area consisting of one to three states. Cardinal also has located distribution centers across the country in close proximity to heavily populated areas.

The process for switching broadline distributors requires time and expense on the customer's part. One customer has described it as a complex and detailed process, especially if the customer operates more than one facility. The process of switching involves an assessment of current inventories and order histories of the different types of med-surg products with the incumbent distributor, ensuring availability of the current products with the new distributor, determining pricing structures, loading and coordinating computer systems with the new distributor, and coordinating placement of orders and deliveries with the new distributor. But, as shown by examples described above, acute care customers often switch distributors for various reasons, including more favorable contract terms.

Challenges to Suture Express' Business

Since its inception, Suture Express has never distributed the full range of med-surg products. Thus, most of the med-surg product categories purchased by hospitals are not available from Suture Express.

Suture Express also does not offer same-day service outside of the area near its warehouse in Kansas.

From 2006 to 2008, Suture Express successfully gained suture and endo business from Medline customers. But this success declined after Medline improved its service in suture and endo distribution, offered discounted pricing, and included bundling terms in its contracts. Since 2010, Medline has experienced significant growth in its suture and endo distribution to both acute and non-acute providers, more than doubling the amount of its sales in this market.

In mid-2010, a certain hospital¹² notified Suture Express that, effective January 2011, it would move its business to O&M. This hospital was Suture Express' largest revenue-producing customer between 2006 and 2010. The hospital accounted for about 20% of Suture Express' net sales in 2009 and 2010. The loss of this customer had a negative effect on Suture Express' revenues and profits.

II. Summary Judgment Standard

The standard for deciding summary judgment is well-known. Summary judgment is appropriate if the moving party demonstrates that there is "no genuine dispute as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also In re Aluminum Phosphide Antitrust Litig.*, 905 F. Supp. 1457, 1460 (D. Kan. 1995). When it applies this standard, the Court "view[s] the evidence and make[s] inferences in the light most favorable to the non-movant." *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1283 (10th Cir. 2010) (citing *Oldenkamp v.*

¹² The sealed version of this Memorandum and Order (Doc. 310) identifies this hospital specifically.

United Am. Ins. Co., 619 F.3d 1243, 1245–46 (10th Cir. 2010)).

“An issue of fact is ‘genuine’ ‘if the evidence is such that a reasonable jury could return a verdict for the non-moving party’ on the issue.” *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)); see also *In re Urethane Antitrust Litig.*, 913 F. Supp. 2d 1145, 1150 (D. Kan. 2012) (explaining that “[a]n issue of fact is ‘genuine’ if ‘the evidence allows a reasonable jury to resolve the issue either way.’” (quoting *Haynes v. Level 3 Commc’ns, LLC*, 456 F.3d 1215, 1219 (10th Cir. 2006)). “An issue of fact is ‘material’ ‘if under the substantive law it is essential to the proper disposition of the claim’ or defense.” *Nahno-Lopez*, 625 F.3d at 1283 (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Anderson*, 477 U.S. at 248)).

The moving party bears “both the initial burden of production on a motion for summary judgment and the burden of establishing that summary judgment is appropriate as a matter of law.” *Kannady v. City of Kiowa*, 590 F.3d 1161, 1169 (10th Cir. 2010) (quoting *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2002)). To meet this burden, the moving party “need not negate the non-movant’s claim, but need only point to an absence of evidence to support the non-movant’s claim.” *Id.* (quoting *Sigmon v. CommunityCare HMO, Inc.*, 234 F.3d 1121, 1125 (10th Cir. 2000)); see also *In re Urethane Antitrust Litig.*, 913 F. Supp. 2d at 1150 (explaining that “a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party’s claim; rather, the movant need simply point out to the court a lack of evidence for the other party on

an essential element of that party's claim." (citation omitted)).

If the moving party satisfies its initial burden, the non-moving party "may not rest on its pleadings, but must bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Id.* (quoting *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996)); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Anderson*, 477 U.S. at 248–49. "To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Adler*, 144 F.3d at 671 (citing *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir.), *cert. denied*, 506 U.S. 1013 (1992)).

Here, plaintiff and defendants both have filed motions for summary judgment. When the parties file cross-motions for summary judgment, the legal standard does not change. Each movant bears the burden of establishing that no genuine issue of material fact exists and it is entitled to judgment as a matter of law under its summary judgment theory. *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000). The Court must treat cross motions for summary judgment separately—"the denial of one does not require the grant of another." *Buell Cabinet Co. v. Sudduth*, 608 F.2d 431, 433 (10th Cir. 1979). However, where the cross motions overlap, the Court may address the legal arguments together. *Berges v. Standard Ins. Co.*, 704 F. Supp. 2d 1149, 1155 (D. Kan. 2010) (citation omitted). Also, the Court may assume that it need not consider evidence beyond that cited by the parties. *Atl. Richfield Co.*, 226 F.3d at 1148 (quoting *James Barlow Family Ltd. P'ship v. David M. Munson, Inc.*, 132 F.3d 1316, 1319 (10th Cir. 1997)).

Nevertheless, the Court must deny summary judgment if disputes remain about material facts. *Id.* (quoting *James Barlow*, 132 F.3d at 1319).

Finally, summary judgment is not a “disfavored procedural shortcut.” *Celotex*, 477 U.S. at 327. Instead, it is an important procedure “designed ‘to secure the just, speedy and inexpensive determination of every action.’” *Id.* (quoting Fed. R. Civ. P. 1). And, summary judgment has “particular importance in the area of antitrust law, because it helps to avoid wasteful trials and prevent lengthy litigation that may have a chilling effect on pro-competitive market forces.” *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 309 (2d Cir. 2008) (citation, internal quotation marks, and alterations omitted); see also *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 73 (3d Cir. 2010) (stating that “[t]he entry of summary judgment in favor of an antitrust defendant may actually be required in order to prevent lengthy and drawn-out litigation, which may have a chilling effect on competitive market forces.” (citation omitted)). Indeed, the Supreme Court has recognized that “[s]ummary judgments have a place in the antitrust field” because “[s]ome of the law in this area is so well developed that [when] the gist of the case turns on documentary evidence, the rule at times can be divined without a trial.” *White Motor Co. v. United States*, 372 U.S. 253, 259 (1963); see also *SEC v. Geyser Minerals Corp.*, 452 F.2d 876, 881 (10th Cir. 1971) (explaining that “even in antitrust litigation, if the pertinent area of law is well developed and the case turns on documentary evidence, disposition by summary judgment may be appropriate” (citing *White Motor Corp.*, 372 U.S. at 259)).

III. Analysis

Suture Express has filed a Partial Motion for Summary Judgment (Doc. 254) asking the Court to find that O&M and Cardinal's bundling actions are an illegal tying practice that violates: (1) Section 1 of the Sherman Antitrust Act; (2) Section 3 of the Clayton Act; and (3) the Kansas Restraint of Trade Act ("KRTA"), K.S.A. § 50-101 *et seq.* Defendants have filed a Motion for Summary Judgment (Doc. 253), seeking summary judgment against all three legal theories invoked by Suture Express' claims. The Court exercises its discretion to address the parties' cross-motions together.

A. Sherman Act § 1

Suture Express asserts that defendants' bundling practices constitute an illegal tying arrangement that violates section 1 of the Sherman Act. A tying arrangement exists when a seller conditions its sale of a product (the "tying" product) on the purchase of a second product (the "tied" product). *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006). The Supreme Court has explained 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." *Id.* (quoting *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984)). But, even in concentrated markets, tying arrangements "may serve pro-competitive purposes, such as quality control, production and sales efficiencies, and facilitation of indirect price competition." *Town Sound & Customer Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 477 (3d Cir. 1992); see also *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 895 (9th Cir. 2007) (explaining tying in

the form of bundled discounts “generally benefit[s] buyers because the discounts allow the buyer to get more for less” and that tying can produce “savings to the seller because it usually costs a firm less to sell multiple products to one customer at the same time than it does to sell the products individually”).

Here, Suture Express claims that defendants have conditioned the sale of other med-surg distribution (the “tying” product) on the purchase of suture and endo distribution (the “tied” product). Each defendant imposed a tying arrangement, according to Suture Express, by offering a bundled discount that makes it uneconomic for customers to contract for suture and endo distribution separate and apart from other med-surg distribution. Suture Express characterizes the bundled discount as a “penalty” that defendants impose on customers who choose to purchase suture and endo distribution elsewhere. And, Suture Express contends, this bundling arrangement amounts to an unreasonable restraint on trade in violation of the Sherman Act § 1.

Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.” 15 U.S.C. § 1. Notwithstanding its words, § 1 does not prohibit every restraint of trade, but only “unreasonable restraints of trade.” *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir.), *cert denied*, 525 U.S. 822 (1998) (internal quotation marks and citation omitted). Courts employ two different tests to determine whether a defendant’s conduct unreasonably restrains trade. *Id.* They are: (1) the per se rule, and (2) the rule of reason. *Id.* (citing *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994)).

The elements of a tying violation are: “(1) two separate products or services are involved; (2) the sale or agreement to sell one product or service is conditioned on the purchase of another; (3) the seller has sufficient economic power in the tying product market to enable it to restrain trade in the tied product market; and (4) a not insubstantial amount of interstate commerce in the tied product is affected.” *Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 886 (10th Cir. 1997) (citations omitted); see also *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461–62 (1992); *Jefferson Par.*, 466 U.S. at 12–18, abrogated on other grounds by *Ill. Tool Works, Inc.*, 547 U.S. at 31; *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Profl Publ’n, Inc.*, 63 F.3d 1540, 1546 (10th Cir. 1995) (reciting the elements of a “per se violation”).

The per se rule “condemns practices that ‘are entirely void of redeeming competitive rationales.’” *Id.* (quoting *SCFC ILC, Inc.*, 36 F.3d at 963). When presented with a practice that is illegal per se, the court “need not examine the practice’s impact on the market or the procompetitive justifications for the practice advanced by a defendant before finding a violation of antitrust law.” *Id.* Some courts have recognized, however, that the “per se” rule in tying cases is not “like other, truly per se rules in antitrust law” because it requires an “inquiry into [the] tying product market structure (which is frequently costly and time-consuming) . . . but if the defendant is found to have market power there, the plaintiff is, in theory, relieved of proving actual harm to competition and of rebutting justifications for the tie-in.” *Town Sound & Customer Tops, Inc.*, 959 F.2d at 477; see also *Sheridan v. Marathon Petroleum Co.*, 530 F.3d 590, 593–94 (7th Cir. 2008) (explaining that despite several Supreme

Court decisions applying the rule of reason test to vertical restraints, the Supreme Court has not discarded the “per se” tying rule and, instead, it has modified the rule by requiring that the seller hold market power in the tying product); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 593 n.2 (1st Cir. 1993) (stating that “[t]ying is sometimes also described as a per se offense but, since some element of power must be shown and defenses are effectively available, ‘quasi’ per se might be a better label.” (citing *Eastman Kodak Co.*, 504 U.S. 451)).

Absent per se liability, a plaintiff still may prevail on a tying claim if the challenged practice unreasonably restrains competition. See *Jefferson Par.*, 466 U.S. at 29; *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 500 (1969) (“A plaintiff can still prevail on the merits whenever he can prove, on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated.”). When making this determination, courts use a rule of reason test that “requires an analysis of the restraint’s effect on competition.” *Law*, 134 F.3d at 1016–17 (citing *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978)). A court first must determine “whether the challenged restraint has a substantially adverse effect on competition.” *Id.* at 1017 (citing *SCFC ILC, Inc.*, 36 F.3d at 965). If so, “[t]he inquiry then shifts to an evaluation of whether the procompetitive virtues of the alleged wrongful conduct justifies the otherwise anticompetitive impacts.” *Id.* (citing *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993)).

To determine whether the challenged practice imposes an unreasonable restraint on trade, the Court must examine “a variety of actual market factors.”

Reazin v. Blue Cross & Blue Shield of Kan., Inc., 899 F.2d 951, 960 (10th Cir. 1990) (citation and internal quotation marks omitted). Under this analysis, plaintiff bears the burden of showing an “adverse effect on competition.” *Id.* (citation and internal quotation marks omitted). Importantly, the challenged restraint must inflict an adverse impact on competition, not just on an individual competitor or the plaintiff’s business. *Id.* (citing *Westman Comm’n Co. v. Hobart Int’l, Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988); *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1172 (9th Cir. 1988)).

When Judge Rogers decided defendants’ motion to dismiss, he ruled that the Complaint failed to state a plausible Sherman Act violation under a *per se* analysis. Doc. 50 at 8–10. But, Judge Rogers held that Suture Express’ tying claim properly stated a claim under the rule of reason analysis. *Id.* at 10–11. In its summary judgment motion, Suture Express recites the elements of a tying violation (Doc. 268 at 67), and asserts that the summary judgment facts demonstrate each of these elements under a rule of reason analysis, thereby warranting summary judgment in its favor. *See* Doc. 268 at 66–80. Suture Express also argues that the bundling provisions have affected competition adversely and no procompetitive justifications exist for the practice. Conversely, defendants argue in their summary judgment motion that the undisputed facts, even when viewed in Suture Express’ favor, fail to establish the elements of a tying claim. And, defendants assert, even if Suture Express could establish the elements of a tying claim under a rule of reason analysis, the summary judgment facts present no anticompetitive effects from defendants’ bundling but instead demonstrate pro-competitive and valid busi-

ness reasons for the bundling practices. Thus, analyzing Suture Express' claim under a rule of reason analysis, defendants contend they are entitled to summary judgment.

The Court addresses each of these arguments below and concludes that the summary judgment facts, even when viewed in the light most favorable to Suture Express, present no basis for a reasonable jury to find the existence of an illegal tying arrangement violating § 1 of the Sherman Act. Thus, Cardinal and O&M are entitled to summary judgment against Suture Express' Sherman Act § 1 claim.

1. Elements of a Tying Arrangement

Suture Express asserts that the undisputed summary judgment facts establish all four elements of an illegal tying arrangement in violation of § 1. As stated, those four elements require proof of: "(1) two separate products or services are involved; (2) the sale or agreement to sell one product or service is conditioned on the purchase of another; (3) the seller has sufficient economic power in the tying product market to enable it to restrain trade in the tied product market; and (4) a not insubstantial amount of interstate commerce in the tied product is affected." *Sports Racing Servs., Inc.*, 131 F.3d at 886 (citations omitted). Suture Express contends that the summary judgment facts entitle it to summary judgment on the issue of liability on its Sherman Act claim.

In contrast, defendants O&M and Cardinal assert that Suture Express cannot establish all four elements. They argue that certain disputed facts exist on some elements, and they thus preclude summary judgment for Suture Express. More specifically, O&M and Cardinal argue that any disputed facts germane to the

first element of a tying claim—whether two separate products are involved—preclude summary judgment for Suture Express. But those disputes do not matter, defendants say, to the legal theory advanced by their summary judgment motion. Defendants assert that no triable issue of material fact exists about the second and third elements of the Sherman Act claim.

The Court examines the second and third elements below. In subpart a, the Court considers the second element of a tying claim—whether the agreement to sell med-surg distribution is conditioned on purchasing suture and endo distribution. As explained in that section, the Court concludes that factual issues preclude a summary judgment finding for either party on this element. In subpart b, the Court concludes that the summary judgment facts preclude the possibility that Suture Express can establish the third element of a tying claim, *i.e.*, that O&M and Cardinal have sufficient market power in the tying product to permit them to restrain trade in the tied product market. This conclusion leads the Court to grant summary judgment for defendants against Suture Express' §1 tying claim. Likewise, it negates Suture Express' motion for summary judgment.

- a. The Court Cannot Decide on Summary Judgment whether Defendants Condition the Sale of Med-Surg Distribution on the Purchase of Suture and Endo Distribution.

In its discretion, the Court begins with Suture Express' summary judgment motion, addressing the conditioning element of a tying claim. In this analysis, the Court views the evidence in the light most favorable to defendants, and concludes that these summary

judgment facts present triable issues about the conditioning element of a tying claim.

i. Suture Express' Summary Judgment Arguments on the Conditioning Element

Suture Express asserts that defendants have conditioned the sale of other med-surg distribution on the sale of suture and endo distribution. Suture Express does not assert that the bundling discounts actually prohibit customers from purchasing the two types of distribution separately. Instead, Suture Express contends that the economic penalties imposed by defendants' bundling contracts coerce customers into purchasing both kinds of distribution services from them. *See Monument Builders of Greater Kansas City, Inc. v. Am. Cemetery Ass'n of Kan.*, 891 F.2d 1473, 1476, 1483 (10th Cir. 1989) (holding that plaintiff had stated a tying claim against defendants who had imposed "prohibitively expensive" surcharges on purchasers of cemetery plots who bought grave markers separately instead of purchasing them from the cemetery).

Suture Express relies on two different tests to prove that defendants' bundling practices have an illegal, coercive effect: (1) the buyer behavior test, which focuses on the percentage of buyers of the tied product that take the bundle; and (2) the discount attribution test which examines, after allocation of the alleged discounts to the tied product, whether the incremental price of the tied product is below its costs.

The buyer behavior test, examines "whether nearly all or a very high percentage of buyers purchased the [bundle] from the defendant rather than purchasing [the tying product] from defendant and [the tied product] from a rival." X Phillip E. Areeda & Herbert

Hovenkamp, *Antitrust Law* ¶ 1758a (3d ed. 2011). Suture Express' expert, Professor Elhauge, performed the buyer behavior test two different ways.

First, he examined Suture Express' performance among defendants' customers who had entered into contracts containing the bundling terms and compared it to Suture Express' performance with customers who were not bound by bundling terms. From that data, plaintiff's expert determined that Suture Express' market share among customers who had entered into contracts with bundling terms ranged from 2% to 6%. Second, Professor Elhauge performed a similar buyer behavior test by using sales data from Suture Express, Cardinal, and O&M to calculate whether purchases of Suture Express' suture and endo distribution by customers who purchased other med-surg distribution from O&M and Cardinal (*i.e.*, customers who "broke the bundle") was less than 10% of the sum of those purchases plus purchases of defendants' suture and endo distribution by customers who accepted the bundle. Professor Elhauge determined that this ratio ranged between 3% and 7%, depending on the year.

Defendants respond that Professor Elhauge performed the buyer behavior tests incorrectly, using only Suture Express' sales data as the rival tied product. Indeed, Areeda and Hovenkamp suggest a presumption of non-tying if "a sufficiently large number of customers are observed who purchase the secondary product from someone other than defendant." X Areeda & Hovenkamp ¶ 1758a (emphasis added). Here, Professor Elhauge only examined the percentage of customers who broke the bundle by purchasing the tied product (suture and endo distribution) from Suture Express—not the percentage of *all* purchases of the tied product from any rival med-surg distributor.

Suture Express counters defendants' attack by explaining that Professor Elhauge used all the data available to him to make his calculations, but this data did not include data from non-party med-surg distributors. But, even if he had, Professor Elhauge asserts that the data would not favor defendants because the other broadline distributors also use bundling contracts and any suture and endo sales made by other broadline distributors under their bundling contracts would increase the denominator in the ratio, thereby producing an even smaller percentage than the 3% to 7% that he calculated from just the parties' data (and, thus, the Court infers, establishing even stronger evidence of coercion). Professor Elhauge also opines that, if a customer orders other med-surg from defendants but not suture and endo, then the customer likely orders suture and endo from Suture Express; and not from another broadline distributor because Suture Express offers lower markups than any other distributors in the market. Defendants launch yet another line of attack on Professor Elhauge's analysis, asserting that neither of these buyer behavior tests is dispositive. Therefore, defendants say, Suture Express cannot show it is entitled to summary judgment based solely on these tests.

Areeda and Hovenkamp explain that the results of the buyer behavior test can play a useful—but not dispositive—role. That is, the test may suggest an illegal tying arrangement, or even create presumptions or inferences for and against illegal tying under certain circumstances. X Areeda & Hovenkamp ¶ 1758a. But the commentators never endorse the test as a dispositive one, capable of deciding the entire question. *Id.*

The Court concludes that defendants' criticisms of Professor Elhaug's analysis under the buyer behavior test present fact issues that preclude Suture Express from establishing coercion on summary judgment. While these tests might persuade a reasonable jury to conclude that coercion exists, a reasonable jury also could conclude otherwise—*i.e.*, that consumer choices and preferences drive the results, not coercion from defendants' bundling provisions. Based on this record, the undisputed facts fail to establish that defendants' contracts have a coercive effect.

This leaves Professor Elhaug's analysis under the discount attribution test. He used this test to analyze cost data produced by Cardinal to determine how often the contract terms brought the suture and endo distribution charges below cost. He concluded that among Cardinal customers with contracts containing the bundling provision, the resulting incremental price was lower than the minimum markup 67% of the time. He also opined that among O&M customers¹³ with such contracts, the resulting incremental price was lower than the minimum markup 85% of the time.

Other courts have applied the discount attribution test to tying or bundled discount cases to assess the likelihood that coercion exists. *See Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 275 (6th Cir. 2015) (applying the discount attribution standard and finding a likelihood that plaintiff could prove coercion because the record suggested that defendant was selling the product below its incremental cost); *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 906 (9th

¹³ Because O&M did not produce cost data sufficient for Professor Elhaug to perform a similar calculation for its markups, he used Cardinal's cost data to perform the analysis for O&M.

Cir. 2007) (adopting a discount attribution standard that examined whether “the resulting price of the competitive product or products is below the defendant’s incremental cost to produce them,” and, if it is, “the trier of fact may find that the bundled discount is exclusionary for the purpose of § 2.”).

Defendants contend that Suture Express cannot use the discount attribution test to prove coercion here, and they make two principal arguments. First, defendants argue that the discount attribution test applies only to monopolization claims under Sherman Act § 2, and that no court ever has applied the test to non-monopolists, as are defendants in this case. In *Collins Inkjet Corp.*, the Sixth Circuit applied the discount attribution test when plaintiff asserted a § 1 Sherman Act claim because it found no reason to treat economically identical behavior differently under §§ 1 and 2 when both sections prohibit anticompetitive conduct. 781 F.3d at 267. But, in that case, defendant had a 100% monopolistic share of the market. *Id.* at 281.

Defendants contend that no court ever has applied the discount attribution test to a non-monopolist. The Court’s research reveals the same. This absence of authority makes sense because the test examines whether defendant is selling “the competitive (or tied) [product at a] price below cost,” which may exclude a rival who sells only the tied product. *Id.* at 274. But, in a market without a monopolist, a seller of a full range of products has no incentive to exclude the rival who sells only the tied product because other full range sellers competing in the market still can defeat any effort to raise prices. Here, defendants are not monopolists. And so, even if defendants excluded Suture Express, other med-surg distributors in the market (such as Medline) can prevent defendants from raising

prices. In a market without a monopolist, customers have the option to move their business from defendants to other med-surg distributors (such as Medline) if they are unsatisfied with defendants' prices.

When discussing the "formulation for cost-based tests for determining when a bundled discount is 'exclusionary' in the sense that it keeps rivals out of the market," the commentators have described a scenario similar to the one presented here:

In order to have antitrust significance a bundle must not merely keep one rival out of the market; it must exclude all of them. That is to say, a firm's aggregate discount of product A, B, and C might very well exclude a rival who produces only B and C, but not A. However, if there are other rivals in the market who also make the full range of A, B, and C, then the practice is not exclusionary, although it may limit the range of effective competition to those firms capable of competing across the full range of goods.

Herbert Hovenkamp & Eric Hovenkamp, *Complex Bundled Discounts and Antitrust Policy*, 57 BUFF. L. REV. 1227, 1231 (July 2009). As applied here, defendants' bundling of suture and endo distribution does not exclude *all* rivals. For instance, defendants' bundling arrangements have not excluded Medline, a third national broadline distributor who offers similar bundling provisions. Likewise, defendants have not excluded Seneca and MMS, regional broadline distributors who also offer bundling, from competing in the relevant market. The summary judgment facts thus fail to show that defendants' bundling practices have excluded *all* rivals, and the discount attribution test cannot serve

as a strong indicator of coercion because defendants are not monopolists.

Second, defendants attack Professor Elhauge's analysis by asserting that he used an improper measure of costs and an unrepresentative sample size. These criticisms create fact issues that preclude Suture Express from prevailing on the coercion element of a tying claim and thus preclude summary judgment in its favor. Also, like the buyer behavior test, the discount attribution test may suggest evidence of coercion, but it is not a dispositive test that warrants summary judgment for Suture Express. See Hovenkamp & Hovenkamp, 57 BUFF. L. REV. at 1255 (explaining that the discount attribution test "produces very severe false positives and should be regarded as nothing more than a starting point for analysis"). In short, the results of Professor Elhauge's discount attribution test cannot establish coercion at the summary judgment stage.

Finally, Suture Express relies on anecdotal statements by its customers to establish coercion. Suture Express cites comments from defendants' customers giving their understanding of the bundling terms in defendants' contracts, *i.e.*, that they prevented the customer from purchasing suture and endo distribution from Suture Express. Some customers informed Suture Express that their contracts prohibited the purchases while other customers explained that any savings that they may realize from purchasing suture and endo distribution from Suture Express was offset by the costs incurred under their contracts with defendants. Defendants respond that evidence of customers adhering to their contract terms is not coercion. If that were true, defendants argue, the antitrust laws would prohibit all contracts restraining a customer's ability

to do business with another. But that is not the law. *See, e.g., NCAA v. Bd. of Regents*, 468 U.S. 85, 98 (1984) (explaining that “every contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade”).

Viewing this evidence in the light most favorable to defendants, as the Court must when it considers Suture Express’ summary judgment motion, the Court concludes that the summary judgment facts present genuine issues precluding Suture Express from establishing the second element of a tying claim—that defendants have conditioned the sale of other med-surg distribution on the sale of suture and endo distribution. Because Suture Express cannot prove at least one element of a tying claim on summary judgment, the Court denies Suture Express’ motion for partial summary judgment.

ii. Defendants’ Summary Judgment Arguments on the Conditioning Element

The Court now turns to defendants’ summary judgment arguments on this same element. Defendants contend that the Court must grant summary judgment against Suture Express’ § 1 tying claim because the summary judgment facts present no triable issues about the conditioning element of that claim. Specifically, defendants argue that no evidence of coercion exists because med-surg distributors compete vigorously for contracts before a customer enters into a med-surg distribution contract. And, defendants assert, customers are not coerced into entering those contracts. Instead, defendants claim that the evidence simply shows that customers freely decide to enter contracts and then adhere to the contract terms they

have chosen. Also, defendants argue that the contracts allow customers to terminate them, generally with six months' notice, and defendants have a history of lax enforcement of the bundling terms.

The summary judgment record contains conflicting evidence about this last point—defendants' enforcement of their contracts. A jury could examine defendants' evidence and conclude that no coercion exists. But a reasonable jury also could find that the results of Professor Elhauge's tests, notwithstanding defendants' criticism of them, prove coercion. Thus, the Court finds that disputed factual issues preclude it from deciding on summary judgment whether defendants condition the purchase of other med-surg distribution on the purchase of suture and endo distribution.

Because the summary judgment facts present a genuine issue of fact on the second element of a tying claim—that is, whether defendants have conditioned the sale of other med-surg distribution on the sale of suture and endo distribution—the Court turns now to defendants' other summary judgment theory. As the next section explains, the summary judgment facts present no genuine issues about a separate element of Suture Express' tying claim—market power.

b. Defendants Lack Economic Power in Tying Market.

The Supreme Court requires that “in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.” *Ill. Tool Works*, 547 U.S. at 46. But “[t]he standard of ‘sufficient economic power’ does not . . . require that the defendant have a monopoly or even a dominant position throughout the market for the tying product.” *Fortner Enters.*, 394 U.S. at 502.

Instead, “economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market.” *Id.* at 502–03 (citations omitted). “Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product’s desirability to consumers or from uniqueness in its attributes.” *Id.* at 503 (quoting *United States v. Loew’s Inc.*, 371 U.S. 38, 45 (1962)).

A plaintiff can demonstrate that market power exists by adducing evidence of either “power to control prices” or “the power to exclude competition.” *Westman Comm’n Co. v. Hobart Int’l, Inc.*, 796 F.2d 1216, 1225 n.3 (10th Cir. 1986); see also *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 503 (1969) (“Market power is usually stated to be the ability of a single seller to raise price and restrict output.”). The power to control prices and the power to exclude competition “may, in turn, depend on various market characteristics, including the existence and intensity of entry barriers, elasticity of supply and demand, the number of firms in the market, and market trends.” *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 967 (10th Cir. 1990) (citing *Shoppin’ Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F.2d 159, 162 (10th Cir. 1986)); see also *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 460–61 (1986) (explaining that “[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, ‘proof of actual detrimental effects, such as a reduction of output,’ can obviate the need for an inquiry into market power, which is but a ‘surrogate for detrimental effects’” (quoting 7 P. Areeda, *Antitrust Law* ¶ 1511, p. 429 (1986))).

i. Suture Express' Summary Judgment Arguments on the Market Power Element

Again, the Court begins by addressing Suture Express' summary judgment arguments. In so doing, the Court views the evidence in the light most favorable to defendants, the non-moving parties on Suture Express' summary judgment motion.

Suture Express argues that the summary judgment facts establish that defendants possess power in the market for other med-surg distribution. To support this claim, Suture Express points to defendants' large market share in other med-surg products, the substantial barriers to entering this market, the imposition of the bundling terms in a large percentage of defendants' contracts, the infrequency of customers "breaking" the bundle, and Suture Express' sales losses to defendants because of the bundling provisions.

First, Suture Express asserts that defendants comprise the large majority of nationwide broadline distribution of other med-surg products. From 2007 to 2012, O&M's share of the market ranged from 32% to 38%, and Cardinal's share ranged from 27% to 31%. Suture Express cites several cases in which courts have determined that lesser market shares establish market power. But defendants correctly explain that those cases involved different market conditions than those presented here. *See, e.g., United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239–40 (2d Cir. 2003) (finding market power existed when one defendant had 47% market share and the other defendant had 26% market share in a highly concentrated market where customers could not refuse to do business with defendants, even when subject to significant price increases, because of customer preference); *Toys "R"*

Us, Inc. v. F.T.C., 221 F.3d 928, 937 (7th Cir. 2000) (finding market power when a retailer, with 20% of the national wholesale market and up to 49% in some local wholesale markets, successfully had reduced output from manufacturers thereby insulating it from having to lower prices); *Eiberger v. Sony Corp. of Am.*, 622 F.2d 1068, 1080–81 (2d Cir. 1980) (explaining that defendant had a “strong market position” because it had established 12% market share within just four years of entering the market and defendant was the fastest growing company among four other competitors who accounted for 96% of the market); *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 188–91 (E.D.N.Y. 2015) (concluding that defendant’s 26.4% market share of a highly concentrated market with significant barriers to entry alone was not likely sufficient to prove market power without “the amplifying effect of cardholder insistence” on paying with an American Express card); *Johnson v. Blue Cross/Blue Shield of New Mexico*, 677 F. Supp. 1112, 1119–20 (D.N.M. 1987) (concluding that genuine issues precluded summary judgment for defendant on market power because defendant’s market share of 25% to 30% was “artificially depress[ed]” and entering companies were unable to capture any significant portion of the market).

Importantly, while defendants’ market share is relevant to determining market power, it “alone is insufficient to establish market power.” *Reazin*, 899 F.2d at 967 (citation and internal quotation marks omitted). Thus, the Court cannot conclude that O&M and Cardinal have sufficient market power based on their market shares alone.

Second, the barriers to entry into the market fail to establish market power. “Entry barriers are particular

characteristics of a market which impede entry by new firms into that market.” *Reazin*, 899 F.2d at 968 (citations omitted). Barriers to entry “may include high capital costs or regulatory or legal requirements such as patents or licenses.” *Id.* Suture Express argues that the barriers to entry here are substantial because national broadline distribution requires a network of local distribution facilities and sufficient infrastructure that is expensive to build. It also requires hospital customers to support the operation. But, the summary judgment facts show that competitors in this med-surg market are growing their businesses as they compete against O&M, Cardinal, and Suture Express for acute care customers. For example, Medline has grown its business significantly from 2008 to 2014. It has won customers from O&M, Cardinal, and Suture Express, and it has successfully negotiated contracts with GPOs and regional buying groups. Also, regional distributors are competing successfully in this market, winning contracts from national broadline distributors. For example, regional distributor Seneca has grown its business by 50% in the last five or six years, and it has opened three new distribution centers since 2007. As these competitors have expanded in the market, O&M and Cardinal’s market shares have declined or remained relatively flat. These facts fail to establish that barriers to entry exist in the market.

Suture Express also argues that a customer’s cost to switch med-surg distribution precludes competitors from entering the market. But, the summary judgment facts establish just the opposite. While some customers describe the process of switching distributors as an involved one requiring an investment of time and overhead, the record is filled with examples of customers who, in fact, have switched distributors on a regular basis. Indeed, O&M and Cardinal retain

only about half of all acute care customers after three or four years of beginning to do business with them.

Third, that defendants have managed to secure the bundling terms in a large number of defendants' contracts fails to establish market power. Suture Express' expert reviewed 102 of defendants' customer contracts and concluded that, between 2006 and 2013, O&M made about 98% of its suture and endo sales and Cardinal made about 71% of its suture and endo sales under contracts containing a bundling provision. But the mere existence of these terms in customer contracts cannot create an inference of market power. See *Tele Atlas N.V. v. NAVTEQ Corp.*, No. C-05-01673 RMW, 2008 WL 4809441, at *16 (N.D. Cal. Oct. 28, 2008) (explaining that "[t]o permit the mere existence of a tying arrangement to satisfy the plaintiffs' burden of production on market power is to permit every tying case to proceed to a jury, even where the defendant lacks a shred of market power. This is bad policy, as '[m]any tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market.'" (quoting *Ill. Tool Works*, 547 U.S. at 45)).

The summary judgment facts also establish that other competitors in the market, including national distributor Medline and regional distributors Seneca and MMS, use similar bundling terms for suture and endo distribution in their customer contracts. And Suture Express does not contend that these firms have market power. The undisputed facts reveal a market where customers have a range of choices before deciding which contracts to enter. They can contract through a GPO or regional buying group, or they can contract directly with a med-surg distributor. Customers make the choice to enter into contracts containing

bundling terms, both with defendants and other competitive rivals. The existence of these terms in defendants' contracts does not raise an inference of market power.

Also, competitive rivals offer similar bundling terms, which demonstrates that defendants' bundling is not a barrier to entry. As the Seventh Circuit has explained, "[i]f rivals may design and offer a similar package for a similar cost, there is no barrier, and without a barrier there is no market power." *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 672 (7th Cir. 1985). Here, other med-surg distributors, including Medline, Seneca, and MMS, offer contractual terms similar to the ones used by defendants. Thus, defendants' use of bundling terms is not unique among competitors in the market, and this practice fails to establish market power.

Fourth, Suture Express asserts that defendants' bundling terms are predatory because they fail the discount attribution test. But, as described above, the Court cannot find on summary judgment that defendants fail this test because fact issues preclude such a finding. The Court also refuses to find that the fact issues attendant to this test demonstrate market power. Suture Express cites no legal authority for that conclusion. And, as noted above, no court has applied the discount attribution test to a non-monopolist. Defendants are not monopolists, and they would not benefit from excluding a rival who produces less than a full range of products because other broadline distributors exist to compete against defendants and prevent them from raising prices.

Fifth, because defendants' customers "break the bundle" infrequently, Suture Express contends this establishes O&M and Cardinal's market power. This

fact, it contends, shows an indirect detrimental effect on competition, thereby demonstrating market power. However, as already explained, customers have many alternatives in this market before deciding to enter contracts. That customers make business decisions to enter into contracts and then adhere to their terms does not support a finding of market power.

Sixth, Suture Express asserts that its loss of sales to defendants because of the bundling provisions shows market power. Suture Express' expert concluded that Suture Express' market share among "unrestrained customers" (*i.e.*, those not parties to contracts containing the bundling terms) was four to 15 times greater than its share among customers who were subject to bundling terms, depending on the year. But, like other arguments Suture Express makes, this fact reveals nothing more than customers adhering to their contracts' terms after they have made the decisions to enter into them. Suture Express cites no authority for the proposition that this fact demonstrates market power.

Seventh, Suture Express argues that defendants' intent in implementing the bundling terms was to leverage its market power and protect its business from Suture Express. *See* Doc. 268 at 78 (citing *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) ("knowledge of intent may help the court to interpret facts and to predict consequences"); *Hahn v. Or. Physicians' Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988) (explaining the intent of defendants may be relevant to the effect on competition)). Several of defendants' internal documents and communications acknowledge that using bundling terms successfully has prevented Suture Express from selling suture and endo distribution to their customers. But, as the Ninth Circuit

recognized in *Hahn*, intent is not dispositive. 868 F.2d at 1026. And, the Tenth Circuit has held that “intent to harm a rival, protect and maximize profits, or ‘do all the business [] they can,’ is neither actionable nor sanctioned by the antitrust laws.” *SCFC ILC, Inc.*, 36 F.3d at 969 (quoting *Ball Mem’l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1339 (7th Cir. 1986)). The Court cannot find market power from defendants’ intent to protect its suture and endo business from Suture Express’ rival business model.

The Court concludes that none of Suture Express’ arguments establish that defendants have sufficient market power to entitle Suture Express to summary judgment. Thus, the Court cannot grant summary judgment for Suture Express on this element of their § 1 tying claim.

ii. Defendants’ Summary Judgment Arguments on the Market Power Element

The Court now turns to defendants’ summary judgment arguments on the market power element. In this analysis, of course, the Court views the facts in the light most favorable to Suture Express, the non-moving party. And, the Court concludes that the undisputed facts, when viewed in Suture Express’ favor, present no triable issues about defendants’ power to exclude competition or control prices. See *Westman Comm’n Co. v. Hobart Int’l, Inc.*, 796 F.2d 1216, 1225 n.3 (10th Cir. 1986) (explaining that an antitrust plaintiff may demonstrate market power with evidence of either power to control prices or the power to exclude competition). Thus, the summary judgment facts preclude Suture Express from establishing market power, and the Court must grant summary judgment for defendants.

As described above, the summary judgment facts describe a market rife with competitive rivals who are growing and expanding their business while Cardinal and O&M's market shares have declined or remained relatively flat. Indeed, O&M and Cardinal compete vigorously against one another, winning and losing customers back and forth. They also compete with a third national broadline distributor, Medline, who has grown its business significantly in recent years. The record also includes undisputed examples of growth among regional distributors who compete against national broadline distributors, including defendants, for acute care business. And, at least two competitors in the non-acute care business, McKesson and Henry Schein Medical, potentially could enter the acute care markets and compete against defendants using their existing national distribution networks for non-acute care distribution. The parties also face competition from manufacturers who sell directly to hospital systems that have implemented a self-distribution strategy. All of this evidence demonstrates that defendants lack the power to exclude competition.

Also, the existence of a competitive rival that offers similar bundling—Medline—forecloses defendants' ability to exclude competition here. As Hovenkamp & Hovenkamp explain, "if bundle-to-bundle discount competition can occur in a market, then a particular firm's bundled discount cannot be exclusionary unless its overall price is below its costs. Otherwise an equally efficient firm exists that would be able to match the discounted price and earn a profit."¹⁴ Herbert Hovenkamp & Eric Hovenkamp, *Complex Bundled Discounts and Antitrust Policy*, 57 *BUFF. L.*

¹⁴ Suture Express does not allege that defendants' overall price is below its costs.

REV. 1227, 1231 (July 2009). Cf. *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 915 (9th Cir. 2007) (concluding that defendant possessed “substantial market power” when it was the exclusive provider of tertiary services in the market). Here, Medline uses similar bundling provisions, is growing its business, and competing with O&M and Cardinal. These undisputed facts prevent Suture Express from demonstrating any triable issues about defendants’ ability to exclude competition.

The record also lacks evidence of defendants’ ability to control prices. Instead, the summary judgment facts show that O&M and Cardinal’s markups for the distribution of med surg products were lower, on average, in 2013 than they were in 2008. Their markups for suture and endo distribution also were, on average, lower in 2013 than they were in 2008. Regional distributors Seneca and MMS also experienced declines in markups, which they attributed to competitive pressures from customers and other distributors. And, as Suture Express concedes, competition has lowered markups for suture and endo products.

Also, O&M and Cardinal’s profit margins have declined since 2008. Cardinal’s operating margins for distribution-only activity have decreased by about 80% from 2008 to 2011. O&M’s operating margins for med-surg distribution also have decreased by about 17% between 2008 and 2013. Suture Express contends that these figures are misleading because they calculate the ratio using a figure that includes the value of the product distributed, thereby understating the margins. Suture Express asserts that the more appropriate figure to examine is the distribution services margin. But both O&M and Cardinal’s distribution services margins also declined during this time period.

The margin for Cardinal's distribution services (which is roughly seven to eight times greater than its operating margins) decreased by about 75% between 2008 and 2013; and O&M's margin (which is about 10 to 11 times greater than its operating margin) decreased by about 8% between 2008 and 2013.¹⁵ This decline in markups and margins shows that defendants lack the ability to control prices.

The summary judgment record also establishes that acute care customers are consolidating, thereby forming larger and larger hospital systems. While Suture Express argues that no causal relationship exists between customers' consolidation and lowered prices in the market, several med-surg distributors, including Suture Express' CFO, testified that consolidation has increased customers' buying power and created a very competitive marketplace. The evidence of customer consolidation in a competitive market with declining profits also demonstrates that defendants lack the power to control prices.

Under these facts, no reasonable jury could conclude that defendants have the power to exclude competition or control price. Instead, the undisputed facts demonstrate a market where O&M and Cardinal compete vigorously against Medline, certain regional distributors, and each other. And, after three or four years, O&M and Cardinal can retain only about half of their acute care customers. These facts preclude any triable dispute about defendants' market power. *See In re Wireless Tele. Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 471 (S.D.N.Y. 2005) (granting summary

¹⁵ The sealed version of this Memorandum and Order contains specific data for defendants' profit margins described in the above paragraph. *See supra* n.11.

judgment for defendants because plaintiff failed to present evidence raising a question of fact that any one of the defendants had sufficient market power to force a tie when “defendants compete against each other in terms of service and price” and “the high churn rate is striking evidence of their respective lack of control over the market and the impediments each of them faces to any effort to control price”).

Because the summary judgment facts fail to present a triable issue about market power—one of the required elements for proving a tying claim—Suture Express’ Sherman Act § 1 claim fails as a matter of law. Consequently, the Court must grant summary judgment for defendants.

2. The Summary Judgment Facts Fail to Establish Harm to Competition or an Antitrust Injury.

Defendants argue that they also are entitled to summary judgment against Suture Express’ Sherman Act § 1 claims for another, independent reason—Suture Express cannot establish an antitrust injury. The Court agrees.

A plaintiff asserting an antitrust claim must establish an antitrust injury, as the Sherman Act defines this term. *Cohlmia v. St. John Med. Ctr.*, 693 F.3d 1269, 1280 (10th Cir. 2012) (quoting *Tal v. Hogan*, 453 F.3d 1244, 1253 (10th Cir. 2006)). “The primary concern of the antitrust laws is the corruption of the competitive process, not the success or failure of a particular firm’ or individual.” *Id.* (quoting *Tal*, 453 F.3d at 1258). Therefore, the antitrust laws require a plaintiff to demonstrate “an injury of the type the antitrust laws were intended to prevent and that flows

from that which makes defendants' acts unlawful." *Id.* (quoting *Tal*, 453 F.3d at 1253).

Here, Suture Express argues that it has demonstrated an antitrust injury because defendants' bundling terms have prevented customers from purchasing suture and endo distribution from it. As a result, Suture Express contends, customers are denied Suture Express' superior service and higher fill rates and, in some cases, lower prices. Suture Express asserts that, but for defendants' conduct, it would have won more customers and experienced greater growth. At oral argument on the summary judgment motions, Suture Express emphasized that it offers a superior product—"a better mousetrap." That is, Suture Express contends that its overnight delivery of suture and endo products by air is a more efficient distribution method. And, Suture asserts that customers should have access to it.

But the antitrust laws are not designed to protect competitors like Suture Express; instead, those laws were enacted to promote competition so that market participants could decide who had "a better mousetrap." See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (stating that the "antitrust laws . . . were enacted for the protection of competition not competitors" (citation and internal quotation marks omitted)); *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 960 (10th Cir. 1990) (explaining that a challenged practice must adversely impact competition, not just an individual competitor or plaintiff's business). Thus, Suture Express must show harm to competition, not just harm to Suture Express. See *Cohlma*, 693 F.3d at 1281 ("An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or

services, not just his own welfare.” (quoting *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 641 (3d Cir. 1996)).

The Supreme Court has described raised prices and reduced output as the “hallmarks of anticompetitive behavior.” *NCAA v. Bd. of Regents*, 468 U.S. 85, 113 (1984). Neither one exists here. The summary judgment facts, when viewed in Suture Express’ favor, fail to demonstrate raised prices. Instead, as described above, the facts show declining markups for many competitors in the market—including both defendants, certain regional distributors, and Suture Express. The facts also show that defendants experienced declining margins. The record also contains evidence from med-surg distributors, including Suture Express’ CFO, about competitive pressures in the marketplace that have produced pricing decreases.

The record also lacks admissible evidence of reduced output. Instead, rival national and regional competitors are growing and expanding their businesses. And, even Suture Express’ expert calculated that industry-wide med-surg (including suture and endo distribution) revenues increased year-over-year during the relevant period. These summary judgment facts prevent a reasonable jury from inferring harm to competition, even when viewed in the light most favorable to Suture Express.

Suture Express argues that the Court should not examine the harm to competition by examining historical prices or output in the market. Instead, Suture Express asserts that it has demonstrated anticompetitive harm through its expert’s analysis which shows that prices are higher than they would be but for the defendants’ contracts containing bundling terms. And, Suture Express contends, customers paid these

higher prices while suffering lower fill rates. Professor Elhauge estimates that customers paid higher prices, amounting to \$36 million from 2007 to 2012. To calculate this figure, Professor Elhauge compared the average of defendants' markups on suture and endo distribution overall to Suture Express' markups overall. Defendants argue that by limiting the analysis to these firms, Suture Express fails to show that market-wide prices were higher and quality was lower than it would have been absent defendants' bundling. *See Elec. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 244 (2d Cir. 1997) (explaining that an antitrust violation requires a showing "of an actual adverse effect on competition market-wide").

The Court agrees. The difference in price for suture and endo distribution between these three competitors fails to show that competition is harmed across the market. As one court has explained, "[i]f a plaintiff could generate a jury question on injury to competition simply by asserting that his less expensive or superior product was excluded from the market, the distinction between injury to a competitor and injury to competition would be lost." *Brookins v. Int'l Motor Contest Ass'n*, No. CIV. C96-134 MJM, 1998 WL 937242, at *4 (N.D. Iowa July 15, 1998). It is "[f]or that reason, the courts have held that the mere fact that a certain supplier is prevented from participating in the market does not of itself show an actual adverse effect." *Id.* (citation omitted).

Defendants challenge Professor Elhauge's analysis for another reason, asserting that it fails to account for the fact that acute care customers also require distribution of other med-surg products. Professor Elhauge concedes that the theory of anticompetitive harm depends on the harm in the tied market not

being offset by a consumer surplus benefit in the tying market. While Suture Express contends that customers would have paid less for suture and endo distribution but for defendants' bundling, the analysis fails to show that prices for other med-surg distribution would not increase if defendants omitted the contractual bundling terms and thereby lost the benefit of efficiencies created by the bundle. *See, e.g., Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 492 (3d Cir. 1992) (pointing out the flaw in plaintiff's logic that defendant would not raise the price of the tying product if the challenged tie-in was prohibited; instead, in a competitive market where defendant lacked supranormal profits, defendant would have to raise the price of the tying product "and consumers would be no better off than before").

Professor Elhauge's analysis does not present a genuine issue that the challenged practice harmed competition in the overall market. *See It's My Party, Inc. v. Live Nation, Inc.*, __ F.3d __, 2016 WL 426085, at *5 (4th Cir. 2016) (affirming summary judgment against plaintiff's antitrust claims and holding that the district court was not required "to accept uncritically" an expert's opinion "that coincidentally fit plaintiff's precise circumstances" because "[n]o party can expect to gerrymander its way to an antitrust victory without due regard for market realities."). Thus, Suture Express cannot withstand summary judgment because the facts, even when viewed in Suture Express' favor, fail to show a harm to competition. And without it, Suture Express cannot establish an antitrust injury.

3. Defendants Have Established Procompetitive Justifications for the Contractual Bundling.

Defendants also argue that, even if Suture Express could make a showing that the challenged action has an adverse effect on competition under the rule of reason approach described above, defendants' pricing terms provide customers with procompetitive benefits that are greater than any alleged anticompetitive harm. See *Law*, 134 F.3d at 1017 (explaining that if the challenged conduct results in an adverse effect on competition, then "[t]he inquiry . . . shifts to an evaluation of whether the procompetitive virtues of the alleged wrongful conduct justifies the otherwise anticompetitive impacts." (citation omitted)); see also *NCAA v. Bd. of Regents*, 468 U.S. 85, 104 n.26 (1984) (explaining that the Supreme Court recognizes that "tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis" (citing *Jefferson Par.*, 466 U.S. at 11–12)); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 788–90 (1st Cir. 1988) (Breyer, J.) (concluding that a tying arrangement was lawful under a rule of reason analysis because of an "absence of serious anticompetitive impact" and "evidence of justification").

Because the Court has determined that Suture Express has failed to present a triable tying claim when it cannot establish market power or anticompetitive harm, the Court could stop short of this argument and decline to address it. But given the case's breadth and complexity and to facilitate a full review on appeal, the Court elects to address this argument. See, e.g., *United States v. Microsoft*, 253 F.3d 34, 94–95 (D.C. Cir. 2001) (remanding case to the district court

to consider the procompetitive justifications of a tying arrangement under a rule of reason analysis). And, for the reasons explained below, the Court agrees with defendants.

Defendants argue that the contracts' bundling terms benefit customers because it is more efficient to distribute suture and endo products with other med-surg products, and defendants can pass the savings from those efficiencies on to customers. Indeed, as Areeda and Hovenkamp explain, "tying doctrine and antitrust policy do not condemn the defendant who [sells packaged products and] merely passes on [the] cost savings [from the package] because this "improve[s] customer welfare immediately, tend[s] to increase sales and profits and thereby encourage[s] cost-cutting innovations, and would occur in perfectly competitive markets." X Areeda & Hovenkamp ¶ 1758d1.

Defendants recognize these efficiencies because: (1) sutures and endo products are light weight and take up little space, and therefore little incremental cost results from adding suture and endo to an existing distribution of other med-surg products; (2) suture and endo products are more expensive than other med-surg products, and thus yield higher revenues for distribution services marked up on a percentage basis of the product's cost; (3) suture and endo manufacturers fund distribution of their products on a higher basis than funding provided by other med-surg vendors; and (4) suture and endo products constitute a high volume of customers' med-surg product needs in comparison to the other categories of med-surg products.

Customers who purchase other med-surg distribution from defendants will receive those products from defendants by truck regardless of whether they also

purchase suture and endo products. By adding suture and endo products to the truck with the other med-surg products, defendants realize efficiencies. They also can allocate the costs for the truck delivery that it must incur already while generating more revenue dollars. This, in turn, allows defendants to charge a lower mark-up on other med-surg products than they otherwise would charge for delivery of only the lowered-priced and higher-cost med-surg products.

Suture Express argues that the summary judgment record fails to demonstrate these efficiencies. It contends that the efficiencies do not exist if a customer wants more frequent deliveries of suture and endo than other med surg products. It also asserts that distribution of suture and endo by truck creates additional, significant costs that do not exist when delivering suture and endo by air. But defendants respond. To establish competitive benefits, defendants say, they need not prove that their distribution model by truck is more efficient than Suture Express' model. Instead, defendants must demonstrate that their distribution of suture and endo and other med-surg together produces savings compared to what they would incur if they distributed them separately. *See Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 895 (9th Cir. 2007) (explaining that bundling discounts "generally benefit buyers" and may produce "savings to the seller because it usually costs a firm less to sell multiple products to one customer at the same time than it does to sell the products individually"); *see also It's My Party, Inc. v. Live Nation, Inc.*, ___ F.3d ___, 2016 WL 426085, at *10 (4th Cir. 2016) (describing defendant's bundling as a "one-stop shop" and stating that "[i]n such a case, the practice of 'bundling obviously saves distribution and consumer transaction costs . . . [and] can also capitalize on certain economies of scope.'")

(quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 87 (D.C. Cir. 2001)).

The summary judgment facts, when viewed in Suture Express' favor, show that defendants realize savings by adding suture and endo distribution to other med surg distribution, thereby producing a pro-competitive benefit. Defendants use the same inputs to distribute suture and endo that they employ for other med-surg distribution. They rely on the same warehouses, trucks, and personnel to distribute thousands of types of med-surg products (including suture and endo). And, they experience economies of scope when they can distribute multiple products at the same time. As described above, defendants incur very little incremental cost to add suture and endo distribution to a customer's existing delivery of other med-surg products. But, when they deliver them together, defendants generate substantially more revenue because suture and endo are more expensive products and produce higher funding from vendors.¹⁶ When that occurs, defendants can charge lower prices for distribution of the products together. The joint distribution of both kinds of products together produces efficiencies and thus a procompetitive benefit.

In contrast, if a customer does not purchase suture and endo from defendants, then they must charge higher markups on the other med-surg products to cover the costs incurred for that delivery. The removal of suture and endo from the order does not eliminate much cost but results in substantially less revenue. But, defendants still incur the same costs for delivery

¹⁶ It is undisputed that vendor funding generally is paid as a percentage of the underlying product cost. Thus, the more expensive the product, the more vendor funding it generates.

without the suture and endo, and thus the increased pricing on other med-surg products bears those costs.

Suture Express also asserts that, even if defendants realize efficiencies from their bundling, they offer no evidence to demonstrate that they have passed any cost savings from the bundle on to customers. But the bundling terms, themselves, demonstrate such savings. When customers purchase suture and endo distribution along with other med-surg distribution, they realize savings in the form of lower markups for other med surg distribution than they otherwise would pay if they purchased other med-surg distribution without the bundle.

Trying to neutralize the undisputed facts, Suture Express contends that the bundled pricing terms do not reflect discounted savings to customers but instead allow defendants to impose penalties on customers who chose to buy suture and endo from another distributor. If that were true, defendants must increase prices artificially before discounting them. The record contains no admissible evidence of that practice. Also, no evidence suggests that prices are higher than they would be but for defendants' bundling terms. And, even if they were, the market here includes competitors (like Medline) who can prevent defendants from inflating prices artificially.

Suture Express also argues that defendants cannot realize efficiencies or justify anticompetitive conduct by claiming that any anticompetitive effects in one market (suture and endo distribution) are offset by the benefits to competition in another (other med surg distribution). Suture Express asserts that *Eastman Kodak Co. v Image Tech. Servs., Inc.*¹⁷ rejected a firm's

¹⁷ 504 U.S. 451, 485 (1992).

use of a tie to take profits from one market to cover their investment in another market. But the material facts here are different. No evidence suggests that defendants are taking profits from suture and endo distribution to invest in other med-surg distribution. Instead, the summary judgment facts show that defendants realize efficiencies from selling both types of distribution *together*. Thus, if customers purchase both types of distribution together thereby producing the efficiency, defendants can offer them lower prices for other med-surg distribution.

Providing additional support for these recognized efficiencies, other broadline distributors offer similar bundling provisions. This reinforces the undisputed facts about the bundle's efficiency. Here, the summary judgment record establishes that rival distributors who lack market power, including Medline, Seneca, and MMS, use similar bundling provisions. They require the same types of suture and endo commitments from customers in exchange for lower pricing on other med-surg products. As one court has observed, "firms without market power will bundle two goods only when the cost savings from joint sale outweigh the value consumers place on separate choice." *United States v. Microsoft Corp.*, 253 F.3d 34, 88 (D.C. Cir. 2001). Some distributors also testified that when a customer orders a certain product mix that allows the distributor to realize economics of scale, and the distributor is able to reflect those efficiencies through lower pricing to the customer.

Suture Express also testified that it offers discounted prices to customers who commit to purchase a certain volume of product. These types of commitments differ from defendants' bundling arrangements because they do not involve tying two products

together, but nevertheless they are premised on similar efficiencies. Indeed, Suture Express' CFO testified that Suture Express offers discounted prices for volume commitments because different cost components exist when a customer brings all of its suture and endo business to Suture Express instead of "cherrypick[ing]" certain products for distribution. Doc. 303-3 at 5. Suture Express' CFO also agreed that the customer should pay a different price under the two different scenarios because of the "very different" cost components involved. *Id.*

As the case law cited above recognizes, bundling allows a seller to save on costs and capitalize on economies of scope. Because of efficiencies like these, "cost-justified bundled discounts [are] essential to the efficient operation of markets, even though such discounts may exclude an equally efficient rival." X Areeda & Hovenkamp ¶ 1758d1. Areeda and Hovenkamp describe how a seller realizes efficiencies through a bundled discount in the following example:

Consider this illustration: to drive a truck from Chicago to St. Louis costs \$100, no matter how full the truck is. The buyer needs half a load of beans and half a load of corn and shipping them separately would cost \$100 per shipment, but shipping them together costs \$100 total. So the seller offers a discount of \$60 if the buyer purchases both corn and beans and accepts them in a single shipment, effectively "tying" the corn and bean purchases via the discount. In this case the buyer profits by \$60 over what separate sales from separate sellers would produce. The seller is \$40 ahead after taking a \$60 price cut but avoiding a \$100 truck trip, and the rest of

society is better off because unneeded truck trips consume resources. Nevertheless, the policy injures a rival who sells beans but not corn, even if that seller is an equally efficient bean producer and has tucking costs that are no higher.

X Areeda & Hovenkamp ¶ 1758d1. Suture Express asserts that this example does not apply here, where the comparison is distribution by truck to distribution by air. It argues that joint distribution by truck does not offer a procompetitive benefit to the market when Suture Express can distribute suture and endo more efficiently by air. But, as stated above, defendants need not prove that their model is more efficient than Suture Express' business model. Instead, the procompetitive benefit realized in the market at issue here is the lower pricing offered to customers on other med-surg distribution. Suture Express cannot match the bundle offered by defendants, but that is because of a decision it and it alone has made: to limit its business model to suture and endo distribution.

In essence, Suture Express is asking the Court to insert itself into the market and decide which business model customers should choose when they purchase suture and endo distribution. The Court declines. The Court's involvement in this type of discussion could very well "lead to an environment of commercial parochialism." *It's My Party, Inc.*, 2016 WL 426085, at *13. Actually, it could produce harm to competition. Suture Express wants the Court to enjoin defendants from offering the bundled terms to customers. But this order, if the Court were to issue it, would not stop other market participants like Medline, Seneca, and MMS from offering similar bundling terms—as they do already. The Court cannot issue an order that

restrains defendants from bundling but leaves their competitors free to use them to their benefit (and to defendants' harm). Under these facts, it is most appropriate to let the market's customers decide which business model offers the most efficient distribution of their med-surg needs. *See id.* (concluding that plaintiff could not employ the antitrust laws for "anticompetitive ends" and stating that it was "sending this tussle between two rivals back to the marketplace from whence it came").

Suture Express also argues that defendants cannot demonstrate procompetitive justifications for their bundling because this practice fails the "less restrictive alternative test." Under this test, an antitrust plaintiff may rebut a claim that a tie is procompetitive "by showing that the claimed function is not legitimate in principle, is served poorly by the restraint, or is adequately attainable by substantially less restrictive means." IX Areeda & Hovenkamp ¶ 1729a; *see also Law*, 34 F.3d at 1019 (stating that "[i]f the defendant is able to demonstrate procompetitive effects, the plaintiff then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner"). Here, Suture Express argues, if bundling produces efficiencies, then the less restrictive approach to implementing that efficiency is for defendants to lower the price of suture and endo distribution. Defendants did not take that approach, but instead altered the price for distribution of other med-surg products. Thus, Suture Express contends, defendants fail the less restrictive alternative test.

Defendants respond that the less restrictive alternative advanced by Suture Express fails to realize the

efficiencies described above when defendants are able to distribute both suture and endo and other med-surg together. If defendants discounted only the suture and endo distribution, they would fail to cover the costs incurred for delivery to a customer who purchased only suture and endo distribution but not other med-surg. Defendants also could not match the bundled prices to customers who purchased both suture and endo and other med-surg, thereby producing the described efficiencies and cost savings.

Defendants also reject Suture Express' suggestion that they should reverse the bundle. That is, Suture Express asserts that the less restrictive alternative is for defendants to offer lower pricing on suture and endo distribution in exchange for loyalty in purchasing other med-surg products. This proposal again fails to recognize the efficiencies of distributing the products together, which reduces the *overall* costs of distribution and not simply the cost of one subset of products. Also, defendants assert that customers do not select a broadline distributor based on one category of med-surg products. Instead, customers select broadline distributors based on their ability to distribute across the broader line of med-surg distribution. Thus, defendants would not offer a bundle premised on a discount of one category of med-surg products in exchange for purchase of other-med surg because customers already go to the distributor to purchase their other med-surg needs. The undisputed facts, viewed in Suture Express' favor, do not establish that defendants could achieve the procompetitive benefits of defendants' bundling through a less restrictive alternative.

The Court finds that the summary judgment facts demonstrate procompetitive benefits of bundling, and

they justify any anticompetitive effect. Thus, Suture Express cannot survive summary judgment under a rule of reason analysis on its Sherman Act § 1 claim.

B. Clayton Act § 3

Suture Express also asserts that defendants' contractual terms violate § 3 of the Clayton Act. Section 3 of the Clayton Act prohibits "any person engaged in commerce, in the course of such commerce, to . . . make a sale or contract for sale of goods . . . for use, consumption, or resale within the United States . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 14.

Defendants seek summary judgment against this Clayton Act claim because, defendants argue, the Clayton Act applies only to the sale of "goods, wares, merchandise, machinery, supplies, or other commodities." 15 U.S.C. § 14. And, it does not apply to services. *See Hudson Valley Asbestos Corp. v. Tougher Heating and Plumbing Co.*, 510 F.2d 1140, 1145 (2d Cir. 1975) (explaining that "[i]t is, of course, well settled that section 3 [of the Clayton Act] does not apply to sales of services"). Here, defendants argue, the relevant market is distribution *services*, not the products themselves. Thus, defendants contend the Court must grant summary judgment against Suture Express' Clayton Act claim.

As explained above, the Court has determined that the undisputed facts establish that the relevant product market here is distribution of med-surg products to acute care customers, not distribution services as defendants assert. *See supra* n.3. And Suture Express cites several cases in which courts have held that the Clayton Act applies to distribution agreements for physical goods. *See, e.g., W. Power Sports, Inc. v. Polaris Indus. Partners L.P.*, 951 F.2d 365, 1991 WL 266523, at *3 (9th Cir. Dec. 11, 1991) (unpublished table opinion) (reversing district court's grant of summary judgment on a Clayton Act § 3 claim and holding that the statute applied to distribution agreements requiring distributors to purchase a certain amount of snowmobiles from the manufacturer); *see also Chelson v. Oregonian Publ'g Co.*, 715 F.2d 1368, 1369 (9th Cir. 1983) (holding that the Clayton Act applied to an agreement between a newspaper publishing company and its retail distributors that prohibited the distributors from distributing advertising inserts for another company because the agreement provided that that distributors would purchase goods and resell them); *see also X Areeda & Hovenkamp* ¶ 1752f2 (explaining that the Clayton Act applies even when "services [are] embodied in corporeal goods" and "[w]hen the item sold is a physical product from which buyers derive value, it should be considered a commodity").

Defendants distinguish these cases because they involve the traditional purchase and resale of goods but do not discuss prices that customers pay for distribution services, as customers of med-surg distribution pay in this case. Indeed, Suture Express' expert opined that the relevant product market here is the market for distribution services, not the physical items themselves. He also based his analysis on that market definition. Though defendants seem to have the better

end of this argument, the Court concludes that it need not decide this issue to determine the viability of the Clayton Act claim. Even assuming that the Clayton Act applies to the med-surg distribution at issue here, Suture Express' claim fails for the same reasons described above in the context of the Sherman Act.

Suture Express asserts that the economic effect of defendants' bundling terms makes them exclusive contracts that violate § 3. Thus, Suture Express' claim under the Clayton Act mirrors its tying claim under § 1 of the Sherman Act. And, "the standard for adjudicating tying [under Sherman Act § 1 and Clayton Act § 3] are now recognized to be the same." *Sheridan v. Marathon Petroleum Co.*, 530 F.3d 590, 592 (7th Cir. 2008) (citing *Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc.*, 138 F.3d 869, 874 (11th Cir. 1998); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 495–96 (3d Cir. 1992) (en banc); *Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290, 1298–99 (10th Cir. 1989)); see also IX Areeda & Hovenkamp ¶ 1719b (explaining that although the words of Sherman Act § 1 and Clayton Act § 3 "differ, the two statutes apply a single substantive standard"). Thus, for the same reasons explained in the analysis for Suture Express' Sherman Act claim, defendants are entitled to summary judgment against Suture Express' tying claim under § 3 of the Clayton Act.¹⁸

C. Kansas Restraint of Trade Act

Finally, Suture Express and defendants both move for summary judgment on Suture Express' claim under the Kansas Restraint of Trade Act. The KRTA

¹⁸ And, for the same reasons explained above when discussing the Sherman Act claim, the Court denies Suture Express' summary judgment motion on its Clayton Act claim.

“is broad in scope” but case law under the Act is “largely undeveloped” and “the bulk of [the Act’s] provisions have not been meaningfully interpreted by Kansas courts.” *O’Brien v. Leegin Creative Leather Prods., Inc.*, 277 P.3d 1062, 1068 (Kan. 2012) (citing *Bergstrom v. Noah*, 974 P.2d 520, 530 (Kan. 1999)). The Kansas Supreme Court has noted that the KRTA and federal antitrust laws share some similarities, but “they are not, in fact, the same.” *Id.* (citing *Bergstrom*, 974 P.2d at 531). Federal antitrust law may supplement the remedies available under this Kansas law, but it does not displace the substantive antitrust provisions of the KRTA. *Id.* Therefore, “[w]hile . . . cases [interpreting federal antitrust statutes] may be persuasive authority for any state court interpreting [Kansas] antitrust laws, such authority is not binding upon any court in Kansas interpreting Kansas antitrust laws.” *Bergstrom*, 974 P.2d at 531.

K.S.A. § 50-112 prohibits all agreements or contracts “made with a view or which tend to prevent full and free competition in the . . . sale of articles imported into [Kansas]” and those “designed or which tend to advance, reduce or control the price . . . of any such products or articles.” In *O’Brien*, the Kansas Supreme Court held that K.S.A. § 50-112, in its form on the date of that opinion,¹⁹ omitted any mention of reasonableness, or a rule of reason. 277 P.3d at 1079. The Kansas

¹⁹ The Kansas legislature enacted “substantial changes” to the KRTA after the Kansas Supreme Court’s opinion in *O’Brien*. *Smith v. Phillip Morris Cos.*, 335 P.3d 644, 652 (Kan. Ct. App. 2014). The amendments to the KRTA went into effect on April 18, 2013, but generally do not apply retroactively to cases already pending at the amendments’ effective date. *Id.* (citing K.S.A. § 50-164 (Supp. 2013)) (further citation omitted). Because this case was filed before the 2013 effective date of the KRTA amendments, the current version of the KRTA does not apply to this case.

Supreme Court thus held that the statute “leaves no room” for applying a rule of reason approach, and held that “reasonableness does not set the antitrust violation standard in Kansas . . .” *Id.* at 1083. Given this holding, the Court cannot simply apply its federal analysis to decide whether the KRTA claim survives summary judgment.

Instead, the Court begins its analysis of the KRTA claim with the requirement of antitrust injury. While this requirement originates in “federal antitrust jurisprudence,”²⁰ it undoubtedly plays an important role under the KRTA. As the Kansas Supreme Court explained in *O’Brien*, the antitrust injury requirement “equates to the Kansas concept of causation, or the ‘requirement that a plaintiff’s theory of damages . . . correspond[s] to an economic effect that the statute . . . invoked as the basis for liability aims to prevent.’” 277 P.3d at 1075 (quoting Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 *Antitrust L.J.* 697, 698 (2003) (first ellipsis in original)). *O’Brien* illustrates how Kansas law applies this requirement, whether one thinks of it as antitrust injury or damages causation.

In *O’Brien*, a class of retail consumers who had purchased a particular brand of fashion accessories and luggage from retail stores sued the products’ manufacturer. This class claimed that the manufacturer had violated the KRTA by adopting a pricing policy “suggesting” retailers should sell its products at “keystone,” which was “twice wholesale plus a small amount that varie[d] by product.” *Id.* at 1068. The manufacturer also shipped its products to retailers

²⁰ *O’Brien*, 277 P.3d at 1075 (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

tagged with a “manufacturer’s suggested retail price (MSRP).” *Id.* And while the manufacturer characterized its policy merely as “suggested pricing,” *id.*, the summary judgment facts established that:

- the manufacturer required its retailers to initial and sign an acknowledgment that violating the pricing policy was “grounds for dismissal” from selling the products at retail;
- while never “systematic[ally]” or “comprehensive[ly]” monitoring compliance with this pricing policy, the manufacturer “occasionally enforced” it by refusing to deal with retailers who sold its products at discounted prices; and
- the pricing policy had *increased* the price that the plaintiff class of retail buyers had paid to purchase the products.

Id. at 1068–70.

These summary judgment facts sufficed, the Kansas Supreme Court held, to permit a reasonable jury to find that the plaintiff class “actually [had] paid prices for [the manufacturer’s goods that were] *inflated* by its pricing combinations or arrangements with retailers.” *Id.* at 1078 (emphasis added). The Kansas court deemed these facts sufficient to avoid summary judgment because the KRTA requires a plaintiff seeking to recover under this act to “come forward with evidence that [the plaintiff] has been injured or damaged by” conduct that the KRTA renders illegal. *Id.* at 1077. But *O’Brien* also held that not just any kind of injury will do. A KRTA plaintiff also must seek to recover for “an economic effect that the [KRTA] aims to prevent.” *Id.* at 1075. The Kansas court concluded that the

manufacturer's policy had caused retail customers to pay an inflated price, and this was sufficient to support a finding that the claimed damages met both aspects of the KRTA's requirement for antitrust injury/damage causation. *Id.* at 1078. The Kansas Supreme Court thus reversed the trial court's decision granting summary judgment. *Id.*

Close attention to *O'Brien's* rationale focuses the analysis on the very facts that make summary judgment appropriate here. The summary judgment facts in this case establish a market where both defendants, many regional broadline competitors, and even Suture Express are experiencing *declining* prices and *declining* markups. *See supra* Part III.A.2. Such declines, though bad news for defendants, Suture Express, and other participants in the distribution market, actually are good news for acute care providers who purchase distribution from them. These declining prices also are good news for patients who pay the bills issued by those acute care providers.²¹

Offering discounts to customers does not inflate prices—the condition that *O'Brien* held to satisfy the requirement that the claimed harm must be one that the KRTA “aims to prevent.” To the contrary, price discounts give customers who choose to subscribe to them the chance to purchase at *deflated* prices. This kind of market condition provides no basis for a reasonable jury to find the kind of “economic effect” that the KRTA “aims to prevent.” 277 P.3d at 1075. In

²¹ Also, the summary judgment record contains no admissible evidence of reduced output. Rival national and regional competitors are growing the distribution market. Even Suture Express' expert calculates that industry-wide revenue figures for med-surg distribution had increased, not decreased, during the relevant period. *See supra* Part III.A.2.

short, the summary judgment facts preclude the possibility that Suture Express can satisfy the KRTA's requirement of antitrust injury/damages causation. This makes summary judgment appropriate.

In addition, the summary judgment facts fail to show that defendants' contracts were "made with a view," "designed to," or "tend to" prevent full and free competition, as the KRTA requires. *O'Brien* explained that "it is enough [for a plaintiff] to show that the arrangement is 'designed to' or 'tends to' control prices . . . a plaintiff does not have to show that the arrangement actually succeeds in increasing prices." 277 P.3d at 1075. Also, "the phrase 'designed to' contemplates a subjective standard [while] 'tend to' contemplates an objective standard, one that requires examination of the defendant's behavior to discern whether it would reasonably be expected to produce a particular result, regardless of the defendant's intention." *Id.* at 1075-76. Suture Express cites various documents where defendants discussed, separately, their use of bundling contract terms to defend against Suture Express taking defendants' suture and endo distribution business. But no reasonable jury could find that these communications show that the contracts were designed to prevent full and free competition. To the contrary, a reasonable jury only could find that these communications reveal competitors engaged in the activity that the KRTA seeks to promote—trying to meet and counter the effects of competition that Suture Express' innovative business model brought to the market. If the Court were to view these communications sufficient for a jury to find conduct intended to prevent full and free competition, every attempt by one competitor to gain business from a rival would require a trial under Kansas' antitrust laws. The Court does not understand the Kansas

Supreme Court's interpretation of the KRTA to require such a result.

Even under the broadest permissible view of the KRTA and viewing all evidence in the light most favorable to Suture Express, the summary judgment record lacks evidence that defendants' contracts were designed to or tend to harm competition. To the contrary, Suture Express cannot demonstrate harm to competition sufficient to survive summary judgment on its KRTA claim.

And, for the same reasons, the Court denies Suture Express' summary judgment motion on its KRTA claim because it cannot establish harm to competition, especially when the Court views the evidence in the light most favorable to defendants, as it must when considering Suture Express' summary judgment motion.

IV. Conclusion

This case exposes the rough-and-tumble business of competition in the American marketplace. In 1998, Suture Express launched an innovative business model designed to capture the most lucrative channel of med-surg distribution. It worked. By 2010, Suture Express had managed to capture a 10% share of that lucrative market segment, suture and endo distribution. Defendants and other broadline distributors didn't like losing that market share to Suture Express, so they did what motivated competitors do. They fought back with their own pricing innovation—pricing designed to recapture those lost suture and endo customers. Their innovation worked as well, and it cost Suture Express some of the customers it originally had taken from broadline distributors, including defendants.

The next move in this competitive saga belongs to the market's participants—Suture Express, defendants, other distributors, acute care providers, and other innovators who, as Suture Express once did, can come up with a new idea that customers may fancy. But the Court can find nothing in our antitrust laws that assigns a role, on these summary judgment facts, to the courts. Therefore, the Court grants summary judgment for defendants on all three claims asserted by Suture Express.

IT IS THEREFORE ORDERED THAT defendants Owens & Minor Distribution, Inc. and Cardinal Health 200, LLC's Motion for Summary Judgment (Doc. 253) is granted.

IT IS FURTHER ORDERED THAT plaintiff's Partial Motion for Summary Judgment (Doc. 254) is denied.

IT IS SO ORDERED.

Dated this 7th day of April, 2016, at Topeka, Kansas

s/ Daniel D. Crabtree

Daniel D. Crabtree

United States District Judge

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

[Filed 08/05/13]

Case No. 12-2760-RDR

SUTURE EXPRESS, INC.,

Plaintiff,

v.

CARDINAL HEALTH 200, LLC, and
OWENS & MINOR DISTRIBUTION, INC.,

Defendants.

MEMORANDUM AND ORDER

This is an antitrust action raising federal and state law claims. This case is before the court upon the motions to dismiss for failure to state a claim (Doc. Nos. 23 and 27) filed by defendant Owens & Minor Distribution, Inc. and defendant Cardinal Health 200, LLC.¹ Thus, the question for the court is whether plausible antitrust law violations and state law claims are described in plaintiff's first amended complaint. The court finds that: the first amended complaint does not allege per se antitrust violations or monopolization

¹ Two other defendants named in the first amended complaint, Cardinal Health, Inc. and Owens & Minor, Inc. have been voluntarily dismissed without prejudice. Doc. No. 42. This action makes moot a portion of the motion to dismiss filed as Doc. No. 23 and makes the motion to dismiss filed as Doc. No. 25 entirely moot.

violations; plaintiff's claims of conspiratorial agreement are not specifically supported by factual allegations; and plaintiff's unjust enrichment claim does not properly allege a benefit conferred by plaintiff upon defendant. The court further finds that plaintiff's claims that defendants, acting individually, violated § 1 of the Sherman Act and § 3 of the Clayton Act are plausible under rule of reason analysis and that analogous claims under K.S.A. 50-112 should also survive.²

I. PLAINTIFF'S FIRST AMENDED COMPLAINT (Doc. No. 19).

Plaintiff alleges federal and state antitrust law violations and makes a claim of unjust enrichment relating to the distribution and sale of "med-surg" supplies to acute care providers. "Med-surg" supplies are medical and surgical single-use items such as sutures, needles, syringes, gloves, surgical instruments and catheters. There are thirty product categories in the "med-surg basket" commonly sold to acute care providers. Plaintiff alleges that defendants Owens & Minor Distribution, Inc. ("O&M") and Cardinal Health 200, LLC ("Cardinal") are broad-based distributors who purchase and distribute the full gamut of products in the med-surg basket. The complaint alleges that there are approximately 4,800 acute care providers that commonly purchase med-surg supplies through group purchasing organizations, regional

² The court shall also rule as follows upon motions connected to the motions to dismiss. The unopposed motion to amend the memorandum in support of the motion to dismiss filed by defendant Owen & Minor Distribution, Inc. (Doc. No. 45) and that defendant's request for judicial notice (Doc. No. 29) shall be granted. The motion for oral argument filed by defendants Cardinal Health 200, LLC and Owens & Minor Distribution, Inc. (Doc. No. 48), which is also unopposed, shall be denied.

purchasing cooperatives or other multi-hospital systems. Defendant O&M is alleged to have 39% of this market. Defendant Cardinal is alleged to have 33% of this market.

Plaintiff has limited its business to a portion of the med-surg basket – the sale and distribution of sutures and endomechanical products. Endomechanical (“endo”) products are devices used in minimally invasive surgeries, like laparoscopic surgery. Sutures and endo products are alleged to make up 10% of med-surg supplies distributed in the United States to acute care providers. Plaintiff asserts that it provides a greater variety of suture and endo products than the more broad-based distributors who concentrate on so-called “core” products, which are the most popular or widely-used sutures and endo products. Plaintiff alleges that it is the only significant distributor of specialty or non-core sutures and endo products. For this and other reasons, plaintiff contends that its business thrived from the beginning in 1998 through 2008. Plaintiff alleges that it distributes to approximately 900 of the nation’s 4,800 acute care providers and that it offers both core and non-core sutures and endo products.

Plaintiff states that in 2008 defendants attempted to leverage their power in the distribution of a fuller array of med-surg products to coerce customers from buying plaintiff’s sutures and endo products. Plaintiff asserts that contracts were constructed which unlawfully tied the sale of sutures and endo products to the sale of other products in the med-surg basket. Under these contracts if an acute care provider did not purchase 90% or more of its sutures and endo products from a defendant, then it would pay a penalty on the entire med-surg basket purchased from that defendant. The penalty was allegedly so substantial

that it effectively prevented acute care providers from dealing with plaintiff, thus foreclosing the opportunity for acute care providers to enjoy plaintiff's alleged superior service, lower distribution fees and comprehensive product selection. According to plaintiff, this penalty was also packaged as a "discount program" where providers were not eligible for a discounted distribution fee if they did not purchase their sutures and endo products from a defendant. Plaintiff further contends that the amount of the "discount" was such as to bring the price of defendants' sutures and endo products below cost and, thus, constituted predatory pricing which enhanced defendants' market power, raised barriers to entry and impeded the ability of plaintiff to compete.

Plaintiff asserts that defendants' exclusionary practices are strikingly similar and that the "lock-step implementation of nearly identical penalty programs defies each [defendant's] economic interests." Doc. No. 19, ¶ 52.

Plaintiff contends that in order to avoid paying extra for the med-surg products hospitals needed as part of the med-surg basket, acute care providers declined to purchase sutures and endo products from plaintiff and instead purchased them from defendants. Plaintiff alleges that its business has been injured and that consumers have been injured in the following manner: less consumer choice among competing suture and endo product distributors; increased costs and reduced service; reduced access and barriers to entry to the sutures and endo products distribution market; chilled innovation within the med-surg supplies distribution market; and loss of competition among distributors to the acute care market.

Seven counts are listed in the complaint: a violation of § 1 of the Sherman Act alleging illegal tying (Count 1); a violation of § 2 of the Sherman Act alleging unlawful monopolization or attempted monopolization of the markets for the domestic distribution of sutures and endo products to acute care providers (Count 2); a violation of § 1 of the Sherman Act alleging conspiracy to restrain trade (Count 3); a violation of § 2 of the Sherman Act alleging conspiracy to monopolize (Count 4); a violation of § 3 of the Clayton Act alleging exclusive dealing (Count 5); a violation of K.S.A. 50-101 et. seq. alleging anticompetitive tying and bundling (Count 6); and unjust enrichment (Count 7).

II. STANDARDS GOVERNING DEFENDANTS' MOTIONS TO DISMISS

FED.R.CIV.P. 8(a) requires that a complaint contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” The Supreme Court has stated that a complaint must provide a defendant with “fair notice” of the claims against it and the grounds for relief. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Pursuant to FED.R.CIV.P. 12(b)(6), a court may dismiss a complaint when it does not contain enough facts to state a claim to relief that is plausible on its face. *Id.* at 570. “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.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a

plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (internal citations and parentheticals omitted). The Court observed in *Twombly* that, "proceeding to antitrust discovery can be expensive." *Id.* at 558 (applying the pleading standard to Sherman Act claims). Thus, a court should "insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983)).

In considering a motion to dismiss, a court must accept all of the plaintiff's allegations as true and construe them in the light most favorable to the plaintiff. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) *cert. denied*, 548 U.S. 1148 (2010). In addition, a court may consider documents attached to the complaint or incorporated by reference. *Id.*

III. COUNT ONE AND GLOBAL DEFENSES.

In this section of the court's order, the court shall address defendants' arguments against Count One and some of the arguments defendants have asserted broadly against all of the counts in the first amended complaint. The court shall address defendants' statute of limitations arguments in a separate section of this opinion.

Count One alleges that each defendant individually engaged in illegal tying contracts in violation of § 1 of the Sherman Act. Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of

trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.” 15 U.S.C. § 1. Any “restraint of trade” is *not* prohibited by § 1 of the Sherman Act, only “unreasonable restraints of trade.” *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir.) *cert. denied*, 525 U.S. 822 (1998).

“Generally, a tying arrangement, is illegal under § 1 of the Sherman Act if it can be shown that: (1) two separate products or services are involved; (2) the sale or agreement to sell one product or service is conditioned on the purchase of another; (3) the seller has sufficient economic power in the tying product market to enable it to restrain trade in the tied product market; and (4) a not insubstantial amount of interstate commerce in the tied product is affected.” *Sports Racing Services, Inc. v. Sports Car Club of America, Inc.*, 131 F.3d 874, 886 (10th Cir. 1997).

Whether an alleged restraint of trade is unreasonable depends upon a “rule of reason” or a “per se” analysis. A “rule of reason” analysis, the most commonly used method, requires weighing all of the circumstances of a case to decide whether a restrictive practice imposes an unreasonable restraint on competition. *Gregory v. Fort Bridger Rendezvous Ass’n*, 448 F.3d 1195, 1203 (10th Cir. 2006)(citing *Diaz v. Farley*, 215 F.3d 1175, 1182 (10th Cir. 2000)). Some types of anticompetitive conduct, however, have been considered in some situations to be “per se” unreasonable because their effects on competition lack any redeeming virtue and so are presumed to be unreasonable and therefore illegal. *Id.*

A. Per se analysis.

Count One does not state a plausible Sherman Act violation under per se analysis. The Tenth Circuit has

stated that: "A tie-in constitutes a per se section 1 violation if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied product market." *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc.*, 63 F.3d 1540, 1546 (10th Cir. 1995) cert. denied, 516 U.S. 1044 (1996). The Tenth Circuit has also observed, that: "Per se violations are restricted to those restraints that would always or almost always tend to restrict competition and decrease output. This concern is greatest when actual competitors enter agreements because cooperation among would-be competitors will deprive the market place of the independent centers of decisionmaking that competition assumes and demands, and risks anti-competitive effects. Vertical arrangements, on the other hand, do not generally give rise to the same concerns and often have pro-competitive effects." *Campfield v. State Farm Mutual Automobile Ins. Co.*, 532 F.3d 1111, 1119 (10th Cir. 2008)(interior quotations and citations omitted).

The first amended complaint fails to state a per se tying claim for the following reasons. First, as discussed later in this decision, the court finds that any horizontal conspiracy allegations are insufficiently pled. Second, contracts between an individual defendant and a purchaser of med-surg supplies are vertical arrangements, and therefore less likely to be a per se violation. Third, the alleged market power of each individual defendant is insufficient for the defendant to be held liable in a per se tying case. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26-29 (1984)(30% market share absent other factors is insufficient to establish market power for a per se tying claim); *Times-Picayune Publishing Co. v. United*

States, 345 U.S. 594, 611-13 (1953)(40% of sales insufficient for per se unlawful tying particularly when that share does not greatly exceed the share of any other competitor). Plaintiff alleges no factors in the first amended complaint from which the court could infer that discovery would produce evidence to support a per se tying claim.

B. Rule of reason analysis

To properly allege a tying claim which satisfies the rule of reason analysis, a plaintiff must allege facts showing that the contract or agreement in question had a substantially adverse effect on competition in general. See *Gregory*, 448 F.3d at 1205 (quoting *Law*, 134 F.3d at 1019 for the proposition that plaintiff bears the initial burden of showing that an agreement had a substantially adverse effect on competition); see also, *George Haug Co. Inc. v. Rolls Royce Motor Cars Inc.*, 148 F.3d 136, 139 (2d Cir. 1998). While there is much case authority for the proposition that injury to a plaintiff does not suffice to show an adverse effect on competition in general, plaintiff's alleged position as "the only significant specialty distributor of sutures and endo products" (Doc. No. 19, ¶ 50) as well as the alleged target of defendants' tying activity is a distinguishing factor, particularly when it is asserted that plaintiff has "lost a significant number of existing and potential customers" (¶ 8) and (at ¶ 56) that "numerous hospitals and other acute care providers that would prefer to purchase sutures and endo products from [plaintiff] are prohibited from doing so." See *Apani Southwest, Inc. v. Coca-Cola Enterprises*, 128 F.Supp.2d 988, 997 (N.D.Tex. 2001)(alleged injury to plaintiff may be sufficient to allege substantial injury to competition); see also, *Spanish Broadcasting System of Fla., Inc. v. Clear Channel Communications*,

Inc., 376 F.3d 1065, 1072-73 (11th Cir. 2004) (acknowledging that under some circumstances damage to a critical competitor may also damage competition in general). In addition, plaintiff alleges that the tying activity deprives numerous purchasers' access to a more comprehensive product line, superior service and lower distribution fees.

C. Other arguments

1. Strict tie-ins versus discounts

Defendants argue that plaintiff cannot proceed upon a tying claim because defendants allow for separate purchases of med-surg supplies and sutures and endo products. As described previously, instead of requiring that med-surg supplies and suture and endo products be purchased together, each defendant is offering discounts on the sale of med-surg supplies if 90% of the purchaser's sutures and endo products needs are purchased from the defendant. The court disagrees with defendants' argument. The Tenth Circuit has held that a tying claim was stated when economic penalties (as well as outright prohibition of separate purchases) were used to induce persons to purchase a grave marker from the cemetery providing the grave plot instead of buying the marker separately from a grave marker builder or dealer. *Monument Builders v. American Cemetery Assn.*, 891 F.2d 1473, 1476 (10th Cir. 1989) *cert. denied*, 495 U.S. 930 (1990). Moreover, as the Supreme Court has commented, "the Sherman Act does not prohibit 'tying'; it prohibits 'contract[s] . . . in restraint of trade.'" *Jefferson Parish*, 466 U.S. at 21 n. 34. The question is not so much whether the alleged arrangement is a "tying agreement" as "whether there is a possibility that . . . competition on the merits [has been foreclosed] in a product market distinct from the market for the alleged tying item."

Id. at 21; see also, *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 (1983) (“[a]n agreement to restrain trade may be unlawful even though it does not entirely exclude its victims from the market”). So, plaintiff need not allege a strict tie-in arrangement in which a purchaser is required to purchase two separate products together in order to assert a violation of § 1 of the Sherman Act. While some purchasers do buy sutures from sources other than defendants, this is not fatal to Count One because it does not foreclose the plausibility of plaintiff’s claim that defendants’ discounting activity has restrained trade on the merits for a substantial amount of interstate commerce in the market for sutures and endo products.

2. Insufficient market power

Defendants contend that plaintiff has not asserted that defendants have sufficient market power in the tying product market to plausibly allege the ability to coerce a purchaser to buy sutures and endo products from defendants. As already noted, the first amended complaint states that the alleged tying activity has caused plaintiff to lose a significant number of customers. From this allegation (which must be considered as true) as well as plaintiff’s allegations regarding predatory pricing, entry barriers, and parallel pricing behavior by two substantial competitors in the med-surg market, it is plausible to infer that each defendant has sufficient market power in the tying products to coerce buyers to accept the alleged tying arrangement.³ Contrary to defendants’ contention, plaintiff’s

³ Defendant Cardinal has cited *Bailey’s, Inc. v. Windsor Am., Inc.*, 948 F.2d 1018, 1032 (6th Cir. 1991) for the proposition that a defendant whose share of the market is less than that of other competitors lacks the market power to restrain trade in violation

substantial position in the sutures and endo products market also does not preclude plaintiff from alleging an antitrust injury. See *Sterling Merchandising, Inc. v. Nestle, S.A.*, 656 F.3d 112, 122 (1st Cir. 2011) (success in the market does not preclude plaintiff from proving damages caused by an antitrust violation); *Masimo Corp. v. Tyco Health Care Group*, 2006 WL 1236666 *6 (C.D.Cal. 3/22/2006)(jury could find substantial market foreclosure and anticompetitive effects even though plaintiff was able to grow revenue and capture new sales in the face of defendant's exclusive dealing discounts).

3. Relevant market definition

A proper definition of "relevant market" is critical to determining whether a restraint of trade is unreasonable or anticompetitive, whether a substantial amount of commerce has been foreclosed, and whether a level of market power has been leveraged, attempted or achieved in violation of antitrust statutes. Therefore, it is difficult or impossible to determine the plausibility of an antitrust claim if the relevant market is untenably defined.

Defendants contend that Count One *and the rest of plaintiff's antitrust claims* must be dismissed because plaintiff has improperly confined its definition of the relevant market to domestic acute care providers who purchase med-surg supplies.⁴ Defendants suggest that their market share may be less than alleged by

of § 1 of the Sherman Act. The market share of the defendant in that case, however, was much less than the alleged market share of defendants Cardinal and O&M in this case.

⁴ Plaintiff also alleges that each product category within the broader market of med-surg products constitutes a relevant market or submarket. Doc. No. 19, ¶¶ 25-26.

plaintiff if non-acute care providers who purchase med-surg supplies are included. This is a difficult issue to determine upon a motion to dismiss although it has happened in some cases when the definition appears untenable on its face. E.g., *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3rd Cir. 1997)(affirming dismissal for failure to plead a valid relevant market including interchangeable pizza ingredients, supplies, materials and distribution services).

This is not an instance in which the court can determine that plaintiff's relevant market is flawed on its face. As suggested above, many courts recognize that the definition of the relevant market and a defendant's power in that market are issues of fact. E.g., *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001); *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 199 (3d Cir. 1992) *cert. denied*, 507 U.S. 921 (1993); *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986) *cert. denied*, 486 U.S. 1005 (1988); *Christou v. Beatport, LLC*, 849 F.Supp.2d 1055, 1066 (D.Colo. 2012); *Allen v. Dairy Farmers of America, Inc.*, 748 F.Supp.2d 323, 336-37 (D.Vt. 2010); *Lockheed Martin Corp. v. Boeing Co.*, 314 F.Supp.2d 1198, 1225 (M.D.Fla. 2004). The courts in *Allen* and *Lockheed Martin* discuss in some detail the viability of defining a product market on the basis of customer traits. In *Allen*, a motion to dismiss is denied and in *Lockheed Martin*, a motion to dismiss is granted. Both courts recognize that a relevant product market may sometimes be limited to a portion of customers based on a distinction in the product sold to those customers. *Allen*, 748 F.Supp.2d at 336; *Lockheed Martin*, 314 F.Supp.2d at 1226. The *Allen* court observed that many cases which decided this question resolved summary judgment motions and

that a court should consider such factual issues as “industry recognition of the market, the commercial realities of, among other things, production, transportation, accessibility of plans, pricing and consumer preferences, as well as ‘the actual dynamics of the market.’” *Id.* (quoting *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 496 (2d Cir. 2004)). In *Lockheed Martin*, 314 F.Supp.2d at 1228, the court observed that *consumer* preferences may affect cross-elasticity (i.e., whether demand shifts from goods of one type to goods of a similar type in response to increases in price) which will determine the breadth of the product market.⁵

As plaintiff has noted, in *White and White, Inc. v. American Hospital Supply Corp.*, 540 F.Supp. 951, 988 (W.D.Mich. 1982), hospital customers were a parameter of a relevant market determined by a district court in an antitrust lawsuit where a med-surg supplies distributor was suing a national distributor of hospital supplies. The court made a finding that hospital demand for med-surg products differs from the demand requirements of other consumers because hospitals demand a higher volume of product, a broader product mix and a higher level of vendor service than do other customers; it further found that hospitals were considered a distinct customer class by

⁵ The type of factual analysis described in *Allen and Lockheed Martin* occurred in *Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc.* 875 F.2d 1369, 1374 (9th Cir. 1989) where a plaintiff unsuccessfully argued upon summary judgment that a market should be defined by customers of home center stores that provide one-stop service as opposed to less comprehensive retail outlets. See also, *Westman Comm'n Co.*, 796 F.2d at 1221-22 (discussing markets defined by consumers who demand a “cluster” of goods but not finding such to be the case for restaurant equipment purchasers).

the med-surg supply business. *Id.* Although the district court's outcome was reversed in part because of an erroneous analysis of the geographic market (see 723 F.2d 495 (6th Cir. 1983)), the district court's opinion confirms that an elaborate factual analysis may be required to determine a proper relevant market in the distribution of med-surg supplies or sutures and endo products.

After due consideration, the court cannot state at this time that plaintiff's conception of the relevant market or submarket is so flawed that it renders plaintiff's claims implausible or impossible to consider.

4. Antitrust injury

Defendant Cardinal contends that all of plaintiff's antitrust claims must be dismissed because plaintiff has failed to properly allege the type of injury that antitrust laws are designed to remedy. We reject this contention. Plaintiff alleges that defendants' tying arrangements reduce the level of competition in the distribution of sutures and endo products; that they limit a customer's choice of sutures and endo products; and that they deprive customers of advantages in delivery costs and procedures. This is sufficient to allege an antitrust injury. See *Palmyra Park Hosp., Inc. v. Phoebe Putney Mem'l Hosp.*, 604 F.3d 1291, 1303 (11th Cir. 2010)(tying claim alleging less competition for tied products and fewer choices for consumers adequately expresses an antitrust injury). Defendant Cardinal argues that plaintiff's allegations of antitrust injury are too general and not supported by facts. We reject this point and refer to the prior *Twombly* discussion which dismisses any requirement for "detailed factual allegations." See also, *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)("[s]pecific facts are not

necessary”). In sum, plaintiff’s allegations of antitrust injury are sufficiently specific and plausible.

IV. COUNTS THREE AND FOUR

Counts Three and Four allege a conspiracy to violate §§ 1 and 2 of the Sherman Act. As mentioned earlier, § 1 prohibits among other agreements, conspiracies in restraint of trade or commerce. Section 2 of the Sherman Act prohibits persons from monopolizing, attempting to monopolize or conspiring to monopolize any part of interstate trade or commerce. 15 U.S.C. § 2. An agreement or conspiracy under federal antitrust laws is said to exist when “there is a unity of purpose, a common design and understanding, a meeting of the minds, or a conscious commitment to a common scheme.” *West Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85, 99 (3rd Cir. 2010) *cert. denied*, 132 S.Ct. 98 (2011). “A plaintiff may plead an agreement by alleging direct or circumstantial evidence, or a combination of the two,” but allegations of direct evidence, that are adequately detailed, are sufficient alone. *Id.*

Plaintiff alleges that defendants did the same thing in response to plaintiff’s success in selling suture and endo products; namely, defendants tied the sale of suture and endo products to the sale of other products in the med-surg basket. The first amended complaint (Doc. No. 19) contains the following allegations:

Defendants provide in their contracts that, if an acute care organization wants to purchase distributors’ products in the Med-Surg basket excluding sutures and endo, the customer must also purchase sutures and endo products from this distributor; otherwise, Defendants charge the hospital or other acute care organization a penalty in the form of a

prohibitive distribution fee applicable to the entire Med-Surg basket. Defendants divide purchase requirements between Med-Surg products excluding sutures and endo, and sutures and endo products. If the acute care provider does not purchase 90% or more of its sutures and endo needs from Defendants, it must pay a penalty on its entire Med-Surg spend. That penalty can range from 1 percent to 5 percent. ¶ 44.

Defendants also employ the alternative tactic of repackaging distribution penalty programs as purported discount programs. Defendants offer a bundle of Med-Surg products, including sutures and endo products, for a so-called discounted distribution fee and eliminate the discount when sutures and endo are not included in the basket. ¶ 47.

[T]he allocation of this whole basket “discount” to sutures and endo products brings the price of the Defendants’ sutures and endo offerings below cost. ¶ 48.

This predatory pricing enhances Defendants’ market power, raises barriers to entry and impedes the ability of [plaintiff] to compete. ¶ 49.

These exclusionary practices clearly are directed at [plaintiff]. Sutures and endo are the only product categories in the entire Med-Surg basket subject to Defendants’ illegal tying and bundling arrangements. Further, [plaintiff] is the only significant specialty distributor of sutures and endo products. ¶ 50.

[T]he exclusionary practices directed at [plaintiff] and employed by [defendants] are strikingly similar. ¶ 51.

The Defendants' lock-step implementation of nearly identical penalty programs defies each distributor's independent economic interests. One would expect, for example, in response to [defendant] Cardinal's imposition of contractual penalties on acute care providers who seek to purchase from [plaintiff], that [defendant] O&M – acting independently – would seek these customers' business by offering Med-Surg products without the penalty. Instead, [defendant] O&M imposes a similar regime of contractual penalties and bundling that does not challenge [defendant] Cardinal. In short, [defendants] present a united front against acute care providers' dealing with [plaintiff]. ¶ 52.

There are no legitimate business justifications for Defendants' anti-competitive practices. Any purported legitimate business justifications are mere pretexts. ¶ 53.

The Supreme Court has stated that when alleging a conspiracy in violation of antitrust laws, a complaint must contain "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556. The Court continued that:

[L]awful parallel conduct fails to bespeak unlawful agreement . . . therefore, . . . an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of

agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a[n] [antitrust] claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

Id. at 556-57. In *Twombly*, the Court held that alleged competitive reticence among regional telephone companies was an insufficient basis from which to infer conspiratorial agreement (as opposed to independent parallel conduct) since the plaintiff did not allege that competition against other regional telephone companies was “potentially any more lucrative than other opportunities being pursued by” the companies during the same period. *Id.* at 568.

In the case at bar, plaintiff is alleging that the parallel conduct described in the first amended complaint should be construed as circumstantial evidence of a conspiracy because, instead of challenging defendant Cardinal by offering its med-surg products without a penalty for purchasing sutures and endo products from a different distributor, defendant O&M employed a program similar to defendant Cardinal directed against plaintiff's competition in the market for sutures and endo products. Plaintiff, however, does not explain why it would be more lucrative for defendant O&M to challenge defendant Cardinal instead of taking the approach that O&M allegedly has taken. Other courts have observed that “in a highly concentrated market, any single firm's price and output decisions will have a noticeable impact on the market and on its rivals such that when any firm in that market is deciding on a course of action, any

rational decision must take into account the anticipated reaction of the other firms.” *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 321 n.19 (3rd Cir. 2010)(interior citations omitted). Thus, conscious parallelism is not uncommon or unlawful in certain circumstances. *Id.*, citing *Twombly*, at 553-54. Indeed, each defendant has an independent incentive to prevail in its competition against plaintiff as well as against other competing companies.

Plaintiff does not allege any circumstances, aside from the alleged action against interest, which supposedly supply a factual context to support an inference that defendants had a prior agreement to engage in parallel conduct. Plaintiff’s contention that defendants acted against interest is not sufficient to raise a plausible inference of conspiracy because there is no compelling logic supporting that contention. The fact that a defendant could have chosen a different strategy does not produce an inference that the choice of a strategy similar to that of a fellow competitor is a sign of conspiracy. In the absence of any other contextual support from which to infer a conspiracy, the court agrees with defendants that plaintiff has failed to adequately allege a conspiracy to violate the antitrust laws.

V. COUNTS TWO AND FOUR

Counts Two and Four of the first amended complaint allege violations of § 2 of the Sherman Act. Plaintiff alleges unlawful monopolization and attempted monopolization in Count Two; plaintiff alleges a conspiracy to monopolize in Count Four. To state a monopolization claim, a plaintiff must allege facts supporting an inference of: “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.” *Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745, 756 (10th Cir. 1999) (interior quotation omitted). Attempted monopolization requires allegations of 1) a relevant market; 2) a dangerous probability of success in monopolizing the relevant market; 3) specific intent to monopolize; and 4) conduct in furtherance of such an attempt. *TV Comm’n’s Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1025 (10th Cir.) cert. denied, 506 U.S. 999 (1992).

To allege a conspiracy to monopolize claim, a plaintiff must plead facts which allege: “1) the existence of a combination or conspiracy to monopolize; 2) overt acts done in furtherance of the combination or conspiracy; 3) an effect upon an appreciable amount of interstate commerce; and 4) a specific intent to monopolize.” *Lantec Inc. v. Novell, Inc.*, 306 F.3d 1003, 1028 (10th Cir. 2002)(interior quotations omitted).

Defendants allege that plaintiff’s monopolization and attempted monopolization claims are inadequately pleaded, in part, because plaintiffs have not alleged that defendants possess monopoly power or that defendants’ actions have produced a dangerous probability of attaining monopoly power. As noted before, plaintiff alleges that defendant O&M has 39% of the acute care market for the distribution of med-surg supplies and for sutures and endo products and that defendant Cardinal has 33% of those markets. This means, of course, that other companies share 28% of those markets.

The court agrees with defendants that plaintiff has failed to plead facts which demonstrate a real possibility that discovery would produce proof that defendants

possess monopoly power or that defendants' actions have produced a dangerous probability of attaining monopoly power. The Tenth Circuit held in *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 885 F.2d 683, 694 (10th Cir. 1989) that while a 41% market share indicates a firm has "substantial economic power in the market," this "proximity to monopolistic status" was not sufficient under the facts to indicate a capacity to raise the market share to a monopolistic level. The Tenth Circuit also observed in that case that most lower courts had held that a 70% to 80% market share was necessary to indicate monopoly power.⁶ *Id.* at 694 n. 18. The following year (1990), the Tenth Circuit in *Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F.2d 951, 968 (10th Cir.) *cert. denied*, 497 U.S. 1005 (1990) held that market share percentages may give rise to presumptions, "but will rarely conclusively establish or eliminate market or monopoly power." The court advised that a consideration of entry barriers was relevant to the analysis of market or monopoly power. *Id.* Such entry barriers could include high capital costs, legal or regulatory requirements, and entrenched buyer preferences. *Id.* A court may also look at market trends and the number and

⁶ This conclusion is supported by more recent reviews of case law. E.g., *In re Pool Products Distribution Market Antitrust Litigation*, 2013 WL 1556391 **10-11 (E.D.La. 4/11/2013); *Kolon Industries, Inc. v. E.I. DuPont De Nemours and Co.*, 2012 WL 1155218 **9-11 (E.D.Va. 4/5/2012); *Loren Data Corp. v. GXS, Inc.*, 2011 WL 3511003 *7 (D.Md. 8/9/2011)(50% or 60% is insufficient usually, but other relevant factors should be considered); see also, *Cohlma v. St. John Medical Center*, 693 F.3d 1269, 1283 (10th Cir. 2012)(citing IIB Areeda & Hovenkamp, *Antitrust Law* 250 (3d ed. 2006) as stating, "We . . . presume that market shares below 50 or 60 percent do not constitute monopoly power [and e]ven without an absolute rule, a clear presumption will almost always be decisive.").

strength of other competitors. *Shoppin' Bag of Pueblo, Inc. v. Dillon Co.*, 783 F.2d 159, 161-62 (10th Cir. 1986).

In this case, plaintiff's allegations do not support a viable inference of monopolization. There are no allegations of market share or ability to control price and competition which support a reasonable inference that either defendant has monopoly power. The first amended complaint asserts that the alleged tying and discount programs raise barriers to entry and impede plaintiff's ability to compete, and that the alleged below-cost pricing has caused plaintiff to lose "a significant number of existing and potential customers." ¶ 7. Plaintiff has also asserted in opposition to the motions to dismiss that high capital costs are an entry barrier. But, no facts are alleged to support an inference that defendants' programs and practices, which allegedly began in 2008, have produced a dangerous probability of either defendant attaining monopoly power. Moreover, the substantial market share that each defendant possesses is a factor which undermines a claim that either defendant possesses monopoly power or a dangerous potential to attain such power. *Bayer Schering Pharma AG v. Sandoz, Inc.*, 813 F.Supp.2d 569, 580 (S.D.N.Y. 2011).

As discussed earlier, plaintiff's allegations of conspiracy are insufficiently pled. The court does not believe the first amended complaint sets forth facts from which one can infer a reasonable possibility that defendants conspired to monopolize or conspired to attempt to monopolize the relevant markets in this case. Accordingly, the court rejects plaintiff's suggestion that the court should consider the aggregate market power of defendants in deciding whether plaintiff has adequately pleaded claims under § 2 of

the Sherman Act. Moreover, it appears that most courts have rejected shared or joint monopoly arguments when analyzing § 2 claims, finding that such claims contradict the basic concept that a monopoly is the domination of a market by a single firm. E.g., *Terminalift LLC v. International Longshore and Warehouse Union Local 29*, 2013 WL 2154793 ** 3-4 (S.D.Cal. 5/17/2013); *Oxbow Carbon & Minerals LLC v. Union Pacific R. Co.*, ___ F.Supp.2d ___, 2013 WL 673778 *6 (D.D.C. 2013); *RxUSA Wholesale, Inc. v. Alcon Laboratories, Inc.*, 661 F.Supp.2d 218, 234-35 (E.D.N.Y. 2009); *Arista Records LLC v. Lime Group LLC*, 532 F.Supp.2d 556, 579-80 (S.D.N.Y. 2007).

For these reasons, Counts Two and Four fail to state a claim.

VI. COUNT FIVE

Count Five of the first amended complaint alleges exclusive dealing in violation of § 3 of the Clayton Act against each defendant individually. This section makes it unlawful: “for any person engaged in commerce, in the course of such commerce, to . . . make a sale or contract for sale of goods . . . for use, consumption, or resale within the United States . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.” 15 U.S.C. § 14.

“To prove a violation under § 3 of the [Clayton] Act, a plaintiff must show the following: 1) that the violator is engaged in interstate commerce and that the alleged

unlawful act occurred in the course of such interstate commerce, 2) the violation involved a contract for sale, a sale, or a lease, 3) that the agreement is for goods, wares, merchandise, machinery, supplies or other tangible commodities, 4) that the agreement was conditioned or made on the understanding that the buyer or lessee will not use or deal in the goods of a competitor of the seller or lessor, [and] 5) that the probable effect of the agreement is to substantially lessen competition or create a monopoly.” *Apani Southwest*, 128 F.Supp.2d at 992; see also, *Watkins & Son Pet Supplies v. Iams Co.*, 107 F.Supp.2d 883, 899 (S.D.Ohio 1999)(listing fewer but similar elements).

Plaintiff asserts that defendants have made sales of med-surg products based on the condition that the purchaser will not deal in plaintiff’s sutures and endo products. Plaintiff further asserts that this “exclusive dealing” has foreclosed plaintiff from substantial portions of the markets for the distribution of sutures and endo products and has substantially lessened competition in those markets.

Defendants argue that defendants’ discount programs do not constitute exclusive dealing agreements for the purposes of the Clayton Act because the agreements permit purchasers to buy some percentage of sutures and endo products from distributors other than defendants. The Clayton Act, however, is not expressly limited to contracts which completely exclude the purchase of a competitor’s goods and courts have construed the Act as applying to contracts that are not 100% exclusive. *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 283 (3d Cir. 2012) *cert. denied*, 133 S.Ct. 2025 (2013).

Defendants also argue that plaintiff has not alleged that the discount programs described in the first

amended complaint are actually used by purchasers of sutures and endo products. Although no names are alleged by plaintiff, the court believes one can reasonably infer from the complaint that the discount programs are used and are the reason why plaintiff has lost customers it otherwise would have had. See *Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007)(the court may accept reasonable inferences from a complaint's allegations as true). Defendants further claim that the discounts are not coercive. This claim, however, is a factual issue as opposed to a matter of adequate pleading. Defendants also contend that discounts can be pro-competitive. Again, while this *may* be true, it is part of a rule of reason analysis which in this context is not so straightforward that the court can rule at the pleading stage that plaintiff's exclusive dealing claim is implausible.

Similarly, the court finds that defendants' arguments regarding the level of market foreclosure do not warrant the dismissal of plaintiff's exclusive dealing claim. A number of issues may be relevant to a consideration of whether an exclusive dealing arrangement forecloses a substantial part of the market. For instance, in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 329 (1961), the Court suggested it was necessary to "weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." The Court also considered: the duration of the contract; whether there were dominant sellers in the market or a "myriad [of] outlets with substantial sales volume;" if there was an

industry-wide practice of exclusive contracts; and if there were pro-competitive or pro-consumer benefits to such contracts. *Id.* at 334. Some courts have made reference to 30% or 40% as a threshold level by which to screen exclusive dealing claims. E.g., *Sterling Merchandising*, 656 F.3d at 123-24 (foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent); *B & H Medical, LLC v. ABP Admin., Inc.*, 526 F.3d 257, 266 (6th Cir. 2008) (same). Even in these cases, the screening was done at the summary judgment level.

Here, plaintiff alleges that defendants are foreclosing from plaintiff's competition a percentage of the market equivalent to each defendant's market share for med-surg supplies, which is 39% for defendant O&M and 33% for defendant Cardinal. This is not an implausible claim and given the number of other factors which may be relevant to a rule of reason analysis, the court shall not decide at the pleading stage that plaintiff has failed to plead adequate foreclosure levels to go forward with Count Five.

VII. COUNTS SIX AND SEVEN – STATE LAW CLAIMS

A. Kansas Restraint of Trade Act – Count Six

Plaintiff asserts a violation of the Kansas Restraint of Trade Act (“KRTA”) in Count Six and makes only a general citation to K.S.A. “50-101 *et. seq.*” Defendant Cardinal contends that this citation to K.S.A. 50-101 *et. seq.* is inadequate to provide defendant with proper notice of the state law claims plaintiff is making because there are numerous sections to consider. While this argument has some allure, the general rule appears to be that a complaint need not point to the appropriate statute or law in order to raise a claim for

relief; a complaint may sufficiently raise a claim even if it points to no legal theory or even if it points to the wrong legal theory as a basis for that claim. *Morris v. Schroder Capital Mgmt. Intern.*, 445 F.3d 525, 530 n.3 (2d Cir. 2006); *Morales-Vallellanes v. Potter*, 339 F.3d 9, 15 (1st Cir. 2003); *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (7th Cir. 1992); *Fitzgerald v. Codex Corp.*, 882 F.2d 586, 589 (1st Cir. 1989). This rule appears contrary to the proposition advanced here by defendant Cardinal. In addition, the apparent similarity in the federal and state antitrust law claims alleged in the first amended complaint should be sufficient to provide defendants adequate notice of plaintiff's state law claims.

Defendant O&M and defendant Cardinal further argue that Count Six should be dismissed because plaintiff only alleges lawful unilateral conduct. The court agrees that plaintiff has not adequately alleged illegal conspiratorial conduct. Plaintiff may still contend however that, in violation of K.S.A. 50-112, defendants made contracts or agreements "with a view or which tend to prevent full and free competition in the . . . sale of articles imported into [Kansas]." While plaintiff has not adequately alleged a conspiracy to violate antitrust laws, plaintiff does allege contracts which plausibly fall within the language of K.S.A. 50-112 and constitute more than mere unilateral pricing policy. Therefore, we reject defendants' contention that plaintiff has failed to state a claim under the KRTA.

B. Unjust Enrichment – Count Seven

Plaintiff asserts an unjust enrichment claim in Count Seven. The essence of plaintiff's allegations is that plaintiff has had a "reduced presence" in the sutures and endo products markets and that

defendants' market share is greater in those markets because of defendants' anti-competitive activities. This does not state a claim for unjust enrichment.

It appears undisputed that in Kansas the elements of an unjust enrichment claim are: 1) a benefit conferred; 2) an appreciation or knowledge of the benefit by the one receiving the benefit; and 3) the acceptance or retention of the benefit under such circumstances as to make it inequitable to retain the benefit without payment of its value. *In re Estate of Sauder*, 156 P.3d 1204, 1220 (Kan. 2007); see also *Bettis v. Hall*, 852 F.Supp.2d 1325, 1341 (D.Kan. 2012)(reciting similar elements). Sometimes the first element is listed as "a benefit conferred upon the defendant by the plaintiff." *J.W. Thompson Co. v. Welles Products Corp.*, 758 P.2d 738, 745 (Kan. 1988); *Haz-Mat Response, Inc. v. Certified Waste Services Ltd.*, 910 P.2d 839, 846-47 (Kan. 1996)(quoting *J.W. Thompson Co.*); *Spires v. Hospital Corp. of America*, 289 Fed.Appx. 269, 272-73 (10th Cir. 5/23/2008)(citing *Haz-Mat Response, Inc.*); *Midwest Grain Products, Inc. v. Envirofuels Marketing, Inc.*, 1998 WL 63077 *5 (10th Cir. 2/17/98)(quoting *J.W. Thompson Co.*); *Freebird, Inc. v. Merit Energy Co.*, 883 F.Supp.2d 1026, 1038 (D.Kan. 2012)(citing *Haz-Mat Response*).

It is not plausible to consider plaintiff's reduced market presence as a benefit conferred upon defendants by plaintiff. "Confer" means to bestow, grant, give or contribute. Oxford English Dictionary, OED Online Version June 2013, available at www.oed.com. Plaintiff does not allege that it bestowed, granted or gave business to defendants. Plaintiff alleges that business customers or potential business customers were lured away from purchasing sutures and endo products from plaintiff and attracted to making such purchases from

defendants by defendants' tying, bundling or exclusive dealing contracts. While plaintiff's loss of business or "reduced market presence" may have benefited defendants, it was not a benefit conferred by plaintiff. See *Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp.*, 45 F.Supp.2d 1164, 1206-07 (D.Kan. 1999) (profits defendant made by hiring 13 physicians away from plaintiff clinic were not a benefit conferred by plaintiff); see also, RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. b (1937)(a person confers a benefit upon another if he gives to the other possession of or interest in something valuable, performs a valuable service, satisfies a debt or duty, or in any way adds to the other's security or advantage or saves the other from expense or loss). Here, plaintiff does not allege that an action by plaintiff benefited defendant. Rather, plaintiff alleges that defendants' actions benefited defendants to plaintiff's disadvantage. This is not sufficient to state an unjust enrichment claim.

VIII. STATUTE OF LIMITATIONS AND LACHES

Defendant Cardinal argues that plaintiff's federal claims should be dismissed by virtue of the statute of limitations and the doctrine of laches. Both defendants argue that plaintiff's state law claims are barred by the statute of limitations. It is undisputed for the purposes of the motion to dismiss that plaintiff's federal damages claims are governed by a four-year statute of limitations (*Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1088 (10th Cir. 2006)) and that this time limit is used by some courts as a guideline in considering laches. *Aurora Enterprises, Inc. v. National Broadcasting Co., Inc.*, 688 F.2d 689, 694 (9th Cir. 1982); *Rite Aid Corp. v. American Exp. Travel Related Services Co., Inc.*, 708 F.Supp.2d 257,

272 (E.D.N.Y. 2010); *Little Rock Cardiology Clinic, P.A. v. Baptist Health*, 573 F.Supp.2d 1125, 1151 (E.D.Ark. 2008). It is also undisputed that plaintiff's state law claims are governed by a three-year statute of limitations. K.S.A. 60-512.

The statute of limitations and laches are affirmative defenses. *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980)(statute of limitations); *Grynberg v. Total S.A.*, 538 F.3d 1336, 1341 (10th Cir. 2008)(labeling laches an affirmative defense). Defendant can raise these defenses in a Rule 12(b) motion when (for the purposes of a limitations defense) the dates alleged in the complaint make clear that the right sued upon has been extinguished or (for the purposes of a laches defense) that the facts alleged in the complaint establish that there has been an unreasonable and prejudicial delay in asserting the claim. See *Aldrich, supra* (referencing a statute of limitations defense in a 12(b) motion); *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 949 (10th Cir.) *cert. denied*, 537 U.S. 1066 (2002)(describing burden of proof for laches). The court should not focus upon whether the allegations in the complaint show compliance with the statute of limitations, but whether the allegations in the complaint show noncompliance. See *Jones v. Bock*, 549 U.S. 199, 215 (2007)(complaint need not include facts defeating affirmative defense of administrative exhaustion).

Defendant Cardinal contends that the facts from the complaint demonstrate that plaintiff's federal claims are probably barred, "[u]nless the challenged conduct occurred between December 5 and December 31, 2012." Doc. No. 24, p. 25. But, defendant Cardinal does not establish that plaintiff's allegations show non-compliance with the statute of limitations or that

plaintiff has unreasonably delayed bringing its claims. Therefore, the court shall reject defendant Cardinal's arguments that plaintiff's federal claims are barred under the statute of limitations or laches.

Defendants' argumentation suffers from the same flaw as regards the timeliness of plaintiff's state law claims. The complaint alleges that defendants initiated their alleged illegal bundling or tying activity in 2008. (Doc. No. 19, ¶ 43). Plaintiff filed this action on December 5, 2012. These allegations, accepted as true, do not demonstrate that defendants entered illegal tying, bundling or exclusive dealing contracts *only prior* to December 5, 2009, that is, more than three years prior to filing the original complaint in this case. See *Tricom, Inc. v. Electronic Data Systems Corp.*, 902 F.Supp. 741, 745 (E.D.Mich. 1995)(each tying contract signed constituted a new and independent antitrust injury).

IX. CONCLUSION

Consistent with the above-stated discussion, the court shall grant in part and deny in part defendants' motions to dismiss, Doc. Nos. 23 and 27. The motions are granted as to Counts Two, Three, Four and Seven and denied as to Counts One, Five and Six. Doc. No. 23 is moot as to Cardinal Health Inc. The motion to dismiss filed as Doc. No. 25 is entirely moot. Plaintiff shall be granted leave to file a second amended complaint by August 30, 2013. The motion to amend the memorandum in support of the motion to dismiss filed by defendant Owen & Minor Distribution, Inc. (Doc. No. 45) is granted. The request for judicial notice (Doc. No. 29) shall be granted. The motion for oral argument (Doc. No. 48) is denied.

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IT IS SO ORDERED.

Dated this 1st day of August, 2013, at Topeka,
Kansas.

s/ Richard D. Rogers
Richard D. Rogers
United States District Judge

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APPENDIX D

[1] IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-3065

SUTURE EXPRESS INC.,

Plaintiff-Appellant,

v.

OWENS & MINOR DISTRIBUTION, INC.;
CARDINAL HEALTH 200, LLC,

Defendants-Appellees.

Sanford I. Weisburst, for Appellant, Suture Express, Inc.

Paula Render, for Appellee, Cardinal Health 200, LLC.

Shari Lahlou, for Appellee, Owens & Minor Distribution, Inc.

[2] Before Judge Paul J. Kelly, Jr. (not attending), Judge Carlos F. Lucero, and Senior Judge Michael R. Murphy, Circuit Judges

9:00 a.m., Wednesday, January 18, 2017,
Courtroom III, Byron White Courthouse,
Denver, Colorado

[3] PROCEEDINGS

THE COURT: And we turn to the last orally argued case this morning, which is Suture Express v. Owens. That is Case 16-3017.

SANFORD I. WEISBURST: May it please the Court, Sanford Weisburst for Appellant, Suture Express. In a 2007 Cardinal email, which is at Joint Appendix Page 794, Cardinal said: We are at risk because Suture Express is lower priced and provides a perceived higher quality of service. We are mitigating this risk with every new contract we sign requiring the purchase of suture and endo.

In a 2010 O&M document, which is at Joint Appendix 704, O&M reported: We have had some success defending against Suture Express by bundling our pricing. And consumers were saying the same things. At 3301 of the Joint Appendix, Rady Children's Hospital told Suture Express: We would love to buy suture and endo from you, but we can't. We can't afford the prohibitive increase in our other med-surg prices that would result if we did so.

Now, these examples show really exactly [4] what the rule against tying is about. It's about preventing someone who has market power in the tying market from requiring consumers to be subjected to higher prices and/or lower quality in the tied market.

Now, the District Court erred in several ways in this case, and I'd like to start with market power because that was sort of the first segment of the Court's decision. And there are three ways why we've shown market power, at least at the –

THE COURT: Before you go there, just as a preliminary matter, how does market share play into the analysis of market power?

SANFORD I. WEISBURST: Market share is one of the several ways in which one can show market power. And market share, in particular, focuses on the tying market. Here, the tying market is the other med-surg market.

THE COURT: Right.

SANFORD I. WEISBURST: So it's one of the ways. . .

THE COURT: In looking at market shares here, you have to look at each of [5] the defendant's individually. You can't aggregate their market share, correct?

SANFORD I. WEISBURST: That's - we're not making an aggregation argument. We are arguing that each defendant has sufficient share by itself, and I can tell the Court that this is at 353 of the Joint Appendix, you'll see O&M had between a 32 and a 38 percent share, Cardinal had between a 27 and a 31 percent share.

And there's an important Supreme Court precedent, I think, just to mention on this point, among others, is the Jefferson Parish case. There, it was the defendant's share was 30 percent. And the Court found no per se violation, and we're not pressing a per se violation here. But when it turned its attention to the rule of reason, and this is around Page 30-31 Note 52 of the decision, the Court didn't say, we're going to stop, we're not going to go further because it's only 30 percent.

It did go further, and it asked, well, let's look - and I'm going to segue into another way of showing market

power – let's look at what's going on in the tied market. Our anesthesiologists' prices – that was the tied [6] good there – are they higher or not. And the Court say, look, there's no evidence in the record here of that; and, therefore, we're going to grant – we're going to affirm the trial verdict.

In our case, when you look at the evidence in the summary judgment record, we had clear evidence from the Defendant's own documents – and some of them I just recited; the Court could also look at Page 3210 – where the Defendants themselves are saying Suture Express has lower priced suture and endo and higher quality. It's a higher fill rates; it's getting the sutures and endos to them quicker and in a more complete order so that surgeries can be performed on time.

We have the evidence here that was lacking in Jefferson Parish. And, similarly, in a case like – another Supreme Court case that's very important, we think, here is the Kodak case. There was similar evidence and, again, you've got market share and the tied market, you've got price and quality in the tied market. Similar case where you've got clear showing of differentials. You've got the Defendant having [7] higher priced and lower quality in the tied market. And there, the tied market was services for printers.

Here, again, we have pretty clear evidence. And the District Court didn't – this is, we think, a clear legal error and its decision didn't focus on the evidence that we have in the tied market, which, again, is these differentials in price and quality.

Turning back to the tying market and market share. So, as I mentioned, 32 to 38 percent for O&M, 27 to 31 for Cardinal. Both are within the range that prior Courts have found, including the Second Circuit in the

U.S. v. Visa case, as well as Jefferson Parish, to be sufficient shares.

But couple that with the evidence that we have of high switching costs by customers, which sort of exacerbates those market shares. It creates, if you will, almost a mini-monopoly O&M and Cardinal have over their customers because it's costly for them to switch to someone else.

THE COURT: Or even (indiscernible) preclude them because there's [8] plenty of evidence in this record, isn't it, that plenty were switching, particularly to other competitors that are not Defendants.

SANFORD I. WEISBURST: There is certainly some evidence of switching; we don't deny that. But this is – we submitted a dispute of facts, and it's one of the disputes of fact that the District Court improperly resolved. Now, the District Court talked about a statistic of half of the customers switch over a three-to four-year period. But Defendant's expert in Exhibit 10A and 10B of the McCarthy report actually broke that out and said, let me look at the largest customers who furnish the largest portion of business. And those customers would be expected to have even higher switching costs because they have more products, more hospitals to deal with. It's harder to switch.

And if you look at those hospitals, and this is statistic that we worked up in our reply brief, only 6 to 7 percent approximately are switching each year. Okay? And compare that to the District Court's roughly 15 percent figure or to the Southern District of New York's figure in the Wireless case.

[9] THE COURT: But if the relevant market is acute care hospitals, you have to consider all of them, not just the top two acute care hospitals in market share.

SANFORD I. WEISBURST: You do consider all of them. . .

THE COURT: And then you have, what the Court said, was a 50 percent switching rate.

SANFORD I. WEISBURST: Over a three- to four-year period. We translated it down into a year-by-year period to try to compare apples to apples. But, yes, fair question. We're looking at the entire acute care market, but the vast majority of purchases of suture and endo, as well as other med-surg in that market, are coming from the largest hospitals.

So in terms of how much is Suture Expressed foreclosed from competing? It's best targets are the larger hospitals.

THE COURT: Let me ask you this. Are there other entities out there that do business as Suture Express, and that is just this more isolated suture endo market, as opposed to the Defendants?

[10] SANFORD I. WEISBURST: Not to date. Suture Express had the innovative model. It came in in 1998 with this model.

THE COURT: So there's nobody else.

SANFORD I. WEISBURST: No one has yet replicated it.

THE COURT: Does that mean when you're talking about anti-trust injury that, because Suture Express is the only one that is doing this, that can you say then that injury to Suture Express necessarily means injury to competition?

SANFORD I. WEISBURST: We can say that, and our expert, Professor Elhauge demonstrated. And the way he demonstrated, it was he showed that the vast

majority of Defendants' customers are subject to these restraining conditions. And he compared, well, how is Suture Express doing among the customers that are restrained versus the ones that are one unrestrained.

Suture Express had a much higher share of the unrestrained than the restrained. And going back to the statistic I talked about earlier with the price differentials, okay. If [11] Suture Express had been able to capture some of those customers, those customers would have benefited from the lower price and the higher quality.

THE COURT: My question is this. You know, we've been taught that you have to distinguish between injury to competition and injury to a competitor. Are you telling me that this is a different case, that, given the structure of the market, that there's nobody else like Suture Express out there that injury to competitive injury to Suture Express is the substantial equivalent of injury to competition?

SANFORD I. WEISBURST: We don't deny that we need to show injury to competition.

THE COURT: Okay. But why could (indiscernible)?

SANFORD I. WEISBURST: There could have been other entrants with the Suture Express model. For whatever reason so far, there haven't been. And it may be well because of these bundling conditions that make it so hard to compete for customers. But the key showing – forget about whether Suture Express had more profits; we can just set that to the side. The [12] point is, the customers would have had an option to buy suture and endo products for lower prices and higher quality.

And we don't – we're not just making this up. Customers said it. At 3301, as I mentioned, Rady Children's Hospital said, we would love to be able to buy from you. We have similar examples from Fairchild Hospital, from Guthrie Hospital. They'd prefer to buy from us, and they couldn't because they were going to face consequences.

THE COURT: So if I may.

SANFORD I. WEISBURST: Yes.

THE COURT: Just assume that we agree with you on the first two issues – market power and antitrust injury. You still have to get past the third point, and it's the point that I'd like to know about, and that is the claim that the Defendants basically are bundling the products to better their customers and that there's go pro-competitive reasons for their conduct.

SANFORD I. WEISBURST: Yes.

THE COURT: Would you please finish (indiscernible)?

[13] SANFORD I. WEISBURST: And I think the most of the material facts that remain – sure. So we have the facts that the expert evidence, as well as Defendants' own documents and to just throw out a few citations. Joint Appendix 3210, O&M did a study; found that Suture Express had lower cost, as well as lower prices, than the Defendants. We have Cardinal's costs were analyzed by Professed Elhaug. He found that Cardinal's suture-endo specific costs were lower, and that's at Page 1181 of the Joint Appendix.

And, finally, this is a really telling document in the record, Page 577. It's an O&M contract where – and this is an important point – O&M actually furnished a centralized model alongside its regional trucks

warehouse model. And in this contract at 577, they said, we're going to charge you a lower price for our centralized model than we are for our regional trucks and warehouse model. We think that that's plainly subject to a jury inference that the centralized model, which, of course, is Suture Express's model, is the lower cost and lower priced and better for consumers model.

And interestingly enough, Defendants, [14] even though that involves splitting some suture-endo from the same truck, so to speak, they're not raising their prices. They're not charging a penalty to that customer who chooses centralized warehouse. They've actually giving them the lower price. Again, that's 577.

And just one other point on the pro-competitive efficiencies supposed argument is, why is it, if there are pro-competitive efficiencies, that Defendants are carving out hospitals' purchases directly from manufacturers. So they're saying, we're going to impose the penalty if you buy from another distributor, which is to say Suture Express. But we're not going to do that, we're not going to impose the penalty if you buy directly from a manufacturer.

That doesn't make sense in terms of their same truck story, because the suture and endo is not going to be on the truck if you're buying it from the manufacturer, just as it's not on the truck if you're buying it from Suture Express.

So those are among the many arguments that a reasonable jury could find in our favor. But another just important point to mention –

[15] THE COURT: Well, they're saying basically we have – we're doing bundling so that we can – you have significant cost savings.

SANFORD I. WEISBURST: Sure. But what's best for – this is an important legal point – what's best for Defendants is not necessarily what's best for consumers. And I think this goes back to Judge Murphy's point about antitrust injury as well. This Court in the *Law v. NCA* case, as well as the Supreme Court in *Otter Tail* says, look, we're not primarily concerned about the Defendants' profits, about their cost savings. We're concerned about what the ultimate impact is on the customer.

And at Page 1488, you actually have an O&M witness saying: Why do we do these penalties? We do them so we can meet our same profitability standards if we lose the suture and endo business.

This Court and the antitrust law shouldn't be concerned with whether Defendants lose some business. They should be concerned with whether a competitor was foreclosed from giving lower priced and higher quality suture- [16] endo to a substantial majority of the market. With the Court's permission, I'll reserve the rest of my time.

THE COURT: Sure.

PAULA RENDER: Good morning, Your Honors. I'm Paula Render, I represent Cardinal, and I'll be addressing the market power issue. Ms. Lahlou, who represents Owens & Minor will be addressing a pro-competitive benefits issues, and we'll both be happy to address any other issues that you may have.

THE COURT: Please save time so that we can ask her questions.

PAULA RENDER: I will do so. Thank you. So jumping into the market power issue, the Supreme Court has a number of decisions in which it directs

Courts to look at the market realities in the tying market to determine whether a Defendant has market power in that market. And that's a requirement that Plaintiff has to show market power in the tying market for a tying claim to prevail.

This Court has explained what has to be shown in the tying market. Do the Defendants have the power to control price or exclude [17] competitors in that market. And, here, that's the other med-surg market.

The Supreme Court has directed that the Courts focus on the tying market to make that decision, not the tied market. And Suture Express does not offer any authority for the proposition that this Court can ignore the market realities in the tying market and focus only on some phenomena in the tied market to make that assessment of market power.

THE COURT: So is that the reason why the fact that no other competitor has come in with the same business model as Suture Express? Is that why it's irrelevant, because it related to the tied product?

PAULA RENDER: I think – well, I guess I have a couple of answers to that, Your Honor. First of all, all of the broadliners are perfectly willing to sell just suture, just endo, just any, you know, any of the product categories by themselves.

THE COURT: I take it you as a broadliner.

PAULA RENDER: Yes.

THE COURT: As long as [18] you're – as long as the customer is willing to have a delayed delivery and pay a little more.

PAULA RENDER: Well, the record's a little mixed on that.

THE COURT: Well, if it's mixed, then bang-o, you concede there's a material dispute in the evidence and it goes to jury trial.

PAULA RENDER: I don't think it's a material issue.

THE COURT: Was a jury trial requested?

PAULA RENDER: Yes, one was. I don't think it's a material issue, Your Honor. I think that many customers get several trucks a day. They can get several – they can get suture and endo that day if they wanted. They can call and ask for suture and endo that day.

But the point really is that we're supposed to be looking – without tying market power, the Defendants can't possibly have an adverse impact on the tied market. That was explained in Jefferson Parish.

THE COURT: By that, do you mean that Suture Express has to cover all the [19] rest of the products that you carry in order to come in under your terms?

PAULA RENDER: Certainly not in the matter of antitrust law. They don't have to do that. Now, customers may prefer that, in which case, they need to meet their customer demand. But what Suture Express has to show is that Defendants were able to harm the tied market because they had some power in the tying market. And that's what Suture Express has not shown.

So, for example, in the Fortner case, the Supreme – in the Fortner II case, and so I'm relying on 429 U.S. 610, not the earlier case. In that case, the Court considered exactly the argument Suture Express makes here. If people are paying more for the tied product when they buy this tie, then doesn't that right out of the box show market power. And the Supreme

Court said, absolutely not. They might be doing that for other reasons. They might be doing that because the overall package price is more attractive, and that's certainly a possibility here.

They might be doing that here, because as Suture Express concedes in its Complaint, [20] customers prefer one-stop shopping. They'd rather have one truck pull up at their dock than two.

THE COURT: Well, that's certainly wasn't the case before you started bundling, correct, or did I misread the briefs?

PAULA RENDER: I'm sorry. It was certainly the case that Defendants had one truck that took everything out to customers before the bundling, and they still do that today with the bundling.

THE COURT: Right, but the Suture Express, as I understand, was delivering via FedEx or whatever the airplane delivery mode was, and they could get delivery done the next day; and, therefore, could – and could lower their prices since they were focusing on one product. And at that point, there was fairly healthy competition in the market until the bundling started. And so, maybe you could explain to me why I am misread – whether I am misreading the briefs in that regard.

PAULA RENDER: Well, I think the question of competition in the tying market is really the heart of the market power question, [21] and we have to look at what the competition in that market is. Suture Express is not even in that market. And so, the question – they have to prove market power in the other med-surg market. What's that – does that competitive picture look like? Medline has more than doubled, Seneca has grown by 50 percent, while

Cardinal's market share has declined, and Owens & Minors has only grown by about 5 percent, dwarfed by the growth of Seneca and Medline.

THE COURT: Okay. So that covers the –

PAULA RENDER: And there are a lot of other competitors.

THE COURT: That covers the power to exclude competition. What about the power to affect prices?

PAULA RENDER: Right. That's the other piece, the other way that Suture Express has to prove market power. Here, Suture Express's economist found that Defendant's prices have dropped 46 percent in the relevant period and their margins are – their profit margins are below 2-1/2 percent.

So the profit that these companies see [22] on every dollar on revenue is less than 2-1/2 cents. They're not extracting monopoly profits here. They're not able to control prices because of the competition that exists in the marketplace, so customers have all these options.

THE COURT: As to this one product or as to the combined product?

PAULA RENDER: I'm talking right now about competition in the other med-surg market. Because without market power in that power, as a matter of law under Illinois Tool Works, a tying claim cannot prevail. So setting aside the tied market, they have to prove market power in the tying market.

THE COURT: The multiproduct market.

PAULA RENDER: The multiproduct market.

THE COURT: Rather than suture and endo.

PAULA RENDER: Correct, exactly. Exactly, thank you. Now Suture Express doesn't want to talk about any of that evidence. It says just ignore all that and focus, instead, on the tied market. Higher prices; why would anyone pay higher prices in this marketplace but for the [23] tied, but for some power by the Defendants to force that?

And, again, that's precluded by the Fortner decision. In that case, the Supreme Court held that the way you show that is by showing some uniqueness in the tying market, and we don't have that here.

THE COURT: When Jefferson Parish talked about a 30 percent market share, plus or minus, were they talking about the tying product or the tied product?

PAULA RENDER: They were addressing the tying market in that case. I think that their opinion goes beyond that. I think the Supreme Court was saying that – and it says very specifically, 30 percent alone is not sufficient to support an inference of market power. And this Court has also held that market share is just one factor. It's not dispositive on its own. And that's true whether it's a per se case or rule of reason case.

THE COURT: I understand.

I just want to make sure we're on the same track.

PAULA RENDER: Yes.

THE COURT: Because you say [24] tying product, tying product, tying product. And I want to make sure that's what Jefferson Parish was talking about when they were talking about market power and the 30 percent market share.

PAULA RENDER: They were and – they were, Your Honor. They found that 30 percent alone would not support an inference of market power. But I do want

to emphasize, Mr. Weisburst said that market share is a way to show market power, and that's not actually true. It is one factor among all the market realities that a Court considers. And I'm referring to, for example, the Reazin case from this Court in that regard.

I just want to say one more thing about switching.

THE COURT: Every minute, every second you say, you're taking time away from your colleague.

PAULA RENDER: I want to say about customer switching. What Suture Express has never shown is that the conceded amount of customer switching is actually so low that someone could not enter it. They haven't done the rest of the analysis. They've said it can be [25] hard to switch, but they haven't shown that that actually precludes entry. Thank you.

SHARI LAHLOU: Good morning, Shari Lahlou for Owens & Minor. May it please the Court, I will address the pro-competitive benefits and I'd like to address some of the issues that Judge Lucero highlighted.

But before we do that, we just need to remember that these kinds of bundled discounts that are at issue here are almost always deemed to be pro-competitive. That is recognized in myriad authorities, the case law, including the cases that Suture Express relies on, as well as the academic literature. And the reason is quite simple. It is because firms save money when they are selling two or more goods together; in other words, they achieve an efficiency. And they are able to pass that efficiency on to the customer in the form of lower prices.

THE COURT: It sounds like you're trying to say there's such a thing as a per se reasonableness for whenever you bundle, and that's not the case.

SHARI LAHLOU: That is true, and I'm not saying that, Your Honor. I just want to point [26] out that – and we point this out in the brief in Suture Express and Judge Crabtree recognized as well, that there hasn't been any case in which we're aware of in which these kind of bundled discounts, when offered by non-monopolists, which both Defendants clearly are here, were found to be anti-competitive. And, in fact, they are often deemed to be competitive even when exercised by monopolists.

And customers clearly often prefer bundle discounts as well, precisely because they get the benefit of the discount and they achieve their own efficiency by virtue of the one-stop shopping. That's why we see them in all sorts of different industries where there's clearly no market power. You can think of, you know, one that we're all aware of, which is the, you know, fast food chain and the value meal. You may go into the restaurant to buy a burger, but you realize that if you also get the soda and the fries, you actually get a really good deal. And the reason the restaurants can do that is because they're paying –

THE COURT: But the restaurant isn't going to cut the price of the [27] Diet Coke and subsidize it by increasing the price on the hamburger to drive Diet Coke out of business, for example. And isn't that the very allegation that's being made here, on which there is a claim that there's a material dispute on the evidence that would have precluded a summary judgment determination. We have to recognize, this is a summary judgment case.

SHARI LAHLOU: Absolutely.

THE COURT: And the Court basically ignored the argument, and maybe justifiably so. I'm waiting to hear from you as to the justification in saying, well, what happened here is that the price of the hamburger is carrying the cost of the sutures, if you pardon the mixed metaphor. So if you would address to me, please, the very strange timing here, that the bundling didn't happen until Suture Express was getting a very healthy share of the market.

SHARI LAHLOU: Well, actually, it's a factual matter. I would like to correct that.

THE COURT: Absolutely, please. That's what this argument's for.

SHARI LAHLOU: So Professor Elhaage, [28] Suture Express's expert and own analysis of the contract confirms that this bundling was in place long before Suture Express claimed that they were starting to be injured, long before 2008. And, in fact, some of the contracts that he relied on had these kind of bundling provisions before Suture Express was even established. And so, I do think that timing matters. And it confirms, going back to your question, it's not that. . .

THE COURT: Was that generally true for the industry even before Suture Express existed?

SHARI LAHLOU: I don't know that there's any evidence in the record as to the other broadline distributors using these provisions prior to that time. But certainly, with respect to both Cardinal and Owens & Minor, that evidence – and I can give you a cite. I believe we cite this in our Page 17 in Note 5.

And the reason is the way it functions, similar to the fast food restaurants, not increasing the price of one to

subsidize the other. What happens, let's just take an illustration. We have a truck that is full of, say, 30-40 boxes of different kinds of medical [29] surgical product that hospital indisputably need.

THE COURT: All right. And the truck comes around how often?

SHARI LAHLOU: It depends on the customer and their preferences. Sometimes, it's every day; sometimes, it's multiple times a day; sometimes, it's multiple times a week. There is no evidence in the record that any hospital was wanting sutures more frequently than they were able to get by virtue of their other med-surg deliveries from Cardinal or Owens & Minor.

THE COURT: So the price was the only consideration then that drove the hospitals to purchase from Suture Express.

SHARI LAHLOU: You know, different customers are going to be motivated by different reasons and judge a value differently. And it's very important there because the evidence in the record actually shows that what the marketplace has overwhelmingly judged to be the better value and the better system is the broadlining system exercised by both Cardinal and Owens & Minor.

And very importantly, Medline, Seneca, and the other broadline distributors that Suture Express dismisses as inconsequential, that [30] clearly have no market power. And all the authorities recognize that firms without market power will only engage in these kinds of bundled discounts when it is efficient to do so.

THE COURT: Well, if Judge Kelly were here, he would remind us that big fish eat little fish, and that

they had the economic power to bundle and to reduce the price on the one product that drives the little fish out of business.

SHARI LAHLOU: Well, going back to Judge Murphy's – first of all, there's no evidence that Suture Express has been driven out of business; in fact, they experienced very, very healthy growth for most of the time period. But second of all –

THE COURT: Then that may be relevant. Tell us about that.

SHARI LAHLOU: So, Suture Express experienced very healthy growth until about 2010, right about the time that Medline started to focus more – and there's evidence in the record on this – on distributing suture and endo products. And the fact that they lost a very large customer that was a substantial part of [31] their business, Ascension, to Owens & Minor for the stated reasons by Ascension of wanting to consolidate their purchases with one distributor because that was more efficient for them.

And as Judge Murphy was pointing out, injury to one competitor, even if there were an alleged harm to Suture Express, does not constitute injury to competition and does not constitute an antitrust injury. And going back to the point I was making about the market –

THE COURT: Unless you have a one competitor market, as we do here.

SHARI LAHLOU: I actually would take issue with that, Your Honor, because it's not one competitor market if you're talking about the suture and endo because we have all. . .

THE COURT: No, I understand that. But in terms of the method of doing business, I'm led to believe that nobody does business like Suture Express.

SHARI LAHLOU: It is true, and actually that's significant for, I would argue, a different reason. Which is, if it really were the better model and the preferred model, there's no reason why the Medline and Senecas of the [32] world wouldn't have adopted it.

THE COURT: Well, yeah.

SHARI LAHLOU: It's merely an inexpensive warehouse and a FedEx account.

THE COURT: I'll give you a good one. And that is because they would just start losing money because of the bundling in the tying market, just as Suture Express has lost it. That's why they're not entering. And that's why I had questions about, you know, which market do we look at, because that's precluding competition.

SHARI LAHLOU: Well, to be clear, they have entered into the suture and endo distribution market. They have just adopted the different methodology for doing it, and it's the one that customers prefer because Professor Elhauge, as Mr. Weisburst alluded to, did an analysis of Owens & Minor's and Cardinal's customers, and compared ones that had the bundling terms and the ones that didn't.

THE COURT: You could finish your answer, but could you wind it up because you've run over a couple of minutes. If we add that to the other side and we're going to [33] get to endos paradox.

SHARI LAHLOU: Yes, sir. But what's important about that analysis is it shows that customers – Owens

& Minor's and Cardinal's customer – that never had the bundling terms still overwhelmingly selected Owens & Minor or Cardinal for their suture and endo delivery. They have stated a preference. That is, this is a working market that is not right for judicial intervention, and I would recommend Judge Crabtree's analysis on those points. Thank you very much.

THE COURT: I meant Zeno's paradox, not endo's paradox, but we could create a new a new paradox. We're going to add some time to his – equivalent amount of time to what she went over.

THE COURT: You know, let me ask you this. It seems to me, and I'm speaking for myself, not the entire panel, but your steepest hill is the market power. And we're told, very emphatically, that you want to talk about market power of the tied product, rather than the market power in the tying product. So how do you respond to that?

[34] SANFORD I. WEISBURST: Not at all. We want to talk about both, in fact, and I think we've made both showings in our brief. I think it's Points 1A and B. But let me start with the tying market, okay.

THE COURT: That's what you want to talk about.

SANFORD I. WEISBURST: We have market shares exacerbated by switching costs. We have a lot of arguments on the other side that switching costs weren't so bad; that the market shares here, even though they were at 30 percent, which Jefferson Parish said was enough to move on to rule of reason, isn't enough. We've got some arguments by them. So there's conflicting arguments back and forth, frankly, on the tying market issue.

THE COURT: But that's market shares. And then the next lesson they teach us is that market share alone is enough. So what do you have beyond market share in the tied product?

SANFORD I. WEISBURST: We don't argue that market share is enough necessarily –

THE COURT: All right. [35] What else do you have?

SANFORD I. WEISBURST: – to compel judgment in our favor.

THE COURT: What do you have?

SANFORD I. WEISBURST: What we have, and I think, you know, the absolute crucial precedent on this is Kodak, because you had similar sorts of arguments in Kodak about is there market power or not in the tying market. There were debates back and forth. And the Court said, you know what, we recognize there's a debate. We're at summary judgment, but let's look at the actual facts in the tied market, the t-i-e-d market. We find price differentials, we find quality differentials. It's for a jury to sort out whether these theoretical arguments about the tying market are borne out by the facts.

THE COURT: What do you have for market power in the tying product, other than market share?

SANFORD I. WEISBURST: We've got market share. We've got switching costs. We've got an important one, which I haven't mentioned yet, [36] which is other barriers to entering – this is another crucial point. To do the model that the Defendant's use, you need a fleet – you need to buy or lease a fleet of trucks and warehouses across the country. It's hard to enter; it costs a lot of money. Is it impossible? No. Medline did it. But in this Court's Lenox-MacLaren

case, also you had one person who broke through the entry barrier. That wasn't enough to say that there wasn't market power.

THE COURT: There are many people, besides Medline, that are entering the same. . .

SANFORD I. WEISBURST: There are also a few smaller regionals who can't really compete for the national hospital business, which is the big portion of the market.

Now, if I could turn just to a few other rebuttal points. We heard that these were not new contracts. Page 794 of the Appendix says these are new contracts. Disputed issue of fact, absolutely. There are other contracts that may have existed, but weren't being strongly enforced. They started enforcing them.

Did this – I want to go back to Judge [37] Murphy's question about why is this just Suture Express; why haven't other people come along and done this model? And it's a great question because the entry barriers are pretty low. You need one warehouse and you need a FedEx account. And I venture to say that a jury could find that there probably would be more people who came in if they could make a profit on it, which they can't because of these bundles that are keeping this better model out.

THE COURT: But, see, that's showing the ability to preclude competitors in the tied product, not the tying product.

SANFORD I. WEISBURST: Yes, but that's what tying is all about.

THE COURT: Oh, I know about tying.

SANFORD I. WEISBURST: In every tying case, the competitor – and I want to mention cases like Peace

Health from the Ninth Circuit, as well as Collins Inkjet. The competitor who's suing is someone who's only competing on the tied product. He's a specialist who has lower cost by virtual of specialization. And the Defendant's [38] rule would make Suture Express give us what they themselves called, at Page 798, Suture Express was the Netflix, the great new thing compared to their Blockbuster model where you had to actually go to the rental store and get the tape, instead of getting it in the mail or on the Internet.

They want to go back to that world and force everyone to be in both markets, when we have advantages that customers wanted. And customers like Rady Children's Hospital, like Fairchild Hospital, like Guthrie Hospital, they said, we'd like to buy suture and endo from you. We want your better fill rates so we can perform surgeries on time. We want your lower prices. But they're jacking up the price of other med-surg so high that we can't possibly do that. And that's exactly what, going back to Kodak, says, you should look at.

I want to mention one other precedent point. Fortner II was brought up as saying, well, you have to look at both the tied market price and the tying market. Fortner II Footnote 1 of that case says, this is a per se case. The Plaintiffs have abandoned their rule of reason case. We certainly have not done that. [39] Jefferson Parish is the more relevant precedent on the rule of reason claim. We would urge the Court to follow Jefferson Parish, as well as Kodak, and let us have our day in Court with a jury.

THE COURT: Do you agree that in Jefferson Parish the 30 percent market share was in the tying product?

SANFORD I. WEISBURST: Yes, absolutely.

THE COURT: And so, is your market share going up?

SANFORD I. WEISBURST: Our market share went up from eight to 10, and then it went back down. And our point is, regardless of where it was, we would have gone much higher if we hadn't been foreclosed. And maybe others were to come in like us, but what the important point is from an antitrust law perspective is hospital customers would have gotten lower prices and higher quality in suture and endo, and they should have that chance, at least a jury should be able to find.

THE COURT: When, in the timeline of the damage period of this case, when did you go from 8 to 10? You went from 8 to 10 [40] after bundling had already had its effect, right?

SANFORD I. WEISBURST: We were – approximately, it was between 2008; 2007, we were at 8. I think we went up to 10 at approximately 2010, and went back to 8. But cases like Greyhound and Reazin say, as well as, I believe, McQueen v. Federal Trade Commission say, you can't just look in a historical sense at what someone's market share was at a particular time. You have to look at the but for world. And we would have had, we allege and we've proved, a much higher market share and customers would have been better off than just 8 or 10 percent. Thank you.

THE COURT: Thank you, counsel. The cases are very well presented. We're not judging the presentation, but we like to let you know when you do a good job. Counselor, excused.

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[41] CERTIFICATES

I, Sonya Ledanski Hyde, certify that the foregoing transcript is a true and accurate record of the proceedings.

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