NORTH CAROLINA

BUNCOMBE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 21 CVS 3276

WILLIAM ALAN DAVIS, RICHARD NASH, WILL OVERFELT, Ed.S BCBA, JONATHAN POWELL, FAITH C. COOK, Psy.D., and KATHERINE BUTTON, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

v.

HCA HEALTHCARE, INC., HCA MANAGEMENT SERVICES, LP, HCA, INC., MH MASTER HOLDINGS, LLLP, MH HOSPITAL MANAGER, LLC, MH MISSION HOSPITAL, LLLP, ANC HEALTHCARE, INC. f/k/a MISSION HEALTH SYSTEM, INC., and MISSION HOSPITAL, INC.,

Defendants.

AMICUS CURIAE BRIEF OF THE STATE OF NORTH CAROLINA IN SUPPORT OF PLAINTIFFS

INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

NORTH CAROLINA

BUNCOMBE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 21 CVS 3276

WILLIAM ALAN DAVIS, RICHARD NASH, WILL OVERFELT, Ed.S BCBA, JONATHAN POWELL, FAITH C. COOK, Psy.D., and KATHERINE BUTTON, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

v.

HCA HEALTHCARE, INC., HCA MANAGEMENT SERVICES, LP, HCA, INC., MH MASTER HOLDINGS, LLLP, MH HOSPITAL MANAGER, LLC, MH MISSION HOSPITAL, LLLP, ANC HEALTHCARE, INC. f/k/a MISSION HEALTH SYSTEM, INC., and MISSION HOSPITAL, INC.,

Defendants.

AMICUS CURIAE BRIEF OF THE STATE OF NORTH CAROLINA IN SUPPORT OF PLAINTIFFS[1]

The State of North Carolina, acting through Attorney General Joshua H. Stein, submits this amicus curiae brief in support of Plaintiffs. Plaintiffs allege that Defendants (collectively, "Mission Health") unreasonably restrain trade by, among other things, leveraging their market power to force health insurance companies to accept contractual provisions that prohibit the insurers from steering customers to more affordable providers. Plaintiffs further allege that these "anti-steering" provisions cause residents in western North Carolina to pay significantly higher prices for healthcare.

[1] No person or entity, other than the amicus curiae, wrote any part of this brief or contributed any money to support the brief's preparation. *See* N.C. Bus. Ct. R. 7.14(e).

Mission Health seeks to dismiss Plaintiffs' Complaint without allowing for any discovery into the nature and extent of Mission Health's alleged anticompetitive practices. Under North Carolina's notice pleading requirements, however, Plaintiffs' Complaint is more than sufficient to proceed past a threshold motion. Unreasonable restraint of trade cases are exceptionally fact-intensive. As a result, both state and federal courts rarely dismiss restraint of trade claims before discovery.

In a recent case in which the State, based on similar allegations, brought a federal antitrust claim against the Charlotte-Mecklenburg Hospital Authority ("CHS") (now known as Atrium Health), the district court denied a motion for judgment on the pleadings after concluding that the claims "must be evaluated with the benefit of discovery." *See United States v. Charlotte-Mecklenburg Hosp. Auth.*, 248 F. Supp. 3d 723, 733 (W.D.N.C. 2017). Following the district court's denial of that motion, the State and the United States Department of Justice negotiated a settlement with CHS whereby CHS agreed, among other things, not to include improper anti-steering provisions in its contracts. The State respectfully submits that this Court should similarly deny Defendants' motion to dismiss and allow Plaintiffs to take appropriate discovery.

INTRODUCTION

Healthcare costs place significant burdens on patients and their families who are often already dealing with stressful medical situations. In Asheville and the surrounding area—which is part of Mission Health's self-described service area—the cost of healthcare has become exorbitant. According to Plaintiffs' Complaint, residents of western North Carolina are sometimes paying up to 50 percent more for treatment than residents elsewhere in the state.

The cost of treatment for insured patients is largely determined by negotiations between the patient's insurer and the healthcare provider. Often, patients can only go to providers within their insurance policy's "network"; otherwise, they must pay significantly higher out of pocket

expenses. Geography also limits patient choice. There may be only one provider in an area that offers the treatment the patient needs. And, for emergency care, patients usually need to obtain treatment at the nearest facility and cannot take time to compare prices before receiving treatment.

Meanwhile, hospital consolidation further reduces choice.[2] One of the few ways patients can control the price of their own healthcare is to choose a more affordable provider within the patient's network, if more than one choice exists. Plaintiffs allege that Mission Health robbed them of even that. According to Plaintiffs, Mission Health leveraged its overwhelming market share (between 70 and 90 percent) in acute inpatient treatment in the Asheville area to require insurers to agree to contract provisions that would prevent them from trying to direct patients to more affordable providers. These provisions, which prohibit the insurer from encouraging or incentivizing patients to use lower-cost providers, allow Mission Health to negotiate prices with insurers without fear of price competition. Insurers, unsurprisingly, pass some or all of Mission Health's high prices on to patients in the form of higher premiums, co-pays, deductibles, and other costs.

In short, this case involves critical issues of competition and healthcare affordability that have a significant impact on consumers. The Attorney General has a special interest in these issues, both because he is tasked with enforcing North Carolina's laws prohibiting

[2] Notwithstanding Mission Health's mischaracterization, the Attorney General did not "approve" HCA's acquisition of Mission Health. *See* Defs.' Mem. in Supp. of Mot. to Dismiss (ECF 28) at 3. Rather, the Attorney General reviewed the transaction under his authority to review a charitable or religious corporation's transaction selling, leasing, exchanging, or otherwise disposing of all or a majority of its property. N.C. Gen. Stat. § 55A-12-02(g). After requiring Mission Health's Board of Directors to re-vote on the transaction after disclosure of a potential conflict of interest, and securing several prospective commitments from HCA related to HCA's carrying on Mission Health's charitable purpose post-transaction, the Attorney General declined to object to HCA's acquisition of Mission Health.

anticompetitive conduct and other harms to consumers, and because virtually all North Carolinians are healthcare consumers.

Mission Health, meanwhile, seeks to cut this litigation short and has moved to avoid discovery into its business practices. The Court should deny that motion. Plaintiffs have made serious allegations of anticompetitive conduct, and they deserve the opportunity to attempt to corroborate their allegations through discovery. That is the process favored by North Carolina's Rules of Civil Procedure generally, the approach both federal and state courts take to allegations that a defendant has unreasonably restrained trade, and the path a federal district court chose when faced with allegations that another North Carolina healthcare system's anti-steering provisions unreasonably restrained trade.

ARGUMENT

I. This Court Should Permit This Case to Proceed Into Discovery

Plaintiffs allege that Mission Health has unreasonably restrained trade by, among other things, including anti-steering provisions in its contracts with insurers. Mission Health moves to dismiss Plaintiffs' Complaint, and specifically argues that its anti-steering provisions have procompetitive purposes and effects and are therefore reasonable. A motion to dismiss, however, is not the appropriate phase of litigation to assess the reasonableness of Mission Health's anti-steering provisions. It is impossible to conclude that Mission Health's anti-steering provisions are reasonable without even seeing them.

Because reasonableness is typically so fact-intensive, courts rarely dismiss unreasonable restraint of trade claims before discovery. For example, in *Charlotte-Mecklenburg Hospital Authority*, which involved similar allegations of a large hospital system's unreasonable inclusion of anti-steering provisions in contracts with insurers, CHS argued that dismissal was appropriate because its anti-steering provisions had procompetitive purposes and effects. The federal district

court rejected that argument, explaining that determinations about the reasonableness of the anti-steering provisions were not appropriate until after discovery. 248 F. Supp. 3d at 730–31. Of course, North Carolina's notice pleading standard is more lenient than the federal standard under which *Charlotte-Mecklenburg Hospital Authority* was decided. *See Savino v. Charlotte-Mecklenburg Hosp. Auth.*, 375 N.C. 288, 297 (2020); *Fox v. Johnson*, 243 N.C. App. 274, 286 (2015) ("[T]he higher federal plausibility pleading standard differs from our State's notice pleading standard.") "[T]he policy behind notice pleading is to resolve controversies on the merits, after an opportunity for discovery, instead of resolving them based on the technicalities of pleadings." *New Hanover Cnty. Bd. of Educ. v. Stein*, 868 S.E.2d 5, 2022-NCSC-9, ¶ 22 (quoting *Ellison v. Ramos*, 130 N.C. App. 389, 395 (1998)). "Further specificity" about "precisely the basis of both claim and defense," or the "disputed facts and issues" "is reserved for the discovery process." *Acosta v. Byrum*, 180 N.C. App. 562, 568 (2006) (quoting *Sutton v. Duke*, 277 N.C. 94, 102 (1970)).

Plaintiffs make additional allegations of anticompetitive conduct and bring claims under other provisions of Chapter 75. Although this brief focuses on Plaintiffs' allegations that Mission Health unreasonably restrains trade by including anti-steering provisions in its contracts with insurers, the State believes that Plaintiffs' other allegations and claims are also sufficiently pled and should proceed to discovery.

a. Courts rarely resolve restraint of trade claims before discovery.

While North Carolina's pleading standard affords plaintiffs greater opportunity to conduct discovery than does the federal pleading standard, *see Fox v. Johnson*, 243 N.C. App. at 286, unreasonable restraint of trade cases are rarely resolved before discovery in either state or federal courts. That is because whether a restraint of trade is unreasonable is a fact intensive

question. *See DiCesare v. Charlotte-Mecklenburg Hosp. Auth.*, 2017 NCBC 32, ¶ 80 (N.C. Super. Ct. Apt. 11, 2017).

North Carolina law prohibits unreasonable restraints of trade, including those that "violate[] the principles of the common law." N.C. Gen. Stat. §§ 75-1, 75-2. Federal law applying the Sherman Act, while not binding, informs a court's application of § 75-1. *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 655 (1973); *see, e.g.*, *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 275–76 (2005) (adopting the federal *Noerr-Pennington* doctrine in a state law restraint of trade case).

The elements of a restraint of trade claim are: "(1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade." *DiCesare*, 2017 NCBC 32, ¶ 77 (quoting *Dickson v. Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002)). Although in rare cases an "unreasonable restraint on trade is so obvious" that a "court may find the alleged restraint is per se unreasonable," *see Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 887, 886 (2007), most often courts consider the totality of the circumstances to determine "whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977); *see Rose*, 282 N.C. at 657 (first evaluating whether the alleged restraint was *per se* anticompetitive, then considering whether the restraint was unreasonable). Under the "rule of reason," a restraint is unreasonable when it "suppress[es] or even destroy[s] competition" rather than "merely regulates" a market, thereby "promot[ing] competition." *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *see also Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341 (1990) (explaining that a restraint is unreasonable when "its anticompetitive effects outweigh its procompetitive effects").

A plaintiff can allege that a restraint has anticompetitive effects by pointing to the restraint's "actual detrimental effects" in the relevant markets. *F.T.C. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460 (1986). Actual detrimental effects include reduced output and increased price. *NCAA v. Alston*, 141 S. Ct. 2141, 2155 (2021). Alternatively, a plaintiff can allege that, in light of the defendant's market power, the restraint "has the potential for genuine adverse effects on competition." *Ind. Fed'n of Dentists*, 476 U.S. at 460.

Ultimately, it is for a factfinder to determine whether a restraint is unreasonable. *Chi. Bd. of Trade*, 246 U.S. at 238. And the reasonableness of a restraint is an especially "fact-specific assessment." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). Among the relevant considerations are facts particular to the industry; the history, purpose, and effect of the restraint; and whether the restraint's impact reaches consumers. *Chi. Bd. of Trade*, 246 U.S. at 238. This inquiry "is best conducted with the benefit of discovery." *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 292 (4th Cir. 2012); *see also DiCesare*, 2017 NCBC 32, ¶ 80. Even federal courts, which apply a more stringent pleading standard, recognize that "a plaintiff may only have so much information at his disposal at the outset," *Robertson*, 679 F.3d at 291, and therefore rarely dismiss antitrust complaints before discovery absent a "glaring deficienc[y]." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 444 (4th Cir. 2011).

Plaintiffs' Complaint contains no such glaring deficiency. Plaintiffs allege that Mission Health includes anti-steering provisions in contracts with insurers. Compl. ¶ 217. Thus, they have satisfied a restraint of trade claim's first element. *See DiCesare*, 2017 NCBC 32, ¶ 77 (explaining that the first element of a restraint of trade claim is "a contract, combination, or conspiracy").

Plaintiffs also adequately allege that Mission Health's anti-steering provisions have anticompetitive effects. First, Plaintiffs allege that Mission Health's anti-steering provisions produce actual detrimental effects in the relevant market. *See Ind. Fed'n of Dentists*, 476 U.S. at 460. Plaintiffs allege that the anti-steering provisions result in increased healthcare costs. Compl. ¶¶ 217, 235-241. Insurance premiums in Mission Health's self-described service area are up to 50 percent higher than in other North Carolina metropolitan areas. *See* Compl. ¶ 235. For inpatient procedures, Mission Health charges insurers 393 percent above the Medicare price. Compl. ¶ 171. The statewide average, meanwhile, is only 262 percent above the Medicare price. Compl. ¶ 171. For some procedures, including cesarean delivery, cardiovascular stress test, and lipid panel, Mission Health charges roughly double the statewide average. Compl. ¶¶ 175, 177, 178. Increased prices are an actual detrimental effect in the relevant market. *Alston*, 141 S. Ct. at 2155.

Although arguably unnecessary under North Carolina's more lenient pleading standard, *see Fox*, 243 N.C. App. at 286 (rejecting the federal plausibility pleading standard), the Complaint explains how Mission Health's anti-steering provisions plausibly relate to higher healthcare costs in western North Carolina. Because Mission Health prohibits insurers from directing patients to lower costs providers, Mission Health can charge higher prices without fear of price competition. Compl. ¶ 217.

Second, Plaintiffs allege that the anti-steering provisions, coupled with Mission Health's market power, have the potential for adverse effects on competition. *See Ind. Fed'n of Dentists*, 476 U.S. at 460. The Complaint adequately alleges Mission Health's significant market power. Mission Health, Plaintiffs allege, enjoys an over-80-percent market share for acute inpatient hospital services in Buncombe and Madison counties, Compl. ¶ 130, and an over-70-percent

market share in the neighboring counties where some Plaintiffs reside. Compl. ¶ 131. Mission Health's overwhelming market share is evidence of its significant market power. *See Eastman Kodak Co. v. Image Tech. Srvs., Inc.*, 504 U.S. 451, 470 n.15 (1992) (explaining that a court may infer a defendant's market power from the defendant's market share).

Plaintiffs also allege that this market power allows Mission Health's anti-steering provisions to threaten harm to competition. Plaintiffs allege that Mission Health leverages its market power to require otherwise unwilling insurers to agree to the anti-steering provisions. Compl. ¶ 229. Those provisions, Plaintiffs allege, prohibit insurers from encouraging patients to visit lower-cost providers or charging a higher co-pay or deductible when the patient uses the higher-priced facility. Compl. ¶ 228. By insulating itself from price competition, Mission Health—which already enjoys an over-70-percent share of the market for acute inpatient hospital services in Plaintiffs' area—threatens to expand its market dominance even further.

Mission Health responds that its anti-steering provisions have procompetitive purposes and effects. Defs.' Br. in Supp. of Mot. to Dismiss (ECF 28) at 30. The ultimate reasonableness of the anti-steering provisions, however, is a question of fact. *Chi. Bd. of Trade*, 246 U.S. at 238. Plaintiffs need not *prove* their case at the motion to dismiss stage. *DiCesare*, 2017 NCBC 32, ¶ 80. Both federal and state courts have recognized that it is rarely appropriate to assess the reasonableness of a restraint prior to discovery. *E.I. du Pont de Nemours & Co.*, 637 F.3d at 444. Accordingly, this Court should deny Mission Health's motion to dismiss and permit the parties to take discovery.

b. *United States v. Charlotte-Mecklenburg Hospital Authority* further suggests that this Court should afford Plaintiffs the opportunity to take discovery.

Finally, the State's own recent success litigating and resolving a federal antitrust claim against a health system based on its use of anti-steering provisions underscores the

appropriateness of denying Mission Health's motion to dismiss here. In *United States v. Charlotte-Mecklenburg Hospital Authority*, the State, alongside the United States Department of Justice, alleged that CHS violated § 75-1's federal analog, § 1 of the Sherman Antitrust Act, when it leveraged its 50-percent market share in the Charlotte area to impose anti-steering provisions on insurers. 248 F. Supp. 3d at 724–25. The anti-steering provisions, the State alleged, had substantial anticompetitive effects, including "protecting CHS's market power and enabling CHS to maintain at supracompetitive levels the prices of acute inpatient hospital services." Complaint at 10-11, *United States v. Charlotte-Mecklenburg Hosp. Auth.*, 248 F. Supp. 3d 720 (W.D.N.C. 2017) (No. 3:16-cv-00311).

CHS moved for judgment on the pleadings. *Charlotte-Mecklenburg Hosp. Auth.*, 248 F. Supp. 3d at 723. The district court rejected CHS's motion and found that the State's allegations were sufficient to support a § 1 claim. *Id.* at 729–31. The district found that the State's allegations satisfied both the "actual detrimental effects" and the "potential for genuine adverse effects" tests. *Id.* at 729–31. The district court first explained that the State's allegations that CHS's anti-steering provisions caused increased prices adequately pled a § 1 violation because increased prices are an actual detrimental effect. *Id.* at 729. The district court also found that the State's allegations that CHS had a 50 percent share of the relevant market, and that CHS leveraged that market share to impose anti-steering provisions on insurers, revealed "a potential for genuine adverse effects on competition." *Id.* at 730–31 (quoting *Ind. Fed'n of Dentists*, 476 U.S. at 460).

Most notably, the district court emphasized the importance of permitting discovery before resolving the restraint of trade claim. CHS urged the district court to grant judgment on the pleadings, asserting that its anti-steering provisions had procompetitive purposes and effects and

were therefore reasonable. *See id.* at 730. The district court rejected that argument, explaining that the reasonableness of restraint is a "fact-intensive inquir[y]" that "requires discovery." *Id.* The district court acknowledged that CHS "raised serious and robust questions about the purposes, effects, and legality of its contractual steering restrictions," but concluded that "those questions are best resolved after the benefit of discovery[.]" *Id.* at 730. Accordingly, the district court denied CHS's motion to dismiss. *Id.* at 733. Ultimately, the parties reached a settlement and CHS agreed to not include improper anti-steering provisions in its contracts. Press Release, United States Department of Justice, Atrium Health Agrees to Settle Antitrust Lawsuit and Eliminate Anticompetitive Steering Restrictions (Nov. 15, 2018), *available at* https://www.justice.gov/opa/pr/atrium-health-agrees-settle-antitrust-lawsuit-and-eliminate-anticompetitive-steering.

Charlotte-Mecklenburg Hospital Authority demonstrates that this Court should allow Plaintiffs to proceed to discovery. *Charlotte-Mecklenburg Hospital Authority* rejected the argument that a court should dismiss a claim that a health system's anti-steering provisions represent an unreasonable restraint of trade based on the health system's assertion that its anti-steering provisions have procompetitive effects. *Id.* at 730–31. That is the very same argument Mission Health advances now. Defs.' Br. in Supp. of Mot. to Dismiss (ECF 28) at 30.

Moreover, the district court in *Charlotte-Mecklenburg Hospital Authority* found that the State's allegations—which closely resemble Plaintiffs' allegations here—satisfied the more stringent federal pleading standards. 248 F. Supp. 3d at 729–31. Plaintiffs' allegations, including the fact that Mission Health's market share is even greater than CHS's, should certainly survive under North Carolina's more lenient pleading standard. *See, e.g., Fox*, 243 N.C. App. at 286.

This Court should follow the district court's example, deny Mission Health's motion to dismiss, and permit Plaintiffs to take discovery.

CONCLUSION

For the reasons stated above, the State of North Carolina, acting through Attorney General Joshua H. Stein, respectfully requests that this Court deny Mission Health's motion to dismiss and permit Plaintiffs to take appropriate discovery.

Respectfully submitted this 30th day of March, 2022.

JOSHUA H. STEIN
Attorney General

W. Swain Wood
First Assistant Attorney General and General Counsel
N.C. Bar No. 32037
SWood@ncdoj.gov

Tiffany Y. Lucas
Deputy General Counsel
N.C. Bar No. 26237
TLucas@ncdoj.gov

Kevin Anderson
Senior Deputy Attorney General
Director, Consumer Protection Division
N.C. Bar No. 22635
KAnder@ncdoj.gov

/s/ *South A. Moore*
General Counsel Fellow
N.C. Bar No. 55175
SMoore@ncdoj.gov

North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602
Phone: (919) 716-6000
Facsimile: (919) 716-6050

Counsel for Amicus Curiae State of North Carolina

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Rules 7.8 and 7.14 of the North Carolina Business Court Rules in that it contains no more than 3,750 words, excluding the caption, any index, table of contents or table of authorities, signature blocks, and required certificates.

This the 30th day of March, 2022.

/s/ *South A. Moore*
South A. Moore

CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing document with the North Carolina Business Court using the Court's electronic filing system, which serves all counsel of record in this matter.

This the 30th day of March, 2022.

/s/ *South A. Moore*
South A. Moore