FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ENDURE INDUSTRIES, INC.	§	
	§	
Plaintiffs,	§	**CIVIL ACTION NO. 3:20-cv-3190-X**
	§	
v.	§	
	§	
VIZIENT, INC., a Delaware corporation,	§	
VIZIENT SUPPLY, LLC, a Delaware	§	
limited	§	
VIZIENT SOURCE, LLC, a Delaware	§	**JURY DEMANDED**
limited liability company, and PROVISTA,	§	
INC., a Delaware corporation,	§	
	§	
Defendants.	§	

ENDURE'S RESPONSE AND BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

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Plaintiff Endure Industries, Inc. files this Response and Brief in Opposition to Defendants Vizient, Inc., Vizient Supply LLC, Vizient Source LLC and Provista, Inc.'s (collectively, "Vizient") Motion to Dismiss Plaintiff's Second Amended Complaint and states as follows:

I. INTRODUCTION

Vizient is not a "typical" GPO. Rather, it is a club for a cartel of suppliers that pays hospital management kickbacks (concealed as "rebates") to hook Member Hospitals on cash infusions and ultimately exclude more transparent and less expensive medical product suppliers like Endure. The Court should deny Vizient's Motion, again, because Endure has alleged that:

Endure has antitrust standing. Vizient's exclusionary ISP forecloses a market and prevents Endure and others from not only participating in multi-million-dollar hospital purchasing contracts, but from selling to Member Hospitals through any channel. Vizient also directly competes with Endure, through its Novaplus private label. Vizient's ISP has increased prices charged to hospitals, controlled hospital demand, reduced competitors' sales and margins, eliminated choice, and diminished innovation – all of which constitute antitrust injury.

Endure has alleged legally cognizable relevant markets. The marketing, supply, and distribution of disposable medical supplies ("DMS") by means of (1) GPOs to acute-care hospitals and academic medical centers in the United States ("GPO Market"), (2) Vizient to Vizient Member Hospitals in the United States (the "Vizient Market") are both legally cognizable relevant markets. Courts have recognized the GPO market as distinct,[1] the combination of different medical supplies or services into "a single market,"[2] and single-brand markets in analogous situations.[3] Endure's

[1] *Natchitoches Par. Hosp. Serv. Dist. v. Tyco Intern., Ltd.,* No. 1:05-CV-12024PBS, 2009 WL 4061631, at *6 (D. Mass. Nov. 20, 2009).
[2] *Suture Exp., Inc. v. Cardinal Health 200, LLC*, 963 F. Supp. 2d 1212, 1222 (D. Kan. 2013).
[3] *American Airlines, Inc. v. Travelport Ltd.*, 2011 WL 13047291, at *5 (N.D. Tex. Nov. 21, 2011); *US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 48-49 (2d Cir. 2019); *US Airways, Inc. v. Sabre Holdings Corp.*, 2022 WL 874945, at *3 (S.D.N.Y. 2022).

alleged markets are especially warranted because Vizient intended to create a purchasing channel through its ISP with the sole purpose of "locking in" hospitals by raising switching costs to a degree that substitution based on price competition became impossible.

Vizient has monopoly power. Vizient accounts for over 70% of the total DMS spend in the GPO Market, and 100% in the Vizient Market. What's more, Vizient admits to having monopoly power because it touts to its cadre of suppliers that the ISP provides "protection from competitive threats." In a salient example of its ability to control prices, Vizient recently rejected an equally qualified bid that would have saved Vizient Member Hospitals nearly $100 million dollars over five years; and instead anointed an exorbitant incumbent provider as sole source of medical tape for its Member Hospitals.

Vizient's exclusionary conduct. Bundling and "rebate" programs like Vizient's ISP program create *de facto* exclusivity because these programs lock Member Hospitals into purchasing all DMS from Vizient's chosen provider. It is functionally impossible for Endure or other non-ISP manufacturers to gain any sort of footing for their products, regardless of lower pricing or higher quality.

For these reasons, and for those set forth below, the Court should deny Vizient's Motion.

II. FACTS

Plaintiff Endure Industries, Inc. ("Endure") is a medical device manufacturing and distribution company founded in 2016. Since its founding, Endure has single-mindedly pursued one goal: to produce and distribute high-quality disposable medical supplies ("DMS") using radical price transparency as a means to lower medical costs for hospitals, insurers, and patients. (*See* Dkt. 100, ¶¶ 1, 22.) DMS constitute the least technically complex subset of all devices sold in the medical supply market and include single-use disposable items such as medical tapes, syringes, tourniquets, monitoring electrodes, and transparent dressings. (*See Id.*)

Vizient, Inc. ("Vizient") purports to be a group purchasing organization ("GPO") and a direct competitor with Endure. As a GPO, Vizient professes to act as the distribution middleman between DMS suppliers like Endure and large health care providers like acute care hospitals and academic medical centers/hospitals. (*See* Dkt. 100, ¶ 2.) Because these large hospitals use GPOs to purchase nearly all of their DMS, they are the primary revenue generators of DMS for manufactures and suppliers like Endure. (*Id.*)

Vizient is the largest GPO in the United States and has been for several years. (Dkt. 100, ¶ 3.) It grew even more just recently when it acquired the then-fourth largest GPO in the nation, Intalere. (*Id.*) Vizient serves approximately 97% of the nation's academic medical centers, and over 50% of the nation's community (acute care) hospitals. (*Id.*) Vizient's contracts have generated more than double the annual purchasing volume than that of the next largest GPO, making Vizient customers, upon information and belief, responsible for at least 70% of the total spend on DMS through GPOs in the United States. (*Id.*) Through its purchasing programs and policies, Vizient has effectively prevented member hospitals from joining competing GPOs or purchasing directly from individual suppliers like Endure.

Specifically, Vizient has developed and exercised monopoly power through the implementation of its Impact Standardization Programs ("ISPs")—programs that are nothing more than an anticompetitive scheme with the purpose of protecting Vizient and the dominant producers with which it contracts. (Dkt. 100, ¶ 4.) The ISPs "are structured to lock these Member Hospitals into purchasing virtually all of their DMS from Vizient's chosen providers". These providers, like 3M, have astronomically higher prices than Endure. (Dkt. 100, ¶ 54.) Between 95 and 98% of Vizient's Member Hospitals participate in the ISPs. (Dkt. 100, ¶ 46.)

Vizient achieves its monopolistic goal of locking in its Member Hospitals by offering

aggregate quarterly "rebates" (if the Member Hospitals satisfy conditions) rather than real-time discounts on each product. (Dkt. 100, ¶ 5.) The quarterly payment schedule makes it more difficult for any Member Hospital to leave the program to explore other suppliers because switching to a lower-cost provider would require hospitals to forgo millions of dollars. (*Id.*) Moreover, Vizient's eligibility requirements for the rebates themselves are inherently anticompetitive. To qualify, within each Traditional ISP (*e.g.,* General Surgery), a Member Hospital must buy products from Vizient-approved suppliers for 75% of its overall needs. (*Id.*) In addition, the Member Hospital must purchase at least 90% of its requirements from each category within the ISP (*e.g.,* adhesive tapes, transparent dressings) from Vizient-approved suppliers. (*Id.*) These requirements make it functionally impossible for Endure or other non-ISP manufacturers to gain any sort of footing for their products. (Dkt. 100, ¶¶ 5, 6.) This is because an equally efficient "new entrant like Endure cannot possibly offer a discount on a single product like medical tape or tourniquets equivalent to the total sum of kickbacks that the Member Hospital receives *for every product category within the ISPs*." (Dkt. 100, ¶ 38.)

The ISPs also benefit Vizient by entrenching dominant, higher-priced suppliers, for example, 3M in the "medical tape" category. As Vizient's own documents show, participation in an ISP offers producers "protection from competitive threats." (Dkt. 100, ¶¶ 7, 57.) Finally, "Vizient also employs a staggered termination date strategy, under which a hospital or supplier's termination date for each product category within a program differs," possibly lasting for up to five years at a time and making it nearly impossible for Member Hospitals to exit the ISP—even if they find better prices for a product in a specific product category. (Dkt. 100, ¶ 56.)

As just one example of Vizient's power over the relevant markets, on or around September 16, 2019, Endure executed a Product Supplier Agreement with Vizient to supply DMS

(specifically medical tape) to Vizient Member Hospitals. Although approved as to quality and all other criteria, Endure's proposal was rejected, despite offering 35% less than 3M's price. This would have saved the Member Hospitals approximately $100 million over five years. (Dkt. 100, ¶¶ 62-63.)

Endure's exclusion from supplying DMS to Member Hospitals is not the result of merely losing a bid, but a notable example of a deliberate anticompetitive scheme employed by Vizient to further monopolize the DMS market for acute care hospitals and academic medical centers. The direct result of Vizient's behavior is to harm competition for DMS. This harm includes, among other things, that Vizient "increased prices charged to Member Hospitals" and continues to "control[] Member Hospitals' demand for [DMS], reduce[] competitors' sales and margins, and diminish[] competitors' ability and incentive to invest and innovate." (Dkt. 100, ¶ 100.) Endure also alleges that Vizient has harmed competition by "reduc[ing] choice and increase[ing] price that patients face as a result of the ISPs' restrictions." (Dkt. 100, ¶ 95.) Endure has suffered monetary damage as a proximate result of Vizient's conduct.

III. PROCEDURAL BACKGROUND

As more fully described in its Cross-Motion for Leave to File Second Amended Complaint, (Dkt. 85), Endure noticed the appearance of new counsel on January 4, 2022, and, with the benefit of some early discovery, conferred with Defendants to file a second amended complaint. Defendants had repeatedly attacked Plaintiff's complaint and allegations as "far from clear" and "confusing and inconsistent." (Dkt. 73 at ¶¶ 3, 5); (*see also* Dkt. 75 at ¶18.) (referring to "Endure's vague allegations" and to the Complaint's failure to "define" or give "clear meaning" to the relevant market); (Dkt. 83 at ¶ 1.) (complaining about "wide-ranging and inconsistent allegations" that "will interfere with the efficient disposition of this litigation"). Plaintiff therefore sought to give Defendants what they asked for: an amended complaint that refines, synthesizes, and clarifies

Plaintiff's claims. The Court granted leave over Defendants' objection. But Defendants, unsurprisingly, will never consider any complaint to state actionable claims.

IV. ARGUMENT

A. Legal Standard

In the Fifth Circuit, motions to dismiss "are viewed with disfavor and are rarely granted." *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009). In reviewing a motion to dismiss, the Court must accept as true all well-pled facts in the complaint and view those facts in the light most favorable to the plaintiff. *See Sonnier v. State Farm Mutual Auto. Ins. Co.*, 509 F.3d 673 (5th Cir. 2007). Rather than evaluate the plaintiff's ultimate likelihood of success, the Court need only determine whether the plaintiff has stated a plausible and legally cognizable claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. Endure Has Alleged Antitrust Standing.

To establish antitrust standing at the pleading stage, a plaintiff must allege three things: "(1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; (2) antitrust injury; and (3) proper plaintiff status, which assures that other parties are not better suited to bring suit." *Sanger Ins. Agency v. Hub Int'l, Ltd.*, 802 F.3d 732, 737 (5th Cir. 2015).

Endure has alleged all three.

1. *Vizient's Exclusionary Conduct Must Be Considered Holistically.*

Vizient attempts to advance a "divide-and-conquer" strategy aimed at distorting the Second Amended Complaint beyond recognition (Dkt. 105, at 8-9), but the Supreme Court requires courts to examine antitrust allegations holistically. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962) (the anticompetitive conduct is "not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole"). Indeed, "[a]n antitrust plaintiff should be given the full benefit of proof without tightly compartmentalizing the

various factual components and wiping the slate clean after scrutiny of each." *Universal Hosp. Servs., Inc. v. Hill-Rom Holdings, Inc* 2015 WL 6994438, at *6 (W.D. Tex. Oct. 15, 2015). Thus, the Court must assess Vizient's exclusionary conduct within the allegations' broader context—not by adopting Vizient's fun-house-mirror version of the Second Amended Complaint.

Vizient's central standing argument is that this case is only about Endure's loss of a single bid. (*See* Dkt. 105, at 8-9.) But that misleadingly narrow lens ignores the broader anticompetitive landscape. Endure has alleged a comprehensive scheme by Vizient to "protect" itself and its dominant suppliers from "competitive threats," a scheme that extends beyond a single bid. (*See, e.g.*, Dkt. 100, ¶¶ 46-58.) True, the medical tape bid—which 3M won despite a price 35% higher than Endure's—exemplifies the <u>*type*</u> of harm the market has suffered. (Dkt. 100, ¶ 63.) But saying that Endure's claim is "about a lost bid" is like saying the movie *Titanic* is "about an iceberg"—partially true, but incredibly misleading. In reality, the Second Amended Complaint sets forth a comprehensive scheme designed to not only prevent Endure from winning specific bids, but also to block Endure (and other low-cost suppliers) from selling to <u>*any*</u> of Vizient's high-volume acute care and academic medical center hospitals through <u>*any*</u> distribution channel. (*See* Dkt. 100, ¶¶ 28-38.) Reviewed holistically, Endure's standing allegations more than suffice.

2. <u>*Endure Has Alleged Injury-In-Fact.*</u>

Endure suffered direct injury-in-fact from Vizient's scheme, which was specifically designed to "protect [Vizient] and its dominant suppliers from competitive threats" like Endure. (*See* Dkt. 100, ¶ 57.) The scheme had intended winners (Vizient and its anointed high-priced suppliers) and losers (new entrant competitors like Endure and, ultimately, patients). By Vizient's design, Endure had to be one of the losers because Endure's strategy "was to offer radical price transparency as a means of lowering medical costs for hospitals, insurers, and patients." (Dkt. 100, ¶ 22.) Endure's exclusion is therefore an injury proximately caused by the defendants' conduct.

(Dkt. 100, ¶¶ 62-66.); *see also Sanger*, 802 F.3d at 737.

Vizient insists that no harm occurred because Endure somehow cobbled together a few strip-mall surgery centers to which it can sell a *de minimis* amount of DMS. (*See* Dkt.105, at 15.)[4] But it is absurd to insist that a monopolist is only liable when it chokes all life out of the plaintiff and forces it into bankruptcy. Nor does the law require such extreme allegations when the practical effect of Vizient's ISP is to prevent acute care and academic medical center hospitals from <u>*ever*</u> purchasing from DMS suppliers like Endure, because doing so would trigger a massive penalty across all bundled products, thus costing those hospitals millions of dollars. (Dkt. 100, ¶¶ 7, 88.); *see Universal Hospital Services, Inc. v. Hill-Rom Holdings, Inc*, 2015 WL 6994438, at *12 (W.D. Tex. 2015) (finding that "as a practical matter, the complaint alleges that the conditional discounts and rebates offered by Hill–Rom in exchange for the sole-source condition are sufficiently steep to create an irresistible bundle" and acknowledging that "courts have held that such agreements are not economically capable of termination as a practical matter).[5] Endure's exclusion from the market constitutes "injury-in-fact" because Vizient intentionally designed the ISP to "protect" itself and its entrenched suppliers from competition, thus making it "functionally impossible for Endure or other non-ISP manufacturers to gain any sort of footing for their products." (Dkt. 100,

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[4] Vizient improperly reaches beyond the pleadings and cites to Endure's website, attempting to claim that "Endure actually does sell to hospitals, and through a GPO." (Dkt. 105, at 5.) The court should ignore this attempt to import external facts beyond the face of the pleadings because it's improper under Rule 12(b)(6). Endure objects to Vizient's entire appendix as improper. *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999). Beyond that, Vizient's use of this information is misleading because, unlike with Vizient's ISP, Endure's engagement with this tiny, regional distributor is merely as a listing on a directory.

[5] *See also Natchitoches Par. Hosp. Serv. Dist. v. Tyco Intern., Ltd.,* No. 1:05-CV-12024PBS, 2009 WL 4061631, at *6 (D. Mass. Nov. 20, 2009) ("[B]uyers [were] effectively unable to exit the agreements without breaking their commitments and [risking] the threat of suffering financial penalties through the loss of previously-accrued rebates and discounts"); *In re Remicade Antitrust Litigation*, 34 F.Supp.3d 566 (E.D. Pa 2018) (rejecting argument that the plaintiff is free to purchase from a competitor to a bundled product "whenever it likes, at prices it alleges to be lower" because "the threat of losing rebates . . . [u]ltimately provided customers with no choice but to continue purchasing from the defendants"); *FTC v. Surescripts, LLC*, 424 F.Supp.3d 92 (D.D.C. 2020) (rejecting argument that "loyalty programs are entirely optional" because "a contract need not contain specific agreements not to use the services of a competitor as long as the practical effect is to prevent such use").

¶ 6.); *see Pulse Network, L.L.C. v. Visa, Inc.,* 30 F.4d 480, 494 (5th Cir. 2022) (holding that "a reasonable jury could find a non-speculative causal link between the claimed injuries" and the exclusionary policies including volume-rebate incentives, which "deprived [the plaintiff] of the opportunity to compete for business"); *Doctor's Hosp. of Jefferson, Inc. v. Southeast Medical Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir. 1997) (hospital excluded from membership in non-profit PPO had antitrust standing).

3. *Endure Has Suffered Antitrust Injury.*

Endure has also alleged antitrust injury under the Supreme Court's *Brunswick* standard, which requires allegations of harm "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*, 429 U.S. 477, 489 (1977). Endure's injury qualifies as "antitrust injury" because, if allowed to sell directly to the high-volume acute care hospitals currently purchasing exclusively through Vizient, Endure's prices and innovations would have spelled doom for the Vizient's scheme. (Dkt. 100, ¶¶ 62-66.); *see Pulse Network,* 30 F.4th at 494 (finding antitrust injury where volume-based rebates, while technically terminable, were "designed to lock up the market and thereby *protect [defendant's] business from competition*") (emphasis added).

At its core, Vizient's "antitrust injury" argument rests on two fundamental distortions. *First*, Endure *does* compete with Vizient for the distribution of DMS. Not only does Vizient act as a *de facto* DMS distributor, but it also offers competitive DMS directly to Member Hospitals through its own private label brand, Novaplus. (*See* Dkt. 100, ¶¶ 59-61.) For example, Endure has alleged that, even though it could sell tourniquets to Vizient's Member Hospitals for 15% less than Vizient currently offers, it has been unable to do so because Vizient sells *its own* branded tourniquets to those Member Hospitals. (*See* Dkt. 100, ¶¶ 60-61.)

Second, it is simply not true that "antitrust injury" *requires* the plaintiff to be a consumer

or a competitor. As the Supreme Court held in *Blue Shield of Virginia v. McCready*, the Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." 457 U.S. 465, 472 (1982). More recently, in *Universal Hospital Services, Inc. v. Hill-Rom Holdings, Inc.*, the Western District of Texas held that a plaintiff had properly alleged antitrust standing even where it did "not seek recognition of its injuries as either a consumer or current competitor [the defendant's] products" because that plaintiff had "alleged losses and competitive disadvantage resulting from its alleged exclusion from," a market in which it did not then compete. 2015 WL 6994438, at *12 (W.D. Tex. 2015). Thus, even if Vizient is right as a factual matter (and it is not), it does not matter because antitrust standing extends beyond direct competitors.[6]

4. *Endure Has Alleged That Vizient's Unlawful Acts Have Directly Harmed Competition.*

Finally, Endure has alleged detailed facts showing harm to competition. These include, among others, that Vizient "increased prices charged to Member Hospitals" and continues to "control[] Member Hospitals' demand for [DMS], reduce[] competitors' sales and margins, and diminish[] competitors' ability and incentive to invest and innovate." (Dkt. 100, ¶ 100.) Endure has also alleged that Vizient harmed competition by "reduc[ing] choice and increase[ing] price that patients face as a result of the ISPs' restrictions." (Dkt. 100, ¶ 95.); *Hill-Rom*, 2015 WL 6994438, at *17 (finding injury to competition base on, among other things, allegations "that

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[6] *See also Am. Cent. E. Tex. Gas Co. v. Union Pac. Res. Grp., Inc.*, 93 F. App'x 1, 7 (5th Cir. 2004) (establishing that "competitor status is not required to establish antitrust standing" and "[r]elief for antitrust claims is not confined to consumers, or to purchasers, or to competitors, or to sellers"); *New Mexico Oncology and Hematology Consultants, Ltd. v. Presbyterian Healthcare Services*, 54 F.Supp.3d 1189, 1202 (D.N.M. 2014) (finding antitrust standing in Section 2 case despite the plaintiff not being a competitor because the defendants' actions in the private insurance market had the anticompetitive effect of harming the plaintiff in the comprehensive oncology market); *Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F.2d 951, 962 (10th Cir. 1990) (holding that a plaintiff-hospital had demonstrated that it had suffered antitrust injury as a result of the defendant-insurer's decision to terminate the hospital's contracting provider agreement with the insurer).

competition is harmed by a reduction of consumer choice"). In *Suture Express Inc. v. Cardinal Health*—a case involving allegations about GPO bundling/rebate practices—the court held that the plaintiffs' allegations of a "reduc[tion] [in] the level of competition in the distribution of [the plaintiff's] products" and "limit[ing] [of] a customer's choice" are "sufficient to allege an antitrust injury." 963 F. Supp. 2d 1212, 1223 (D. Kan. 2013). Thus, Endure's harm allegations emphasize the very market distortions that the antitrust laws are designed to address.[7]

For these reasons, the Court should reject Vizient's antitrust standing arguments.[8]

C. <u>Endure Has Alleged a Legally Cognizable Relevant Market.</u>

A relevant market is comprised of a product market and geographic market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). The question of whether plaintiff has properly defined the relevant market is fact-intensive, and "courts hesitate to grant motions to dismiss for failure to plead a relevant product market." *Chandler v. Phoenix Services*, 419 F. Supp. 3d 972, 984 (N.D. Tex. 2019); *cf. Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 504 U.S. 451, 482 (1992) (reversing summary judgment on issue of relevant market because market definition could "be determined only after a factual inquiry into the 'commercial realities' faced by consumers").

"[T]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and

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[7] The cases Vizient relies on offer nothing more than general, anodyne principles, inapplicable to the facts here. (*See* Dkt. 105, 8-10.) For example, Vizient crows about a recent Fifth Circuit case, *Continental Auto Systems, Inc. v. Avanci, LLC*. (*Id.*) But not only did the facts of that case have nothing to do with those here (patent licensing indemnity obligations), *Avanci* did not involve antitrust standing at all. 27 F.4th 326 (5th Cir. 2022). None of the other standing cases that Vizient cites fare any better. *See, e.g., Ginzburg v. Mem'l Healthcare Sys., Inc.*, 993 F. Supp. 998, 1015 (S.D. Tex. 1997) (differentiating a single doctor being unable to practice at a single hospital from *Doctor's Hospital*—where a hospital excluded from membership in non-profit PPO *had* antitrust standing); *Marucci Sports L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 376 (5th Cir. 2014) (concluding no antitrust injury due to a failure to assert *any* plausible injury to the market); *FUNimation Entm't v. A.D. Vision, Inc.*, No. 4:12-CV-1736, 2013 WL 2189881 (S.D. Tex. May 20, 2013) (determining no antitrust injury because one party simply defaulted on a payment obligation, and the other party exercised its right to accelerate repayment).

[8] Although Vizient does not challenge Endure's status as a "proper plaintiff," Endure has also properly alleged facts support each factor set forth in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). (*See* Dkt. 100, ¶¶ 57, 93-103.)

substitutes for it" but submarkets that are well-defined "may exist which, in themselves constitute product markets for antitrust purposes*." Brown Shoe*, 370 U.S. at 325. However, "[t]he boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.*

Here, Endure has alleged two cognizable relevant markets. The first is the market for the marketing, supply, and distribution of disposable medical supplies by means of GPOs to acute-care hospitals and academic medical centers in the United States ("GPO Market") (Dkt. 100, ¶ 67.) The second is the market for the marketing, supply, and distribution of disposable medical supplies by means of Vizient to Vizient Member Hospitals in the United States (the "Vizient Market") (Dkt. 100, ¶ 73.)

1. *The GPO Market is Distinct.*

Endure has alleged that "the commercial realities of the sale and distribution of DMS mean that there are practically no interchangeable substitutes for [the supply of DMS to] acute care and academic hospitals . . . except through GPOs." (Dkt. 100, ¶ 68.) Although Vizient's criticizes the GPO Market as improperly narrow (Dkt. 105, at 11), the commercial realities are that Vizient has developed its ISP program with the goal of ensuring that its academic and acute care hospitals cannot substitute DMS suppliers no matter the price. (Dkt. 100, ¶¶ 69-71.)

Vizient's arguments against the GPO Market fail for three additional reasons.

First, courts readily acknowledge that a "relevant product market may sometimes be limited to *specific types of customers* based on a distinction in the product submarkets" and the choices available to that consumer group. *Suture Exp., Inc. v. Cardinal Health 200, LLC*, 963 F.

Supp. 2d 1212, 1222 (D. Kan. 2013) (emphasis added).[9] Nor does limiting the market to hospitals with GPO contracts undermine the plausibility of Endure's GPO Market; courts have routinely held that customers view distribution through GPOs differently from other distribution avenues. *See, e.g.*, *Natchitoches*, 2009 WL 4061631, at *7 (upholding market limited to distribution through GPOs because alternative distribution channels for selling sharp containers were not reasonably interchangeable).

Endure has also alleged that acute care and academic hospitals view DMS distribution via GPOs differently from other DMS purchasers, and thus make up a distinct submarket within the broader healthcare market for DMS. (*See* Dkt. 100, ¶¶ 67-72.) Specifically, Endure alleged that "academic medical centers and large acute care hospitals are the highest volume purchasers of DMS" and thus account for a disproportionately high share of revenue for the sale of DMS through GPOs. (Dkt. 100, ¶30.) Endure further pleaded that over 96% of all hospitals purchase DMS through GPOs and "[a]cute care and academic medical center hospitals purchase almost entirely through GPOs." (Dkt. 100, ¶¶ 31, 69.) As in *Natchitoches*, Endure alleged facts regarding the "unique advantages of GPOs in reducing transaction costs, obtaining significantly lower prices [], and their tremendous effect on sales, which distinguish the GPO market from the wider market" for DMS. 2009 WL 4061631, at *7; (Dkt. 100, ¶¶ 68-71.) Courts routinely uphold similar submarkets, particularly at the pleading stage. *See Suture Exp*, 963 F. Supp. 2d at 1222 (finding that plaintiff sufficiently pleaded the relevant market of domestic acute care providers who

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[9] *See also Eastman Kodak Co. v. Image Tech. Services, Inc.*, 504 U.S. 451, 482 (1992) (recognizing that relevant markets may be defined based the specific options available to a limited group of customers); *Retractable Techs., Inc. v. Becton Dickinson & Co.*, No. 2:08-CV-16, 2011 WL 13134434, at *5 (E.D. Tex. Mar. 15, 2011) (upholding relevant market limited to acute care and alternate care submarkets in the healthcare industry for syringes and catheters); *White & White, Inc. v. Am. Hosp. Supply Corp.,* 540 F. Supp. 951, 988 (W.D. Mich. 1982), rev'd on other grounds, 723 F.2d 495 (6th Cir. 1983) ("Hospital demand for medical-surgical products differs from the demand requirements of other consumers of these supplies. . . . Also from a supply perspective, hospitals are regarded as a distinct customer class.").

purchase med-surg supplies).[10]

Second, Vizient suggests Endure did not address interchangeable substitutes, but that's just wrong. Endure alleged that "the commercial realities of the sale and distribution of DMS mean that there are practically no interchangeable substitutes for acute care and academic hospitals to DMS (like medical tapes and tourniquets) except through GPOs." (Dkt. 100, ¶ 68.) Endure also alleged that GPOs market, supply, and distribute DMS to virtually all acute-care hospitals and academic medical centers and that Endure has no alternative but to do so through a GPO or lose those sales. (Dkt. 100, ¶ 68.) These acute care and academic hospitals do not "view other methods of purchasing disposable medical supplies to be reasonable substitutes." (Dkt. 100, ¶ 69.) As a result, "[p]rices of disposable medical supplies sold though GPOs are not meaningfully constrained by the price of alternative methods" to the point that even if the acute care hospitals and academic medical centers "face an increase in prices for DMS sold through a GPO, it would have no ability to shift to an alternative method of distribution." (Dkt. 100, ¶ 70.) These allegations directly allege that the GPO Market lacks interchangeable substitutes for acute care and academic hospitals' purchase of DMS outside of the GPO Market.

Third, Vizient complains that Endure's use of a broader market for disposable medical supplies is vague. (*See* Dkt. 105, at ¶ 14.) But it is a bold gambit for Vizient—facing antitrust claims for bundling eleven purportedly different categories of DMS under its anticompetitive ISP program—to insist that Endure's allegations don't pass muster because different types of DMS do not belong together. (Dkt. 100, ¶ 47.) If anything, Vizient's own decision to weld together these

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[10] Vizient's cases do not change this analysis. In *Glynn-Brunswick Hosp. Auth. v. Becton*, for example, the court rejected the submarket because, unlike Endure, the plaintiff did not allege anything suggesting that the industry "recognizes the sales of syringes or IV catheters to acute care providers as a discrete market." 159 F. Supp. 3d 1361, 1379 (S.D. Ga. 2016). Similarly, *Little Rock Cardiology Clinic P.A. v. Baptist Health* does not apply because that alleged market turned on how consumers *pay* for the product (insurance versus self pay). 591 F.3d 591 (8th Cir. 2009). Finally, *T. Harris Young & Associates, Inc. v. Marquette Elecs., Inc.* does not help Vizient because that case affirmed a JNOV motion brought *after trial*, not at the pleading stage. 931 F.2d 816, 825 (11th Cir. 1991).

11 categories in the ISP program only strengthens Endure's basis for its relevant market, because the whole point of that program is to ensure that hospital decisions about purchasing one type of DMS become inextricably intertwined with ten other types of DMS. (Dkt. 100, ¶¶ 51-58.)

Beyond this, courts routinely combine seemingly disparate products into "a single market" when it reflects the market's "commercial realities." *Ohio v. Am. Express Co.,* 138 S. Ct. 2274, 2285 (2018); *FTC v. Staples, Inc*., 970 F. Supp. 1066 (D.D.C. 1997) (defining the relevant market as "'the sale of consumable office supplies through office superstores,' with 'consumable' meaning . . . items which 'get used up' or discarded," a market that included an array of different items such as "paper, pens, file folders, post-it notes, computer disks, and toner cartridges").[11] Endure has alleged that the "commercial realities" of this market have created a world in which acute care and academic hospitals view DMS as a single group and, as a result of Vizient's ISP program, consider all DMS to be part of an intertwined group of products. (*See* Dkt. 100, ¶¶ 47-53.) That is sufficient to establish a cognizable GPO Market consisting of DMS.

2. *The Vizient Market is a Distinct Sub-Market.*

The Supreme Court has long rejected Vizient's argument against a single-brand market and instead held that "one brand of a product can constitute a separate market" when commercial realities of the market necessitate it. *Eastman Kodak Co.,* 504 U.S. at 482; *Assoc. Radio Serv. Co. v. Page Airways, Inc*., 624 F.2d 1342, 1349 (5th Cir. 1980). The Second Circuit's analysis in *US Airways, Inc. v. Sabre Holdings Corp.*—a case with strikingly similar facts to those here—further undermines Vizient's position. In *Sabre*, US Airways sued Sabre, a global distribution platform

[11] *See also Suture Exp.*, 963 F. Supp. 2d at 1228 (upholding relevant market consisting of the "sale of med[ical]-surg[ical] supplies to acute care providers"); *In re Pool Products Distribution Market Antitrust Litigation*, 940 F.Supp.2d 367 (E.D. La. 2013) (upholding relevant market consisting of the "wholesale distribution of pool products" including "the equipment, products, parts or materials used for the construction, renovation, maintenance, repair or service of residential and commercial swimming pools").

("GDS") that—much like Vizient's role vis-à-vis Member Hospitals—connects airlines with travel agents who book flights for corporate travelers. 938 F.3d 43, 48-49 (2d Cir. 2019). Like Vizient's ISP, Sabre's distribution platform imposed volume rebates and exclusive contracts on travel agents as a way to protect its monopoly. *Id.* at 49-51. Rejecting Sabre's argument against single-brand market, the Second Circuit upheld the plaintiff's alleged Sabre-only market because, among other things, US Airways "alleged that travel agents are locked into the Sabre platform because of the prohibitively high costs of switching to alternative channels." *Id.* at 66. Similar cases—including one in the Northern District of Texas[12] —have found that a single-brand market is proper where, as Vizient's ISP does with Member Hospitals, a distribution platform "locks in" end users.

As in *Sabre*, Endure has alleged that (1) "the commercial realities of the sale and distribution of disposable medical products mean that there are practically no interchangeable substitutes for Member Hospitals to DMS except through Vizient" and (2) "Vizient's ISPs effectively locks in Member Hospitals to purchasing such DMS through Vizient because it is cost-prohibitive for Member Hospitals to switch to a new GPO." (Dkt. 100, ¶ 74.) Endure's nearly identical allegations therefore suffice to establish a legally cognizable Vizient-only submarket.

D. Endure Has Alleged that Vizient Has Monopoly Power.

"Monopoly power is 'the power to control price or exclude competition.'" *United States v. E.I. du Pont de Nemours & Co*., 351 U.S. 377, 391 (1956). It may be established by direct evidence that the defendant has the ability to control prices or exclude competition, or it may be inferred from one's predominant share of the market. *See United States v. Grinnell Corp*., 384 U.S. 563,

[12] *See American Airlines, Inc. v. Travelport Ltd.*, 2011 WL 13047291, at *5 (N.D. Tex. Nov. 21, 2011) (upholding single-brand GDS market "because it is cost-prohibitive for the travel agent to switch to a new GDS"); *US Airways, Inc. v. Sabre Holdings Corp*., 2022 WL 874945, at *3 (S.D.N.Y. 2022) (allowing single-brand GDS market on summary judgment because "a reasonable jury could conclude that Sabre maintained a lock on the travel agent side of the market and that, from the perspective of [plaintiff] and other providers, the services of GDS platforms were not reasonably interchangeable").

571 (1966). "Power over price and power over 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*, 899 F.2d at 967. "A 70% to 90% market share allegation is sufficient to establish that [the defendant] possesses monopoly power for a claim under Section 2 of the Sherman Act." *Hill-Rom*, 2015 WL 6994438, at *13.

Endure has alleged Vizient's monopoly power in both the GPO Market and the Vizient Market. Among other things, Endure has alleged that "Vizient's monopoly power is demonstrated directly by its actual exercise of power over price and related contractual terms, and by its actual exclusion of nascent, more-efficient, less-expensive competitors from the market." (Dkt. 100, ¶ 118.) Endure further alleges that Vizient touts its own market power by telling its dominant suppliers that it can provide them with "protection from competitive threats." (Dkt. 100, ¶ 7.) Indeed, despite minimal qualitative differences between bids, Vizient chose 3M as the exclusive supplier to Member Hospitals even though Endure's would have "saved Member Hospitals nearly $100 million dollars over 5 years". (Dkt. 100, ¶¶ 8, 91.) This ability to "control prices" in the Relevant Markets more than satisfies the pleading standard.

Endure also alleges that both Vizient's market share and the high barriers to entry into the relevant markets establish market power. (*See* Dkt. 100, ¶¶ 82-87.) Of course, Vizient has 100% of the Vizient Market, so monopoly power as to that market is established. (Dkt. 100, ¶¶ 118, 127, 137.) In the GPO Market, Endure has alleged that Vizient accounts for more than 70% of the total spend, which is more than enough to establish monopoly power at the pleading stage. (Dkt. 100, ¶¶ 82-84); *American Airlines*, 2011 WL 13047291, at *6 (Sabre's "alleged market share of over 60% of the market is sufficient market power to support a claim for monopolization under section 2"). Endure further alleges that Vizient's market share has increased following its recent

acquisition of the fourth largest GPO and that over the last five years, and that the shares of Vizient's two remaining GPO competitors have since decreased. (Dkt. 100, ¶ 83.)

Finally, Endure has alleged that "a new market entrant would face several barriers to entry including the costs and length of time required to establish relationships and negotiate agreements with suppliers and acute care hospital and/or academic medical centers, which are generally operating under multi-year contracts with existing GPOs and which incur significant costs in converting to a new GPO." (Dkt. 100 ¶ 84.) Perhaps the biggest barrier to entry, however, is the ISP itself, which Vizient "structured . . . such that Endure would need to offer a discount on medical tape or tourniquets or another competitive product equivalent to *the total sum of kickbacks* that the Member Hospital receives *for every product category within the ISP*." (Dkt. 100, ¶ 85.) [13]

E. **Endure Has Alleged That Vizient Engaged in Anti-Competitive Conduct.**

"Exclusionary conduct is conduct, other than competition on the merits or restraints reasonably necessary to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power." *Taylor Pub. Co. v. Jostens, Inc.*, 216 F.3d 465, 475 (5th Cir. 2000). Endure has alleged in detail how Vizient's anti-competitive conduct substantially foreclosed Endure and other suppliers from access to the acute care and academic hospitals otherwise purchasing through GPOs, including Vizient.

[13] Despite ample evidence of competition in and control over the relevant markets, Vizient insists that its market share is somehow zero. (*See* Dkt. 105, at ¶16.) But as discussed above, Vizient does directly compete in the relevant markets. And even if that were not true, courts have routinely found that a defendant has market power where the defendant controls a market's prices and output like Vizient does through its platform. *See, e.g.*, *Sabre*., 2022 WL 874945, at *3; *Genico, Inc. v. Ethicon, Inc.*, 2006 WL 7134667, at*4 (E.D. Tex. Mar. 2006) (new-entrant medical products supplier against, among others, GPO defendants based on allegations that GPOs' "prevented competition from market entrants"); *Altitude Sports & Entm't, LLC v. Comcast Corp*., No. 19-CV-3253-WJM-MEH, 2020 WL 8255520, at *15 (D. Colo. Nov. 25, 2020) (regional sports network alleging monopolization claims against cable company); *New Mexico Oncology*, 54 F.Supp.3d at 1202 (cancer treatment facility alleging monopolization claims against health insurer); *Reazin*, 899 F.2d 966-73 (hospital alleging monopolization claims against insurer based on decision to terminate the hospital's contracting provider agreement).

1. *Endure Sufficiently Alleged Exclusive Dealing.*

Vizient insists Vizient Member Hospitals are free to purchase DMS from any source, but this does not square with the reality that the ISP effectively compels Member Hospitals to only purchase through Vizient. (Dkt. 100, ¶ 38.) Courts across the country have regularly rejected such "form-over-substance" arguments, finding, even in the GPO-related context, that bundling and rebate programs like Vizient's constitute *de facto* exclusivity. *See Suture Exp.*, 963 F. Supp. 2d at 1228 (rejecting argument that bundling and rebate programs "do not constitute exclusive dealing because the agreements permit some percentage of [defendants'] products from distributors other than defendants"); *Natchitoches*, 2009 WL 4061631, at *7 (rejecting similar argument because "buyers [were] effectively unable to exit the agreements without breaking their commitments and [risking] the threat of suffering financial penalties through the loss of previously-accrued rebates and discounts").[14]

It is no different here, where Endure has alleged that "Member Hospitals who fail to meet compliance goals with suppliers for one type of product—say bowel management—will lose rebates the hospitals would otherwise receive for totally separate products—such as adhesive tapes. "In this way, Vizient's rebates are bundled across product categories and suppliers, thus effectively locking Member Hospitals in to making all purchases exclusively through Vizient." (Dkt. 100 ¶ 51.) Because "Vizient's rebates are bundled across product categories and suppliers,"

[14] *See also ZF Meritor v. Eaton Corp.*, 696 F. 3d 254 (3d Cir. 2012) (rejecting argument that long-term agreements were not exclusive based on contention that such agreement did not require the purchase of 100% of the OEM's requirements and finding instead that rebates allowed the court to infer that the agreements were de facto exclusive dealing); *FTC v. Surescripts, LLC,* 424 F. Supp. 3d 92, 101 (D.D.C. 2020), cert. denied, No. CV 19-1080 (JDB), 2020 WL 2571627 (D.D.C. May 21, 2020) (rejecting argument that "loyalty programs are entirely optional" because "a contract need not contain specific agreements not to use the services of a competitor as long as the practical effect is to prevent such use"); *In re Remicade Antitrust Litig*., 345 F. Supp. 3d 566, 580 (E.D. Pa. 2018) (finding that the threat of losing rebates ultimately left customers with no choice but to continue purchasing from the defendants, which meant that defendants' "conduct had the effect of foreclosing competition" in the relevant market, resulting in plaintiffs paying supracompetitive prices).

Member Hospitals are effectively locked in "to making all purchases exclusively through Vizient." (Dkt. 100, ¶¶ 49-52.) To further exacerbate the harm, "Vizient employs a staggered termination date strategy, under which a hospital or supplier's termination date for each product category within a program differs." (Dkt. 100, ¶ 56.) Thus, "if a Member Hospital wants to switch suppliers, it must allow each program to terminate, or risk losing massive bundled rebates on all other products." (Dkt. 100, ¶ 56); *see, e.g.*, *Hill-Rom*, 2015 WL 6994438, at *16 (finding, "as a practical matter, the complaint alleges that the conditional discounts and rebates offered by Hill–Rom in exchange for the sole-source condition are sufficiently steep to create 'an irresistible bundle.' … and acknowledging that "courts have held that such agreements are not economically capable of termination as a practical matter").; *Natchitoches*, 2009 WL 4061631, at *7; *Suture Exp.*, 963 F. Supp. 2d at 1228. Accordingly, Vizient has created a system of *de facto* and *de jure* exclusivity. (Dkt. 100, ¶ 38.)

2. *Endure Sufficiently Alleged Substantial Foreclosure.*

"The test of whether a monopolist forecloses competition is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." *Surescripts, LLC*, 424 F. Supp. 3d at 101. As cited above, courts insist that consideration of "the impact on the market analysis should involve a cumulative assessment of the defendant's actions, not just a determination of the percentage of the market foreclosed." *Hill-Rom*, 2015 WL 6994438, at *14. In other words, this evaluation is highly fact-intensive, and thus discouraged at the pleading stage. *Virgin Atl. Airways Ltd. v. British Airways PLC*, 872 F. Supp. 52, 66 (S.D.N.Y. 1995) (evaluating degree of market foreclosure from exclusive dealing "requires a factual inquiry that is inappropriate on the face of the complaint").

Endure has alleged that because "95 to 98% of Vizient Member Hospitals" participate in the ISP program, "it is functionally impossible for Endure or other non-ISP manufacturers to gain

any sort of footing for their products." (Dkt. 100, ¶ 6.) Thus, ISP program's practical effect is to foreclose all access by any DMS suppliers other than those approved by Vizient. (Dkt. 100, ¶ 88.) And because "Endure does not manufacture an equally diverse group of products as Vizient offers to its Member Hospitals through the ISPs," neither Endure, nor other similarly situated suppliers, would be able to make a comparable price offer to Member Hospitals "equivalent to the total sum of kickbacks that the Member Hospital receives for every product category within the ISPs." (Dkt. 100, ¶¶ 38, 89); *see Masimo Corp. v. Tyco Health Care Group, L.P.*, 350 F. Appx. 95, 97 (9th Cir. 2009) (finding "bundling contracts [that] gave customers a price discount for purchasing a number of unrelated products together" but "conditioned upon customers purchasing 90-95% of their requirements of those products" from the defendant to be "the hallmark of exclusive dealing" because it "prevents customers from dealing in the goods of competitors.")

Additionally, Vizient's ISP bundling and rebate ISP program "mutually reinforces dominant suppliers and enables Vizient to obtain supracompetitive fees at the expense of equally efficient competitors like Endure." (Dkt. 100, ¶ 91.) In other words, each dominant supplier that participates in the ISP "protects" other suppliers from "competitive threats" effectively reinforces the market power of not only Vizient but each dominant supplier in the program. *See Hill-Rom*, 2015 WL 6994438, at *16 (finding that the plaintiff alleged substantial foreclosure based on allegations that "the exclusionary nature of GPO contracts is reinforced by commitment requirements and loyalty discounts" because "customers are substantially penalized if they go 'off contract'"). To successfully participate in the market and overcome such aggregation of market power, "Endure would have to offer discounts equaling a substantial multiple of the rebates paid by the dominant suppliers who are part of the ISP." (Dkt. 100, ¶ 91.) Accordingly, because close to 98% of Vizient member Hospitals participate in the ISP, the aggregate market foreclosure in the

relevant market is substantial. (Dkt. 100, ¶ 91); *see Am. Airlines*, 2012 WL 3737037, at *9 (finding, on similar facts involving GDS distribution platform, that plaintiff alleged sufficient facts to establish substantial foreclosure).

3. <u>*Endure Sufficiently Alleged Vizient's Unlawful Refusal to Deal.*</u>

A competitor's unilateral refusal to deal with rivals may violate Section 2 if the purpose or effect is to create or to maintain a monopoly. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (holding that "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2"). The Fifth Circuit has imposed no requirement that an antitrust plaintiff have had a preexisting course of dealing with the alleged monopolist, and cases elsewhere have held that such a requirement is unnecessary. *Helicopter Transp. Services, Inc. v. Erickson Air-Crane Inc*., No. CV06-3077-PA, 2008 WL 151833, at *9 (D. Or. Jan. 14, 2008) ("The Supreme Court has never held that termination of a preexisting course of dealing is a necessary element of an antitrust claim."). Thus, Endure's lack of prior dealings with Vizient is irrelevant and the Court must take Endure's pleaded allegations as true. (*See* Dkt. 100, ¶¶ 42-66.)[15] Here, Endure relies on the allegations cited above regarding Vizient's established monopoly, refusal to deal with Endure, and alike suppliers, except on unreasonable anticompetitive terms (*i.e.* Vizient's ISPs that lock in Member Hospitals and exclude Endure from selling DMS to these relevant markets). These allegations are sufficient to survive dismissal.

4. <u>*Endure Sufficiently Alleged an Essential Facilities' Claim.*</u>

At the pleadings stage, an essential facility claim requires allegations that: (1) defendant

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[15] *See also Mylan Pharm. v. Celgene Corp.,* No. CV 14-2094 ES, 2014 WL 12810322, at *6 (D.N.J. Dec. 23, 2014) (same); *In re Thalomid & Revlimid Antitrust Litig*., No. CV146997KSHCLW, 2015 WL 9589217, at *15 (D. N.J. Oct. 29, 2015) (same).

controls access to and exercises monopoly power over the facility; (2) as a practical matter, plaintiff cannot duplicate this facility; (3) plaintiff has been denied use of the defendant's facility; and (4) defendant could allow plaintiff to use the facility without impairing its other obligations. *Twin Lab, Inc. v. Weider Health & Fitness*, 900 F.2d 566 (2nd Cir. 1990); *David L. Aldridge Co. v. Microsoft Corp.*, 995 F. Supp. 728, 752 (S.D. Tex. 1998). Here, Endure has alleged facts supporting each element.

Endure alleged that Vizient, as the largest GPO in the United States serving 97% of the nation's academic medical centers and more than 50% of acute-care health systems, controls access to the distribution channel necessary to distribute DMS to these hospitals. (Dkt. 100, ¶¶ 3, 6.) Endure alleged that there are only three major GPOs that sell DMS, including Vizient, and "[n]o start-up GPO has successfully launched in more than 20 years." (Dkt. 100, ¶ 29.) Moreover, due to the way Vizient has structured its ISPs, "Endure would need to offer a discount on medical tape equivalent to the total sum of kickbacks that the Member Hospital receives for every product category within the ISP[,]" which is "neither practical nor possible for Endure to do." (Dkt. 100, ¶ 58.) If DMS suppliers like Endure do not participate with Vizient that supplier will receive virtually no sales orders from hospitals that subscribe to that particular GPO. (Dkt. 100, ¶ 29.). Vizient's exclusion of suppliers like Endure "are not reasonably necessary to accomplish any significant procompetitive benefits and certainly does not advance Vizient's purported goal of offering Member Hospitals the best deals. (Dkt. 100, ¶ ¶ 101, 102.) Permitting suppliers like Endure to enter these markets would lead to better benefits for the ultimate consumers. (*Id.*)

5. *Endure Sufficiently Alleged Vertical Agreements in Restraint of Trade.*

Vizient's argument that Endure failed to provide any "real supporting explanation" as to its claim that Vizient had vertical agreements that unlawfully restrained trade severely misses the point and ignores over 150-plus paragraphs of specific factual allegations detailing the series of

agreements Vizient has with its Member Hospitals and dominant suppliers like 3M that ultimately restrain competition in the relevant markets. Endure has sufficiently alleged how these agreements restrain competition through staggered termination dates, quarterly rebates, and kickbacks bundled across product categories—which effectively locks Member Hospitals into only doing business with Vizient-approved suppliers. (Dkt. 100, ¶¶ 43-58.) Moreover, the Second Amended Complaint provides sufficient detail as to the unlawful effects these agreements have on trade (*e.g.*, restraining, suppressing, and eliminating competition in the relevant markets, artificially raising, stabilizing, and maintaining high and supracompetitive levels prices charged by Vizient to its member Hospitals, and directly and proximately injuring and financially damaging Endure in its business and property). (Dkt. 100, ¶ 93.) Finally, the complaint does allege that each of the Defendants participated in Vizient's ultimate anticompetitive scheme. (Dkt. 100, ¶¶ 14-17, 113.)

F. <u>Endure Has Claims for Attempt to Monopolize and Conspiracy to Monopolize.</u>

Pleading an attempt to monopolize claim requires "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 456 (1993). For the reasons discussed in detail above, Endure has alleged each element of this claim. If, however, the Court finds that Endure failed to sufficiently plead Vizient's monopoly power, despite the direct evidence demonstrating Vizient's control of pricing and exclusion of competitors like Endure, Endure maintains that it has provided plausible facts demonstrating the dangerous probability that such monopoly power will be achieved by Vizient's multifaceted anticompetitive scheme.

For its conspiracy to monopolize claim, Endure has alleged the specific agreements that Vizient has entered with its dominant suppliers like 3M. At this pre-discovery stage of the case, Endure is not required to know and plead all the particularized details of how the conspiracy was

formed—that is what discovery will reveal. *See Starr v. Sony BMG Music Entertainment*, 592 F.3d 314, 325 (7th Cir. 2010) (finding that a plaintiff need not "identify the specific time, place, or person related to each conspiracy allegation" at the motion to dismiss stage). The terms of those agreements, although not entirely known, were alleged in enough detail to demonstrate that such sole-source agreements were entered with the concerted purpose to "protect" the suppliers from competitive threats while at the same time maintain Vizient's market power and control of the relevant markets. (Dkt. 100, ¶ 54.) Accordingly, at this pleading stage, Endure's conspiracy to monopolize is sufficient to survive dismissal.[16]

V. CONCLUSION

For the reasons stated above, Endure respectfully requests that the Court deny Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint (Dkts. 105, 106) and also sustain Plaintiff's Objection to Defendants' Appendix.

[16] Vizient's position that Endure fails to allege that each Defendant conspired and that the Defendants are related entities which cannot as a matter of law conspire is unfounded. First, Endure adequately alleged each Defendants' involvement for purposes of this pre-discovery pleading stage. Moreover, whether the entities are considered a part of the same economic enterprise is not something that can be determined at this stage.

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