IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

UNITED HEALTHCARE OF COLORADO, INC.,
PACIFICARE HEALTH PLAN ADMINISTRATORS, INC.,
PACIFICARE OF COLORADO, INC., and
UNITED HEALTHCARE INSURANCE COMPANY,

Plaintiffs,

v.

HCA, INC.,
HEALTHONE OF DENVER, INC.,
HCA-HEALTHONE, LLC,
MEDICAL IMAGING OF COLORADO, LLC, and
THE IMAGING GROUP, LLC.

Defendants.

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM OF LAW

United HealthCare of Colorado, Inc. ("UHC-Colorado"), PacifiCare Health Plan Administrators, Inc. ("PacifiCare-HPA"), PacifiCare of Colorado, Inc. ("PacifiCare"), and United HealthCare Insurance Company ("UHIC") (collectively, plaintiffs are referred to herein as "United"), hereby move for a temporary restraining order and emergency injunctive relief: 1) prohibiting HCA, Inc, HealthONE of Denver, Inc., HCA-HealthONE, LLC, (collectively "HCA"), Medical Imaging Group of Colorado LLC ("MIC"), and The Imaging Group, LLC ("TIG") (collectively the "Imaging Defendants") (all collectively the "Defendants") from terminating their imaging contracts with United in the Denver Metro Area and 2) allowing

United physical and telephonic access to its members who are patients in HCA facilities. In support, United states as follows.

INTRODUCTION

Defendants control 70 percent of all locations in the Denver Metro Area where mammographies are performed. Defendants are now abusing that monopoly power in an effort to cause irreparable harm to both United and its members. Through its control of the Imaging Defendants, HCA has forced the termination of certain imaging contracts with United effective November 7 and 9, 2006, to strong-arm United into paying above market rates for HCA's hospital services. *See* Declaration of Lisa McDonnel ("McDonnel Decl.") ¶ 14. As additional punishment for not agreeing to pay above-market rates, HCA has unlawfully prevented United representatives from contacting and advising United member-patients at HCA facilities about the availability of other affordable health care options. *See* Declaration of Christopher Stanley, M.D. ("Stanley Decl.") ¶ 15. These and other acts stem from Defendants' monopoly position and will directly result in loss of customers to United, loss of reasonable access to mammography services and increased costs for health care consumers.

United can no longer sit back and hope that negotiations will resolve the situation, as irreparable harm is now imminent. Colorado's Department of Insurance requires United to notify its members on September 22, 2006 that the Imaging Defendants will become "out-of-network" providers within 45 days. *See* Ex. A to Declaration of Greg Tamkin ("Tamkin Decl."). If Defendants are allowed to terminate the imaging contracts and to preclude United's ability to talk to and advise its member-patients, United stands to be irreparably harmed by the loss of customers, damage to its business and goodwill in the marketplace, and substantial diminution of its competitive position in the marketplace. Further, the health care consumers in Denver will face higher costs and limited choice for mammography services. United requests this Court to

maintain the status quo by entering an injunction prohibiting the Defendants from terminating their imaging contracts with United and from interfering with United's communications and access to its member-patients at HCA facilities.

FACTUAL BACKGROUND

United contracts with providers like HCA to provide medical services at affordable rates for United's members throughout Colorado. In addition, PacifiCare-HPA and UHIC provide health care administration services to employers who self-fund health care benefit plans in order for their employees to access health care services. Within the Denver Metro Area, United has over 400,000 members of which over 200,000 are women. *See* Keyes Decl. ¶ 9. HCA owns or controls 7 hospitals, 11 ambulatory surgery centers, and more than 30 outpatient clinics, in addition to 20 imaging facilities in the Denver Metro Area ("Imaging Facilities"). *See* McDonnel Decl. ¶¶ 6, 7. By its own admission, HCA has 70 percent of the market share for mammography services, and a substantial, if not monopoly, market share of ultrasound services. *See* Keyes Decl. ¶ 5.

Beginning in 1998, United has contracted with HCA for the provision of general acute care hospital services and ambulatory surgery services through a number of hospital participation agreements ("Hospital Agreements"). *See* McDonnel Decl. ¶ 5. Health plans will enter "participating provider contracts" with providers, such as hospitals or imaging facilities, who agree to be part of a "network" of providers offering care to members at a negotiated discounted rate. *Id.* ¶¶ 9, 10. Members face significantly greater personal financial exposure when care is provided by out-of-network providers, i.e., providers not under contract with health plans, than when it is provided by in-network providers. *Id.*

HCA has repeatedly threatened to terminate and, in fact, has terminated the Hospital Agreements for the purpose of renegotiating substantially higher reimbursement rates. *Id.* ¶¶ 12, 13. On or about December 8, 2005, HCA terminated one of the Hospital Agreements, effective August 31, 2006, with "the intent of negotiations in the first quarter of 2006 on an Amendment that would become effective on 01 September 2006." *Id.* ¶ 12; Ex. B to Tamkin Decl. Similarly, on or about June 1, 2006, HCA terminated the remaining Hospital Agreements, also effective August 31, 2006. *See* McDonnel Decl. ¶ 12; Ex. C to Tamkin Decl.

During the latest round of failed negotiations, HCA demanded a rate increase for commercial business in excess of 35 percent over the next four years. United refused HCA's demand and countered with a proposal more consistent with inflation. *See* McDonnel Decl. ¶ 13. As a result, the termination of the Hospital Agreements became effective midnight August 31, 2006. *Id.*

In addition to the Hospital Agreements, UHC-Colorado and PacifiCare are parties to certain provider agreements with the Imaging Defendants—majority-owned and controlled subsidiaries of HCA—for the provision of imaging services, including but not limited to mammography services, to United members (the "Imaging Agreements"). *Id.* ¶ 5. The negotiations concerning the Imaging Agreements have historically been separate and apart from the Hospital Agreements negotiations. *Id.* ¶ 14.

But, following final termination of the Hospital Agreements by HCA, HCA separately caused the termination of the Imaging Agreements. *Id.* ¶ 14. On August 9, 2006, MIC notified United that HCA "has informed [United] that the [MIC] diagnostic centers shall be included in the [Hospital Agreement] currently being negotiated. In the event that an agreement is reached,

the rates of the [MIC] centers will become effective on the effective date of the [Hospital Agreement]. If no agreement is reached then the [MIC] centers will be out of network on the termination effective dates mentioned above." *See* Ex. D to Tamkin Decl. Similarly, on August 11, 2006, The Imaging Group, LLC, notified United that their Imaging Facilities "will become non-participating [providers] with [United] as of 09 November 2006. In the event that negotiations successfully conclude with [United], Imaging Group centers will be included in the new agreement." *See* Ex. E to Tamkin Decl.

Thus, HCA has now, for the first time, tied the Imaging Agreements to the Hospital Agreements: If United wants the HCA Imaging Facilities to remain within the United network, then United must agree to the terms demanded by HCA under the Hospital Agreements. *See* McDonnel Decl. ¶ 14. Because of HCA's market power in mammography services, HCA is effectively demanding United to pay an "access fee" for United's members to have continued access to Defendants' imaging services, including vital mammography services, in the form of substantially higher hospital service rates (the "Mammography Access Fee"). HCA knew of its monopoly position in women's imaging services and the negative impact its decision to terminate the Imaging Agreements would have on United and its members. With respect to mammography services, HCA's list prices and the prices HCA charged to United were already at least twice the list prices and charged prices of non-HCA facilities for United in the Denver Metro Area. *Id.* ¶ 11. The payment of the Mammography Access Fee would make HCA's prices even higher.

HCA's unlawful conduct did not stop there. HCA has and continues to use its market power to intentionally drive customers away from United and to maintain its inflated prices. On

July 21, 2006, during the ongoing Hospital Agreement negotiations between the parties, Leonard Kalm, Senior Vice President of Managed Care for HealthONE, sent an e-mail to a third-party health care insurance broker who sells insurance coverage to employers on behalf of United's competitors, to encourage the broker to contact United's customers and urge them to switch insurance carriers.

In the e-mail message, Mr. Kalm stated the following:

> [To:_] – I honestly give this an 80% chance of going to termination on 9/1. We met for 12 hours with no success, and both parties are preparing for 9/1. They are trying to redirect care, inform [patients]; we are telling docs not to move.; telling employers to complain, and *I am just about to term[inate] all the Invision/SallyJobe/Imaging Group locations that will remove 14 more sites from [United's] network. This will eliminate about 70% of where mammographies are done today and really the top-notch quality sites*. . . .

See Keyes Decl. ¶ 5 (emphasis added).

HCA took other predatory acts to punish United and ultimately drive customers away from United and to other health plans willing to comport with Defendants' anticompetitive demands. *See* Complaint ¶¶ 44-82. Specifically, on or about August 31, 2006, HCA abruptly stopped providing United with notice of United member admissions, barred United's Nurse Advocates access to United's members, and generally interfered with United's efforts to communicate with its members. *See* Stanley Decl. ¶ 14.

Prior to the termination of the Hospital Agreements and the Imaging Agreements, HCA notified United of member admissions to hospitals, permitted United to monitor its members' admissions through HCA's Meditech system, and registered United members on UHC-Colorado's website portal when admitting them to HCA facilities. *Id.* ¶ 9. These notifications

permit United to assist members in navigating their way through the often confusing interactions between health care and insurance. *Id.* After knowing that its members have been admitted to an HCA facility, United contacts these members through its Nurse Advocates. *Id.* ¶¶ 9-11. Nurse Advocates advise patients who are United members on the terms of their coverage, suggest in-network alternate care services, and facilitate discharge planning. *Id.* The Nurse Advocates are a vital tool in coordinating disease management and care management programs and help the members themselves from paying higher out-of-network charges. *Id.*

In fact, HCA historically provided United with access because it understood United's need to advise its members of their benefits. *Id.* Since August 31, however, HCA not only has refused to notify United of member admissions and denied United's Nurse Advocates access to members within HCA hospitals, but HCA has also refused to provide United representatives with member room numbers and has further refused to connect telephone calls from United representatives to hospitalized members. *Id.*

In spite of all of these and other unlawful acts, United was willing to negotiate new terms to a Hospital Agreement in order to avoid losing customers and prevent its members from facing higher costs and limited access to mammography services. As recent as September 11, 2006, United presented Defendants with a new contract proposal. *See* McDonnel Decl. ¶ 15. However, in spite of the fact that the parties have been negotiating, Defendants were unwilling to respond to United's proposal until September 22, 2006—the precise day when United, as mandated by Colorado Insurance law, must inform its members that Defendants' Imaging Facilities will cease to be part of the network as of November 9, 2006. *Id.* ¶ 15. Defendants know that by prolonging negotiations, HCA has timed its conduct to coincide with the highest volume of customer

renewals and new customer enrollments. HCA's conduct thus poses the maximum harm to United by forcing it to notify its customers of the loss of Defendants' Imaging Facilities from in-network status during this high volume enrollment period, resulting in lost customers for United, and higher prices and less choices for consumers. Thus, HCA's conduct is a blatant attempt to drive a wedge between United and its customers and members. United has already lost customers and received numerous communications from employers and individuals that they will cease using United because of the loss of Defendants' facilities in United's network. *See* Keyes Decl. ¶ 6. As a result of Defendants' actions, United has no alternative but to bring suit. In conjunction with this motion, United has also filed a Complaint against Defendants alleging, among other counts, violation of Section 2 of the Sherman Act for monopolization and attempted monopolization and tortious interference with contract. *See* Complaint, Counts I-III ("Complaint").

ARGUMENT

United moves the Court for a temporary restraining order ("TRO") and preliminary injunction prohibiting Defendants from terminating their Imagining Agreements with United and allowing United physical and telephonic access to its members who are patients in HCA facilities. The standard for granting a TRO and preliminary injunction are the same. *Stevens v. Ocwen Fed. Bank FSB*, 2006 WL 1409139 (D. Utah, May, 17 2006);[1] *Kansas Hospital Ass'n v. Whiteman*, 835 F. Supp. 1548, 1551 (D. Kan. 1993).

A preliminary injunction is an equitable remedy available within the discretion of the trial court. *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980). While it is an extraordinary

[1] Pursuant to D.C.COLO.LCivR 7.1(D), a copy of the opinion is attached hereto as Ex. F to Tamkin Decl.

remedy, an injunction should issue when the right to relief is clear and unequivocal. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.,* 269 F.3d 1149, 1154 (10th Cir. 2001). The movant need only make a *prima facie* showing of a probable right to the ultimate relief and a probable danger of injury if the motion is denied. *Big O Tires, Inc. v. Bigfoot 4X4, Inc.*, 167 F.Supp.2d 1216, 1221 (D. Colo. 2001).

Ordinarily, the party seeking relief should demonstrate: (1) that it has a substantial likelihood of success on the merits; (2) that it will suffer irreparable harm unless the preliminary injunction is issued; (3) that the threatened injury outweighs the harm the preliminary injunction might cause the opposing party; and (4) that the preliminary injunction if issued will not adversely affect the public interest. *Prairie Band of Potowatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001). However, that standard is lessened if the injunction does not seek to change the status quo, seek mandatory relief, or seek all the relief sought in the complaint, and in such cases the courts are to closely scrutinize the exigencies of the case. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975-76 (10th Cir. 2004). The status quo is defined as the "last uncontested status between the parties which preceded the controversy." *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991).

The lightened standard applies in this case. United does not seek to alter the status quo. To the contrary, United wishes to preserve the status quo by preventing HCA from terminating the Imaging Agreements and barring the Nurse Advocates from contacting United members who are patients at HCA facilities – which was the status between the parties before the termination of the Hospital Agreements became effective. Nor does United seek any mandatory relief. The relief United seeks is prohibitive, requiring HCA to suspend its termination of the Imaging

Agreements and cease preventing United's Nurse Advocates from contacting United members. Lastly, United does not seek all of the relief demanded in its Complaint through its request for a preliminary injunction. The Complaint seeks additional relief, including monetary damages.

All four elements for injunctive relief are satisfied here. The Court should enjoin and temporarily restrain Defendants' wanton violations of antitrust law that harm United and its members. Defendants are capitalizing on their market power to squeeze United and its members out of access to vital mammography services to the detriment of United, its business interests, its members and health care consumers throughout the Denver Metro Area.

I. United Is Likely To Succeed On The Merits Of Its Claims

A. Mammography Services - Violations of Antitrust Law

To state a claim under Section 2 of the Sherman Act for illegal monopolization, a plaintiff must allege the defendant: (1) possesses monopoly power in the relevant market, and (2) has willfully acquired and maintained that power as distinguished from growth or development of a superior product, business acumen, or historic accident. *See Unites States v. Grinnell Corp.*, 384 U.S. 563, 572-82 (1966). As an initial threshold, a plaintiff must also establish that they have "antitrust standing." In other words, has the plaintiff suffered an "antitrust injury" which is an "injury of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *B-S Steel of Kan. v. Tex. Indus., Inc.*, 439 F.3d 653, 667 (10th Cir. 2006) (quotations omitted). However, under § 16 of the Clayton Act, injunctive relief is "available even though the plaintiff has not yet suffered actual injury." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969). A plaintiff "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a

contemporary violation likely to continue or recur." *Id.* In the context of injunctive relief, the Tenth Circuit has delineated the following factors a plaintiff must establish to have antitrust standing: "(1) the causal connection between the antitrust violation and the plaintiff's [potential] injury; (2) the defendant's intent or motivation; (3) the nature of the plaintiff's [potential] injury; [and] (4) the directness . . . of the connection between the plaintiff's [potential] injury and the market restraint resulting from the alleged antitrust violation." *B-S Steel,* 439 F.3d at 667 (citing to *Roman v. Cessna Aircraft Co.,* 55 F.3d 542, 543 (10th Cir. 1995)).

1. United has antitrust standing as Defendants willfully engaged in conduct directly resulting in antitrust injury

Defendants have engaged and continues to engage in a systematic pattern of predatory behavior designed to maintain monopoly prices and to drive business away from United to other health plans in order to maintain higher than market prices. "In this circuit, monopoly power is defined as the ability to control prices and exclude competition." *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 894 (10th Cir. 1991). Defendants' actions and monopoly power are the direct cause of the antitrust injuries of higher prices and less availability of affordable mammography services. But for Defendants' monopoly power and willingness to condition access to mammography services, at an already inflated rate, on the payment of the Mammography Access Fee, United and its members would not be faced with higher prices for mammography services nor would United lose customers. In fact, United has already received notice from customers that they intend not to renew their insurance with United because of the loss of Defendants from United's network. *See* Keyes Decl. ¶ 6.

Even before discovery, United has evidence that Defendants have blatantly abused its monopoly power and displayed its intent to drive customers away from United and to keep its

prices inflated. Defendants' Mr. Kalm admitted the impact of his termination of the Imaging Agreements: "This will eliminate about 70% of where mammographies are done today." *Id*. ¶ 5. But Defendants were not content with just terminating a contract with a health plan, an act that by itself might not rise to the level of antitrust injury. Rather, Defendants intended to drive customers away from a health plan that dared stand up to its extortion. After arming the third-party health care insurance broker with this information that Defendants were terminating the Imaging Agreements, Mr. Kalm informed that person that he/she should obtain a list of United customers ("500 employer groups") that Mr. Kalm previously obtained unlawfully from United and sent to one of United's competitors, Great-West Life & Annuity Insurance Company ("Great West"). With that list, Mr. Kalm implored the third-party health care insurance broker to urge those customers to switch carriers. Mr. Kalm encouraged this broker to "[P]lease help move business. Call them. Go for it." These actions, among others, have resulted in and will likely result in additional lost customers to United. *Id.* ¶ 5; Complaint ¶¶ 44-82, Counts 4-6 (identifying other predatory acts and claims for tortuous interference and conversion).

The fact that United has already lost a number of customers resulting from the loss of Defendants as hospital services providers, in a relevant market in which Defendants *only* have approximately 35 percent of the market, is compelling evidence as to the likelihood of additional customers leaving United due to the loss of Defendants' mammography services, a market in which Defendants have 70 percent of the market. *See, e.g., Blue Cross and Blue Shield v. Marshfield Clinic*, 152 F.3d 588, 590 (7th Cir. 1998) (upholding grant of injunctive relief where plaintiff could not identify damages, noting "a common reason why the damages remedy is inadequate is that the plaintiff is unable to quantify the harm that the defendant's practice has

inflicted or *will inflict* on him") (emphasis added); *see also B-S Steel,* 439 F.3d at 667 (noting plaintiff seeking injunctive relief need only establish "potential" injury). The impact of Defendants' behavior is: (1) United members will have fewer affordable choices for mammography services and (2) health care consumers in the Denver Metro Area, generally, will have fewer affordable health insurance options for mammography services, if they choose to go to a health insurance carrier willing to pay Defendants' rates. The alleged antitrust injury to competition is precisely the type of injury the antitrust laws are designed to prevent, namely, increased prices for consumers and reduced output and choices. *See, e.g., Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745, 754 (10th Cir. 1999) (noting that lost output and choice for consumers as the type of anticompetitive conduct the antitrust laws were designed to prevent, holding plaintiffs adequately alleged that defendants conduct deprived "consumers of their pre-existing choices in the market"). For these reasons, United has antitrust standing to bring a Section 2 claim against Defendants.[2]

2. Defendants possess or will likely achieve monopoly power in mammography services

For purposes of a Section 2 claim, the plaintiff must first identify the relevant service market and the relevant geographic market. The relevant product market is "determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962). United has alleges that Defendants possess monopoly power in mammography services in the Denver Metro

[2] Because United is seeking injunctive relief under Section 16 of the Clayton Act, it need not establish that it is also the most efficient plaintiff to enforce the antitrust laws. Regardless, as a purchaser of mammography services for over 200,000 women members, United is best positioned to enforce the antitrust laws against Defendants. *See, e.g., Abraham v. Intermountain Health Care*, No. 05-4043 at 35-36 (10th Cir. Sept. 6, 2006) (noting potential plaintiffs better suited to bring an monopolization claim include competitors and consumers of the relevant service).

Area. Mammography services are a distinct diagnostic procedure performed using a mammography machine and conducted on women to screen and diagnose breast-disease, such as breast cancer, with no readily available alternatives. The relevant geographic market is "that geographic area 'to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition.'" *Fed. Trade Comm'n v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995) (citations omitted). The geographic market must reflect "commercial realities of the industry." *Brown Shoe*, 370 U.S. at 336. As the Supreme Court has indicated a key question in determining a geographic market is "where does a potential *buyer* look for potential suppliers of the service – what is the geographical area in which the *buyer* has, or, in the absence of monopoly, would have, a real choice as to price and alternative services?" *Grinnell Corp.*, 384 U.S. at 588-89 (emphasis added). Courts have often considered where buyers, such as United, purchase services to define the geographic market. *See United States v. Rockford Memorial Corp.*, 717 F. Supp. 1251, 1262-63, 1277 (N.D. Ill. 1989) (determining the relevant geographic market by considering admitting patterns of physicians and the preference of third party payers); *California v. Sutter Health System*, 130 F. Supp. 2d 1109, 1129-31 (N.D. Cal. 2001) (analyzing managed care organizations, "the true consumer of acute inpatient services," and the admitting privileges of physicians to determine the relevant geographic market); *see also FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1055 (8th Cir. 1999) (assessing the "commercial realities," the Eighth Circuit criticized the district court's evaluation of the relevant geographic market for failing to consider the impact managed care and health plans have on patient choice of alterative providers).

In this case, United has identified the relevant geographic market as the "Denver Metro Area" comprised of the following six counties: Adams, Arapahoe, Broomfield, Denver, Douglas, and Jefferson. *See* McDonnel Decl. ¶ 6. Within the Denver Metro Area, by Defendants' own admission, Defendants possess 70 percent of the mammography services. *See* Keyes Decl. ¶ 5; *see also Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989) (noting that monopoly power generally exists when defendant controls 70 to 80 percent of the relevant market). This court has inferred monopoly power based on "a firm's possession of a dominant share of the relevant market, which is protected by entry barriers." *Nobody in Particular Presents, Inc. v. Clear Channel Commc'n., Inc.*, 311 F. Supp.2d 1048, 1098 (D. Colo. 2004). This court has recognized also that "the ability to raise prices above the industry average while increasing market share demonstrates entry barriers and a potential ability to control prices." *Id.* at 1100.

Here, Defendants have been able to extract prices for mammography services from United which are twice as high as other mammography providers, while maintaining a commanding 70 percent market share. In addition to Defendants' ability to raise and maintain prices above the industry average, Defendants have used other means to bar competition that would undermine its market power. Specifically, the Imaging Defendants are joint ventures between HCA and large radiology practice groups in which HCA has majority ownership. Imaging Facilities require radiologists to read diagnostic tests and supervise the provision of imaging services. By locking up radiologists through joint ventures and preventing such radiologists from either owning other Imaging Facilities or providing professional radiology services at other imaging facilities, Defendants have put prospective competitors at a distinct

disadvantage in the Denver Metro Area. *See* McDonnel Decl. ¶ 7; *see also McKenzie-Willamette Hospital v. PeaceHealth*, 2004 U.S. Dist. LEXIS 20980, at *18-20 (Dist. Ore. Oct. 13, 2004) (identifying monopolist defendant hospital's physician contracting behavior as example of defendant's predatory acts).[3] Defendants have also created barriers to entry through its contracting behavior with third-party insurance carriers. Defendants have required insurance carriers to enter provider contracts on an exclusive basis, prohibiting the carriers from contracting with competing imaging providers within a certain geographic market in which Defendants also provide imaging services. *Id*. Because of Defendants' exclusive imaging contracts with certain carriers, prospective imaging competitors will be left out-of-network creating a significant competitive disadvantage and a disincentive for a competitor to enter the Denver Metro Area. *See, e.g., Caldera Inc. v. Microsoft Corp.*, 87 F. Supp. 2d 1244, 1250-51 (D. Utah 1998) (noting that exclusive contracts can alone or with other anticompetitive behavior rise to the level of a Section 2 liability); *McKenzie-Willamette Hospital v. PeaceHealth*, 2003 U.S. Dist. LEXIS 16203 at *21-22 (Dist. Ore. Aug. 15, 2003) (identifying as anticompetitive activity hospital's refusal to provide largest insurer in the relevant market discounts for necessary tertiary care services unless insurer agreed to either exclusively use defendant for certain hospital services, in order to prevent the insurer from contracting with defendant's competitor)[4].

By comparison, an independent study focusing on the high costs of health care in the Denver metro area noted that HCA, the "system with the highest market share [in hospital services]. . . also had the highest operating margin." *See* Project for Strategic Health Care Purchasing, a study for Colorado for Health Care, SKY HIGH HEALTH CARE COSTS IN THE MILE

[3] Pursuant to D.C.COLO.LCivR 7.1(D), a copy of the opinion is attached hereto as Ex. G-1 to Tamkin Decl.

HIGH CITY, at 9 (September 2005). *See* Ex. H to Tamkin Decl. According to that study, the average hospital operating margin in the United States in 2003 was only 4%. *Id*. Based on 2003 government data, HCA's operating margin was 29%. *Id*. In the local market, HCA's operating margin in 2003 ranged from nearly 2.5 times higher to almost five times higher than the operating margins of its major hospital services competitors. *Id*. This study was only focused on *hospital services* in which HCA *only* has a 32 percent market share. *Id.* Given Defendants' 70 percent market share in mammography services in the Denver Metro Area, its prices for mammography services which are twice that of other mammography providers, its contractual joint ventures locking-up large physician groups and its exclusive contracting, there is sufficient evidence to support the allegation that Defendants have monopoly power or, at the very least, there exists a dangerous probability that Defendants will achieve monopoly power.

3. Defendants are engaged in predatory acts to maintain their monopoly power in mammography services

Defendants have engaged in a systematic campaign to maintain or obtain monopoly power in the relevant market. As the Third Circuit noted, the court must "look to the monopolist's conduct taken *as a whole* rather than considering each aspect in isolation." *LePage's Incorporated v. 3M*, 324 F.3d 141, 162 (3rd Cir. 2003) (emphasis added) (citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)). Likewise, the Ninth Circuit observed that it "would not be proper to focus on specific individual acts of an accused monopolist while refusing to *consider their overall combined effect.*" *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992) (emphasis added).

[4] Pursuant to D.C.COLO.LCivR 7.1(D), a copy of the opinion is attached hereto as Ex. G-2 to Tamkin Decl.

Because of its monopoly share of the mammography services market, Defendants have billed to and received from United, twice the amount for mammography services than any other United in-network provider. *See* McDonnel Decl. ¶ 11. Now, by terminating the Imaging Agreements, Defendants will be able to receive even more money as an out-of-network provider from United members, a significant number of whom will have to continue to use Defendants' Imaging Facilities because of Defendants' market share. Further, the only way for United and its members to maintain contract with Defendants for mammography services is if United agrees to pay Defendants the predatory Mammography Access Fee. The Mammography Access Fee is a form of predatory pricing by a monopolist designed to extract higher prices from consumers. *See, e.g., LePage's*, 324 F.3d at 154 (upholding jury verdict for plaintiff, where the District Court found sufficient evidence that defendants' exclusionary conduct consisted of "bundling" rebate programs and exclusive dealing arrangements); *PeaceHealth*, 2004 U.S. Dist. LEXIS 20980 at *8-14 (upholding jury verdict for plaintiff where the court found sufficient evidence that defendant's bundling of discounts for different categories of hospital services in addition to other exclusionary tactics were predatory acts resulting in harm to plaintiff and competition). Defendants' termination of the Imaging Agreements and the predatory Mammography Access Fee is directly related to its monopoly power in mammography services and the cause of higher prices for United and its members.

More important than, but related to, the increased prices is the lack of access to vital mammography services and the reduction in choice for consumers. Although in a different context, the Tenth Circuit has recognized as anticompetitive efforts those which reduce choice and raise prices very similar to what Defendants have done. In ruling on the NCAA's television

plan which restricted how and when universities' could broadcast their college football games, the Court held the NCAA's actions as unlawful in that it "increases concentration in the marketplace; it prevents producers from exercising independent pricing and output decisions; it precludes broadcasters from purchasing a product for which there are no readily available substitutes; it facilitates cartelization." *Board of Regents of the University of Oklahoma v. NCAA*, 707 F.2d 1147, 1160 (10th Cir. 1983). Because Defendants' facilities will be "out-of-network" for United members, United's members will be faced with higher costs for mammography services if they seek them from the Defendants. However, instead of seeking even more costly mammography services at Defendants, members may seek care at the remaining in-network mammography providers. *See* McDonnel Decl. ¶ 16. However, if all of United's women members shifted from Defendants to the other mammography providers, possessing 30 percent or less of the mammography services market, wait time will increase for a procedure in which delay can be deadly. *Id.* ¶ 17. Alternatively, United's members may simply choose to forgo or put off having a mammogram done, either because Defendants' prices are too high or because there are too few reasonable prices alternatives in the market. Ultimately, Defendants' actions not only concentrate the health care provider market but further concentrate and consolidate their position in the mammography services market, as United members will ultimately be forced to go to other payers who agree to Defendants' pricing demands.

B. Access to United Members - Tortious Interference Claim

In Count III of the Complaint, United alleges that HCA has interfered with United's contractual relationships with its members and employer customers with self-funded benefit plans by preventing United's access to its members who are patients in HCA facilities. To

prevail on its claim, United must establish that HCA intentionally and improperly interfered with United's contractual relationships with its members and self-funded employer customers by preventing United from advising its members on health care issues or causing United's advice to members to be more expensive or burdensome, resulting in pecuniary loss to United. *Westfield Dev. Co. v. Rifle Inv. Assoc.*, 786 P.2d 1112, 1117 (Colo. 1990).

United is likely to prove each of these elements and prevail on its tortious interference claim. First, there can be little doubt that HCA's efforts to bar United access to its members are intentional. HCA ceased providing United notification of United member-patient admissions at precisely the same time the termination of the Hospital Agreements became effective and ordered all of the Nurse Advocates out of its facilities shortly thereafter. HCA has further obstructed United's access to its patients by refusing to provide United with the room numbers of its members who are patients and refusing to connect telephone calls from United representatives to its members who are patients.

Second, HCA's actions are improper.[5] Allowing United access to its members provides a significant benefit to United members at no cost to HCA; by simply allowing United access to its members, United can assist it members in making decisions about affordable, quality health care options. Barring United access to its members, however, harms United and its members, at substantial benefit to HCA. By denying United notice of its member's admissions and access to its members who are patients at HCA facilities, it is difficult if not impossible for United to

[5] The Colorado Supreme Court has identified numerous factors to be weighed in considering whether a party's interference was improper: a) the nature of the actor's conduct; 2) the actor's motive; 3) the interests of the other with which the actor's conduct interferes; 4) the interests sough to be advanced by the actor; 5) the social interests in protecting the freedom of the action of the actor and the contractual interests of the other; 6) the proximity or remoteness of the actor's conduct to the interference; and 7) the relations between the parties. *Westfield*, 786 P.2d at 1117-18 (citing Section 767 of the Restatement (Second) of Torts).

contact and advise those patients on in-network health care alternatives to treatment at out-of-network HCA facilities. At best, this requires United to take additional measures to contact its members who are patients, which costs United money and delays the timing of the advice to its members. At worst, it prevents United from providing *any* advice to its members. In either case, however, HCA benefits, because United members are more likely to remain in HCA facilities longer and thus pay higher out-of-network costs to HCA.

II. United Will Suffer Irreparable Harm Absent the Injunction

A. United need not prove irreparable harm on its antitrust claim

The Tenth Circuit has held that "[w]hen the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown." *Star Fuel Marts, LLC v. Sam's East, Inc.*, 362 F.3d 639, 651-52 (10th Cir. 2004); *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir.2001) (quoting *Atchison, Topeka & Santa Fe Ry. Co. v. Lennen*, 640 F.2d 255, 259 (10th Cir.1981)); *see also Burlington N. R.R. Co. v. Bair*, 957 F.2d 599, 601 (8th Cir.1992) ("[I]t is not the role of the courts to balance the equities between the parties [where] Congress has already balanced the equities and has determined that, as a matter of public policy, an injunction should issue where the defendant is engaged in ··· any activity which the statute prohibits.").

United brings its antitrust claims under the Clayton Act. Section 16 of the Act, provides that "[a]ny person ... shall be entitled to sue for and have injunctive relief … against threatened loss or damage by a violation of the antitrust laws ... under the same conditions and principles ...

[usually employed by] courts of equity." 15 U.S.C. § 26. As such, United need not make a demonstration of irreparable injury.

B. Nonetheless, United can demonstrate irreparable harm on both its antitrust and tortious interference claims

Defendants' actions strike to the heart of United's customer base. Since August 31, 2006, HCA has interfered with United's ability to provide its members who are patients with timely advice regarding affordable health, causing United members unnecessary confusion and expense. Starting on November 7, 2006, HCA will terminate United member's in-network access to over 70% of the imaging facilities that provide mammography services in the Denver Metro Area, denying members ready access to mammography facilities and raising costs.

United has already felt the effect of Defendants' actions on its customer base, and if Defendants are not enjoined, United will undoubtedly feel an even greater effect beginning on September 22, 2006, this Friday, when United members and United's employer customers, will receive notice of the Imaging Defendants' termination of their contracts with United. These members and employer customers will start switching carriers during the fall insurance renewal periods. In fact, United has already received notice from many employer customers signifying their intent not to renew their insurance contracts with United based on the loss of Defendants' hospitals from United's network of providers, as Defendants posses a 35 percent of the hospital services market based on in patient discharge data. *See* Keyes Decl. ¶ 6. There is a high-probability that the loss of Defendants as the provider of *70 percent* of the mammography services will have as great if not a greater impact on employers' decision to renew with another insurance carrier.

The loss of customers is evidence of irreparable harm. *See, e.g., Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1262 (10th Cir. 2004) (recognizing the loss of customers, competitive position or harm to goodwill are "factors courts normally rely upon to support a finding of irreparable harm"); *American Television and Commc'n. Corp. v. American Television and Commc'n. Corp.*, 651 P.2d 440, 445-46 (Colo. App. 1982) (recognizing plaintiff's loss of customers as evidence of irreparable harm to plaintiff's business worthy of injunctive relief). By terminating the Imaging Agreements and interfering with United's ability to advise its members, Defendants are forcing the members to leave United, causing undue harm to United's reputation in the marketplace, and forever damaging United's ability to compete for new members. *See Adolph Coors Co., v. Genderson & Sons, Inc.*, 486 F. Supp. 131, 137 (D. Colo. 1980) (granting injunctive relief against defendant whose actions injured the reputation and goodwill of plaintiff).

III. The Unavoidable Injury To United's Customers, Reputation And Goodwill Far Outweighs Any Injury Defendants Might Suffer By Being Temporarily Restrained and Enjoined From Its Antitrust Violation

The third factor courts consider is whether the threatened injury outweighs the harm the preliminary injunction might cause the opposing party. *Prairie Band of Potowatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001). Courts balance the respective injuries to each of the parties and determine in whose favor the scale tips. *Dominion Video Satellite*, 269 F.3d at 1157. Where the opposing party will suffer only monetary loss and the movant has established irreparable harm, the balance tips in favor of granting the injunction. *Id.*

Here, the balance tips overwhelmingly in United's favor. Defendants only arguable detriment arising from the issuance of a preliminary injunction and temporary restraining order

allowing United access to its members and curbing its antitrust activities is losing additional profit by charging United member's higher out-of-network prices. *Id.* Of course, given its current monopoly power and its *current* rates for mammography services being twice as high as any other mammography provider in the Denver Metro Area, Defendants' argument would only be how much more in profit they could reap.

On the other hand, United's threatened harm and the harm to the public is extraordinary. United members will lose in-network access to a substantial percentage of imaging centers and have already lost ready access to advice on affordable health care alternatives from United Nurse Advocates. As a result of this loss in customer services, United may lose tens of thousands of members. This factor weighs heavily in favor of granting the temporary restraining order and preliminary injunction.

IV. The Public Interest Favors Temporarily Enjoining Defendants From Terminating The Imaging Agreements And Allowing United Access To Its Members

United has over 400,000 members in the Denver Metro Area. These members need and deserve adequate access to health care facilities and information. Over 200,000 of United's members in the Denver Metro Area are women. The National Cancer Institute recommends that women 40 years of age and older should receive a mammogram at least every one to two years. *See* National Cancer Institute, "NCI Statement on Mammography Screening" at http://www.cancer.gov/newscenter/mammstatement31jan02 (last visited Sept. 15, 2006). *See* Ex. I to Tamkin Decl. With Defendants' monopoly share of mammography services, women in the Denver Metro Area have very few choices for mammography services. Should Defendants be permitted to continue their antitrust violations and terminate the Imaging Agreements with United, United's women members will either have to seek care from the limited number of in-

network mammography providers who would be hard-pressed to cope with the influx of such a large number of additional patients or pay higher prices to the Imaging Defendants. Currently, Imaging Defendants' list prices for mammography services are *twice* as much as non-HCA mammography providers.

Medical treatment can be expensive, and United has an obligation to its members to advise them on affordable health care alternatives. Prior to the termination of the Hospital Agreements, United was able to track the admission of its members to HCA facilities and direct one of seven Nurse Advocates to advise the member-patient on his or her health care options. This service—at no cost to HCA—allowed United's member who are patients to make informed health care decisions and feel comfortable about those decisions.

It goes without saying that this denial of access and information about health care harms the public. No public policy supports the encouragement of baseless disregard of antitrust law to simply generate higher profits. No public policy supports the abuse and misuse of market power. No public policy supports a party taking actions that will put the public at extraordinary health risk. Rather, public policy supports ensuring the public is informed of issues regarding health care and health insurance. The public interest heavily favors grant of the relief United seeks.

V. HCA Is Unlikely To Be Harmed By The Injunction, Therefore No Bond Is Necessary

The Court "has "wide discretion" under Rule 65(c) in determining whether to require security" for an injunction. *Winnebago Tribe of Nebraska v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2002). A bond is unnecessary absent proof of a likelihood of harm to Defendants. *Id*. Defendants will not suffer any harm as the result of the injunction. Defendants agreed to the terms of the Imaging Agreement and have operated under those agreements for a number of

years. Prohibiting Defendants from terminating the Imaging Agreements merely extends the terms of those contracts. In addition, allowing United access to its members who are patients at HCA facilities costs HCA nothing and causes no harm. Indeed, for years HCA has permitted United access to its members who are patients. There is no need for a bond.

CONCLUSION

WHEREFORE, United respectfully requests that the Court enter an Order temporarily restraining and preliminarily enjoining Defendants, their employees, owners, agents, subsidiary entities, parent entities and all individuals and entities acting by, through, under or in concert with them as follows:

(1) Pending a hearing on Plaintiffs' Motion for Preliminary Injunction and until further Order from this Court, the Defendants are enjoined from terminating the Imaging Contracts with United.

(2) The notices dated August 9 and 11, 2006, from the Imaging Defendants to United, which purport to terminate the Imaging Agreements as of November 9, 2006, are declared null and void.

(3) Defendants are enjoined from demanding payment of any higher fee for hospital services in order to secure access by United to women's imaging services, such as mammography services.

(4) Defendants, are enjoined from denying access to United and its Nurse Advocates to HCA facilities in the Denver Metro Area for purposes of contacting United members, from refusing to disclose to United information concerning United member room numbers, from denying United the right to communicate with Untied members who are patients in HCA

facilities, in person or by telephone, and shall cooperate with United in identifying when United members are admitted to HCA facilities.

AND FURTHER ORDERED that:

(1) Plaintiffs are not required to post a bond because it is not likely that Defendants will suffer any harm from this Temporary Restraining Order.

(2) Such other relief as the Court deems just an appropriate, including setting a time for a Preliminary Injunction Hearing.

Certification of Compliance with D.C.DOLO.LCivR 7.1A and 65.1A: Concurrent with the e-filing of this case, counsel for Plaintiffs e-mailed the Complaint, Motion for Temporary Restraining Order, and all other documents filed therewith, to the general counsel for Defendants. In addition, counsel for Plaintiffs spoke with the general counsel for HealthONE, Elizabeth Carver, by telephone explaining that the Complaint and the Motion for Temporary Restraining Order were about to be filed. Given the nature of the relief sought, it is presumed that Defendants oppose the Motion for Temporary Restraining Order. Ms. Carver indicated that she would begin the process of working with the HCA, Inc's general counsel to obtain local counsel. Plaintiffs' counsel inquired whether Defendants would stipulate to the entry of the relief requested in the Motion pending a hearing on the request for a preliminary injunction. Ms. Carver was not in a position to respond without having retained local counsel.

Respectfully submitted this 18th day of September, 2006.

s/ Gregory S. Tamkin

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