IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA GAINESVILLE DIVISION

WENDY M. GARLINGTON,

Plaintiff,

v. **Case No. 1:17cv131-MW/GRJ**

MARIE KIMA, et al.,

Defendants.
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AMENDED[1] ORDER GRANTING MOTION TO DISMISS

This is an antitrust case. Plaintiff is a physician who wanted to start her own private practice specializing in infectious disease in Gainesville, Florida. For this plan to work, Plaintiff needed patients. The primary way Plaintiff could get patients referred to her practice was to obtain privileges at Gainesville's only private hospital, North Florida Regional Medical Center ("NFRMC").[2] But Defendants' refusals to

[1] This Amended Order is identical to this Court's prior Order, ECF No. 43, except that it has been amended to correct a scrivener's error to reflect that Count I is dismissed without prejudice. *See* Fed. R. Civ. P. 60(a) ("The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice.").

[2] The parties apparently agree that NFRMC is the only private hospital in Gainesville, Florida. But Plaintiff's deposition testimony includes some discussion of another hospital in Gainesville that also provides infectious disease services but isn't affiliated with Shands or the VA. *See* ECF No. 41-10 at 241. The existence of a second private hospital at which Plaintiff could have obtained privileges to kick start her private practice would probably be fatal to her federal antitrust claim. *See Pierson v. Orlando Reg'l Healthcare Sys., Inc.*, 619 F. Supp. 2d 1260, 1277 (M.D. Fla. 2009) (no antitrust injury when Plaintiff was not prevented from practicing medicine

sign off as Plaintiff's alternate provider during the application process effectively blocked Plaintiff from obtaining privileges. Plaintiff claims Defendants violated federal antitrust law because they conspired to keep Plaintiff from competing against them in Gainesville's market for private infectious disease services. Defendants assert there was no conspiracy—they simply made individual decisions not to be Plaintiff's alternate provider primarily due to quality of care concerns. Defendants have moved to dismiss for lack of subject matter jurisdiction, and alternatively, for failure to state a claim. This Court has considered, without hearing, Defendants' Motion to Dismiss, ECF No. 32. For the reasons set out below, the motion to dismiss is **GRANTED**.

I

Plaintiff has some history with Defendants. In 2012, she started working for Defendant Kima's private practice in Gainesville. ECF No. 41-10 at 157. Dr. Kima and the other Defendants coordinated their on-call schedules at NFRMC to have cross-coverage at all times for patients needing infectious disease care. *Id*. at 166; *see also* ECF No. 41-7 at 28. While working for Defendant Kima, Plaintiff obtained privileges at NFRMC and split Defendant Kima's on-call days. ECF No. 41-10 at 67, 166-67.

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at other private hospitals in the vicinity). This Court is left wondering why Defendants fail to make the argument.

In 2013, Plaintiff left Defendant Kima's practice after working there for about a year. *Id*. at 75. Plaintiff's employment agreement included a one-year noncompete provision, so in compliance with that provision, Plaintiff practiced outside of Gainesville for the duration of the year after she left Defendant Kima's practice. *Id*. And Plaintiff eventually resigned her privileges at NFRMC. *Id*. at 68.

Infectious disease physicians with privileges at NFRMC periodically serve on call at the hospital to provide NFRMC with 24/7 coverage in infectious disease services every day of the year. ECF No. 41-5 at 4. These physicians get a majority of their patients by first contacting them through their work at NFRMC. *Id*. at 3. Thus, Plaintiff claims, a private infectious disease practice in Gainesville is economically viable only if she can obtain privileges (and, therefore, patients) at NFRMC. ECF No. 41-10 at 231.

Without privileges at NFRMC, Plaintiff lacks the same access to patients as other private infectious disease physicians in Gainesville. This is true, even though Gainesville is home to two other hospitals (Shands and the Veterans Affairs Medical Center ("VA")), because those *public* hospitals generally don't refer infectious disease patients to private practices in Gainesville. *See* ECF No. 41-11 at 62 ("Shands will not allow any of their employees to work outside of the confines of Shands Hospital . . . ."); *see also* ECF No. 41-4 at 43-44.

Part of the application process for infectious disease privileges at NFRMC required Plaintiff to name another physician to be her "alternate provider" to "attend [her] patients in an emergency when the staff member is not available or until the staff member can be present." ECF No. 41-1 at 26 (D.18 Alternate Physician Coverage). And NFRMC's bylaws require a physician seeking privileges to "delegate in his/her absence . . . the responsibility for diagnosis and/or care of his/her patients only to a Practitioner who is a member in good standing of the Medical Staff and who is qualified and approved by the Hospital to undertake this responsibility by the granting of appropriate clinical privileges." ECF No. 41-8 at 21 (NFRMC Bylaw 3.5.2). The alternate provider must have privileges in the same specialty as Plaintiff's chosen specialty. At NFRMC, "[i]nfectious disease has a different set of privileges . . . and . . . is deemed to be separate from internal medicine." ECF No. 41-3 at 28.

As a solo practitioner, Plaintiff's application for privileges must include a signed letter from her alternate provider that sets out the physician's pledge to act as such. ECF No. 41-2 at 41. The only other physicians in Gainesville with infectious disease privileges at NFRMC are Defendants and a fourth individual, Dr. Mauceri, who was originally a Defendant but was dropped before this case reached this Court. None of these physicians agreed to be Plaintiff's alternate provider, which Plaintiff asserts blocked her from obtaining privileges at NFRMC.

Plaintiff alleges a conspiracy to block her from obtaining privileges arose in February 2014 when Defendants met and discussed the issue of Plaintiff's requests for an "alternate provider." Defendant Kima testified that Defendants discussed the "call schedule" at this time, because "[Plaintiff] wanted to be included, and there was an unwillingness to give up any additional calls." ECF No. 41-7 at 224. By affidavit, Dr. Mauceri also asserts that the February 2014 discussion occurred and that all the Defendants agreed that they didn't want to give up on-call days or be Plaintiff's "alternate physician." ECF No. 41-5 at 7-8. Though Defendant Yancey did not recall any discussion in February 2014, he did send Plaintiff an email stating that he alone couldn't make the decision about providing backup coverage to Plaintiff. ECF No. 41-6 at 100-02.

Plaintiff pursued several other avenues to secure an "alternate provider," but none succeeded. For example, she contacted individuals at the University of Florida and Wake Forest residency programs to inquire if any infectious disease residents would like to join her practice and concurrently apply for privileges at NFRMC. ECF No. 41-10 at 132-33. She contacted other infectious disease physicians across the map to see if any would relocate to Gainesville to join her practice and apply for privileges. *Id*. at 15, 172. And she pursued an exception to the bylaws requirement that staff members reside within 30 miles of the hospital by naming an infectious disease practitioner in Vero Beach, Florida as her alternate provider. *Id*. at 216-17.

Ultimately, Plaintiff's application for privileges was denied for nonconformance with the bylaws. *Id*.

According to NFRMC's CEO Bryan Cook, he wasn't "aware of any shortages of infectious disease [services or care] at [NFRMC]." ECF No. 41-3 at 41-42. Nor, according to Mr. Cook, has a "community needs assessment" ever identified any "community need" for additional infectious disease physicians while he's been with NFRMC. *Id*. at 46. But Plaintiff testified that members of the Gainesville community have approached her about their desire for more doctors to choose from for private infectious disease services. *See* ECF No. 41-10 at 220-21 ("I have also had a couple of neighbors that have asked if I was practicing in Gainesville, because either themselves or family members had an [infectious disease] issue, and they had seen the two practitioners that had outpatient offices, and were not satisfied with the care that they received and they were seeking alternate providers.").

Plaintiff continues to reside in Gainesville, but now works as an infectious disease physician in Ocala with privileges at three area hospitals. *Id*. at 133-34. She currently makes about $30,000 a year more than when she previously worked for Defendant Kima. *Id*. at 136-37.

II

Plaintiff claims Defendants violated the Sherman Act, 15 U.S.C. § 1, and Florida law because they conspired to deny Plaintiff's request to be her alternate

provider to keep her from obtaining privileges at NFRMC. She claims Defendants' conduct essentially caused her exclusion from Gainesville's market of private infectious disease physicians because they wanted to prevent her from competing in the market for private infectious disease services. Defendants have moved to dismiss based on lack of subject matter jurisdiction, and, in the alternative, for failure to state a claim for a violation of § 1 of the Sherman Act. They assert that Plaintiff lacks antitrust standing to proceed with the federal antitrust claim serving as the basis for federal jurisdiction in this case.

Defendants present a factual attack on subject matter jurisdiction, asserting (1) that each Defendant made a *unilateral* decision to refuse Plaintiff's request to act as her alternate provider, based in large part on their concerns about her quality of care; (2) that Defendants did not prevent Plaintiff from practicing infectious disease in Gainesville because she could have gotten privileges from Shands or the VA; (3) that Plaintiff suffered no injury at all because she's earning more money now in Ocala than she ever did when she practiced infectious disease in Gainesville prior to her attempt to reapply for privileges and she can only speculate as to how successful her private practice would be in Gainesville had she obtained privileges at NFRMC; and (4) Defendants' actions had no "anticompetitive effect," as Plaintiff is the only individual affected by Defendants' actions (i.e., no evidence suggests that patient

costs have increased at NFRMC or that patients have lost services at NFRMC based on Plaintiff's inability to obtain privileges and open her own private practice).

The parties agree that a factual attack on subject matter jurisdiction allows this Court to consider matters outside the pleadings without converting the motion into a summary-judgment motion. And Plaintiff correctly notes that in cases where the dispute concerning subject matter jurisdiction implicates the merits of the underlying claim, this Court should apply the summary-judgment standard when evaluating Defendants' factual attacks. In this case, Defendants' attack on subject matter jurisdiction implicates the merits of Plaintiff's federal antitrust claim, because it goes to the heart of whether Plaintiff suffered an antitrust injury at all.

Section 1 of the Sherman Act is actionable by private individuals only through section 4 of the Clayton Act. *See* 15 U.S.C. § 15. Section 4 of the Clayton Act authorizes suits for treble damages by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." *Id*. at § 15(a). But "private individuals who do not qualify for Clayton Act standing may not bring a damage action for antitrust violations." *Feldman v. Palmetto Gen. Hosp., Inc.*, 980 F. Supp. 467, 468-69 (S.D. Fla. 1997).

"Standing to sue under the Sherman and Clayton Acts is a question of law." *Id*. (citing *Austin v. Blue Cross and Blue Shield of Alabama*, 903 F.2d 1385, 1387 (11th Cir. 1990)). A plaintiff has antitrust standing when she alleges facts showing

that she (1) has suffered an "antitrust injury," and (2) that she is "an efficient enforcer of the antitrust laws." *See Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1449 (11th Cir. 1991).

An "antitrust injury" is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). "[A]n antitrust plaintiff must allege and show that his own injury coincides with the public detriment from the alleged violation thereby increasing the likelihood that public and private enforcement will further the same goal of increased competition." *Feldman*, 980 F. Supp. at 469 (citing *Todorov*, 921 F.2d at 1450). But "[a]ntitrust law does not require that the defendant be the exclusive cause of plaintiff's injury but only a 'material' one." *Gulf States Reorg. Grp., Inc. v. Nucor Corp.*, 466 F.3d 961, 965 (11th Cir. 2006) (quoting *Cable Holdings of Georgia, Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1561-62 (11th Cir. 1987)). At its core, "the standing inquiry . . . ensures that the plaintiff's demand for relief ultimately serves the purpose of antitrust law to increase consumer choice, lower prices and assist competition, not competitors." *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc.*, 123 F.3d 301, 306 (5th Cir. 1997).

Plaintiff asserts her injury was exclusion from "the market of private practitioners of [infectious disease] medicine in Gainesville," due to Defendants'

collective decision not to be her alternate provider when she reapplied for privileges at NFRMC. ECF No. 41 at 9. In other cases, the Eleventh Circuit has held that an antitrust plaintiff's alleged exclusion from the relevant market "is inseparable from the alleged harm to competition." *Nucor*, 466 F.3d at 967. Indeed, the Eleventh Circuit "has recognized . . . that an attempt to enter a market coupled with a showing of preparedness is sufficient to establish an injury in fact." *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1572 (11th Cir. 1991).

Plaintiff testified that members in the community wanted more choices for outpatient care for infectious disease services in Gainesville. And this record presents a factual dispute as to whether Defendants' refusals to be Plaintiff's alternative provider were coordinated instead of unilateral. Both Defendant Kima and Dr. Mauceri admit that some discussion occurred between the four private infectious disease physicians in Gainesville about their shared desire not to give up on-call days or serve as Plaintiff's alternate provider. Finally, based on this record, there's a clear dispute as to whether Plaintiff would have been able to open her own private practice in infectious disease had she obtained privileges at Shands or the VA (or simply attempted to open up shop without first obtaining privileges at NFRMC). *See* ECF No. 41-11 at 62 ("Shands will not allow any of their employees to work outside of the confines of Shands Hospital . . . ."); ECF No. 41-4 at 43-44.

In short, these disputed issues of fact prevent this Court from determining as a matter of law that Plaintiff hasn't established an antitrust injury.

Assuming Plaintiff has suffered some antitrust injury, she must also be an "efficient enforcer" of the antitrust laws to have antitrust standing in this case. To determine whether an antitrust plaintiff is an "efficient enforcer," courts generally consider several factors including: (1) the directness or indirectness of the asserted injury; (2) the remoteness of the injury; (3) whether other potential plaintiffs were better suited to vindicate the harm; (4) whether the damages were highly speculative; (5) the extent to which the apportionment of damages was highly complex and would risk duplicative recoveries; and (6) whether the plaintiff would be able to efficiently and effectively enforce the judgment. *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 711 F.3d 1264, 1271 (11th Cir. 2013).

Other courts addressing similar claims within the medical services and credentialing context have found that patients, third-party payors, and the government are often better suited to pursue antitrust claims based on competitors' anticompetitive conduct. For example, in *Ginzburg v. Mem'l Healthcare Sys., Inc.*, 993 F. Supp. 998 (S.D. Texas 1997), a neonatologist sued other neonatologists at the hospital where she practiced for antitrust violations due to, among other things, her competitors' alleged refusals to provide coverage for her patients and to refer patients to her. The neonatologist claimed her competitors refused to deal with her

to drive her from the market for neonatal services, which allegedly decreased both patient choice options and the quality of care.

Assuming such an antitrust injury occurred, the district court held that it would be the hospital's "patients and third party payors, not Ginzburg, who are actually injured by Defendants' allegedly unlawful conduct." *Id*. at 1020. "[The hospital's] patients and third party payors have a strong, nonconflicted interest in assuring that neither quality of care nor patient choice options at [the hospital] are diminished by anticompetitive conduct." *Id*. The neonatologist, on the other hand, "has an indisputable business interest at stake—that of retaining her privileges to see patients at [the hospital] and in gaining a greater percentage of referrals currently directed towards her competitors." *Id*.

Similarly, in *Robles v. Humana Hosp. Cartersville*, 785 F. Supp. 989 (N.D. Ga. 1992), the district court held that an obstetrician was not an "efficient enforcer" to pursue antitrust claims against the hospital and doctors involved in the revocation of his hospital privileges. The court identified two other groups with "a stronger interest [than the obstetrician's] in ensuring that prices and services remain at competitive levels"—obstetric patients and the government. *Id*. at 999. On the other hand, the court noted, the obstetrician's "only interest is that *he* be allowed to compete in Bartow County, not that patients receive quality services at competitive prices." *Id*. (emphasis in original); *see also Pierson*, 619 F. Supp. 2d at 1277

(physician not an efficient enforcer because his interests didn't coincide with patients' interests); *Feldman*, 980 F. Supp. at 470 (same).

Defendants' alleged conduct—conspiracy to exclude Plaintiff from the market of private infectious disease physicians in Gainesville—harms competition by decreasing consumer choice. Defendants and Dr. Maurceri operated the only private practices specializing in infectious disease in Gainesville at the time Plaintiff applied for privileges at NFRMC. Dr. Maurceri has since retired. Gainesville's market for private infectious disease services has therefore shrunk since Plaintiff was allegedly blocked from entering the market. And Plaintiff's testimony identifies consumers who are looking for more choices than what the market currently has to offer. The question, then, is whether Plaintiff is the appropriate party to pursue the interests of antitrust law; namely, "to increase consumer choice, lower prices and assist competition, not competitors." *Doctor's Hosp.*, 123 F.3d at 306. Defendants argue that Plaintiff is not an "efficient enforcer."

This Court agrees. Those potential patients seeking more choices in Gainesville for quality infectious disease care at competitive prices are better suited than Plaintiff to pursue an antitrust claim against Defendants.

Moreover, Plaintiff's damages are speculative. She admits that she's not entitled to or guaranteed any patient referrals, even if she obtains privileges at NFRMC. *See* ECF No. 41-10 at 240. And she testified that she has "no idea whether

[she'd] make more or less" than she currently makes practicing infectious disease in Ocala. *Id*. at 137. All things considered, Plaintiff is not an "efficient enforcer" to bring this sort of antitrust claim.

III

Alternatively, Defendants move to dismiss for failure to state a claim upon which relief can be granted because (1) Plaintiff hasn't alleged sufficient facts to show Defendants' alleged conduct affected interstate commerce, and (2) Plaintiff's allegations only show that Defendants acted unilaterally. Neither argument carries much weight.

"[T]he essence of any violation of § 1 [of the Sherman Act] is the illegal agreement itself[,] rather than the overt acts performed in furtherance of it." *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330 (1991) (citation omitted). "[P]roper analysis focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy were successful." *Id*. Plaintiff "need not allege, or prove, an *actual effect* on interstate commerce to support federal jurisdiction." *Id*. (emphasis added). Rather, factual allegations that "demonstrate a substantial effect on interstate commerce generated" by Defendants' provision of medical services are sufficient. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980) ("Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by

those other aspects of respondents' activity [that are] alleged to be unlawful."); *see also Shahawy v. Harrison*, 778 F.2d 636, 641 (11th Cir. 1985) ("We hold, therefore, that pleading Sherman Act jurisdiction requires allegations that defendant's business activities have a substantial impact on interstate commerce.").

Plaintiff's allegations in this case satisfy *McLain*'s pleading standard. The complaint alleges that Defendants each provide medical care to out-of-state patients, that they accept Medicare and Medicaid payments for their services in addition to out-of-state private insurance payments, and that they accept credit card payments involving out-of-state financial institutions. ECF No. 1 at 2-3. Plaintiff further alleges that Defendants Kima and Thomas purchase out-of-state supplies for their private practices. *Id*. at 2. And all three Defendants provide their services at a hospital that is undoubtedly involved in interstate commerce. Considered together, these allegations "demonstrate a substantial effect on interstate commerce" generated by Defendants' business activities.

"An antitrust complaint must include allegations plausibly suggesting (not merely consistent with) an illegal agreement among the defendants." *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co.*, 870 F.3d 1262, 1270 (11th Cir. 2017) (citation and quotation marks omitted). This Court has already noted that the record presents a factual dispute as to whether an agreement or conspiracy existed between the Defendants. But even limiting this Court's review to the four

corners of the complaint, Plaintiff's factual allegations plausibly suggest an illegal, anticompetitive agreement among Defendants to exclude her from entering Gainesville's market for private infectious disease physicians.

The complaint sets out allegations describing the unique circumstances governing the market for private infectious disease services in Gainesville. A small group of doctors operate the only private practices specializing in infectious disease in town, and all of them have privileges at NFRMC. These same doctors refused to act as Plaintiff's "alternate provider" when she attempted to reapply for privileges at NFRMC. Defendants allegedly came to this decision together after meeting in February 2014 and discussing Plaintiff's plan to open a new private infectious disease practice in Gainesville and agreeing that none of them would give up any on-call days or agree to be Plaintiff's alternate provider. Defendants allegedly "entered into [this agreement] in order to exclude [Plaintiff] from the market of NFRMC [infectious disease] referrals and thereby reserve the associated profits for themselves." ECF No. 1 at 16.

IV

Despite pleading sufficient facts to state a plausible claim for relief, Plaintiff still lacks standing to pursue her antitrust claim. Plaintiff is not an "efficient enforcer." Accordingly, Defendants' motion to dismiss, ECF No. 32, is **GRANTED**. Plaintiff's federal antitrust claim, Count I, is dismissed. This Court declines to

exercise jurisdiction over the remaining state-law claims. *See* 28 U.S.C. § 1367(c)(3). The parties are not diverse, nor has Plaintiff made any argument as to why her remaining state-law claims should not also be dismissed. The remaining claims are dismissed without prejudice, and the Clerk shall close the file.

SO ORDERED on January 3, 2018.

s/Mark E. Walker
United States District Judge