
United States Court of Appeals
for the
Third Circuit

Case No. 25-2969

READING HOSPITAL, on behalf of itself and all others similarly situated,

Appellant,

– v. –

HILL-ROM COMPANY, INC., HILL-ROM HOLDINGS, INC.,
HILL-ROM SERVICES, INC.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA IN NO. 5:24-CV-02715
HONORABLE JOHN M. GALLAGHER, U.S. DISTRICT JUDGE

**BRIEF OF *AMICUS CURIAE* INTERNATIONAL CENTER FOR
LAW & ECONOMICS AND PROFESSOR THOMAS A.
LAMBERT IN SUPPORT OF AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

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INTEREST OF AMICI CURIAE¹

The International Center for Law & Economics (“ICLE”) is a nonprofit, non-partisan global research and policy center aimed at building the intellectual foundations for sensible, economically grounded policy. ICLE promotes using law and economics methodologies and economic learning to inform policy and has expertise evaluating antitrust law and policy.

ICLE has an interest in ensuring that antitrust law promotes the public interest by remaining grounded in rules informed by sound economic analysis.

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PRELIMINARY STATEMENT

The First Amended Class Action Complaint (“FAC”) by named plaintiff Reading Hospital (“Reading”) against defendant Hill-Rom Holdings, et al. (“Hill-Rom”) is remarkably unspecific. Reading complains about “corporate enterprise agreements” (“CEAs”) between Hill-Rom and various “integrated delivery networks” (“IDNs”), which are health systems that own or manage multiple

¹ No counsel for any party authored this brief in whole or in part. Apart from amici curiae, no person contributed money intended to fund the brief’s preparation and submission. The parties consented to the filing of this brief.

hospitals. The IDN with which Reading is affiliated, Tower Health, is a party to one of those CEAs, so Reading surely knows what the agreements entail.

Despite that fact, Reading alleges little about the specific content of the CEAs it is challenging. The FAC avers that the challenged agreements required or encouraged IDN members to buy all or most of their requirements of three types of hospital beds (standard, ICU, and birthing beds) from Hill-Rom rather than from its two leading competitors, Stryker and Linet, both of which produce all three types of beds and compete to secure their own multi-product supply agreements with IDNs. But the FAC alleges nothing about the precise nature of the CEAs' requirements or incentives, instead referring vaguely to "exclusive dealing" provisions, rebates conditioned on hitting purchase targets ("loyalty rebates"), and discounts for buying multiple separate products from Hill-Rom ("bundled discounts").

Regardless of whether the FAC is challenging exclusive dealing arrangements, loyalty rebates, bundled discounts, or some combination of the three, it is legally deficient. Because all three practices are often procompetitive—with loyalty rebates and bundled discounts providing an immediate benefit to consumers in the form of lower prices—courts condemn them only when the factual prerequisites to anticompetitive harm are satisfied. For exclusive dealing, the challenged arrangements must foreclose rivals from a large enough proportion of available sales opportunities to hold them below "minimum efficient scale"

(“MES”)—i.e., the output level at which all economies of scale (i.e., per-unit cost-savings that result simply from producing more units) are exhausted. Absent such “substantial foreclosure,” an exclusive dealing contract may disadvantage *a competitor* (by causing it to lose business) but does not injure *competition itself* (by rendering rivals less efficient and thus less formidable). Loyalty rebates harm competition only if they result in a below-cost price that could drive an equally efficient, but less deep-pocketed, rival from the market. Bundled discounts can cause competitive harm only if they result in a below-cost price for the bundle or include products that the discounter’s rivals do not produce so that they could not match the entire dollar amount of the bundled discount on their own bundles.

Because the FAC does not allege substantial foreclosure that would hold Hill-Rom’s rivals below MES, below-cost pricing on any of Hill-Rom’s products, or a lack of product diversification on the part of Hill-Rom’s rivals so that they could not offer competitive bundled discounts, it does not plead any harm to competition itself. To prevent the Third Circuit from becoming a mecca for antitrust strike suits, this Court should reject plaintiffs’ attempt to saddle defendants with burdensome discovery obligations on the basis of threadbare allegations that do not aver competitive harm. It should affirm the district court’s order dismissing plaintiffs’ complaint with prejudice.

ARGUMENT

I. Plaintiffs Have Not Alleged Anticompetitive Exclusive Dealing

a. Exclusive Dealing Is Usually Procompetitive and Injures Market Competition Only In a Narrow Set of Circumstances.

“Exclusive dealing” refers to an arrangement under which two parties agree to do business exclusively with one another for a period of time. Such contracts are often “of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public.” *Standard Oil Co v. United States*, 337 U.S. 293, 306 (1949). They are ubiquitous, and prohibited only if “competition has been foreclosed in a substantial share of the line of commerce affected.” *Id.* at 314. *Standard Oil* held that the government could challenge exclusive contracts if their effect “may be to substantially lessen competition.” *Id.* at 302. But the Court later held that private parties must do more. They must be able to show that “the contract will foreclose competition in a substantial share of the line of commerce affected” based on “facts peculiar to the case.” *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

This test reflects the prevalence of exclusive dealing in highly competitive markets where such arrangements strengthen competition and increase output. One way they do so is by eliminating “interbrand free riding.” To win sales, producers seek to make their offerings more attractive, often by investing in their distributors. A gasoline manufacturer, for example, may boost sales by providing retailers with

attractive signage, good lighting, and free customer items (e.g., roadmaps). If those retailers also carried gasoline from a rival that made no comparable investments (and thus faced lower costs and could charge lower wholesale prices), some of the investing producer's gains would accrue to that rival. By ensuring that distributor investments do not benefit competitors, exclusive dealing can encourage output-enhancing, consumer-friendly investments. *See generally* Howard P. Marvel, *Exclusive Dealing*, 25 J. L. & ECON. 1, 6–11 (1982); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 440 (3d ed. 2005).

Exclusive dealing may also benefit consumers by intensifying competition for distribution. To secure exclusivity and the resulting increase in sales, producers often reduce wholesale prices. Retail competition then tends to pass those savings on to consumers as lower retail prices, which can outweigh any loss from reduced product variety and produce net consumer benefits. *See generally* Benjamin Klein & Kevin M. Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 ANTITRUST L. J. 433 (2008).

Even early enforcement decisions like *Standard Oil* recognized that exclusive dealing can further enhance output by “assur[ing] supply, afford[ing] protection against rises in price, enabl[ing] long-term planning... and obviat[ing] the expense and risk of storage.” *Standard Oil*, 337 U.S. at 306. A gasoline retailer, for instance,

may want adequate inventory for peak summer demand. Committing in advance to a fixed quantity risks either surplus or shortage. A requirements contract—under which the retailer agrees to buy all its needs from one supplier in exchange for guaranteed supply—may minimize those risks. *See id.*

On the producer side, exclusive dealing reduces uncertainty by securing a more “predictable market.” *Id.* at 306-07. By improving demand forecasts, such arrangements can encourage producers to expand capacity. *See generally* Hovenkamp, *supra*, at 440.

Because of these benefits, exclusive dealing can be anticompetitive only when they substantially foreclose competition on metrics relevant to the line of commerce and facts of a particular industry. *Tampa*, 365 U.S. at 327. Most industries exhibit economies of scale, meaning that average costs decline as output rises—up to a point. Beyond that point, diminishing returns cause average costs to increase. The lowest output level at which scale economies are exhausted is the industry’s MES. *See* ROBERT S. PINDYCK & DANIEL S. RUBINFELD, MICROECONOMICS 237 (6th ed. 2008); HAL R. VARIAN, INTERMEDIATE ECONOMICS 428 (1987). To compete most effectively, firms must reach that level of output.

In certain cases exclusive dealing by a dominant rival can prevent them from doing so. Because expansion requires access to buyers, a dominant firm can restrict rivals’ growth by locking up distribution outlets. If foreclosure is sufficiently

substantial, rivals may be unable to reach MES. *See generally* Joshua D. Wright, *Moving Beyond Naïve Foreclosure Analysis*, 19 GEO. MASON L. REV. 1163, 1166–71 (2012). The economic results—reduced output and higher prices—can injure competition, not just competitors, where three conditions are present.

First, foreclosure must be substantial enough to push rivals below MES. *Id.* at 1166. Second, rivals must lack practical alternatives, such as competing for their own exclusive or direct distribution contracts. Third, barriers to entry into the producer’s market must be so significant that new firms cannot enter in response to supracompetitive pricing.

Given the many procompetitive benefits of exclusive dealing it is unsurprising that empirical studies generally find that these conditions are rarely satisfied, and that exclusive dealing enhances rather than reduces competition. *See* Jan B. Heide et al., *Exclusive Dealing and Business Efficiency*, 41 J. L. & ECON. 387 (1998) (finding that “firms are more likely to use exclusive dealing when there is a potential that other manufacturers can free ride on the services they provide” and that “when manufacturers are concerned about the costs that exclusive dealing imposes on end customers, such arrangements are less likely”); Tim R. Sass, *The Competitive Effects of Exclusive Dealing*, 23 INT’L J. INDUS. ORG. 203 (2005) (concluding that exclusive dealing in the beer market increases market output); James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT’L J. INDUS. ORG. 639, 658 (2005)

(observing that although “some studies find evidence consistent with both pro- and anticompetitive effects . . . virtually no studies claim to have identified instances where vertical practices were likely to have harmed competition”); Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints*, in HANDBOOK OF ANTITRUST ECONOMICS 391, 409 (2008) (“[I]t appears that when manufacturers choose to impose restraints, not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and better service provision”); Daniel O’Brien, *The Antitrust Treatment of Vertical Restraints*, in THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 76 (2008) (observing that “with few exceptions, the literature does not support the view that [vertical restraints] are used for anticompetitive reasons”).

b. Reflecting Economic Learning, Supreme Court Precedent Requires Substantial Foreclosure as a Necessary, Though Insufficient, Condition for Exclusive Dealing Liability.

Because (1) procompetitive uses of exclusive dealing are quite common, (2) anticompetitive harm from exclusive dealing can occur only under rare conditions, and (3) most instances of exclusive dealing enhance market output, courts impose a “qualitative foreclosure” test for assessing the legality of such arrangements. They typically start by assessing the percentage of sales opportunities in the relevant geographic and product market the challenged deal has foreclosed to the defendant’s rivals. *Tampa*, 365 U.S. at 327-29. But the analysis is not merely quantitative. *See*

Jonathan M. Jacobson, *Exclusive Dealing, “Foreclosure,” and Consumer Harm*, 70 ANTITRUST L.J. 311, 322 (2002) (explaining why governing standard is *qualitative* foreclosure). As *Tampa* explains:

“To determine substantiality [of market foreclosure] in a given case, it is necessary to weigh *the probable effect of the contract on the relevant area of effective competition*, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and *the probable immediate and future effects which preemption of that share of the market might have on effective competition therein.*”

Tampa Electric, 365 U.S. at 329 (emphasis added).²

Tampa’s effects-based, qualitative foreclosure approach properly reflects economic insights about exclusive dealing’s ability to enhance market output even when it forecloses some sales opportunities for a defendant’s rivals. The Court’s emphasis on the *competitive effects* of foreclosure requires an assessment of whether the challenged arrangement occasioned an actual change in market output—i.e., a significant change in the total number of units sold, their quality, or the prices charged. If the evidence on that question is indeterminate, courts should then consider:

² This language from *Tampa Electric*, which assessed liability under Section 3 of the Clayton Act, 15 U.S.C. § 14, undermines the bizarre claim of amicus Open Markets Institute that “the *Tampa Electric* decision is not an invitation to lower courts to apply the rule of reason.” Brief of Open Markets Institute as Amicus Curiae in Support of Plaintiffs-Appellants at 15. In directing courts to assess “the probable effect” of a challenged exclusive dealing agreement in light of a number of context-specific factors, *Tampa Electric* explicitly prescribed a rule of reason analysis.

- what is minimum efficient scale in the industry at issue, and whether the foreclosure occasioned by the arrangement threatens to drive or hold a rival below that level of output;
- the likelihood that the challenged arrangement creates procompetitive benefits by reducing interbrand free-riding, intensifying competition for distribution, or cutting costs or otherwise enhancing output by guaranteeing demand for producers or supply for distributors; and
- barriers to entering the relevant markets.

To state a claim for anticompetitive exclusive dealing, a plaintiff must plead the above or other facts that, taken as true, show that the challenged arrangements actually caused market foreclosure substantial enough to hold the defendants' rivals below MES or otherwise prevent them from continuing to supply output to the relevant markets.

c. Plaintiffs Have Not Alleged the Factual Prerequisites to Anticompetitive Harm from Exclusive Dealing.

Given that economically informed pleading requirement, plaintiffs' FAC is deficient. A well pled exclusive dealing complaint should allege that the challenged agreements would result in a degree of market foreclosure sufficient to hold the defendants' rivals below MES and that they have consequently been forced out of the market for the output consumers want (here, hospital beds). Yet the FAC says

nothing about MES. It provides a conclusory allegation that competitors were deprived of scale but does not allege that the challenged agreements have driven those competitors below MES, much less in ways that have substantially foreclosed them from continuing to offer competitive output. Instead, it admits that these competitors have continued to supply beds in the decade since the challenged agreements were first used.

For this and other reasons the district court noted, the “Plaintiff does not plead facts regarding the necessary degree of foreclosure.” Mem. Op. at 16. Plaintiff says the allegedly exclusive contracts (CEAs) substantially foreclose competition, but “Plaintiff does not attach, quote, or otherwise reference anything from the CEA” to support this conclusion. *Id.* at 19. That is particularly true because the FAC “is noticeably absent of any allegation that Plaintiff itself has entered into a CEA with Defendants.” *Id.* at n.2. This point alone makes this case fundamentally different from *Tampa* and *Standard Oil*. And the FAC’s failure to allege how CEAs deprived other hospitals of the opportunity to choose among competing suppliers for each contract cycle makes this case fundamentally different from *LePage’s* and all the other well-pled exclusive dealing cases Plaintiff cites. Indeed, the FAC here admits that hospitals continue to have the same choice of suppliers they have always had, and that those suppliers compete for exclusive contract cycles because they are efficient for hospitals given the installation and training costs associated with the

line of commerce (smart beds). These allegations confirm that this case does not allege the actual economic and anticompetitive effects the law requires to state an antitrust claim for exclusive dealing.

The district court correctly found these and other pleading defects fatal to this case. “The share of the market that has allegedly been foreclosed is a major component of a finding of substantial foreclosure.” Mem. Op. at 16. And even where substantial foreclosure is adequately pled, a plaintiff must relate it to consumer harm in the form of reduced output or higher prices caused by the allegedly unlawful terms of the exclusive arrangement. The FAC does neither. It alleges that the deals caused price inflation, but it does not cite any contract or market prices at all, much less tie them to any exclusivity provisions. Instead, plaintiff admits it was *not* forced to sign any exclusive deal and admits that the other hospitals it purports to represent still have the same choice of bed suppliers they had before the exclusive dealing began over a decade ago. The FAC thus fails to plead any of the economic facts required to challenge exclusive deals under the Supreme Court cases above.

d. Plaintiffs’ Allegations Suggest Procompetitive Rationales for the Alleged Exclusive Dealing.

The pleading failures above are not surprising, because the FAC describes economic reasons for the allegedly exclusive CEAs that would make them procompetitive for the line of commerce and industry at issue. As discussed above, it is widely recognized that exclusive dealing agreements can provide for supply

stability and can mitigate the costs of uncertainty across market fluctuations, to the extent that the agreements increase a seller's incentive to meet a customer's requirements fully, and on a reliable basis. *See* Jacobson, *EXCLUSIVE DEALING*, *supra*, at 359. The FAC itself describes such conditions that would benefit from exclusive agreements. For example, it cites high, rising, and volatile input costs: “To manufacture hospital beds, new entrants need to purchase commodities such as aluminum and steel that are subject to significant volatility. Similarly, hospital bed manufacturing increasingly requires chips and sensors, which have been subject to shortages that have led to rising prices throughout the country.” FAC at 20-21. The FAC characterizes these uncertainties as entry barriers, but uncertainty about the price and availability of key production inputs is a challenge—and a cost—for any incumbent manufacturer of the relevant hospital beds. And “episodic rather than smooth demand” for hospital beds, FAC ¶ 30, confounds planning for the *consumers* of hospital beds—hospitals, hospital systems, and other health care providers—as well as producers. Both upstream and downstream exclusive dealing agreements can mitigate these costs in ways beneficial to the manufacturers and the IDNs, GPOs, and health care providers with whom they contract. That is a straightforward—and legitimate—business rationale for both parties to an exclusive dealing contract regarding the supply of hospital beds.

Such inconsistencies on both the supply side and the demand side can exacerbate stock inconsistencies as well; and it is understood that exclusive dealing arrangements can reduce stock inconsistencies associated with multiple product lines and myriad SKUs. That is, streamlined stocks and supply chains may be a significant advantage to hospitals, even as a wide range of product choices may be desirable at the time of contracting. See *id.* at 357 (citing *Joyce Beverages, Inc. v. Royal Crown Cola Co.*, 555 F. Supp. 271, 276 (S.D.N.Y. 1983)). Moreover, the FAC acknowledges that IDNs, such as Tower Health, “naturally prefer to standardize,” their agreements, and that the “promise of future *low prices*” encourages IDNs (not manufacturers) “to force its individual hospitals to stick to the agreement.” Appx94-95, 118, 120 ¶¶ 70, 178, 181. Again, these are demand-side pressures on manufacturers, such as Hill-Rom, to enter into exclusive arrangements with IDNs. They do not suggest that such agreements result from anticompetitive exploitation of manufacturer market power rather than efficient, procompetitive arrangements.

The FAC also alleges that the importance of product support in hospital bed markets should be seen as a barrier to entry. For example, “U.S. hospital customers demand that suppliers have a local sales and service organization in order to provide dedicated sales support, as well as in-service training, education, and clinical support specific to the U.S. health care industry.” FAC at ¶ 24. Perhaps, but the demand for such services is a demand-side pressures *on* manufacturers, such as Hill-Rom,

Stryker, and Linet, as is the risk that competitors might free-ride on a manufacturer's investments in such support services, Jacobson, *EXCLUSIVE DEALING*, *supra*, at 312. Exclusive dealing agreements can mitigate the risk of inter-brand free riding and thus enhance incentives for the investments required to meet such demands. *Id.*

II. Plaintiffs Have Not Stated a Claim Based on Hill-Rom's Agreements to Provide Discounts for Meeting Purchase Targets.

While plaintiffs focus primarily on Hill-Rom's alleged exclusive dealing agreements (without identifying the agreements' precise terms), they also suggest that Hill-Rom has used conditional price cuts to exclude its rivals, impairing market competition. The Complaint alleges that Hill-Rom's CEAs "ensur[e] that an IDN *cannot achieve its maximum rebate* unless the hospitals in the system purchase effectively all of their requirements for the Relevant Products from Hill-Rom." Cmpl. ¶ 172 (emphasis added). It also refers to purchase thresholds of 80-90% of a hospital's requirements. *Id.* at ¶ 160. The Complaint thus suggests (again, with no specificity) that Hill-Rom is using "loyalty rebates"—price cuts conditioned upon meeting purchase targets on individual products—to foreclose its rivals from sales opportunities. Elsewhere, the Complaint alleges that Hill-Rom offers IDNs "bundled

discounts”—discounts conditioned on buying a package of different products—to exclude less diversified rivals.³

Although both loyalty rebates and bundled discounts may be anticompetitive in certain circumstances, they are not inevitably so. And they always entail immediate consumer benefit in the form of lower prices. To ensure that antitrust law does not chill consumer-friendly discounting without justification, courts wisely limit antitrust liability based on loyalty rebates and bundled discounts to situations in which the factual prerequisites to anticompetitive harm exist. Because plaintiffs have not alleged such factual prerequisites here, they have failed to state an antitrust claim on the basis of either loyalty rebates or bundled discounts.

a. Plaintiffs Have Not Alleged the Below-Cost Pricing Required to Establish Actionable Loyalty Rebates.

For single-product loyalty rebates—e.g., “we will provide a 20% rebate on all your purchases of standard hospital beds if you purchase at least 80% of your standard bed requirements from us”—there can be no harm to competition unless the discounted price is below the discounter’s cost. A loyalty rebate resulting in a below-cost price may harm competition by winning business from, and perhaps

³ See Cmpl. ¶ 139 (“The CEAs were therefore designed to bundle and link together all of the purchasing decisions by hospitals in numerous distinct product markets ... into a single overarching agreement with a collective rebate.”); *id.* at ¶ 173 (“The CEAs thus ensure that it is impossible for any competitor in the Relevant Markets which does not manufacture a similarly broad line of products to demonstrate how offered savings could offset the rebate potential on other products with Hill-Rom.”).

driving from the market, a rival that is as efficient as the discounter but does not have the reserves required to endure losses from below-cost pricing. But if the loyalty rebate results in an above-cost price, any equally efficient rival could match it by cutting its profit margin while still charging a sustainable price. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 768 (3d ed. 2008) (“For single-item discounts, no matter how measured or aggregated, exclusion of an equally efficient rival seems implausible, provided that the fully discounted price remains above the seller’s cost.”). Any rival excluded by an above-cost loyalty rebate, then, would be either less efficient than the discounter or less willing to lower its price to a sustainable, though less profitable, level. Winning business from a less efficient or less aggressive rival by enhancing the benefits offered to consumers is hardly anticompetitive; it is the essence of price competition. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (“[C]utting prices in order to increase business often is the very essence of competition.”).

The Supreme Court has thus limited antitrust liability for simple price cuts to those that result in below-cost prices that an equally efficient rival could not sustainably match. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993) (“[A] plaintiff seeking to establish competitive injury resulting from a rival’s low prices must prove that the prices complained of are below an appropriate measure of its rival’s costs.”); *Atlantic Richfield Co. v. USA Petroleum*

Co., 495 U.S. 328, 340 (1990) (“Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.”). The Circuit Courts—including this Court—have extended that holding to rebates conditioned on meeting single-product purchase targets. *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 274 n. 11 (3d Cir. 2012) (“[W]e join our sister circuits in holding that the price-cost test applies to market share or volume rebates offered by suppliers in a single-product market.”) (citing *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 452 (6th Cir. 2007); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1061 (8th Cir. 2000); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983)).

Although plaintiffs’ complaint does appear to allege some sort of loyalty rebate (albeit with no specificity), it never alleges that the post-rebate price on any product was below Hill-Rom’s cost. Accordingly, the complaint does not state an antitrust claim arising from loyalty rebates.

b. Plaintiffs Have Not Alleged Actionable Bundled Discounts Because They Have Not Identified Less Diversified Rivals that Are Plausibly Excluded By Hill-Rom’s Discount Arrangements.

While below-cost pricing is not a prerequisite to anticompetitive harm from a bundled discount, no such harm can result when (1) the discounted bundle price is non-predatory in that it exceeds the aggregate cost of the items in the bundle (i.e., the discount is an “above-cost bundled discount”), *and* (2) the discounter’s rivals

can offer all the products in the discounted bundle and can thus, if equally efficient, match the discounted price without pricing below cost. Because plaintiffs have not alleged either that Hill-Rom's bundled discounts resulted in below-cost pricing or that its identified rivals could not replicate its bundle, plaintiffs have failed to state an antitrust claim based on Hill-Rom's bundled discounts. Indeed, plaintiffs have not plead any facts about the product bundle that Hill-Rom is alleged to have offered or any other product bundle in the industry.

Admittedly, an above-cost bundled discount may exclude an equally efficient, aggressive rival in one line of commerce if the rival cannot offer a comparable bundle, and must therefore price its more limited offerings below cost to match the discount on the bundle. That is the situation the *LePage's* plaintiff pled with supporting facts about the bundled items and prices at issue, but this case does not plead at all. Instead, the FAC admits the challenged bundles do *not* result in below cost pricing on the defendants' beds (the relevant lines of commerce here). Nor does it plead any facts showing that the defendants' bundles require rivals to price their beds below cost because they cannot offer comparable bundled discounts.

Nor does the FAC plead the practical (non-price) foreclosure the Third Circuit addressed in rejecting a safe harbor for above-cost bundled discounts in *LePage's Inc. v. 3M*, 324 F.3d 141 (3rd Cir. 2003) (en banc). The plaintiff in that case, LePage's, produced private label transparent tape. It complained of bundled

discounts offered by 3M, which produced branded “Scotch” tape, private label transparent tape, and a number of other products. 3M offered retailers rebate programs conditioned upon meeting purchase targets across multiple 3M lines of commerce beyond transparent tape. *Id.* at 154. LePage’s alleged that 3M’s bundled discounts were anticompetitive because they induced retailers to eliminate LePage’s as a supplier so that they could meet 3M’s purchase target for private label tape and thereby qualify for rebates on purchases from a number of 3M product lines. *Id.* at 160-61. A jury found that LePage’s had established illegal monopolization, but a divided panel of this Court reversed on the ground that LePage’s “did not even attempt to show that it could not compete by calculating the discount that it would have had to provide in order to match the discounts offered by 3M through its bundled rebates.” *LePage’s Inc. v. 3M*, 2002 WL 46961, at *9 (3rd Cir. Jan. 14, 2002). On rehearing en banc, this Court reinstated the jury verdict in favor of LePage’s on grounds the FAC does not plead here. *LePage’s*, 324 F.3d at 164-66.

The en banc Court first emphasized that the principal anticompetitive danger of bundled discounts is that they can disadvantage competitors that sell narrower product lines and therefore could only compete by offering discounts so deep they cannot stay in the marketplace. *Id.* at 155. Once LePage’s showed that the bundle 3M’s customers had to buy to secure the discounts included product lines that LePage’s could not offer and that this fact made it difficult for LePage’s to compete

with 3M, the burden shifted to 3M to prove that its bundled discounts were “justified” by cost savings of some sort. *Id.* at 163-64. Because 3M failed to prove that selling its products in a bundled fashion reduced cost by an amount equal to or exceeding the discount, its bundled discounts were deemed unjustified and thus exclusionary. *Id.* at 164. *LePage’s* thus holds that (1) bundled discounts may be exclusionary if the discounter is bundling product lines its rivals do not produce and foreclosing those rivals from competing, but (2) the presumption may be rebutted if the discounter proves a “business reasons justification” for the bundled discounts, meaning that the bundling saves costs in excess of the total discount.

LePage’s has been limited to its facts in this circuit and generated a great deal of critical commentary in other circuits and among antitrust scholars. *See, e.g., In re Epi Pen*, 44 F.4th 959, 991-1000 (10th Cir. 2022); *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 273-74 (6th Cir. 2015); *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2009); *FTC v. Church & Dwight Co., Inc.*, 665 F.3d 1312, 1316–17 (D.C. Cir. 2011);⁴ Thomas A. Lambert, *Evaluating Bundled*

⁴ Even in *Church*, which was a government enforcement case, the D.C. Circuit stressed that *LePage’s* “has been roundly criticized.” *Church*, 665 F.3d at 1316–17 (citing Antitrust Modernization Comm’n, Report and Recommendations 94 (2007) (“The lack of clear standards regarding bundling, as reflected in *LePage’s v. 3M*, may discourage conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare”); Bruce H. Kobayashi, *The Law and Economics of Predatory Pricing*, in *Antitrust Law and Economics* 116, 148 (Keith N. Hylton ed., 2009) (“The potential for liability will result in [firms with sufficient market power and multiple product lines] being deterred from using

Discounts, 89 MINN. L. REV. 1688, 1722-26 (2005); Daniel L. Rubinfeld, *3M's Bundled Rebates: An Economic Perspective*, 72 U. CHI. L. REV. 243, 254–56, 262–64 (2005); Daniel A. Crane, *Multiproduct Discounting: A Myth of Non-Price Predation*, 72 U. CHI. L. REV. 27 (2005); Gary P. Zanfagna, *LePage's v. 3M: A Reality Check*, ANTITRUST SOURCE 1 (Nov. 2004) (“The Third Circuit en banc decision in *LePage's* is a giant step backwards in Section 2 jurisprudence.”). A primary criticism is that, by eschewing consideration of the relative efficiency of a complaining rival and focusing solely on product line breadth, it can enable inefficient but less diversified competitors to block consumer-friendly discounts or even recover treble damages based upon them thus punishing suppliers who offer customers the best prices and most varied or innovative products. Indeed, one of the expert economists hired by *LePage's* admitted that *LePage's*—which walked away with more than \$68 million in damages—was a less efficient producer of transparent tape than 3M. *LePage's*, 324 F.3d at 177 (Greenberg, J., dissenting). Given that *LePage's* may prop up less efficient rivals at the expense of consumers, other courts

bundling that would have led to reduced prices for consumers and higher welfare”); Richard A. Epstein, *Monopoly Dominance or Level Playing Field? The New Antitrust Paradox*, 72 U. CHI. L. REV. 49, 71 (2005) (“highly unlikely that 3M would tailor practices that cover six of its departments solely because of the effects that it would have on” the one product market in which it competed with *LePage's*).

have declined to follow it. *See, e.g., Cascade*, 515 F.3d at 899-900 (9th Cir. 2008); *see also EpiPen, Collins, and Church, supra*.

Even under *LePage's*, however, the plaintiffs here have not alleged actionable bundled discounts. The *LePage's* Court emphasized that “[t]he principal anticompetitive effect of bundled rebates as offered by 3M is that when offered by a monopolist they may foreclose portions of the market to a potential competitor *who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer.*” *Id.* at 155 (emphasis added). If a bundled discount does not result in bundled price that is below the aggregate cost of the items in a bundle (a situation that might trigger liability for predatory pricing under *Brooke Group*), then it can harm competition only if it excludes a less diversified rival. A rival that produces all the bundled product lines or some comparable array of products could match any above-cost bundled discount if it were as efficient as the discounter, and antitrust law should not intervene to protect less efficient rivals or those that are equally efficient but unwilling to reduce their profit margin to win business from discounters. For this reason, this Court has restricted liability under *LePage's* to above-cost bundled discounts that exclude *less diversified* rivals where plaintiffs plead (and ultimately prove) that they are substantially foreclosed from competition by exclusivity terms with offsetting efficiencies. *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 274 n. 11 (“The reasoning of *LePage's* is limited to cases

in which a single-product producer is excluded through a bundled rebate program offered by a producer of multiple products, which conditions the rebates on purchases across multiple different product lines.”). Where, as here, the defendant’s rivals produce all of the relevant lines of commerce, *see* Cmplt. ¶¶ 36, 52, 68 (alleging that defendant Hill-Rom’s chief rivals produce the standard, ICU, and birthing beds at issue in this case), there can be no liability for bundled discounting absent facts that show the defendant has bundled the relevant product lines with other lines for which rivals have no comparable offerings and thus can only compete by offering unsustainable below-cost prices on the relevant products. The FAC does not allege any such facts here. It alleges no prices or bundle components at all. It also alleges no facts about what bundles or discounts Hill-Rom offers and how they compare to rival bundles and discounts. Nor does it allege any facts showing that Hill-Rom’s bundles involve discounts that rival bed makers can match only by pricing their beds below-cost. Instead, the FAC admits that rivals continue to offer all relevant bed product lines to customers now, and that these rivals include Stryker—one of the largest medical suppliers in the world with product lines far beyond what Hill-Rom offers. *See* Stryker Corp., Annual Report (Form 10-K), at 1 (Feb. 11, 2026). The district court was therefore correct in concluding that “this set of facts does not fit into the limited scope of the [Court’s] opinion in *LePage’s*.” Mem. Op. at 18.

Amici supporting the plaintiffs contend otherwise. They read *ZF Meritor* as instructing that an exclusionary effect on a less diversified rival is a sufficient, not a necessary, condition for liability under *LePage*'s. Brief of Amicus Curiae American Antitrust Institute in Support of Appellant (“AAI Brief”) at 9 n. 4 (“*ZF Meritor* may have been suggesting that a single-product rival is sufficient to impose liability under *LePage*'s, but it was not suggesting that it is necessary.”). They also maintain that an excluded rival need not be a single-product producer in order to impose liability for above-cost bundled discounting because *LePage*'s itself produced multiple products, as did the plaintiff in *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3rd Cir. 1978), another Third Circuit decision condemning bundled discounts. AAI Brief at 9, n. 4; Brief of Committee to Support the Antitrust Laws as Amicus Curiae in Support of Plaintiff-Appellant at 20-21. Amici thus imply that this Court should allow the imposition of liability for above-cost bundled discounts even when the discounter's rivals are equally diversified and could, if equally efficient, match the bundled discounts at issue.

Amici are unpersuasive. The relevant language of *ZF Meritor*—“The reasoning of *LePage*'s *is limited to* cases in which a single-product producer is excluded through a bundled rebate program offered by a producer of multiple products, which conditions the rebates on purchases across multiple different product lines,” *ZF Meritor*, 696 F.3d at 274 n. 11 (emphasis added)—is plainly

stating a necessary, not sufficient, condition for liability under *LePage's*. Moreover, the *LePage's* Court itself was clear that the anticompetitive effect of an above-cost bundled discount is its potential to exclude *less diversified* rivals that cannot, even if they are as efficient as the discounter in producing the products they make, match the total dollar value of the discount on their narrower product line. *LePage's*, 324 F.3d at 155 (“The principal anticompetitive effect of bundled rebates . . . is that when offered by a monopolist they may foreclose portions of the market to a potential competitor *who does not manufacture an equally diverse group of products* and who therefore cannot make a comparable offer.”) (emphasis added). Critically, both the *LePage's* and *SmithKline* plaintiffs were far less-diversified than their bundled discounting rival, *see id.* at 144, 157; *SmithKline*, 575 F.2d at 1059, and would thus have had to match the entire dollar volume of its discount on their narrower line of products.⁵ Hill-Rom’s rivals, by contrast, produce the same types of hospital beds as Hill-Rom—standard, ICU, and birthing—and thus could, if equally efficient, match any above-cost discount on bundles of beds. The district court was therefore correct to conclude that *LePage's* is inapposite.⁶

⁵ The *ZF Meritor* Court’s reference to a “single-product producer” in its limitation of *LePage's*, *see ZF Meritor*, 696 F.3d at 274 n. 11, is just case-specific shorthand for the actual “reasoning of *LePage's*,” which facially applies only to *less diversified* (if not single-product) rivals.

⁶ To the extent plaintiffs complain of bundled discounts involving products besides hospital beds, their complaint is deficient because it does not identify what the

Amici’s apparent position—that a plaintiff complaining of a bundled discount may state an antitrust claim without identifying a less diversified rival and explaining why it cannot match the discount at issue—would empower antitrust plaintiffs to subject defendants to burdensome discovery obligations by simply stating that the defendant had offered a bundled discount. After all, there will almost always be some rival out there that produces some, but not all, items in the bundle. This Court should decline plaintiffs’ and their amici’s invitation to transform the already pro-plaintiff *LePage*’s decision into an open invitation to file strike suits.

CONCLUSION

The District Court’s judgment should be affirmed.

April 21, 2026

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products are and thus why equally efficient competitors could not match the discounts across them.

CERTIFICATE OF COMPLIANCE

1. Pursuant to Third Circuit Local Appellate Rule (L.A.R.) 28.3(d), I hereby certify that I, Dana McSherry am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.
2. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 6,457 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), as counted using the word-count function on Microsoft Word software.
3. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) and L.A.R. 32.1(c) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.
4. This electronic version of this brief complies with this Court's Rule 31.1(c) because its text is identical to the paper copies of the brief, and because the document has been scanned with Metadact and is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the Court's CM/ECF system, thereby serving all registered counsel of record.

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