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UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Civil Action No. CV96-121-M
	)	
v.	)	
	)	
GENERAL ELECTRIC COMPANY,	)	**MEMORANDUM OF THE UNITED**
	)	**STATES IN OPPOSITION TO**
Defendant.	)	**DEFENDANT'S MOTION TO DISMISS**
	)	

The United States alleges in its Complaint that General Electric Company ("GE") has entered into anticompetitive agreements with more than 500 hospitals that are among GE's most significant actual or potential competitors in servicing medical imaging equipment. These anticompetitive agreements are contained in licenses that authorize the hospitals to use certain valuable GE software to service their own GE medical imaging equipment. In exchange for the license, GE has required each hospital to agree not to compete with GE in servicing any other

facilities' medical imaging equipment, even though the hospitals would not, and indeed could not, use GE's software or any other benefit obtained from the license to service that equipment.

The Complaint alleges that these agreements, which in many areas of the country eliminated GE's only significant service competitor, have raised the prices paid and reduced the amount of service purchased by health care facilities, and left them with fewer options in various service and equipment markets. Count 1 of the Complaint alleges that these agreements not to compete violate Section 1 of the Sherman Act. Count 2 of the Complaint alleges that these agreements violate Section 2 of the Sherman Act.

GE contends that Count 1 of the Complaint should be dismissed because it fails to define a relevant market. GE is wrong for three reasons. First, the Complaint alleges that GE has entered into agreements with its competitors not to compete for customers. Such agreements are naked restraints of trade that are per se illegal under Section 1 of the Sherman Act. Under the per se rule, the United States need not define a relevant market. Second, the Complaint alleges that these agreements have raised prices and reduced output in the sale and servicing of medical imaging equipment. As GE itself concedes, allegations of actual harm to competition obviate any need to allege a relevant market. Third, the Complaint in fact identifies product and geographic markets in which GE's agreements have restrained competition. The United States need not delineate in its Complaint the precise boundaries of each and every such market in order to state a claim upon which relief can be granted.

GE argues that Count 2 of the Complaint is deficient because it fails to allege that the contracting hospitals shared GE's specific intent to monopolize. The law, however, is clear that

only one party to an illegal agreement to monopolize need have the intent to monopolize for the agreement to violate Section 2 of the Sherman Act.[1]

It is well settled that, when deciding a motion to dismiss under Rule 12(b)(6), the court must "accept[] the facts as stated by the nonmoving party from the record and draw[] all inferences in its favor." Only if it is "beyond doubt that the plaintiff can prove no set of facts in support of his or her claim" will the motion be granted. Everest and Jennings, Inc. v. American Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994); see NL Indus. v. Kaplan, 792 F.2d 896, 897 (9th Cir. 1986). Moreover, a motion to dismiss is subject to an even more "rigorous standard" in an antitrust case than in other matters. See Hospital Building Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746 (1975). Here, the Complaint clearly alleges that GE's agreements have harmed competition for the service and sale of medical equipment in Montana and throughout the country.

Because the Complaint alleges facts that if proved would violate both Sections 1 and 2 of the Sherman Act, GE's Motion to Dismiss must be denied.

I. THE ALLEGATIONS OF THE COMPLAINT

GE sells various types of medical imaging equipment. Hospitals, clinics, and doctors use imaging equipment, including MRIs, CT scanners, and x-ray machines, to create images of the body's internal structure. Complaint at ¶ 4. Such equipment is essential to the diagnosis of numerous injuries and illnesses. Id. at ¶ 16.

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[1] GE also mistakenly argues in a footnote that the Section 2 conspiracy charge is deficient because it fails to allege a relevant market. Def. Mem. at 12 n.9.

Imaging equipment, like other medical equipment, requires regular, high-quality service. Such service ensures that the equipment functions accurately and reliably, which is critical with patient health at stake. Id. at ¶ 1. Some hospitals employ and retain service engineers "in house" to service the hospital's medical equipment. Id. at ¶¶ 3, 22. Other hospitals hire outside parties such as GE to service their imaging equipment. GE services many types of medical equipment, including equipment manufactured by other companies. Id. at ¶ 20.

GE has developed highly specialized sets of software and manuals ("Advanced Diagnostics") that enable service engineers to service certain GE imaging equipment much more quickly than otherwise possible. Id. at ¶ 27. GE makes the Advanced Diagnostics available to hospitals with in-house service groups that compete or can potentially compete with GE in servicing other facilities' medical equipment. Id. at ¶¶ 3, 23, 31.

To gain access to GE's Advanced Diagnostics, however, such hospitals have to sign a license containing a "Continuing Representations" clause ("Restrictive Clause"). The Restrictive Clause prevents a hospital from servicing any medical equipment owned by others, even though it would not be possible for the hospital to use the Advanced Diagnostics to perform the service. When a hospital licenses the Advanced Diagnostics to self service its GE MRI, for example, it is required to agree not to service any medical equipment, by any means, at any unaffiliated

facility. More than 500 potentially competing hospitals have agreed to the restrictions.[2] Id. at ¶¶ 31, 33.

Each version of Advanced Diagnostics is designed to work on only one piece of equipment. The Advanced Diagnostics for one model of GE imaging equipment cannot be used on another model, even if the two models are of the same "modality" (e.g. if both are GE CT scanners), and cannot be used on other manufacturers' equipment. Id. at ¶ 30. Given the model-specific design of the software, GE's requirement that the hospitals not service any other models or other manufacturers' equipment is unrelated to any legitimate interest GE had in licensing its software.[3]

By exacting a commitment from hospitals not to provide any outside service in competition with GE in exchange for the Advanced Diagnostics, GE has harmed competition for the service of medical equipment. Id. at ¶¶ 38-41. Hospitals have been forced by GE to abandon their efforts to provide competitive service of medical equipment to other nearby health care facilities. Id. at ¶¶ 22, 31, 39.

St. Patrick Hospital in Missoula, Montana and Deaconess Medical Center in Billings, Montana are two hospitals that wanted to service other hospitals' and clinics' medical equipment, but could not due to their agreements with GE. As a result, facilities in Montana had

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[2] GE first entered into license agreements containing the Restrictive Clause in 1988. The 1988 Restrictive Clause forbade each hospital and its employees from servicing, even in their off hours, medical imaging equipment of others. [Attachment A]. In 1992, GE broadened the restrictive language to prohibit the hospital and its employees from servicing any medical equipment of others. [Attachment B]. GE continued to use this broader language at least through April 1996.

[3] In fact, because of technological safeguards commonly used by GE (e.g. "fingerprinting"), software licensed for one machine physically cannot be used on any other machine, even on another machine of the same model.

fewer service options, and in many cases, no other option than to turn to GE for service. Id. at ¶ 39. Consequently, health care facilities have paid supracompetitive prices for equipment service and purchased less service than they otherwise would have. Id. at ¶¶ 40, 43.

The Restrictive Clause has also reduced competition in the sale of medical imaging equipment in Montana and throughout the nation. Health care facilities need prompt and affordable repairs for their imaging equipment. Because of the cost and delays of travel, proximity to a service provider is a key factor in being able to get efficient service. Consequently, hospitals are reluctant to purchase a piece of imaging equipment unless someone near their facility can service it. Id. at ¶¶ 17, 19.

Because manufacturers cannot economically place their own service engineers in areas where they do not have a large installed base, they need someone else in those areas who is qualified to service their equipment. Id. at ¶ 19. Hospitals with in-house service departments could provide such service for a given manufacturer's equipment. Id. at ¶¶ 3, 39. But, because GE exacted agreements from hospitals not to provide needed service, GE has disadvantaged its equipment manufacturing competitors. Id. at ¶ 44. As a result, GE has restrained health care facilities in Montana and similar areas from purchasing imaging equipment from manufacturers other than GE, even though the equipment may have better suited the facilities' needs. Id. at ¶¶ 42, 45.

II. THE UNITED STATES HAS PROPERLY ALLEGED A VIOLATION OF SECTION 1 OF THE SHERMAN ACT.

GE contends that Count 1 of the United States' Complaint must be analyzed under a "rule of reason," which requires proof of markets. GE then argues that the Complaint is deficient

because it does not define a "relevant market." GE misapprehends the nature of the Complaint and misstates the law.

A. The Complaint Alleges that GE's Restrictive Clause Allocates Service Markets Which Is a Per Se Violation of Section 1 of the Sherman Act, Not Requiring Market Definition.

Count 1 of the Complaint alleges that GE has entered into agreements with more than 500 hospitals throughout the United States not to compete with GE in the service of medical equipment owned by third parties. Id. at ¶¶ 29, 31. Each of these hospitals was an actual or potential competitor of GE in the servicing of other facilities' medical equipment, and its status as such a competitor of GE did not depend on and was entirely independent of any license or other agreement it might have had with GE. Accordingly, the agreements between GE and the hospitals are "horizontal."[4] . Id. at ¶ 3.

An agreement between horizontal competitors not to compete with each other for customers is the type of restraint that is so likely to have anticompetitive effects that it is deemed to be per se illegal under the antitrust laws. See, e.g., Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990) (per curiam).

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[4] A restraint is "horizontal" when it involves parties that perform comparable economic functions at the same level of market structure. Kilter, Federal Antitrust Law, §10.40. Here, both GE and the in-house service organizations can provide service for medical equipment. While the hospitals, as GE's customers and licensees, also have a vertical relationship with GE, the restraint at issue in this case relates solely to their positions as competitors of medical equipment service. Compare Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348 (9th Cir. 1982), cited by GE. (Def. Mem. at 8).

Application of the "per se rule" means the restraint is conclusively presumed to harm competition as a matter of law, without requiring further proof.[5] Consequently in a per se case, courts will find conduct unlawful without inquiring into the particular market context or effects.

The agreements between GE and its licensees not to compete to service other facilities' medical equipment are essentially agreements to allocate customers, long held to be per se illegal. See Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5 (1958). Indeed, the agreements are remarkably similar to agreements the Supreme Court recently held to be per se illegal in Palmer v. BRG of Georgia, 498 U.S. at 49-50. In Palmer, the Court reviewed a license agreement between Harcourt Brace Jovanovich Legal and Professional Publications ("HBJ"), and BRG of Georgia ("BRG"), two companies that offered bar review courses. HBJ had licensed copyrighted materials to BRG for use in offering a review course for the Georgia Bar. In return for the license, BRG promised not to begin to compete with HBJ by offering bar review courses outside Georgia, the territory which HBJ wished to reserve for itself. As here, the restrictions at issue were restrictions on BRG's ability to compete, not restrictions on BRG's use of the licensed materials. The Court summarily held that the agreement was a market allocation and a per se violation of Section 1 of the Sherman Act. Id. Because the agreements not to compete are per se violations of Section 1 of the Sherman Act, no allegation of market definition is required.

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[5] The long-standing per se rule avoids overly burdensome market analyses in cases where the likelihood of anticompetitive effects is obvious, thus avoiding the high costs traditionally associated with a full-blown rule of reason analysis. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 (1984). Conduct that falls within the per se approach includes horizontal and vertical price fixing, and horizontal market division. Taggart v. Rutledge, 657 F. Supp. 1420, 1440 (D. Mont. 1987) (Lovell, J.), aff'd, 852 F.2d 1290 (9th Cir. 1988).

GE contends, in one sentence of its motion unsupported by any analysis, that the legality of its agreement with the hospitals should be assessed under the rule of reason because the restrictions are "plainly ancillary to a legitimate and procompetitive transfer of GEMS' valuable intellectual property." Def. Mem. at 7. In doing so, GE ignores Paragraph 8 of the Complaint, which alleges that "[t]he agreements GE has exacted from its licensees not to service other facilities' medical equipment are unrelated to any of GE's legitimate interests in licensing its software and manuals."[6]

While restraints that are ancillary to a legitimate transaction are exempt from the per se rule, and thus analyzed under the rule of reason, the defendant must establish that the restraints are in fact ancillary. A restraint is ancillary if it is reasonably necessary to achieve a procompetitive objective. See Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1395-1396 (9th Cir.) (an agreement is ancillary if it is "subordinate and collateral to another legitimate transaction and necessary to make that transaction effective"), cert. denied, 469 U.S. 990 (1984); see also, U.S. Dep't of Justice & the Federal Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property, Section 3.4 (1995) 1995, WL 229332 (D.O.J.) at *11 (whether a restraint in a licensing arrangement is ancillary depends on "whether the restraint in question can be expected to contribute to an efficiency-enhancing integration of economic activity"). GE will thus have to prove that the Restrictive Clause is reasonably necessary to the success of its legitimate objective -- licensing its Advanced

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[6] GE's licenses contain a number of provisions that limit a licensee's ability to use the Advanced Diagnostics for any purpose other than to service its own equipment. Those provisions, similar to provisions found in many software licenses to prevent software from being misappropriated, are not being challenged in this case.

Diagnostics for the licensee's own use. The mere fact that the restriction is included in an agreement that also licenses the Advanced Diagnostics is not itself sufficient to establish that the restraints are ancillary to the license and thus that the per se rule does not apply. Only if GE can prove that the Restrictive Clause was reasonably necessary to achieve the pro-competitive benefits of the license should the court undertake a rule of reason analysis.[7] Ancillarity is in the first instance a question of fact on which the defendant has the burden of proof. The Complaint alleges that the challenged provision is not a legitimate ancillary restraint, and this allegation is sufficient to withstand a motion to dismiss.

B. The United States Need Not Allege a Relevant Market Because It Alleges "Actual Detrimental Effects on Competition."

Even if GE could demonstrate that the restraints are ancillary to its license agreements, and therefore should be assessed under the rule of reason, the United States need not delineate relevant markets if it shows "actual detrimental effects on competition." See FTC v. Indiana Federation of Dentists, 476 U.S. 447, 460-61 (1986). Defendants in Indiana Federation argued, as GE does here, that a violation could not be found without a "definition of the market." Id. at 460. Flatly rejecting that claim, the Supreme Court explained:

> [s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effect, such as a reduction of output can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects." 7 P. Areeda, *Antitrust Law* ¶ 1511, p. 429 (1986).

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[7] GE's quotation from Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 229 (D.C. Cir. 1986), to the effect that the Court must use a rule of reason analysis if the restraint, among other things, "appears capable of enhancing the group's efficiency" does not help it here. Def. Mem. at 8. The Complaint alleges that the Restrictive Clause is unrelated to any legitimate interest. Complaint at ¶8. Thus, the clause does not enhance any efficiency.

Id. at 461. Similarly, in Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1448 (9th Cir. 1988), the Ninth Circuit held that plaintiffs did not need to prove a relevant market where they had shown actual detrimental effects, i.e., that some customers who preferred plaintiffs' service were hindered from obtaining it or that the price of the service had increased. 861 F.2d at 1448.

The Complaint clearly alleges that GE's Restrictive Clause has had "actual detrimental effects." It specifically alleges that the Restrictive Clause has forced health care facilities to pay higher service prices, purchase less service, and have fewer options in various service and equipment markets. Complaint at ¶¶ 40-45. Accordingly, even if the Court were to assess the legality of GE's agreements not to compete under the rule of reason -- which the Government contends would be inappropriate -- the United States is not required to delineate a relevant market.[8]

C. The Complaint Adequately Describes Markets Where Competition Is Restrained.

Although GE's restraints should be condemned as per se illegal without inquiry into market definition, and although the United States has specifically alleged that the restraints have had actual detrimental effects and thus the United States need not allege relevant markets, the Complaint nevertheless adequately identifies those markets in which competition has been unreasonably restrained.

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[8] GE, in a footnote, seemingly recognizes that the United States' allegations of actual detrimental effects obviate the need for market definition. See Def. Mem. at 9 n.8, citing Oltz.

The Complaint alleges that more than 500 hospitals throughout the United States that are among GE's most significant competitors in the servicing of medical imaging equipment agreed not to service any medical equipment owned by other health care providers in competition with GE. Complaint at ¶¶ 23, 29, 31. The Complaint further alleges that the provision of service on each type of medical imaging equipment is a separate product market, and that those markets are local in nature. Id. at ¶¶ 14-18. The Complaint alleges that GE's agreements restrained competition in each of these product and geographic markets. Id. at ¶¶ 38-41, 43. Additionally, the Complaint alleges that the sale of each type of medical imaging equipment is a separate market; and that because the availability of service is so important to the sale of equipment and that availability varies by location, the geographic markets for the sale of each type of equipment are local. Id. at ¶¶ 18, 19. The Complaint further alleges that GE's agreements with its licensees have limited the ability of GE's competitors in the sale of medical imaging equipment to compete in markets where those manufacturers have a limited installed base and cannot offer their own service, including Montana. Id. at ¶¶ 19, 42, 44-45.

Under Rule 12(b)(6), these allegations of relevant markets are sufficient, even assuming that the United States were required to define relevant markets in this case. The Complaint need only "sketch the outline" of the antitrust violation and allege "injury to competition within a framework of market analysis." Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 508 (9th Cir. 1989); see Z. Channel Ltd. Partnership v. Home Box Office, Inc., 931 F.2d 1338, 1340 n.3 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992). ("[T]he Complaint need only allege sufficient facts from which the Court can discern the elements of an injury resulting from

an act forbidden by the antitrust laws.")[9] The United States has provided GE with adequate notice of the markets where the anticompetitive effects occur. For the same reasons, GE's alternative motion for a more definite statement of market definition also should be rejected.

III. THE COMPLAINT PROPERLY ALLEGES A COMBINATION TO MONOPOLIZE IN VIOLATION OF SECTION 2 OF THE SHERMAN ACT.

GE contends that the United States has not alleged a specific intent to monopolize by each of the 500 hospitals that have agreed to forgo competition with GE. GE further argues that the United States must prove such intent for its Section 2 Count to be valid. GE, however, misreads the law relating to a Section 2 combination to monopolize.[10]

A. A Combination to Monopolize Does Not Require a Specific Intent to Monopolize by Every Party to the Combination.

To prove a combination to monopolize under Section 2 of the Sherman Act, the plaintiff need only show a "[s]pecific intent to monopolize and anticompetitive acts designed to effect that intent." Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1491 (9th Cir.

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[9] To argue that the Complaint does not sufficiently identify the relevant markets, GE relies on cases in which the plaintiff either failed to allege harm to competition See Razorback Ready Mix Concrete Co. v. Weaver, 761 F.2d 484, 488 (8th Cir. 1985); Five Smiths, Inc. v. NFL Players Ass'n, 788 F. Supp. 1042, 1051-52 (D. Minn. 1992); Carsten v. United Parcel Serv., Inc., 1996-1 Trade Cases ¶71,413, 1996 WL 335421, at *2 (E.D. Cal. March 26, 1996), or in which the plaintiff pled a market so narrow as to be implausible as a matter of law. Joplin Enter. v. Allen, 795 F. Supp. 349, 352-53 (W.D. Wash. 1992). None of those cases applies here where the United States has pled harm to competition in plausible product and geographic markets.

[10] Section 2 of the Sherman Act makes it unlawful to "combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations." 15 U.S.C. § 2. The Supreme Court has clearly stated that a "combination" under the antitrust laws can exist even if one party "unwillingly compl[ied]" with the demands of the other or "acquiesced" in the demand only because of "threats of termination." See Albrecht v. Herald Co., 390 U.S. 145, 149 & n.6 (1968).

1991); Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 926 (9th Cir. 1980), cert. denied, 450 U.S. 921 (1981). A "specific intent to monopolize" means an intent to exclude competition or control prices. Carpet Seaming Tape Licensing Corp. v. Best Seam, Inc., 616 F.2d 1133, 1141 (9th Cir. 1980); see American Tobacco Co. v. United States, 328 U.S. 781, 789 (1945) (object of a combination or conspiracy to monopolize is the exclusion of actual and potential competitors). The intent to monopolize can be inferred from the character of the actions taken, i.e. agreeing not to compete. See Morgan, Strand, Wheeler & Biggs, 924 F.2d at 1491; Hunt-Wesson Foods, 627 F.2d at 926.

GE does not dispute that the Complaint alleges that it has the requisite intent to establish a combination or conspiracy to monopolize. It errs, however, when it claims that all 500 licensee hospitals need to harbor the same intent. The law is clear that it is sufficient if the hospitals agreed to cooperate with GE with some awareness of the anticompetitive effect.

The Ninth Circuit has repeatedly acknowledged that a combination to monopolize may exist even if one party thereto lacks the desire to achieve the anticompetitive result sought by the other party. See City of Vernon v. Southern California Edison Co., 955 F.2d 1361, 1371 (9th Cir.) ("[A] conspiracy to monopolize may exist even where one of the conspirators participates involuntarily or under coercion."), cert. denied, 506 U.S. 908 (1992); Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 682 (9th Cir.) ("The involuntary nature of one's participation in a conspiracy to monopolize is no defense."), cert. denied, 429 U.S. 940 (1976); cf. MCM Partners Inc. v. Andrews-Bartlett & Assocs., Inc., 62 F.3d 967, 973 (7th Cir. 1995) (citing the Supreme Court in United States v. Paramount Pictures, Inc., 334 U.S. 131, 161 (1948), and thirteen other cases, to support its holding that a Section 1 conspiracy "is not negated

by the fact that one or more of the co-conspirators acted unwillingly, reluctantly, or only in response to coercion").

In both City of Vernon and Calnetics, even though one party to the conspiracy did not desire the anticompetitive effects of the conspiracy, but was coerced into participating in it, the courts found that a combination to monopolize could exist. Likewise, GE's licensees did not seek the anticompetitive effects that GE sought. Indeed, many wanted to offer high-quality, low-cost service to neighboring hospitals and clinics. Complaint at ¶¶ 23, 39. They agreed not to compete because that was the only way to obtain the valuable Advanced Diagnostics. Id. at ¶¶ 27, 31.

A case on which GE elsewhere relies, Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990 (9th Cir. 1986), cert. denied, 479 U.S. 1031 (1987), is directly on point. Syufy states that, to establish a conspiracy to monopolize under Section 2, a plaintiff must show that the co-conspirator has "at least some awareness that the underlying conduct was anticompetitive or monopolistic." Id. at 1001; cf. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 143 (1968) (White J., concurring) (antitrust suit not barred because one party's participation in the illegal arrangement was required by the other).

The court in Syufy found there was no conspiracy only after finding no evidence that the other parties "knew or even should have known that Syufy would use the film licenses for monopolistic purposes." Id. at 1000. In contrast, GE's licensees knew or should have known that their agreements not to compete with GE would reduce competition in service markets.[11]

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[11] For its contrary position, GE relies on a footnote in Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1437 n.8 (9th Cir.), cert. denied, 116 S. Ct. 515 (1995). Even though Rebel Oil involved a claim under Section 2 for "attempted monopolization" and not

B. GE's Argument that the Hospitals Do Not Have an Economic Incentive to Cooperate with GE Ignores the Allegations of the Complaint.

GE purports to argue that the Government could not allege that GE's licensees had the specific intent to monopolize. The substance of GE's argument, however, is instead that the hospitals had no rational economic motive to enter agreements that would allow GE to achieve its anticompetitive goal. Def. Mem. at 17-20. Contrary to GE's assertions, the Complaint describes a clear motive: The licensees desire the Advanced Diagnostics to increase the speed with which they service their own imaging equipment. Complaint at ¶ 29. As each hospital's overriding goal is to provide quality health care to its own patients, it is not surprising that the hospitals agreed not to compete with GE in servicing medical equipment for other institutions in order to obtain the Advanced Diagnostics. To provide quality health care, a hospital must have imaging equipment that is well-maintained and quickly repaired. Id. at ¶¶ 7, 15-17. The Advanced Diagnostics allow a hospital's in-house engineers to maintain its equipment more effectively and to service it much more quickly. Id. at ¶¶ 27, 29.

One case, elsewhere cited by GE, is particularly instructive on this "economic incentive" point. In Oltz v. St. Peter's Community Hosp., 656 F. Supp. 760 (D. Mont. 1987) (Smith, J.), aff'd, 861 F.2d 1440 (9th Cir. 1988), a hospital was accused of combining with a group of anesthesiologists to exclude two other anesthesiologists. Like GE, defendants there made "an extensive argument" that the hospital had "no economic motive" to see the group succeed. Oltz,

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"conspiracy to monopolize," the court volunteered dictum in footnote 8 that plaintiff would need to prove an "intent to conspire" by all participants in order to prevail. That does not mean, as GE implies, that every participant needs an "intent to monopolize." Rebel Oil is consistent with Syufy's holding that the underlying conduct must be coupled with "at least some awareness" that the conduct will have anticompetitive effects.

656 F. Supp. at 762. The court rejected that argument because the group of anesthesiologists "had threatened to quit" and the hospital understood that, "[I]f several of the anesthesiologists leave the community, the quality of anesthesia services would deteriorate. Overall quality of care in the hospital would decline in [that] no anesthesiologists could be recruited to replace those who are leaving." Id. at 763.

Like the hospital in Oltz, the hospital licensees here determined that they would be worse off if they did not agree to GE's demands. They concluded that "overall quality of care in the hospital would decline" since they would lose the Advanced Diagnostics that enabled them to lower the costs of servicing their own equipment unless they agreed not to compete with GE in the outside service market. Caught between the rock and the hard place of either forgoing access to valuable diagnostic material to enhance their own provision of health care or forgoing the provision of service to neighboring facilities, GE's licensees understandably chose the latter.[12] Thus, the Complaint adequately alleges that GE's licensing agreements constitute combinations to monopolize in violation of Section 2 of the Sherman Act.

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[12] In claiming that the hospitals had no motive to cooperate with it, GE relies on cases that are irrelevant. In each of those cases the plaintiff could not show that the party allegedly conspiring with the monopolist would receive any benefit from doing so. See, e.g., TV Communications Network, Inc. v. TNT, 964 F.2d. 1022, 1026 (10th Cir. 1992) ("[A]chievement of the goal of the conspiracy would actually be contrary to the interest of the [alleged co-conspirators]"); Kramer v. Pollock-Krasner Foundation, 890 F. Supp. 250 (S.D.N.Y. 1995) (one alleged co-conspirator would have risked going out of business if it helped the other to monopolize).

C. The United States' Allegation of a Combination to Monopolize in Violation of Sherman Act Section 2 Does Not Require Proof of a Relevant Market.

In a footnote, GE argues that a combination to monopolize under Section 2 of the Sherman Act also requires proof of a "relevant market." Def. Mem. at 12 n.9. However, most courts have held that proof of a relevant market is not necessary to establish a combination to monopolize under Section 2.[13] Indeed, one authority cited by GE makes that clear.[14] The Ninth Circuit is in accord that a combination to monopolize does not require allegations of a relevant market because, unlike other types of antitrust claims, it does not require proof of any "particular level of market power or 'dangerous probability of success.'" Hunt-Wesson Foods, 627 F.2d at

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[13] See, e.g., Salco v. General Motors, Inc., 517 F.2d 567, 576 (10th Cir. 1975); United States v. Consolidated Laundries, 291 F.2d 563, 573 (2d Cir. 1961); Olsen v. Progressive Music Supply, Inc., 703 F.2d 432, 438 (10th Cir.), cert. denied, 464 U.S. 866 (1983); Alexander v. National Farmers Org., 687 F.2d 1173, 1182 (8th Cir. 1982)("A section 2 claim for conspiracy to monopolize, however, generally does not require proof of a relevant market . . . . [It] does require a minimal showing of product and geographic context -- upon what and where the alleged conspiracy is focused -- to ensure that a claim is not based upon some abstract showing of unlawful intent. The nature of such proof, however, is simply to show the context of the conspiracy. It need not be as rigorous as the relevant market showing for other Section 2 claims, because actual attainment or "dangerous probability" of monopoly power is not at issue in a conspiracy claim."), cert. denied, 461 U.S. 937 (1983); Perington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369, 1377 (10th Cir. 1979); United States v. National City Lines, 186 F.2d 562, 568 (7th Cir. 1951); Richter Concrete Corp. v. Hilltop Basic Resources, Inc., 547 F. Supp. 893, 915 (S. D. Ohio 1981), aff'd, 691 F.2d 818 (6th Cir. 1982); Carlos C. Gelardi Corp. v. Miller Brewer Co., 421 F. Supp. 237, 245 n.14 (D.N.J. 1976); Giant Paper and Film Corp. v. Albermarle Paper Co., 430 F. Supp 981, 987 (S.D.N.Y. 1977); see also American Tobacco, 328 U.S. at 789.

[14] See 3 Philip Areeda & Donald F. Turner, Antitrust Law ¶ 839 at 358-9 (1978). Defendants quote part of a sentence from Areeda and Turner for support of their position, but in that same paragraph Areeda and Turner also state:

> We do note that the courts referring to conspiracies to monopolize have generally held that market power or market definition is not a prerequisite to finding that offense. . . . Where the agreements involved would also be held to offend §1 without the necessity of proving power, the failure to require it for the §2 conspiracy offense is understandable.

926 (citing Salco and Consolidated Laundries). Thus, a Section 2 combination does not require that a relevant market or power therein be pled or proven.

CONCLUSION

In deciding a motion to dismiss, the Court must accept the facts as stated in the Complaint and draw all inferences in the United States' favor. See Everest and Jennings, Inc., 23 F.3d at 228. It is clear that the United States has alleged facts that would support a finding that GE has violated both Sections 1 and 2 of the Sherman Act. Accordingly, GE's Motion to Dismiss must be denied.

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Respectfully submitted,

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