UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY B. ALPERN, D.O.	:	
	:	
v.	:	
	:	CIVIL ACTION
NICHOLAS C. CAVAROCCHI,	:	
M.D., P.C., et al.	:	No. 98-3105
	:	
v.	:	
	:	
ST. LUKE'S HOSPITAL, et al.	:	

O'Neill, J. April 28, 1999

M E M O R A N D U M

Counterclaim plaintiffs Nicholas Cavarocchi, M.D., and his professional corporation, Nicholas Cavarocchi, M.D., P.C., assert federal antitrust and various state law claims against counterclaim defendants St. Luke's Hospital, Jeffrey B. Alpern, D.O., and Gregory L. Erdelyan, M.D. Now before the Court is St. Luke's motion to dismiss all of the claims asserted against it for failure to state a claim upon which relief can be granted. Fed. R. Civ. Proc. 12(b)(6). For the reasons set forth below, the motion will be granted in part and the federal antitrust counterclaims will be dismissed. In addition, upon sua sponte consideration of its subject matter jurisdiction over the various state law claims asserted in this matter, the Court will dismiss all remaining state law claims in this action.

BACKGROUND

This litigation commenced on June 15, 1998 when Alpern filed a complaint against Cavarocchi and his professional corporation (the "Corporation"). Alpern, who was employed by the Corporation from August 1994 until November 1997, asserts three claims: for unpaid pension contributions for the years 1994 through 1996 under the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq.; for unpaid wages and benefits due for the month of October 1997 under the Pennsylvania Wage Payment and Collection Law, 43 Pa. C.S.A. § 260.1 et seq.; and for breach of Cavarocchi's alleged fiduciary duties to Alpern based on Cavarocchi's failure to inform Alpern of an opportunity to commence a new practice in cooperation with a third party, Mercy Med-Care, Inc. Presumably on the basis of his ERISA claim, Alpern invokes the Court's jurisdiction under 28 U.S.C. § 1331, which provides the federal district courts with original jurisdiction over all actions arising under federal law.

Cavarocchi and the Corporation have since joined Erdelyan and St. Luke's Hospital as counterclaim defendants and asserted thirteen counterclaims against Alpern, Erdelyan, and St. Luke's. Eight of these name St. Luke's as a defendant and the remaining five are asserted against Alpern and/or Erdelyan only. The counterclaim plaintiffs invoke the Court's original federal question jurisdiction over their two antitrust claims and the Court's supplemental jurisdiction over the counterclaims arising under state law. See 28 U.S.C. § 1367.

Counterclaim plaintiffs allege the following facts relevant to this opinion. Dr. Cavarocchi is a cardiothoracic surgeon who sues on behalf of himself and his professional

Corporation, a practice associated with defendant St. Luke's Hospital of Bethlehem, Pennsylvania. I will generally refer to the counterclaim plaintiffs collectively as "Cavarocchi" or "plaintiff." Defendants Alpern and Erdelyan practiced cardiothoracic surgery with Cavarocchi as employees of the Corporation. Alpern joined the Corporation in August 1994 and was an at-will employee of the Corporation at the time of the events at issue in this case. Erdelyan began working for the Corporation on January 1, 1997, when he signed a one-year employment contract. (Compl. ¶¶ 45-46, 49.)

In early 1997, plaintiff entered into negotiations with Mercy Med-Care, Inc. ("Mercy") to establish a practice at Mercy's Wilkes-Barre and Scranton locations. He "anticipated that his practice at St. Luke's would continue as the Mercy relationship would not be in competition with St. Luke's." (Compl. ¶ 51.) In August 1997, apparently foreseeing the need to associate more physicians with his St. Luke's practice in order to commence his new Mercy practice, plaintiff requested additional applications for medical staff privileges at St. Luke's. The counterclaim does not state what happened with this request, but plaintiff states in his brief that he never got a reply to this request. Plaintiff and Mercy reached and executed an agreement on October 2, 1997, and plaintiff actually commenced practice at Mercy in late November, 1997. (Compl. ¶ 53-55.)

In late October, 1997, after plaintiff reached agreement with Mercy but before he had commenced practice there, plaintiff had a conversation about his new Mercy practice with two St. Luke's staff physicians, Doctors Morin and Giamber, neither of whom are parties in this lawsuit. Morin and Giamber had apparently been informed by Alpern and Erdelyan that plaintiff was establishing a practice at Mercy and that Alpern and Erdelyan intended to leave plaintiff's

St. Luke's practice. Morin and Giamber told plaintiff that St. Luke's was unhappy about his new Mercy practice. They also told him that he would not have enough coverage for his St. Luke's practice without Drs. Alpern and Erdelyan, and Dr. Morin stated that he would try to prevent plaintiff from hiring any more doctors for his staff. Apparently, it was news to plaintiff that Alpern and Erdelyan were planning to quit his practice. Within three days of this conversation (effective November 1, 1997), Alpern and Erdelyan did quit and shortly thereafter they commenced their own cardiothoracic practice from a St. Luke's office building. (Compl. ¶¶ 56-60.)

On November 5, 1997, St. Luke's wrote plaintiff demanding that he stop his Mercy work in order to cover his St. Luke's patients. On the same day, plaintiff wrote St. Luke's to request medical staff applications for two additional physicians to cover his practice. In the meantime he got another doctor to provide temporary coverage for his patients. On November 14, St. Luke's announced that it would be closing the medical staff for cardiothoracic surgery (limiting it to six physicians), and thereafter refused plaintiff's repeated requests for additional staff applications. On December 12, 1997, the Medical Staff Development Committee of St. Luke's Board of Trustees adopted a resolution requiring preapplication approval by the Board for future applicants to the medical staff. New cardiothoracic physicians were thereafter added to the staff, but the complaint does not state when or how many. Nor does the complaint state that plaintiff ever sought preapplication approval for any particular new associates for his St. Luke's practice. (Compl. ¶¶ 62-67, 104.)

The foregoing events, plaintiff alleges, occurred in furtherance of a conspiracy between St. Luke's, Alpern, and Erdelyan that began as early as January 1996 and was aimed at

destroying or stealing his practice. These events and the alleged conspiracy are the basis of plaintiff's antitrust claims and most of his tort claims against St. Luke's. Basically, construed in plaintiff's favor, the complaint appears to allege that defendants engineered a one-two punch in which Alpern and Erdelyan abandoned his practice and St. Luke's then refused to grant additional staff applications so that plaintiff was unable to add new associates to take their place.

The remainder of plaintiff' claims against St. Luke's are based on allegations that he was wrongfully associated with an instance of medical malpractice (or so the counterclaim alleges) that occurred in February 1998. (See Compl. ¶¶ 69-75.) Allegedly, a former patient of plaintiff underwent surgery by Erdelyan to replace a heart valve. Upon encountering "difficulties" with the operation, Erdelyan called Alpern to assist him and also obtained advice from Dr. Morin. A few days later, however, the patient died. The patient's medical records incorrectly listed Cavarocchi as a treating physician, so his name "may have been reported to administrative agencies with oversight responsibilities." (Compl. ¶ 76.) Cavarocchi asserts claims for defamation and negligence based on these facts.

STANDARD

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint. The question presented is whether the facts alleged in the complaint, assuming their truth, support plaintiff's claims. See Kost v. Kozakiewicx, 1 F.3d 176, 183 (3d Cir. 1993). "The pleader is required to 'set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist.'" Id., quoting 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1357, at 340 (2d ed. 1990).

In considering whether Cavarocchi has met this requirement as to each of his claims, I accept as true the well-pleaded factual allegations in the complaint and construe them in the light most favorable to plaintiff. Id. I may grant the motion only if I determine that plaintiff may not prevail under any set of facts that may be proven consistent with his allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Jordan v. Fox, Rothchild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). I am not, however, required to accept allegations that amount to mere legal conclusions or "bald assertions" without any factual support. See, e.g., Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997); Kost, 1 F.3d at 183.

I. THE ANTITRUST CLAIMS

Cavarocchi asserts that defendants' alleged conduct amounted to a restraint of trade and monopolization or attempted monopolization in violation of § 1 and § 2 of the Sherman Act (Counts I and II). Section 1 of the Sherman Act outlaws "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Section 2 of the Sherman Act makes it illegal "to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . ." 15 U.S.C. § 2. The alleged "relevant market" with regard to both claims is the market for cardiothoracic surgery in Bethlehem, PA. Cavarocchi sues to recover for the alleged Sherman Act violations pursuant to § 4 of the Clayton Act, which provides a cause of action for treble damages and the costs of suit to "any person who

shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15.

St. Luke's contends that Cavarocchi fails to state a claim under either § 1 or § 2 because he does not sufficiently allege "antitrust injury" -- i.e., harm to competition. St. Luke's also argues that the § 1 claim fails because plaintiff does not sufficiently allege conspiracy by defendants. In response to these arguments, Cavarocchi argues that St. Luke's is demanding something more than the "notice pleading" required by Federal rules of procedure, that he has alleged all the elements of his antitrust claims, and that the Court of Appeals for the Third Circuit has discouraged summary dispositions of antitrust cases. Cavarocchi has not sought leave to amend his complaint in response to St. Luke's motion to dismiss.

The Court of Appeals has indeed found occasion to discourage dismissing antitrust claims at the pleading stage. See Brader v. Allegheny General Hosp., 64 F.3d 869, 876 (3d Cir. 1995). However, there is no per se rule that antitrust claims are not subject to summary disposition, and courts have not hesitated to dismiss antitrust claims at the pleading stage in proper cases. See Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) (affirming dismissal of § 1 claims for failure to state a claim upon which relief could be granted). Our Court of Appeals has done so frequently, most recently in Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 1999 WL 167619 (3d Cir. 1999) (affirming dismissal of § 1 claims for failure to allege "antitrust injury") and City of Pittsburgh v. West Penn Power Co., 147 F.3d 256 (3d Cir. 1998) (same).[1] In this case, I am firmly convinced

[1] See also, e.g., Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997) (affirming dismissal of claims under § 2 for monopolization and attempted monopolization); Schuylkill Energy Resources v. Pennsylvania Power & Light Co., 113 F.3d 405, 412-13 (3d Cir. 1997) (same);

that plaintiff has not alleged facts constituting cognizable antitrust claims and that defendants should not be put to the task of defending against them.

A. Antitrust Injury

Section 4 of the Clayton Act has been construed over the years to encompass a number of "standing" requirements for private antitrust plaintiffs. Among these is "antitrust injury." "Antitrust injury," in turn, encompasses a number of requirements that limit which potential plaintiffs may maintain private antitrust claims and the injuries for which they may recover -- even where antitrust violations are established (or assumed). As the Supreme Court summed up in Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990):

> A private plaintiff may not recover damages under § 4 of the Clayton Act merely by showing 'injury causally linked to an illegal presence in the market.' . . . Instead, a plaintiff must prove the existence of 'antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'

Id. at 334, quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

Essential to "antitrust injury" is a showing that the defendants' challenged conduct has harmed competition. The antitrust laws, after all, protect competition, not competitors. Brunswick Corp., 429 U.S. at 488. Business practices -- however unseemly, hurtful, or even otherwise unlawful-- do not constitute antitrust violations unless they harm, or at least endanger, competition. See, e.g., Tunis Bros. Co., 952 F.2d 715, 728 (3d Cir. 1992). Thus, an antitrust

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Commonwealth ex rel. Zimmerman v. Pepsico, Inc., 836 F.2d 173, 179-183 (3d Cir. 1988) (affirming dismissal of § 1 claims). Cf. Rototherm Corp. v. Penn Linen & Uniform Service, Inc., 1997 WL 419627 (E.D. Pa. July 3, 1997) (dismissing antitrust claims); Pao v. Holy Redeemer Hosp., 547 F. Supp. 484, 491 (E.D. Pa. 1982) (same).

plaintiff must allege that the "challenged conduct affected the prices, quantity or quality of goods or services,' not just his own welfare." Mathews v. Lancaster General Hosp., 87 F.3d 624, 641 (3d Cir. 1996), quoting Tunis Bros. Co., 952 F.2d at 728. Moreover, for an injury to be actionable under § 4, the injury must "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." Brunswick Corp., 429 U.S. at 489; see also Atlantic Richfield Co., 495 U.S. at 339. This is so because actions which violate the antitrust laws do not necessarily have only anti-competitive effects; they may also have pro-competitive or neutral effects. The antitrust injury requirement "ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." Atlantic Richfield Co., 495 U.S. at 344.

In many cases, the question of antitrust injury -- i.e., whether alleged antitrust violations have had anticompetitive effects and thereby injured the plaintiff -- presents factual questions that may only be decided on summary judgment at the earliest. Where a physician alleges that he or she has been excluded from the market, for example, factual development may be required to ascertain whether that exclusion has caused or entailed some harm to the market.[2] In this case, however, I conclude as a matter of law that Cavarocchi fails to allege "antitrust injury."

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[2] See, e.g., Brader v. Allegheny General Hosp., 64 F.3d 869, 872, 875-76 (3d Cir. 1995); cf. Mathews v. Lancaster General Hosp., 87 F.3d 624, 641 (3d Cir. 1996) (affirming summary judgment entered against plaintiff physician who asserted antitrust claims based on restrictions placed on his staff privileges by the defendant hospitals in light of the district court's finding that "orthopedic services are still readily available to consumers in the Lancaster area from a large and ever-increasing number of providers" and that restrictions placed on the plaintiff's privileges did not extinguish his ability to provide services altogether, "but merely curtailed his ability to perform spine surgery at Lancaster General."); Angelico v. Lehigh Valley Hosp., Inc., 984 F. Supp. 308, 313-14 (E.D. Pa. 1997) (granting summary judgment on antitrust claims against plaintiff physician who had failed to demonstrate that his exclusion from the relevant markets had reduced the number of cardiothoracic surgeons practicing in that geographic market, increased prices, reduced quality, or had any other adverse effect on consumers in that market).

This is so because there are no facts alleged which, if proven, would establish that defendants' alleged conduct has caused harm to competition, as distinguished from harm to Cavarocchi's practice at St. Luke's. Cavarocchi does not allege that the number of cardiothoracic surgeons in the alleged Bethlehem market was reduced as a result of defendants' actions, or even merely that he himself was excluded from that market by defendants.[3] Rather, he alleges that what was one practice (Cavarocchi's) with three doctors became two practices (Cavarocchi's and Alpern and Erdelyan's) with three or more doctors. This is a pro-competitive result, not an anti-competitive one.

As to St. Luke's alleged refusal to enable Cavarocchi to add new associates, this alleged conduct merely prevented plaintiff from maintaining as large and lucrative a practice at St. Luke's as he had enjoyed prior to commencing his Med-Mercy practice and being abandoned by Drs. Alpern and Erdelyan. Cavarocchi does not and apparently cannot allege that he lost his St. Luke's practice altogether due to defendants' conduct. His own ability to practice at St. Luke's was apparently unchanged; if he lost his practice, the allegations make clear, it was because of his commitment to the Mercy practice in Scranton and Wilkes Barre and consequent inability to

[3] It is worth reiterating that Cavarocchi does not allege that his staff privileges at St. Luke's were revoked or that he could not have maintained a practice at St. Luke's by himself, or that there were not other hospitals in Bethlehem with whom he had or could have obtained staff privileges. Thus, this case is not like those in which physicians have alleged they were effectively denied access to large geographic markets upon having their staff privileges wrongfully revoked or denied. Compare Brader v. Allegheny General Hosp., 64 F.3d 869, 872, 875-76 (3d Cir. 1995) (holding that plaintiff surgeon sufficiently plead "antitrust injury" where he alleged that defendants conspired to revoke his staff privileges and thereby "prevented him from practicing medicine in any location within the market served by the defendants and forced him to relocate his practice to North Carolina"); Fuentes v. South Hills Cardiology, 946 F.2d 196 (3d Cir. 1991) (plaintiff physician sufficiently alleged restraint on trade where he alleged that defendants successfully conspired to have his staff privileges revoked and thereby entirely excluded him from the Pittsburgh market); cf. Miller v. Indiana Hosp., 843 F.2d 139, 141 n. 2 (3d Cir. 1988) (noting centrality of staff privileges to a surgeon's successful practice of medicine).

personally oversee the St. Luke's practice.

Thus, aside from Cavarocchi's voluntary withdrawal of his own personal services from the Bethlehem market in order to pursue his Mercy practice, it is clear that "[f]rom the consumers' point of view, nothing about the market ha[d] changed"; what did occur "'was only a reshuffling of competitors.'" Balaklaw v. Lovell, 14 F.3d 793, 798 (2d Cir. 1994), quoting Coffey v. Healthtrust, Inc., 955 F.2d 1388 (10th Cir. 1992); see also City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 266 (3d Cir. 1998) ("as the district court correctly points out, the actions of the [defendant] utilities merely maintained the status quo. Thus, the utilities' purported antitrust violation can only be said to have been competition-neutral and as such, is not actionable.") This fact, so plain on the face of the complaint, cannot be undone by Cavarocchi's conclusory allegations that prices "have or could have" increased and that quality was reduced.[4]

In sum, Cavarocchi has failed to allege any harm to competition, as opposed to harm to his own interests. Accordingly, he has not established that he has suffered antitrust injury for purposes of maintaining claims under § 4 of the Clayton Act, and his antitrust claims must be dismissed.

B. Sherman Act Violations

In light of my conclusion that plaintiff has failed to allege antitrust injury and therefore

[4] The counterclaim does not explain how "quality" was reduced in the market. Since Alpern and Erdelyan remained in the market, I assume that Cavarocchi means to allege that quality was reduced insofar as his own services were no longer as available in Bethlehem as they had been. However, since Cavarocchi has not alleged that he was unable to practice at St. Luke's or elsewhere in Bethlehem, quality could only have been reduced insofar as he chose to reduce the amount of time he personally practiced in the Bethlehem area.

has no standing to maintain claims under § 4 of the Clayton Act, there is no need for lengthy discussions of the sufficiency of the underlying Sherman Act claims. However, a few observations are in order.

1.

To state a § 1 claim under the rule of reason, a plaintiff must allege and eventually prove (1) concerted action by the defendants that (2) has caused anti-competitive effects on the relevant product and geographic markets and (3) involves illegal conduct or purpose and (4) has proximately caused plaintiff injury. Mathews v. Lancaster General Hosp., 87 F.3d 624, 639 (3d Cir. 1996), citing Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991).[5] As already discussed, Cavarocchi fails to allege facts which, if proven, would establish harm to competition in the relevant market.[6] Accordingly, plaintiff's § 1 claim fails for the same reason he fails to establish standing under § 4 of the Clayton Act.

In addition, St. Luke's argues with merit that Cavarocchi fails to sufficiently allege a conspiracy or other concerted action between it and Alpern and Erdelyan. Concerted action -- contract, combination, or conspiracy -- is the crux of a § 1 claim. Mathews, 87 F.3d at 639.

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[5] Compare Fuentes, 946 F.2d 196, at 198 (plaintiff must establish that (1) defendants engaged in a conspiracy or other concerted action; (2) that this concerted action amounted to or resulted in an unreasonable restraint on trade; (3) this conduct affected interstate trade). The Mathews formulation appears to differ from that of Fuentes merely in that it includes the injury and causation requirements of § 4 of the Clayton Act and unpacks to some extent the concept of "unreasonable restraint on trade."

[6] Cavarocchi does not allege a "per se" antitrust violation such that he could avoid alleging and proving unreasonable anticompetitive effects. See Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1108 (7th Cir. 1984) ("It is only when the plaintiff adequately states a per se violation of § 1 of the Sherman Act that an allegation of anticompetitive effects is not required.")

"'Unilateral action, no matter what its motivation, cannot violate [section] 1.'" Id., quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 110 (3d Cir. 1980). Here, Cavarocchi provides no allegations of fact to support his conclusory allegation that defendants conspired or combined to steal or destroy his practice. The sum total of Cavarocchi's allegations concerning the alleged conspiracy is his allegation on information and belief that defendants conducted "secret meetings" as early as January 1996 aimed at destroying his practice at St. Luke's. (Compl. ¶ 79.) While plaintiff might not be required to plead details concerning secret meetings to which he was not privy, he must allege some facts to support his conclusory allegation of conspiracy. See Commonwealth ex rel. Zimmerman v. Pepsico, Inc., 836 F.2d 173, 179-182 (3d Cir. 1988). There are no such factual allegations here.

Finally, I note that plaintiff's complaint does not meet even the very low threshold established in this Circuit for alleging the interstate commerce nexus required to maintain an antitrust claim. See Brader, 64 F.3d at 873-75, discussing Fuentes v. South Hills Cardiology, 946 F.2d 196 (3d Cir. 1991) (allegations that one physician has been excluded from the market and therefore cannot serve out-of-state patients sufficiently alleges interstate commerce nexus that is required both for standing and to state a cognizable claim under the Sherman Act).

2.

To state a claim for monopolization under § 2, plaintiff "must allege '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.'" Crossroads Cogeneration Corp. v. Orange & Rockland

Utilities, Inc., 159 F.3d 129, 141 (3d Cir. 1998), quoting Schuylkill Energy Resources v. Pennsylvania Power & Light Co., 113 F.3d 405, 412-13 (3d Cir. 1997). To state a claim for attempted monopolization, plaintiff "must allege '(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.'" Id., quoting Schuylkill, 113 F.3d at 413.

Cavarocchi's § 2 claim fails because he has not alleged any facts demonstrating that defendants have "monopoly power" or a "dangerous probability of achieving monopoly." Other than an allegation implying that St. Luke's had around a half-dozen cardiothoracic surgeons in late 1997, plaintiff' complaint provides no factual allegations concerning the alleged relevant market for cardiothoracic surgery in Bethlehem, Pennsylvania, or concerning St. Luke's relationship to or power in that market. If St. Luke's were the only hospital in the relevant market, and if antitrust injury had been alleged, Cavarocchi's allegations might implicate some sort of monopoly concerns. But plaintiff does not allege that St. Luke's is the only game in town and I will not assume such a scenario. Cf. Brader, 64 F.3d at 877 (noting with regard to § 2 claim that "every court that has addressed this issue has held or suggested that, absent an allegation that the hospital is the only one serving a particular area or offers a unique set of services, a physician may not limit the relevant geographic market to a single hospital"). And the factual allegations suggest that rather than increasing any tendency toward monopolization in the alleged market, defendants' conduct decreased it by splitting what had been one practice at St. Luke's into two.[7]

[7] Compare Crossroads, in which the court affirmed the dismissal of the plaintiff' § 2 claims, stating:

For the foregoing reasons, in addition to failing to allege "antitrust injury," plaintiff fails to sufficiently allege a violation of either § 1 or § 2 of the Sherman Act.

II. STATE LAW CLAIMS

Cavarocchi has alleged six state law claims against St. Luke's. Four of these claims -- for tortious interference with existing and prospective contracts, civil conspiracy, and concert of action -- are, like the antitrust claims, based on Alpern and Erdelyan's abandonment of Cavarocchi's practice and St. Luke's subsequent refusal to give Cavarocchi additional staff applications. The two other claims, for defamation and negligence, are based on the identification of Cavarocchi in medical records as a treating physician of the patient who died while allegedly under Alpern's and Erdelyan's care. St. Luke's moves to dismiss all of these claims for failure to state a claim upon which relief can be granted. I will not reach the merits of St. Luke's arguments, however, in light of my resolution of certain jurisdictional issues which I raise sua sponte below.

As the parties in this case are not of diverse citizenship, the Court's original subject

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> Alleging market share alone is not sufficient to state a claim . . . Monopolization or threatened monopolization requires something more, which may include 'the strength of competition, probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct, and the elasticity of consumer demand.' . . . Crossroads has not alleged any of these factors. Nor is it likely that it could have done so. Crossroads admits that it acts as a competitor to O & R in selling its excess capacity in O & R's service area, and it provides no reason why it is prevented from doing so in the future. The complaint simply fails to allege anything to suggest monopolization by O & R cognizable by the Sherman Act.

159 F.3d at 141-42 (citation omitted).

matter jurisdiction over the action is based on the federal claims asserted by Alpern and Cavarocchi. See 28 U.S.C. § 1331 (federal question jurisdiction). Having concluded that Cavarocchi's federal claims must be dismissed, I have found reason to question sua sponte whether I have jurisdiction over his state law counterclaims, and, if so, whether I should exercise that jurisdiction. This inquiry, in turn, led me to question my jurisdiction over plaintiff Alpern's state law claims. I conclude that I either do not have or should not exercise jurisdiction over any of the state law claims in this action and therefore will dismiss them without prejudice.

A. Supplemental Jurisdiction under 28 U.S.C. § 1367.

If the Court has subject matter jurisdiction over any of the state law claims asserted in this action it is by virtue of 28 U.S.C. § 1367, which provides in relevant part:

> Supplemental Jurisdiction
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> (a) Except as provided in subsections (b) [regarding diversity cases] and (c) or expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. . . .
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--
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> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Enacted in 1990, § 1367 codifies the well-developed judge-made law of "pendent" and "ancillary" jurisdiction.[8] See generally 13-13B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure §§ 3523.1, 3567.1 (2d ed. Supp. 1998). "Pendent" claims are state law claims appended by a plaintiff to the federal claim over which the Court has original jurisdiction, while "ancillary" claims are claims asserted by the defendant or a third party. See e.g., Nanavati v. Burdette Tomlin Memorial Hosp., 876 F.2d at 104, n. 7 (3d Cir. 1988) (discussing "pendent" versus "ancillary" claims and jurisdiction); Ambromovage v. United Mine Workers, 726 F.2d 972, 988-91 (3d Cir. 1984) (same). In United Mine Workers v. Gibbs, 383 U.S. 715 (1966), the Supreme Court established that federal courts have the power to entertain pendent and ancillary[9] state law claims so long as they are related to a federal claim so as to be part of the same "Case or Controversy" under Article III. In other words, Gibbs established pendent and ancillary jurisdiction as expansive as Article III allows, and § 1367 codified this expansive jurisdiction under the unifying rubric of "supplemental jurisdiction." New Rock Asset Partners v. Preferred Entity Advancements, Inc., 101 F.3d 1492, 1509 (3d Cir. 1996).

[8] The principles of pendent and ancillary jurisdiction and supplemental jurisdiction generally apply without regard to the basis for original federal jurisdiction. But see § 1367(b) (providing special rules for diversity cases). I confine my discussion to supplemental jurisdiction in federal question cases, as that is the only basis for jurisdiction in this case.

[9] While Gibbs involved pendent claims, courts have extended the same principles to ancillary claims. See e.g., Ambromovage, 726 F.2d at 989 ("As we see it, Gibbs provides the unifying principle which limits the extent of federal jurisdiction over both pendent and ancillary claims.")

Under § 1367(a), therefore, all state law claims, whether "pendent" or "ancillary," are subject to the same jurisdictional inquiry: if they are "so related to claims in the action within [the court's] original jurisdiction [i.e., federal claims] that they form part of the same case or controversy under Article III," then they are within the court's supplemental jurisdiction. The "case or controversy" inquiry, in turn, continues to focus on the standards set forth in Gibbs:

[1] The federal claims must have substance sufficient to confer subject matter jurisdiction on the court. [2] The state and federal claims must derive from a common nucleus of operative fact. [3] But if considered without regard to their state or federal character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in the federal courts to hear the whole.

383 U.S. at 725 (emphasis, footnote, and internal citation omitted).

Though generally considered ambiguous, this passage has been construed by most authorities to require that all three stated conditions be met for supplemental jurisdiction to be exercised over state claims. See Lyon v. Whisman, 45 F.3d 758, 760 (3d Cir. 1995) (citing authorities); 13B Wright, Miller & Cooper, supra, § 3567.1 at 116 (2d ed. 1984). The key threshold question here, as in many cases, is whether the state and federal claims derive "from a common nucleus of operative fact." See e.g., Lyon, 45 F.3d at 760; Ambromovage, 726 F.2d at 989. As to this test, it has been stated that "mere tangential overlap of facts is insufficient, but total congruity between the operative facts . . . is unnecessary." Nanavati v. Burdette Tomlin Memorial Hosp., 857 F.2d 96, 105 (3d Cir. 1988); see also Lyon, 45 F.3d at 760-61 (reviewing cases to illustrate the "fact sensitive" nature of the test).

It is worth noting that § 1367 appears to depart from Gibbs and its progeny in at least one substantive way that might be relevant to this case. Whereas Gibbs suggested that a court always had discretion as to whether it would exercise supplemental jurisdiction over state law claims, § 1367 appears to mandate that supplemental jurisdiction be exercised over claims encompassed by § 1367(a) unless one of certain specified exceptions applies.[10] Still, at least in this Circuit, the basic steps of the inquiry remain essentially the same as before § 1367 was enacted,: first, does the Court have power under § 1367(a) to hear the state law claim; second, does the Court have discretion under § 1367(a) and (c) as to whether or not to exercise that power, or does a federal statute expressly provide otherwise; and third, if the Court does have discretion, should it hear the claim or not? See § 1367(a); cf. Ambromovage, 726 F.2d at 989-90 (setting forth three-tier test for supplemental jurisdiction in which court inquires whether it has power to hear the claim

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[10] See § 1367(a) ("Except as provided in subsections (b) [regarding diversity cases] and (c) or expressly provided otherwise by Federal statute . . . the district courts shall have supplemental jurisdiction over all other claims that are so related to claims . . ."); § 1367(c) (court may decline to exercise jurisdiction over claim properly before it under (a) for three specified reasons or if, "in exceptional circumstances, there are other compelling reasons for declining jurisdiction"); see also Innovative Home Health Care, Inc. v. P.T.-O.T. Associates, 141 F.3d 1284, 1287 (8th Cir. 1998) (district court could refuse to exercise supplemental jurisdiction over state law counterclaims properly before it under § 1367(a) only for one of the four reasons set forth in § 1367(c)); cf. Lyon, 45 F.3d at 760 n. 4 (noting that section § 1367 "may have modified the discretionary arm of the Gibbs decision") (emphasis in original). Compare Wright, Miller, & Cooper, supra, at §§ 3523, 3523.1, 3567.1 (Supp. 1998).

Discussions in Wright, Miller & Cooper demonstrate the unsettled state of the case law concerning courts' discretion under § 1367. In a section on supplemental jurisdiction, these authorities seem to suggest that exercising supplemental jurisdiction remains as discretionary as it was under Gibbs, stating: "In Section 1367(c), Congress affirmed that the exercise of ancillary and pendent jurisdiction is discretionary. . . ." Id. § 3523.1 at 108. However, they also note divisions in the case law as to whether exercising supplemental jurisdiction under § 1367 is mandatory with the specified exceptions set forth in subsection (c), or discretionary with the enumerated conditions of (c) offered for guidance. Id. § 3523.1 at n. 29. In another section concerning pendent jurisdiction, they seem to take the opposite tack, suggesting that under § 1367 exercising supplemental jurisdiction is mandatory with specified exceptions to be narrowly construed. Id. § 3567.1 at 28. Of course, such differences may amount in practice to little more than semantics.

and, if so, whether federal policy precludes doing so or other prudential concerns militate against it).

B. Alpern's State Law Claims

I first consider whether the Court has supplemental jurisdiction over Alpern's state law claims. I conclude that under the plain dictates of § 1367 and the decision in Lyon v. Whisman, 45 F.3d 758 (3d Cir. 1995), it does not.

In Lyon, the plaintiff employee asserted one federal claim and two state law claims against her employer: violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. §207(a), for failure to pay her overtime; breach of contract for failure to pay her a promised bonus; and violation of state tort law for threatening to withhold a vested bonus to keep her from quitting. The lower court returned a verdict in favor of the employee on all three claims and the employer appealed. Although neither party had questioned the district court's jurisdiction or raised the issue on appeal, the Court of Appeals considered the question sua sponte. The Court noted that the "only link between Lyon's FLSA and state law claims is the general employer-employee relationship between the parties," id. at 762, and found this relationship insufficient to establish a common nucleus of facts and support supplemental jurisdiction. Id. at 762-63. Accordingly, the district court lacked jurisdiction over the employee's state law claims and those claims had to be dismissed.

As already mentioned, Alpern asserts one federal claim under ERISA for allegedly unpaid pension plan contributions. The facts relevant to this claim are whether or not Cavarocchi was bound to and did or did not make contributions to the pension plan on behalf of Alpern for 1994, 1995, and 1996. Alpern's other two claims arise under state law and are based on (1) Cavarocchi's alleged failure to pay him certain salary, bonus, and benefits for October 1997; and (2) Cavarocchi's failure, in breach of his alleged fiduciary duties, to inform Alpern of the opportunity to undertake a new practice in cooperation with Mercy. The only commonality between the "operative facts" of these state claims and the federal claims is that they all arose in the context of Alpern's employment relationship with Cavarocchi. Under Lyon, this is simply not sufficient to make the claims part of the "same case or controversy" for purposes of conferring supplemental jurisdiction under § 1367(a). See 45 F.3d at 760-63. Accordingly, Alpern's state law claims must be dismissed for lack of subject matter jurisdiction.

C. Cavarocchi's State Law Counterclaims

Turning to the state law counterclaims asserted by Cavarocchi, I note first that the inquiry as to whether these claims are properly before the Court is not identical to the question of whether they may be considered compulsory or permissive counterclaims under Rule 13 of the Federal Rules of Civil Procedure. See Rule 13(a) (defining a compulsory counterclaim as one that "arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim"). While a compulsory state law counterclaim is undoubtedly within the Court's supplemental (i.e., ancillary) jurisdiction, it does not necessarily follow that a "permissive" state law counterclaim is outside the Court's jurisdiction. See Ambromovage, 726 F.2d at 990-91 (noting that Rule 13 could neither enlarge the scope of federal courts' jurisdiction under Article III nor limit its boundaries, and that "[s]everal transactions [or occurrences] may share an intersection of 'operative fact.'"). The question with regard to supplemental jurisdiction is whether the state law counterclaim claim shares a "common nucleus of operative fact" with the underlying federal claim.

In addition, my inquiry in this case is not limited to the relationship between the state law counterclaims and Alpern's underlying federal claim. The state law counterclaims must also be analyzed with regard to their relationship to Cavarocchi's federal antitrust claims. Section 1367(a) does not distinguish between state law counterclaims and other types of state law claims, or between types of claims within the Court's original jurisdiction. It simply asks whether any state law claim is "so related to claims in the action within [the court's] original jurisdiction" that they form part of the same case or controversy. Thus I consider the state law counterclaims relative to all the federal claims within the Court's original jurisdiction, which is to say both Alpern's ERISA claim and Cavarocchi's antitrust claims.

I first consider the relationship between the state law counterclaims and Alpern's federal claim. If the state law counterclaims formed part of the same case and controversy as Alpern's claim, then the Court would have supplemental (i.e., ancillary) jurisdiction over them. See generally 13 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure §§ 3523, 3523.1 (1998 Supp.). Moreover, the apparently mandatory language of § 1367(a) suggests that I would not have discretion to dismiss them unless for some "compelling reason" under § 1357(c)(4). See supra note 10.

Alpern's federal claim is based on allegations that Cavarocchi failed to make pension plan contributions for him in 1994, 1995, and 1996. Cavarocchi's state law claims are based on allegations that Alpern and Eredlyan planned to and did leave Cavarocchi's practice in late 1997, that St. Luke's then failed to enable him to associate other physicians, and that he was wrongly associated with medical malpractice that occurred in February 1998. The only commonality between these claims is that both remotely touch on Alpern's employment relationship with Cavarocchi. As noted previously, this is not sufficient to establish a "common nucleus of facts" so as to meet the case and controversy requirement of § 1367(a). Accordingly, the Court does not have supplemental jurisdiction over these claims as ancillary to Alpern's federal claims.

Thus, if the Court has supplemental jurisdiction over the state law counterclaims, it can only be because of their relationship to Cavarocchi's federal counterclaims. Since the Court has original (federal question) jurisdiction over the antitrust counterclaims, the Court would have supplemental jurisdiction over any state law counterclaims that share a "common nucleus of facts" with the federal antitrust claims.

The defamation and negligence claims (Counts IX and X) do not meet this test. These claims are based on events that occurred in February 1998, after the events giving rise to Cavarocchi's antitrust claims were over. The only apparent commonality between these claims and the antitrust claims is the parties involved, which is not sufficient to amount to a "common nucleus of facts." Thus, I find there is no grounds for exercising supplemental jurisdiction over these claims and will dismiss them for lack of subject matter jurisdiction.[11]

[11] Cavarocchi's claims against Alpern for breach of a loan agreement (Count XI), debt (labeled "Count XI" but apparently intended as Count XII), and conversion (Count XIII) are similarly unrelated to an federal claim in this action and therefore will also be dismissed for lack of subject matter jurisdiction.

On the other hand, I find that the state law claims asserted against St. Luke's for tortious interference with contract, civil conspiracy, and concert of action (Counts III, IV, V, VII, and VIII) are within the Court's supplemental jurisdiction. These claims are based on essentially the same facts as are the antitrust claims and therefore, obviously, form part of the same case and controversy. Thus, although the antitrust claims will be dismissed, the Court nonetheless has the power to entertain the state law claims. See § 1367(c) (providing that district court may dismiss state claims after all claims within court's original jurisdiction have been dismissed) (emphasis added). The question is whether, in light of the fact that the federal counterclaims have been dismissed, the Court should entertain these claims. See id. at § 1367(c)(3).[12]

[12] The same question presents itself as to Cavarocchi's claim against Alpern for tortious interference with existing and prospective contractual relationships (Counts VI), which is based on the same or related alleged facts as the Counts mentioned above.

We are left with a case in which the original plaintiff, Alpern, asserts one federal claim against Cavarocchi for unpaid pension contributions, and the defendant, Cavarocchi, asserts six state law counterclaims against Alpern, St. Luke's, and Erdelyan which have nothing even remotely to do with his alleged failure to pay pension contributions for Alpern. Moreover, the federal counterclaims which gave the Court jurisdiction over these state law counterclaims have been dismissed, at least one counterclaim raises unsettled issues of state law,[13] and if the case went to trial it appears that the counterclaims would predominate over Alpern's remaining ERISA claim. Any one of these factors might be sufficient grounds on which to decline to exercise supplemental jurisdiction over these claims. See § 1367(c)(1), (2), and (3). Taken together, they plainly militate in favor of dismissal.

[13] Cavarocchi's claim for tortious interference with prospective contractual relations against St. Luke's appears to be based on his loss of patients from his St. Luke's practice. Ordinarily, the tort for interference with contractual relationships requires that the defendant induced or otherwise wrongfully caused a third party to fail to perform a contract or to not enter into a contract with the plaintiff. See Restatement (First) of Torts § 766; Restatement (Second) of Torts §§ 766, 766B(a). However, Cavarocchi does not allege that St. Luke's interfered directly with his patients, or with referring physicians. Rather, his theory appears to be that St. Luke's is liable for interfering with his ability to take advantage of prospective contractual relationships. Though neither party has noted it, this theory, which is set forth in § 766B(b) of the Restatement (Second) of Torts (1977), has not been adopted by the Pennsylvania Supreme Court. See Windsor Securities, Inc. v. Hartford Life Ins. Co., 986 F.2d 655, 660-663 (3d Cir. 1993). The Court of Appeals for the Third Circuit and various district courts have predicted that the Pennsylvania Court would not adopt a theory of tort liability based upon a defendant's interference with the plaintiff's performance of his own contract. See Gemini Physical Therapy and Rehabilitation, Inc. v. State Farm Mutual Automobile Ins. Co., 40 F.3d 63, 66 (3d Cir. 1994) (considering § 766A); Allen v. Washington Hosp., 34 F. Supp. 2d 958, 964-65 (W.D. Pa. 1999) (considering § 766B(b)); The New L & N Sales and Marketing, Inc. v. Menaged, 1998 WL 575270, *9 (E.D. Pa. Sept. 9, 1998) (same); cf. Peoples Mortgage Co., Inc. v. Federal National Mortgage Assoc., 856 F. Supp. 910, 933 (E.D. Pa.1994) (noting that the court would be "equally or more reluctant" to predict that Pennsylvania Supreme Court would adopt Restatement 766B(b) than it would to predict adoption of 766A because more leeway is generally given for interference with prospective contracts than with existing ones).

Accordingly, I will dismiss all of plaintiff Alpern's state law claims and all of the remaining counterclaims without prejudice.[14]

[14] Counsel's attention is directed to 42 Pa. C.S.A. § 5103(b).