UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: EVANSTON NORTHWESTERN HEALTHCARE CORPORATION ANTITRUST LITIGATION	)	No. 07 C 04446
	)	Judge Edmond E. Chang

MEMORANDUM OPINION AND ORDER

On January 1, 2000, Evanston Northwestern Healthcare, now known as NorthShore University HealthSystem, merged with Highland Park Hospital. R. 774, Def.'s Summ. J. Br. at 1.[1] Seven years later, this class action was filed, R. 1, Compl., alleging that the merger violated federal antitrust laws. The Complaint (now on a Second Amended Complaint) alleges that the merger substantially lessened competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and fueled NorthShore's illegal monopolization of the market for healthcare services in the Chicagoland area in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. In April 2015, NorthShore moved for summary judgment, R. 675, asserting that the Class claims are time barred under 15 U.S.C. § 15b, which generally sets a four-year statute of limitations for private causes of action brought under the federal antitrust laws. The Court denied NorthShore's motion without prejudice after the Class requested more time to complete outstanding discovery on the limitations issue. *See* R. 680, Rule 56(d) Mot.; R. 708, 05/28/2015 Order. Once fact discovery finally closed in December 2015, NorthShore once again moved for summary

[1]This Court has subject matter jurisdiction over the case under 28 U.S.C. § 1331. Citations to the record filings are "R." followed by the docket number and, when necessary, a page or paragraph number.

judgment based on the statute of limitations. R. 773, Mot. Summ. J. For the reasons discussed below, NorthShore's motion is granted in part and denied in part.

I. Background

In deciding Northshore's motion for summary judgment, the Court views the evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). NorthShore University HealthSystem provides healthcare in northern Illinois, and currently consists of four hospitals: Evanston Hospital, Glenbrook Hospital, Highland Park Hospital, and Skokie Hospital. R. 779, DSOF ¶¶ 1, 6, 9.[2] Before January 2000, NorthShore (then known as Evanston Northwestern Healthcare)[3] comprised only two hospitals, Evanston Hospital and Glenbrook Hospital. *Id.* ¶ 6. On January 1, 2000, however, NorthShore merged with Highland Park Hospital.[4] *Id.* ¶ 7.

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[2]Citations to the parties' Local Rule 56.1 Statements of Fact are "DSOF" (for NorthShore's Statement of Facts) [R. 779 (unsealed)]; "PSOF" (for the Class's Statement of Additional Facts) [R. 800 (unsealed); R. 796 (sealed)]; "Pls.' Resp. DSOF" (for the Class's Response to NorthShore's Statement of Facts) [R. 799 (unsealed); R. 790 (sealed)]; and Def.'s Resp. PSOF (for NorthShore's Response to the Class's Statement of Additional Facts) [R. 815 (sealed)]. Where a fact is admitted, only the asserting party's statement of facts is cited; where an assertion is otherwise challenged, it is so noted. The Court cites to the unsealed versions of the parties' briefs and to the sealed versions of the parties' statement of facts and responses thereto. There are, however, a couple of exceptions: NorthShore only filed an unsealed version of its Statement of Facts, so all cites are to that publicly-available document. And Northshore only filed a sealed version of its Response to the Class's Statement of Additional Facts. In other words, no publicly-available, redacted version of that document currently exists. By September 22, 2016, NorthShore must file a publicly redacted version of its Response to the Class's Statement of Additional Facts, and both parties must explain why anything in this Opinion should remain sealed.

[3]For convenience's sake, the Court will refer to Evanston Northwestern Healthcare as "NorthShore" throughout the Opinion.

[4]Since 2000, NorthShore has added Skokie Hospital to its healthcare delivery system, and has partnered with the University of Chicago Medical School. DSOF ¶ 9. The Class claims do not concern either of these affiliations.

Chicago news outlets covered the anticipated merger. DSOF ¶ 28; R. 800, PSOF ¶ 3; R. 790, Pls.' Resp. DSOF ¶ 28. Months before the merger took place, NorthShore and Highland Park Hospital publicly represented that the merger would benefit consumers, Managed Care Organizations (which go by the acronym MCOs), and the communities that the three hospitals served. PSOF ¶ 3.[5] NorthShore did not, however, announce any intention to negotiate higher contract rates with its MCO customers post-merger. *Id.* ¶ 4; DSOF ¶ 28; Pls.' Resp. DSOF ¶ 28 ("Neither the press releases nor the new[s] stories indicated that the [m]erger would result in increased prices for hospital services."). The named plaintiffs acknowledge that they knew about the merger—after hearing about it from the press or elsewhere—before it occurred. DSOF ¶¶ 29, 30, 31, 32; Pls.' Resp. DSOF ¶¶ 29, 30, 31, 32.

[5]*See also, e.g.*, R. 779-2, Exh. PP, Mark LeBien, *Evanston Northwestern Healthcare and Highland Park Hospital Merger Advances*, The CHICAGO TRIBUNE (June 30, 1999), *available at* http://articles.chicagotribune.com/1999-06-30/news/9907020383_1_evanston-northwestern-healthcare-highland-park-hospital-evanston-hospital ("Officials said the merger would help the three hospitals better serve northern Cook County and Lake County, enable the hospitals and their physicians to obtain more managed-care contracts, provide more on-site learning opportunities for Northwestern University Medical School students and allow for future expansion of healthcare service locations."); *id.* ("Mark R. Neaman, president and [CEO] of [NorthShore] said the merged organizations will create 'a single point of contact' for managed-care insurers that have been negotiating with them separately."); R. 779-2, Exh. RR, Karen Berkowitz, *Spaeth: Hospital merger focus is 'growth'*, HIGHLAND PARK NEWS (July 8, 1999) ("'The benefit to the managed-care companies is that it gives them a single point of contact and the broader service area and reach that our collective organizations can put together,' said Neaman."); *id.* ("[The president and CEO of Highland Park Hospital] said the merger will provide patients greater convenience and expanded access to specialists.").

NorthShore initially notified its MCO customers about the planned merger back in June 1999. DSOF ¶ 21.[6] It then contacted its MCO customers again in early December 1999. *Id.* ¶ 22.[7] This time, NorthShore sent the MCOs a letter (along with a Consent and Assignment form) discussing post-merger logistics. *Id.* First, the letter notified each MCO that, after the merger, Highland Park Hospital and NorthShore would operate under the same legal entity and tax identification number and that Highland Park Hospital would no longer exist as a separate entity. *Id.* ¶ 23. Second, the letter also identified—subject to the MCO's written consent and return of the Consent to Assignment form—what contract would govern the parties' relationship once the merger took effect. *Id.*; Pls.' Resp. DSOF ¶ 23. For example, if before the merger the MCO had a contract with NorthShore and a separate one with Highland Park Hospital, then the letter would identify (again, subject to the MCO's written consent) which contract—the MCO's preexisting contract with NorthShore or its preexisting contract with Highland Park Hospital—would govern post-merger. DSOF ¶ 23 ("[NorthShore] notified the MCOs [that] … [it] was either terminating [Highland Park Hospital's] current contracts, or terminating [NorthShore's] contracts and assigning [Highland Park Hospital's] agreements to [NorthShore] … ."); Pls.' Resp. DSOF ¶ 23 ("These letters portrayed

[6]The Class denies that "'[NorthShore and Highland Park Hospital] sent letters [in June 1999] to *all* of their MCO customers announcing the impending [m]erger,'" and that there is any evidence establishing that the letters NorthShore did send "were actually sent to, or received by, the purported addressee, or when." Pls.' Resp. DSOF ¶ 21.

[7]Again, the Class denies that NorthShore and Highland Park Hospital sent letters (along with a Consent and Assignment form) in December 1999 to "*all* of [their] MCO customers," and that there is any evidence establishing that the letters NorthShore did send "were actually sent to, or received by, the addressees … ." Pls.' Resp. DSOF ¶ 22.

including one entity or the other under the preexisting MCO contract a ministerial matter necessitated by the merger … ."). Neither party disputes, however, that at the time of the merger, NorthShore did not know whether its MCO contracts "were better" than Highland Park Hospital's.[8] PSOF ¶ 8; Def.'s Resp. PSOF ¶ 8. And finally, the letter acknowledged that NorthShore would provide services under the existing rates, terms, and conditions set forth in its (or Highland Park Hospital's) preexisting contract with the MCO. DSOF ¶ 23 ("[NorthShore] notified the MCOs [that] … [it] intended to provide services under the existing rates, terms and conditions of either the current [Highland Park Hospital] or [NorthShore] agreements."); Pls.' Resp. DSOF ¶ 23. There was no mention in the letter that NorthShore would increase its prices for healthcare services after the merger. PSOF ¶ 7; Def.'s Resp. PSOF ¶ 7 ("NorthShore also admits that none of the assignment letters stated that [it] had a right to higher reimbursement rates as a result of the merger."). The majority of MCOs[9] did not sign and return the Consent to Assignment form before the merger. DSOF ¶ 25; Pls.' Resp. DSOF ¶ 25.

Soon after the merger, NorthShore began to renegotiate their contracts with the MCOs. PSOF ¶ 9. The Class maintains—and NorthShore does not directly

[8]NorthShore claims that one letter sent to a particular MCO put that MCO on notice that NorthShore would choose whichever contract—the MCO's preexisting contract with Northshore or its preexisting contract with Highland Park Hospital—was "more favorable." *See* Def.'s Summ. J. Br. at 8. But that letter only suggests that NorthShore and the MCO would continue using whichever preexisting contract was "better," not that NorthShore was going to choose whichever preexisting contract charged higher rates. *See* Pls.' Resp. Br. at 5 n.3.

[9]Six MCOs signed and returned the Consent to Assignment form before the merger. DSOF ¶ 24; Pls.' Resp. DSOF ¶ 24.

dispute[10]—that by February 10, 2000, none of the MCOs had signed a finalized, renegotiated contract with NorthShore.[11] *Id.* In fact, the first renegotiated contract was not signed until February 23, 2000. *Id.* ¶ 11.[12]

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[10]In response to the Class's allegation that "[n]o non-assignment MCO contracts were signed between the date of merger and February 10, 2000," PSOF ¶ 9, NorthShore states that it "denies this statement as vague and unsupported by the cited evidence," Def.'s Resp. PSOF ¶ 9. Local Rule 56.1(a) states that in response to a non-moving party's statement of additional facts, "the moving party may submit a concise reply *in the form prescribed in [section (b)]* for a response." N.D. Ill. R. 56.1(a) (emphasis added). This means that a moving party's response "shall contain … in the case of any disagreement, *specific references to the affidavits, parts of the record, and other supporting materials relied upon …* ." N.D. Ill. R. 56.1(b)(3)(b) (emphasis added); *accord Koursa, Inc. v. Manroland*, Inc., 971 F. Supp. 2d 765, 770-71 (N.D. Ill. 2013); *Aukstuolis v. Harrah's Ill. Corp.*, 2002 WL 31006128, at *2 (N.D. Ill. Sept. 5, 2002). Local Rule 56.1(a) further warns that "all material facts set forth in [the non-moving party's statement of additional facts] will be deemed admitted *unless controverted by the statement of the moving party*." N.D. Ill. R. 56.1(a) (emphasis added). Here, Northshore offers no record evidence rebutting the Class's allegation that "[n]o non-assignment MCO contracts were signed between the date of merger and February 10, 2000," PSOF ¶ 9, so the Court will treat that allegation as undisputed. *See Curtis v. Costco Wholesale Corp.*, 807 F.3d 215, 219 (7th Cir. 2015) ("It is the litigants' duty to clearly identify material facts in dispute and provide the admissible evidence that tends to prove or disprove the proffered fact. A litigant who denies a material fact is required to provide the admissible evidence that supports his denial in a clear, concise, and obvious fashion, for quick reference of the court."). Merely denying allegations on the grounds that they are "vague and unsupported by the evidence cited" does not meet Local Rule 56.1's requirements. *See Ammons v. Aramark Unif. Servs., Inc.*, 368 F.3d 809, 817 (7th Cir. 2004) (district courts should mandate and enforce strict compliance with Local Rule 56.1).

[11]One of the MCOs amended its contract with NorthShore effective January 1, 2000; but NorthShore signed the amendment in November 1999 *before* notifying the MCOs that NorthShore would provide services under the existing rates, terms, and conditions set forth in its (or Highland Park Hospital's) *preexisting contract* with the MCO. *See* PSOF ¶ 9; Def.'s Resp. PSOF ¶ 9.

[12]Again, NorthShore fails to properly respond to the Class's Statement of Additional Facts. In response to the Class's allegation that "[n]one of the MCO contracts which were renegotiated post-merger were signed prior to [one MCO] signing its contract on February 23, 2000," PSOF ¶ 11, Northshore states that it "admits that a contract with [that MCO] was signed by [the MCO] on or about February 23, 2000, however the contract's effective date was January 1, 2000. NorthShore denies the remainder of this statement." Def.'s Resp. PSOF ¶ 11 (internal citation omitted). Because NorthShore's response here does not contradict, but rather only tries to add more information—namely, that NorthShore and [one MCO] agreed to retroactively apply their renegotiated contract, *compare* PSOF ¶ 11, *with* Def.'s Resp. PSOF ¶ 11—the Court will treat the Class's contention as undisputed. *Cf. Ammons*, 368 F.3d at 817 ("In this case, several of Ammons' responses to Aramark's

Once the merger took effect, NorthShore sought to equalize the "chargemasters"—a list of prices for every procedure performed at the hospital and the items used during those procedures—between Evanston Hospital, Glenbrook Hospital, and Highland Park Hospital. PSOF ¶ 13. This process took until June 2000 to complete. *Id.*; Def.'s Resp. PSOF ¶ 13 ("Mr. Hillebrand testified that 'by June 30th of 2000, [equalizing charges at all three sites] had been completed.'").

On February 10, 2004, the Federal Trade Commission filed an administrative complaint against NorthShore. DSOF ¶ 10. The complaint alleged that the merger violated federal antitrust laws because it substantially lessened competition and enabled NorthShore to unlawfully increase its prices for healthcare services. *Id.* Ultimately, the Commission held that the merger violated Section 7 of the Clayton Act, 15 U.S.C. § 18. *Id.* ¶¶ 11-13.

As soon as the FTC proceeding wrapped-up in August 2007, the Class filed suit challenging NorthShore's merger. DSOF ¶ 14; Pls.' Resp. DSOF ¶ 14. In November 2008, the Class filed a Second Amended Complaint,[13] alleging that NorthShore violated Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 7 of the Clayton Act, 15 U.S.C. § 18. R. 224, Second Am. Compl. ¶ 16. Specifically, the Class alleged that Northshore "'raise[d] its prices immediately and substantially after completion of the [merger],'" and that "'there were substantial merger-coincident price increases … .'" *Id.*; *id.* ¶ 33 (alleging that NorthShore "'rapidly

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allegations admit to the allegation but then add other additional facts. These facts should have been included in a separate statement.").

[13]A First Amended Complaint had been filed a year earlier in November 2007. R. 22, Am. Compl.

increased the prices that it charged to most of its … customers'" after the merger took place)[14]; *cf. id.* ¶ 33 (alleging that "[NorthShore] began to implement its price increases sometime after the close of the merger through a number of ways.").

In April 2015, NorthShore moved for summary judgment, R. 675, asserting that the Class claims are time barred under 15 U.S.C. § 15b.[15] Section 15b generally imposes a four-year statute of limitations for private causes of action brought under the federal antitrust laws. 15 U.S.C. § 15b. In response to NorthShore's motion, the Class filed a motion under Federal Rule of Civil Procedure 56(d), requesting that the Court wait until fact discovery closed before deciding the limitations issue. Rule 56(d) Mot.; *see also* Fed. R. Civ. P. 56(d). The Court granted the Class's Rule 56(d) motion and correspondingly denied NorthShore's summary judgment motion without prejudice so that NorthShore could re-file its motion at the close of fact discovery. 05/28/2015 Order. NorthShore re-filed its motion for summary judgment in December 2015. Mot. Summ. J.; Def.'s Summ. J. Br.

II. Standard of Review

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In evaluating

[14]Paragraphs 16 and 33 of the Second Amended Complaint quote, but do not cite to, the FTC opinion affirming that NorthShore violated the federal antitrust laws.

[15]Back in December 2007, NorthShore moved to dismiss the Class claims as time barred, R. 32, but the previously assigned judge denied the motion, R. 77, because the face of the complaint did not establish the accrual date for the claims.

summary judgment motions, courts must view the facts and draw reasonable inferences in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). The Court may not weigh conflicting evidence or make credibility determinations, *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 704 (7th Cir. 2011), and must consider only evidence that can "be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). The party seeking summary judgment has the initial burden of showing that there is no genuine dispute and that they are entitled to judgment as a matter of law. *Carmichael v. Vill. of Palatine*, 605 F.3d 451, 460 (7th Cir. 2010); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Wheeler v. Lawson*, 539 F.3d 629, 634 (7th Cir. 2008). If this burden is met, the adverse party must then "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256.

III. Analysis

The Class brings two federal antitrust claims against NorthShore for violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, which prohibits unlawful monopolization,[16] and Section 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits acquisitions that substantially lessen competition or tend to create a monopoly. *See* Second Am. Compl. NorthShore asserts that the federal antitrust claims are time-barred under 15 U.S.C. § 15b, which generally imposes a four-year statute of limitations for any private cause of action brought under the federal antitrust laws.

[16]The Class alleges that Northshore illegally monopolized the relevant market for healthcare services (Count 1), Second Am. Compl. ¶¶ 42-50, or in the alternative, attempted to monopolize the relevant market for healthcare services (Count 2), *id.* ¶¶ 51-56. For convenience's sake, the Court will refer to both counts together as the Class's "Section 2" claim.

Def.'s Mot. Summ. J. at 1, 5. It steadfastly maintains that both of the Class's claims accrued on January 1, 2000, the day that NorthShore merged with Highland Park Hospital. *Id.* at 5-6, 9-14; R. 816, Def.'s Reply Br. at 1, 6-8. If that is the right start date for the limitations clock, then the Class's claims expired on January 1, 2004—forty days *before* the FTC brought its antitrust action against NorthShore. (As discussed below, *see infra* Section III.A.1. at 12-13, Section 5 of the Clayton Act, 15 U.S.C. § 16(i), tolled the Class's federal antitrust claims as of February 10, 2004, but only to the extent the statute of limitations on its claims had not *already* run.) NorthShore further asserts that neither the discovery rule nor the continuing violations doctrine render the Class's claims timely. Def.'s Mot. Summ. J. at 1-3, 6-8, 14-19; Def.'s Reply Br. at 1-8.

In response, the Class contends that its claims did not accrue until class members paid NorthShore's allegedly anticompetitive prices.[17] R. 808, Pl.'s Resp. Br. at 10-18. That is, the Class argues that the claims did not accrue until *after* the merger took place on January 1, 2000, and in fact, that the undisputed evidence shows that the claims could not possibly have accrued before February 10, 2000 (that is, four years before the FTC brought its antitrust action against NorthShore). *Id.* at 16 ("But even in the remote chance that a class member could have connected all of the dots that it was paying higher prices after the merger, that those higher

[17]Alternatively, the Class asserts that, under the discovery rule, their claims did not accrue until the FTC filed its complaint against NorthShore on February 10, 2004. Pl.'s Resp. Br. at 12-14. According to the Class, the "notorious opacity of hospital pricing" prevented them from discovering their antitrust injuries until February 2004 when the FTC announced—via its complaint—"that th[e] merger might be anticompetitive … ." *Id.* at 14.

prices were the result of increased market power …, and that the increased market power was being abused to extract higher reimbursements, it could not have reached all of these conclusions before February 10, 2000."). The Class further asserts that NorthShore's monopolization of the healthcare services market warrants applying the continuing violations doctrine, which restarts limitation periods anew where the defendant inflicts continuous and accumulating injury. *Id.* at 22-27. Finally, the Class maintains that two tolling doctrines, equitable tolling and equitable estoppel, tolled the statute of limitations on its claims. *Id.* at 14-15 (equitable tolling), 18-21, 27-28 (equitable estoppel).

In analyzing whether the Class brought this case on time, the key date is February 10, 2004, because that is the date that the FTC brought its case, and the filing of that complaint tolled the statute of limitations as of that date. *See infra* Section III.A.1 (discussing 15 U.S.C. § 16(i)). So whatever Class claims were timely as of February 10, 2004 were preserved. Put another way, the Class claims—if any—that accrued on or after February 10, 2000 are timely. Because that is the dividing line, the Court's analysis is divided into two sections: Section A analyzes whether the Class claims based on NorthShore's alleged *post*-February 10, 2000 supracompetitive price increases are time-barred. This analysis explains why 15 U.S.C. § 16(i) tolled the Class claims based on those price increases and when those claims accrued. Section B then discusses whether Class claims based on

NorthShore's *pre*-February 10, 2000 supracompetitive price increases are time-barred.[18]

A. Post-February 10, 2000 Price Increases

1. Tolling Under 15 U.S.C. § 16(i)

Section 5 of the Clayton Act, 15 U.S.C. § 16(i), tolls the limitations period for private antitrust actions during the time that a related government case is pending:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, … the running of the statute of limitations in respect to every private or State right of action arising under said laws and based in whole or in part of any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under Section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

15 U.S.C. § 16(i). As compared to the accrual rule, which determines when the statute of limitations *begins*, tolling rules like § 16(i) interrupt, or pause, the ticking of the limitations clock after it has already begun to run. *Heard v. Sheahan*, 253 F.3d 316, 317-18 (7th Cir. 2001) ("Tolling interrupts the statute of limitations after it has begun to run, but does not determine when it begins to run; that question is the question of accrual[.]"); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990) ("Tolling doctrines stop the statute of limitations from running even if the

[18]The Class definition is broad enough to include any unlawful overcharges that the Class paid "from at least *as early as January 1, 2000* … ." R. 587, 12/10/2013 Class Certification Order (emphasis added). In its response brief, the Class does not explicitly point to any overcharges that class members paid before February 10, 2000, but it does contend that "[NorthShore] may have raised a handful of prices in the 40 days after the merger." *See* Pls.' Resp. Br. at 7. For this reason, the Court addresses whether claims based on any pre-February 10, 2000 overcharges are time-barred. *See infra* Section III.B.

accrual date has passed."). Courts routinely apply § 16(i) to proceedings "instituted" by the FTC. *See Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co.*, 381 U.S. 311, 321-22 (1965) (applying federal antitrust tolling provision to FTC proceedings); *Rader v. Balfour*, 440 F.2d 469, 473 (7th Cir. 1971) (same).

Here, the FTC "instituted" a proceeding against NorthShore on February 10, 2004. That proceeding continued on well after counsel for the Class case filed the proposed class action. Case Timeline, Federal Trade Commission, *available at* https://www.ftc.gov/enforcement/cases-proceedings/0110234/evanston-northwestern-healthcare-corporation-enh-medical-group. So, as of February 10, 2004, § 16(i) kicked-in and tolled the limitations period for any cause of action that the Class had accrued, so long as the four-year limitations period for those claims had not already run. *See* 15 U.S.C. § 16(i). This means that whatever rights the Class had as of February 10, 2000—four years before the FTC instituted its action against NorthShore—still existed when the Class filed its complaint on August 7, 2007. In other words, § 16(i) only suspended the statute of limitations to the extent that the Class had any *unexpired* claims as of February 10, 2004.[19] The Court addresses that issue next.

[19]NorthShore makes a last-ditch argument in its summary judgment brief, asserting that Section 16(i) does not apply to the Class claims because the *FTC* did not file its complaint "during the four-year limitations period starting on January 1, 2000." Def.'s Summ. J. Br. at 20 (emphasis added). To support this argument, NorthShore points to the last sentence in Section 16(i), which states "[t]hat whenever the running of the statute of limitations … is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension *or within four years after the cause of action accrued*." 15 U.S.C. § 16(i) (emphasis added). The obvious problem is that NorthShore's argument *assumes* that the four-year limitations period started on January 1, 2000. In other words, NorthShore attempts to bootstrap its § 16(i)

2. The Accrual Rule:

The parties dispute when the Class claims accrued. While NorthShore maintains that both claims accrued on January 1, 2000, the date of the merger, Def.'s Summ. J. Br. at 5-6, 9-14; Def.'s Reply Br. at 1, 6-8, the Class contends that the claims accrued when class members paid NorthShore's anticompetitive prices, Pls.' Resp. Br. at 10-18.

To get the basic terminology straight: "[a]ccrual is the date on which the statute of limitations begins to run." *Cada*, 920 F.2d at 450; *Heard*, 253 F.3d at 317-18. In the antitrust context, this means that "a cause of action [generally] accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). Calculating the accrual date for antitrust actions, as in other areas of the law, can be fairly straightforward—often the plaintiff knows that he has been injured by the defendant's alleged antitrust violation as soon as that violation occurs. But not always. In instances where the plaintiff does not discover his antitrust injuries until after the alleged wrong occurs, the "discovery rule"[20] kicks-in

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argument to its accrual-upon-merger argument. So, whether NorthShore can prevail on its § 16(i) argument, turns on when the Section 2 and Section 7 claims accrued—issues which the Court addresses next. *See infra* Section III.A.2. So there is actually no independent argument in NorthShore's favor based on this filing date of the FTC's complaint.

[20]The discovery rule "is read into statutes of limitations in federal-question cases … in the absence of a contrary directive from Congress," *Cada*, 920 F.2d at 450, which is precisely the case here. In fact, the Seventh Circuit and the Northern District of Illinois have applied the discovery rule to federal antitrust claims. *See In re Copper Antitrust Litig.*, 436 F.3d 782, 789-90 (7th Cir. 2006) (analyzing whether the discovery rule applied to the plaintiffs' Sherman Act and Clayton Act claims); *see also, e.g.*, *Shuffle Tech Int'l, LLC v. Scientific Games Corp.*, 2015 WL 5934834, at *15 (N.D. Ill. Oct. 12, 2015) (acknowledging that the discovery rule could apply to a Section 7 cause of action); *Nat'l Black Expo v. Clear*

to "postpone[] the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured … ." *Cada*, 920 F.2d at 450; *In re Copper Antitrust Litig.*, 436 F.3d 782, 789 (7th Cir. 2006). The discovery rule then is *not* so much an exception to the accrual rule, but rather a rule that tells us when the claim accrues. *See Barry Aviation, Inc., v. Land O'Lakes Mun. Airport Comm'n*, 377 F.3d 682, 688 (7th Cir. 2004) ("[The discovery rule] is based on the general rule that accrual occurs when the plaintiff discovers that 'he has been *injured* and who *caused* the injury.'" (quoting *United States v. Duke*, 229 F.3d 627, 630 (7th Cir. 2000))); *In re Cooper Antitrust Litig.*, 436 F.3d at 789.

Another principle of accrual, called the "continuing violations" doctrine, postpones the beginning of the limitations period where the defendant inflicts continuing and accumulating harm. *Heard*, 253 F.3d at 319*; see also Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15 (1968) (continuing violation applies where the defendant's conduct "inflict[s] continuing and accumulating harm on [the plaintiff]."). "[A] violation is called 'continuing,' signifying that a plaintiff can reach back to its beginning even if that beginning lies outside the statutory limitations period, when it would be unreasonable to require or even permit him to sue separately over every incident of the defendant's unlawful conduct." *Heard*, 253 F.3d at 319.[21]

Channel Broad., Inc., 2007 WL 495307, at *5 (N.D. Ill. Feb. 8, 2007) (acknowledging that the discovery rule could apply to a Section 2 cause of action).

[21]*Heard* acknowledges that courts differ on whether the continuing violations doctrine operates to toll an already-running limitations clock or instead to set an accrual date (that is, the start, or restart, of the limitations clock). 253 F.3d at 319 ("But the usual and it seems to us the correct characterization of the doctrine of continuing violation is that

Taking the Section 2 and Section 7 claims in turn—again, based on NorthShore's alleged post-February 10, 2000 price increases—the Court first will consider when it is that NorthShore committed an act that allegedly injured the Class, *see Zenith Radio*, 401 U.S. at 338, before analyzing whether the discovery rule, *see Cada*, 920 F.2d at 450, or the continuing violations doctrine, *see Heard*, 253 F.3d at 319, postponed the date on which those claims accrued.

a. Illegal Monopolization Under Section 2 of the Sherman Act

i. *Berkey v. Photo, Inc. v. Eastman Kodak Co.*

In *Berkey v. Photo, Inc. v. Eastman Kodak Co.*, the Second Circuit was presented with the question of when a purchaser's Section 2 cause of action accrued. 603 F.2d at 295-96. The purchaser alleged that the defendant's anticompetitive conduct—which included illegal acquisitions, exclusionary tactics, and other improper conduct—enabled the defendant to monopolize the photographic paper market and overcharge its customers. *Id.* at 293. The anticompetitive conduct occurred more than four years before the filing of the suit; four years is the limitations period for an antitrust claim. *Id.* Relying on the Supreme Court's decision in *Zenith Radio*, *Berkey* observed that "the business of a monopolist's *rival* may be injured at the time the anticompetitive conduct occurs … ." *Id.* at 295 (emphasis added). But rivals are one thing, and *purchasers* are another. *Berkey* explained that "a purchaser, by contrast, is not harmed until the monopolist

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it is a doctrine governing accrual, not a tolling doctrine, because we don't *want* the plaintiff to sue before the violation is complete. Tolling rules create defenses; they are optional with the plaintiff; he can sue as soon as his claim accrues. We therefore delay the accrual date when, quite independent of the plaintiff's wishes, we want to delay his right to bring suit." (internal citations omitted)).

actually exercises its illicit power to extract an excessive price." *Id.* Rather than hold that the defendant's anticompetitive conduct by itself triggered the statute of limitations, *Berkey* reasoned that a purchaser's Section 2 claim cannot accrue until "the purchaser[] … actually pays the [supracompetitive price]." *Id.*

Despite NorthShore's argument to the contrary,[22] *Berkey* is persuasive and the Court applies it here. True, the Seventh Circuit has not decided one way or the other to adopt *Berkey*. But there is no reason to think that the Seventh Circuit would not do so, particularly given that *Berkey* relies almost exclusively on Supreme Court precedent to reach its holding. *See Berkey*, 603 F.2d at 295-96 (citing, for example, *Zenith Radio*, 401 U.S. 321; *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); and *Schine Chain Theatres v. United States*, 334 U.S. 110 (1948), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984)). What's more, the Seventh Circuit has cited *Berkey's* accrual rule with approval in a non-antitrust context, *see Taylor v. Meirick*, 712 F.2d 1112,

[22]NorthShore asserts that *Berkey* is irrelevant: *Berkey* applies where "a monopolist waits until sometime after it acquires a monopoly to charge an unlawful price," and here, NorthShore contends, "no time lapse existed between the anticompetitive conduct (the [m]erger) and the alleged exercise of monopoly power (the alleged overcharges)." Def.'s Summ. J. Br. at 11-12. To support this argument, NorthShore cites to the Second Amended Complaint, *see id.*, which alleges that NorthShore exercised its monopoly power by increasing its prices "immediately" after, or "coincident" with, the merger, *see* Second Am. Compl. ¶ 16. But phrases like "immediately" and "coincident" must be interpreted in context—here, that "context" refers to a merger amongst three major northern Chicago hospitals. Sure, perhaps the merger formally took place on January 1, 2000, but mergers are not over and done with in a day. In fact, it took NorthShore six months just to equalize the hospitals' chargemasters. PSOF ¶ 13; Def.'s Resp. PSOF ¶ 13. So the Court declines to read the Class's allegation that NorthShore "immediately" increased its prices "coincident" with the merger as alleging that NorthShore increased its prices "on January 1, 2000." The Court also notes that in any event, *Berkey* held that a purchaser's claim does not accrue until "the purchaser[] … actually *pays* the [supracompetitive price]." 603 F.2d at 295 (emphasis added). So the key issue is when the Class *paid* NorthShore's supracompetitive prices, not whether NorthShore "immediately" increased its prices on January 1, 2000.

1118 (7th Cir. 1983), and has repeatedly relied on *Berkey* to distinguish between unlawful monopolization and lawful competition, *see, e.g.*, *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000); *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1412-13 (7th Cir. 1995), *as amended on denial of reh'g* (Oct. 13, 1995); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 375-76 (7th Cir. 1986); *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1106 (7th Cir. 1983). Given all of this, there is no reason to think that the Seventh Circuit would not also adopt *Berkey's* accrual-on-purchase approach to Section 2 claims.

So *Berkey* controls. Under *Berkey*, the Section 2 claim accrued when class members purchased NorthShore's healthcare services at allegedly supracompetitive prices. And the fact that NorthShore's alleged anticompetitive conduct—the January 1, 2000 merger—occurred before the limitations period started does not change this: "[T]here can be no unfairness in preventing a monopolist that has established its dominant position by unlawful conduct from exercising that power in later years to extract an excessive price." *Berkey*, 603 F.2d at 296. Although NorthShore notified the MCOs about the merger before it occurred, *see* DSOF ¶¶ 21-22, NorthShore did not tell them that it would increase its prices for healthcare services until after the merger. PSOF ¶ 7 ("None of [the letters] stated that the assignment would increase prices, or that [NorthShore] had a right to higher reimbursements as a result of the merger."); Def.'s Resp. PSOF ¶ 7 ("NorthShore also admits that none of the assignment letters stated that [NorthShore] had a right

to higher reimbursement rates as a result of the merger."). Nor did NorthShore ever publicly announce its intention to increase its prices post-merger. PSOF ¶ 4; DSOF ¶ 28; Pls.' Resp. DSOF ¶ 28. Actually, before the merger, NorthShore had agreed to provide its services under the same rates, terms, and conditions set forth in its (or Highland Park Hospital's) preexisting contract with the MCO.[23] DSOF ¶ 23; Pls.' Resp. DSOF ¶ 23. It was not until after the merger that NorthShore and the MCOs began to renegotiate their contracts. PSOF ¶ 9. Indeed, none of the MCOs had signed a finalized, renegotiated contract with NorthShore by February 10, 2000. *Id.* The first MCO to sign a renegotiated contract with NorthShore did not do so until February 23, 2000. *Id.* ¶ 11. This means that the MCOs began paying a supracompetitive price for NorthShore's healthcare services sometime *after* that date once their renegotiated contracts took effect. NorthShore contends that "distinct from *Berkey*, no time-lapse existed between the anticompetitive conduct and the alleged price increases." Def.'s Summ. J. Br. at 3. But there was a time lapse here: between January 1, 2000, when the merger occurred, and post-February 23, 2000, when the renegotiated contracts took effect and class members actually paid NorthShore's supracompetitive prices. So, despite NorthShore's argument to the contrary, the rationale underlying *Berkey*—that purchasers are not injured until they pay the too-high price—applies with equal force here.

[23]As a reminder, to the extent that the Class argues that NorthShore increased its prices as of January 1, 2000 when it chose (subject to the MCO's consent) what contract would govern post-merger and that class members were harmed as a result of those supracompetitive price increases, the Court addresses those claims in Section III.B.

In sum, the Class's Section 2 claim based on NorthShore's post-February 10, 2000 supracompetitive price increases accrued when the Class paid those allegedly illegal prices. Those payments did not occur, based on the record evidence, until *after* February 10, 2000. This accrual timing, when combined with the tolling of § 16(i), renders the post-February 10, 2000 Section 2 claims timely. Put another way, § 16(i) kicked in as of February 10, 2004 when the FTC brought its action and tolled the limitations period all the way up until the Class filed this lawsuit. On these grounds alone, NorthShore's motion for summary judgment must be denied.

ii. The Discovery Rule

Even if the rule established by *Berkey* does not apply, the Section 2 claim for post-February 10, 2000 supracompetitive price increases would still survive by operation of the discovery rule. Remember that the discovery rule "postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured … ." *Cada*, 920 F.2d at 450; *In re Copper Antitrust Litig.*, 436 F.3d at 789. NorthShore asserts that the discovery rule does not apply because the Class "admitted to knowing about the [m]erger before it occurred and alleged that NorthShore 'immediately' increased its prices after the [m]erger."[24] Def.'s Summ. J. Br. at 14. But the fact that the Class knew about the

[24]To support this argument, Northshore relies on commentary from a leading antitrust treatise discussing the accrual rule for Section 2 claims:

> Customers of the monopolist are not injured until after the monopolist causes them injury through higher prices, which may occur later than the exclusionary practices creating the monopoly. For example, competitors are injured immediately by predatory pricing, but customers would not be injured until much later, when the predation has done its work and the monopolist raises its price. Once customers

merger before it occurred is irrelevant; the discovery rule asks when the Class knew (or had reason to know) that NorthShore had unlawfully increased its *prices*. *See Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 902 (7th Cir. 2004) ("The period of limitations for antitrust litigation runs from the most recent injury caused by the defendants' activities rather than from the violation's inception."). As far as the Class could tell as of January 1, 2000, NorthShore was touting that the merger was only going to benefit consumers, MCOs, and the communities that the three hospitals served. PSOF ¶ 3.

And here, class members could not have discovered that they suffered any injury as a result of the merger until they knew that NorthShore had illegally overcharged them for its healthcare services. As of January 1, 2000, NorthShore had agreed to provide those services under the same rates that the MCO was paying before the merger—either under its preexisting contract with NorthShore or its preexisting contract with Highland Park Hospital. DSOF ¶ 23; Pls.' Resp. DSOF ¶ 23. (To the extent that the Class argues that class members were harmed—that

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> have reason to know of the violation and their damages are sufficiently ascertainable to justify an antitrust action, the statute begins to run against them.

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 320c4 (3d & 4th eds. and 2015 Cum. Supp.); *see also* Def.'s Summ. J. Br. at 14.

The problem is that this excerpt actually supports applying the discovery rule to postpone starting the limitations period until the Class knew (or had reason to know) that NorthShore had charged supracompetitive prices. As the treatise points out, the class members were not injured until after NorthShore "cause[d] them injury through higher prices," which occurred once the parties' renegotiated contracts took effect. Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 320c4. And even once the renegotiated contracts took effect, the Section 2 claims would not have actually accrued until the class members "ha[d] reason to know" that they paid supracompetitive prices for healthcare services. *Id.*

is, paid NorthShore's supracompetitive prices—*before* February 10, 2000, the Court addresses whether those claims are timely in Section III.B.) In other words, based on the record evidence, there is nothing to suggest that the MCOs knew of NorthShore's plan to increase its prices as of February 10, 2000.[25] In fact, the MCOs' discovery of their alleged injuries was probably much later. *Cf. In re Copper Antitrust Litig.*, 436 F.3d at 792; *In re Ready-Mixed Concrete Price Fixing Litig.*, 2006 WL 2849711, at *2 (S.D. Ind. Sept. 29, 2006). This is in part because "the market for hospitals services [is] particularly complex," which in turn makes it difficult to readily uncover the basis of the pricing of those services:

> Adding even more complexity [to the market for hospital services] is the fact that insurers and health care providers negotiate contracts that cover not a single service but complex bundles of many different services and products. ... Even without such unbundling or re-bundling, the prices of the individual component items are themselves subject to a wide variety of market influences. ... Without any exercise of market power, therefore, the price for [a] bundled service ... might go up, go down, or stay level, despite substantial changes in the prices of the component[] [services and products]. As a result of these complexities, changes in the nominal prices charged for particular services might actually conceal rather than reveal a health care provider's exercise of unlawful market power.

Messner v. Northshore Univ. Health Sys., 669 F.3d 802, 816-17 (7th Cir. 2012) (internal citation omitted). As the Class aptly points out, "even in the remote chance that a class member could have connected all of the dots that it was paying higher prices after the merger, that those higher prices were the result of increased market

[25]NorthShore asserts that one letter it sent to one MCO put that particular MCO on notice that NorthShore was going to choose the "more favorable" contract to govern the parties' post-merger relationship. Def.'s Summ. J. Br. at 8. But that letter only implies that NorthShore and the MCO would utilize whichever preexisting contract was "better," not that NorthShore was going to choose whichever preexisting contract charged higher rates. *See* Pls.' Resp. Br. at 5 n.3.

power as opposed to a one-time catch up or normal price increase[], and that the increased market power was being abused to extract higher reimbursements, it could not have reached these conclusions before February 10, 2000." Pls.' Resp. Br. at 16. Again, there is no factual dispute here: the Class did not discover its antitrust injuries based on NorthShore's post-February 10, 2000 price increases until after February 10, 2000—four years before the FTC brought its antitrust action against NorthShore. So, even if the holding of *Berkey* does not apply, the discovery rule would require the denial of NorthShore's motion for summary judgment as to the Section 2 claim.

iii. Continuing Violations Doctrine

Because both *Berkey* and the discovery rule apply here, the Class need not rely on the continuing violations doctrine to refute the limitations defense. For the sake of completeness, the Court will discuss the application—or, as it turns out, the non-application—of the doctrine. As noted earlier, the continuing violations doctrine postpones the limitations period where the defendant inflicts continuing and accumulating harm. *Heard*, 253 F.3d at 319. Thus, in order for the doctrine to apply, the plaintiff must be challenging "not just one incident of [unlawful] conduct … but an unlawful practice that continues into the limitations period … ." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81, (1982). In continuing violations cases, "the complaint is timely when it is filed within [the limitations period,

measured from] the last asserted occurrence of that practice."[26] *Id.*; *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 271 (7th Cir. 1984) ("[I]f a continuing violation extends into the statutory period, the victim is entitled to complain about the whole violation, no matter how long ago it began … .").

The Class asserts that the continuing violations doctrine applies based on the Supreme Court's holding in *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481; *see also* Pls.' Resp. Br. at 22-23. In that case, United, a shoe machinery manufacturer and distributor, instituted a lease-only policy in 1912, whereby it agreed to lease, but would not sell, its machinery to Hanover. 392 U.S. at 483-84. Hanover finally brought suit in 1955, asserting that the lease-only policy amounted to unlawful monopolization. *Id.* The Court rejected United's argument that "because the earliest impact on Hanover of United's lease only policy occurred in 1912, Hanover's [claim] arose during that year and is now barred by the … statute of limitations":

> We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. Rather, we are dealing with conduct which constituted a *continuing violation* of the Sherman Act and which *inflicted continuing and accumulating harm* on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955.

Id. at 502 n.15 (emphases added) (internal citation omitted). Because the lease-only policy continually harmed the plaintiff from 1912 through 1955, the Court

[26]*See also Heard*, 253 F.3d at 320 ("In between the case in which a single event gives rise to continuing injuries and the case in which a continuous series of events gives rise to a cumulative injury is the case in which repeated events give rise to discrete injuries.").

concluded that the plaintiff "[wa]s entitled to damages for [that] entire period." *Id.* at 502.

Hanover Shoe held that the continuing violations doctrine allowed the plaintiff to reach back *outside* the limitations period to the earliest date that United's lease-only policy first inflicted harm. 392 U.S. at 502 n.15. But that holding is of little relevance here. Applying *Hanover Shoe* here would only, at best, allow the Class to reach back to when NorthShore's post-February 10, 2000 supracompetitive prices first inflicted harm—in other words, when class members actually paid NorthShore's allegedly illegal overcharges. Based on the record evidence, and according to the Class, this did not happen until after February 23, 2000, once Northshore had renegotiated its MCO contracts. PSOF ¶¶ 9, 11; *see also* Pls.' Resp. Br. at 17 (observing that "[NorthShore] signed new contracts with MCOs which contained price increases, and MCOs [then] paid those higher prices … ."). So the continuing violations doctrine is not of much use in this case because § 16(i)'s tolling rule already renders timely the Class claims for post-February 10, 2000 overcharges. *See supra* Section III.A.1. In other words, the Class does not have to reach back *outside* the limitations period to assert those claims.

In any event, it is not clear that *Hanover Shoe* would even apply to a Section 2 *merger*-based claim like the one at issue here. Although the Seventh Circuit has not analyzed whether the continuing violations doctrine applies to merger-based claims, other Circuits have concluded that it does not. *See Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 598-99 (6th Cir. 2014) (analyzing the continuing violations

doctrine and observing that "price increases in the merger-acquisition context do not extend the statute of limitations"); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1052 (8th Cir. 2000) (concluding that "[c]ontinuing violations have not been found outside the RICO or Sherman Act conspiracy context, however, because acts that 'simply reflect or implement a prior refusal to deal or acts that are merely unabated inertial consequences (of a single act) do not restart the statute of limitations'" (quoting *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 467-68 (6th Cir. 1996))). What's more, even if the doctrine applied to merger-based claims, subsequent price increases or contract renegotiations would not constitute an "independent predicate act" sufficient to start the limitations period anew. As Professors Areeda and Hovenkamp point out:

> [I]f there is one clear case where a subsequent act is a mere 'reaffirmation' rather than an 'independent' predicate act, it is the ongoing sales of the post-merger firm. Every merger contemplates that the post-merger firm will continue to sell the product. To regard each sale as an independent predicate act thus deprives the notion of 'independence' of all meaning.

Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 320c5. So, based on the above, the continuing violations doctrine does not apply to the Section 2 claim.

In any event, both *Berkey* and the discovery rule provide independent bases on which the Class's Section 2 claims based on post-February 10, 2000 alleged overcharges may go forward. (The continuing violations doctrine, by contrast, does not.) It is worth noting that, not only must NorthShore's motion be denied, but it appears that there is no factual basis (given the legal principles that the Court has

adopted) for NorthShore to assert the limitations defense; in other words, the Class might be entitled to summary judgment *against* the defense. But the Class did not cross move, so it remains open, at this point, for NorthShore to try to prove that a particular MCO knew, before February 10, 2000, that NorthShore planned to charge supracompetitive prices.

b. Anticompetitive Merger Under Section 7 of the Clayton Act

i. Hold-and-Use Doctrine

Because Section 7, broadly speaking, prohibits anticompetitive acquisitions, Section 7 claims typically accrue as soon as the acquisition takes place. *See United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 598 (1957) (citing cases brought under Section 7 "at or near the time of acquisition"). But it is possible for accrual to take place afterwards. Indeed, a Section 7 claim can accrue "any time when the acquisition threatens to ripen into a prohibited effect." *Id.* at 597. In other words, "old activity (in *du Pont*, a stock acquisition preceding the suit by 30 years) is not immunized, if the potential for a reduction in output is created or realized more recently as market conditions change." *U.S. Gypsum Co. v. Ind. Gas Co.*, 350 F.3d 623, 628 (7th Cir. 2003). And this makes sense: "The Clayton Act was intended to supplement the Sherman Act. Its aim was primarily to arrest apprehended consequences of inter corporate relationships before those relationships could work their evil, which may be at or *any time after* the acquisition, depending upon the circumstances of the particular case." *E.I. du Pont*, 353 U.S. at 597 (emphasis added).

So, where a merger only produces anticompetitive effects *post*-merger, the statute of limitations begins to run not when the merger transpired, but when the injury occurred.[27] *E. I. du Pont*, 353 U.S. at 597-98*; see also United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 242 (1975) ("Thus, there can be a violation at some time later even if there was clearly no violation—no realistic threat of restraint of commerce or creation of a monopoly—at the time of the initial acts of acquisition."). Courts sometimes refer to this as the "hold-and-use" doctrine. *See, e.g.*, *Z Techs. Corp.*, 753 F.3d at 595; *see also ITT Cont'l Baking Co.*, 420 U.S. at 240 (Clayton Act regulates "holding as well as obtaining assets"). Applying this principle, in *Julius Nasso Concrete Corp. v. Dic Concrete Corp.*, a district court determined that the plaintiff's Section 7 claim accrued when the defendants manipulated the market for concrete materials, not when the mergers "which made [those] actions possible" took place. 467 F. Supp. 1016, 1023 (S.D.N.Y. 1979). The court observed that "[c]onstruing [Section] 7 to reach only conduct pertaining to initial mergers would violate the Supreme Court's ruling in [*du Pont*]. … Thus, in addition to prohibited acquisitions giving rise to immediate [Section 7] claims, subsequent anti-competitive acts committed by the merger enterprise give rise to separate causes of action." *Id.* Because accrual occurs when the post-merger anticompetitive acts are committed, the court held that "[the plaintiff's] charges about Certified's pricing

[27]The Class interprets the holding in *du Pont* and the hold-and-use doctrine generally as part and parcel of the continuing violations doctrine. *See* Pls.' Resp. Br. at 23-24. But the hold-and-use doctrine applies where the defendant lawfully acquires assets, but then later uses those assets in a manner that inflicts anticompetitive injury. *See E. I. du Pont*, 353 U.S. at 597-98. The continuing violations doctrine, by contrast, applies where the defendant causes continuing and accumulating harm. *Heard*, 253 F.3d at 319.

policy and DIC-Underhill's misuse of bonding power[28] may be dated from the time these events actually transpired and not only from the date of the mergers which made these actions possible." *Id.*

Similarly, here the Class alleges that the merger enabled NorthShore to manipulate the market for healthcare services by charging supracompetitive prices. Hold-and-use applies here: the Class seeks to recover for injuries arising from NorthShore's post-merger anti-competitive acts—increasing the price of healthcare services so as to allegedly overcharge the Class for those services. The Class's Section 7 claim thus accrued, at the earliest, sometime after February 23, 2000, once NorthShore had renegotiated its MCO contracts, PSOF ¶¶ 9, 11—not from the date of the merger that made that act possible.

The Court hastens to add, however, that in order for the hold-and-use doctrine to apply, the Class will have to show a causal connection between the January 1, 2000 merger and NorthShore's later supracompetitive price increases:

> To base a [Section] 7 violation on subsequent conduct, however, several things must be shown. First, it must be demonstrated that *the conduct was made possible by the acquisition*. Plaintiffs must show either that the acts were anticompetitive because of the acquisitions, or that their anticompetitive nature was enhanced by the acquisitions. Acts that might be characterized as merely competitive before a merger, might well be viewed as anticompetitive when performed by a company that, because of the merger, "dominates" the market. There must be a showing that the conduct was related to an enhanced capacity to meet the short-term threat of a new entrant into a dominated market, or simply that the conduct had a tendency to substantially lessen competition or create a monopoly.

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[28]The plaintiff had alleged that the defendantDIC-Underhill "abused its pre-eminent market position by posting performance bonds for building projects on which it ha[d] applied for the concrete subcontract in exchange for which the prime contractor award[ed] it the job without soliciting competitive bids." *Julius Nasso*, 467 F. Supp. at 1019.

Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., Inc., 491 F. Supp. 1199, 1224 (D. Haw. 1980) (emphasis added) (internal citations omitted), *aff'd*, 732 F.2d 1403 (9th Cir. 1984). In other words, the Class must show that the merger "made [the price increase] possible." *Julius Nasso*, 467 F. Supp. at 1023; *cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) ("The injury should reflect the anticompetitive effect either of the [Section 7] violation or of anticompetitive acts made possible by the [Section 7] violation."). Because NorthShore instituted a supracompetitive pricing policy after February 10, 2000—again, four years before the FTC brought its action—and because the merger made that policy possible, the Class's Section 7 claim based on that policy can go forward.

ii. The Discovery Rule

The discovery rule also applies to the Section 7 claim. In other words, even absent the "hold-and-use" doctrine, the discovery rule dictates that the Class's Section 7 claim would not have accrued until class members discovered that the merger caused anti-competitive injury. *See Cada*, 920 F.2d at 450; *In re Copper Antitrust Litig.*, 436 F.3d at 789. Like NorthShore's argument against applying the discovery rule to the Section 2 claim, here NorthShore argues that "[t]he rule is irrelevant to determining when [the Section 7] claim accrued because it is undisputed that each named plaintiff had actual knowledge of the [m]erger as of January 1, 2000." Def.'s Summ. J. Br. at 6; *see also supra* Section III.A.2.a.ii. at 20-23. But again, the fact that the Class knew about the *merger* before it occurred is

irrelevant. What is relevant is when the Class knew (or had reason to know) that NorthShore had unlawfully increased its *prices*. *See Xechem, Inc.*, 372 F.3d at 902.

NorthShore further contends that a recent case, *Shuffle Tech International, LLC v. Scientific Games Corp.*, 2015 WL 5934834 (N.D. Ill. Oct. 12, 2015), explains why the discovery rule does not apply to the Section 7 claim here. Northshore is right on one point: *Shuffle Tech* held that the discovery rule did not apply to the Section 7 claim because the plaintiffs were not participants in the relevant market at the time the acquisitions occurred. *Id.* at *15; *see also* Def.'s Summ. J. Br. at 7. But *Shuffle Tech* is a very different case from this one: there, the plaintiffs alleged that the acquisitions *themselves*—not *subsequent* anticompetitive acts made possible by those acquisitions—caused the anticompetitive harm:

> But although it may be possible for a cause of action under section 7 to accrue sometime after a merger causes a plaintiff's undiscovered injury, that is not the issue in this case. Plaintiffs claim that SHFL's acquisition of CARD in 2004 and VendingDate in 2009 were monopolistic *acquisitions that caused anticompetitive harms when they transpired*. At the time SHFL made these acquisitions, plaintiffs were not participants in the casino shuffler market. Accordingly, plaintiffs do not allege that they were in a position to suffer an injury as a result of the merger. The discovery rule does not apply where, as here, there was no injury to discover.

Shuffle Tech, 2015 WL 5934834, at *15 (emphasis added). *Shuffle Tech*, therefore, has no bearing on deciding whether the discovery rule applies to the Section 7 claim in this case. Here, the Class alleges that NorthShore's *post*-merger anti-competitive act—increasing the price of healthcare services so as to overcharge the Class for those services—caused anticompetitive injury. If anything, *Shuffle Tech* only supports the application of the discovery rule, because *Shuffle Tech* recognized that

the discovery rule can apply to Section 7 claims that are based on post-merger anticompetitive acts. *Id.* Just as the discovery rule applies to the Section 2 claim, so too does it apply to the Section 7 claim.

iii. Continuing Violations Doctrine

For the sake of completeness, the Court briefly discusses the applicability—or inapplicability—of the continuing violations doctrine to the Section 7 claim. As with the Section 2 claim, even if the continuing violations doctrine applied to merger-based claims, the doctrine would only at best allow the Class to reach back to when it first was injured by the anticompetitive effects of the merger—that is, when class members paid NorthShore's supracompetitive prices, which occurred after the renegotiated contracts took effect. Because Section 16(i)'s tolling rule already renders timely the Class's claims based on those alleged overcharges, the continuing violations doctrine is not of much use in this case. *See supra* Section III.A.1. In other words, the Class does not have to reach back *outside* the limitations period to assert its Section 7 claim. What's more, the case law against applying the continuing violations doctrine to merger-based claims brought under Section 7 in particular is fairly well-settled. *See Z Techs. Corp.*, 753 F.3d at 598-99; *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 271 (8th Cir. 2004); *Concord Boat Corp.*, 207 F.3d at 1052; *see also supra* Section III.A.2.a.iii. at 23-27.

In any event, the hold-and-use doctrine and the discovery rule do apply to the Section 7 claim, and each is an independent basis to defeat the summary judgment motion. The Court reiterates that to the extent NorthShore can prove that a

particular MCO knew that NorthShore planned to charge supracompetitive prices *before* February 10, 2000, then NorthShore can still argue that the statute of limitations bars that particular MCO's Section 7 claim. For now, there is no record evidence to that effect, so Northshore's motion based on the Section 7 claim is denied in its entirety.

B. Pre-February 10, 2000 Supracompetitive Price Increases

Until now, the analysis has focused on what rights, if any, the Class had from February 10, 2000 onward. This is because § 16(i) postponed the limitations period for any claims that accrued after that date. (Remember the FTC instituted its action against NorthShore on February 10, 2004, so any claim that accrued on or after February 10, 2000 is timely.) The only issue left for the Court to address is whether the Class can assert any claim for injuries it suffered as a result of NorthShore's alleged *pre*-February 10, 2000 anticompetitive conduct. The short answer is no.

NorthShore sent letters to the MCOs in December 1999 identifying which contract—the MCO's preexisting contract with NorthShore or its preexisting contract with Highland Park Hospital—would govern post-merger. DSOF ¶ 23; Pls.' Resp. DSOF ¶ 23. If NorthShore's strategy for choosing between those contracts was to go with whichever one charged higher rates for healthcare services, then the MCO would have faced a price increase as of January 1, 2000. (This is because whatever rates the MCO had paid pre-merger for services rendered at NorthShore's hospitals *or* at Highland Park Hospital—depending on which preexisting contract would govern post-merger—would have increased post-merger.) And in fact, this is

exactly what NorthShore asserts happened: "In other words, Northshore informed the MCOs that it needed to renegotiate its contracts coincident with the [m]erger and that it intended to provide services under the terms and conditions of either the [NorthShore] or [Highland Park Hospital] contract, *whichever was more favorable to [NorthShore]*." Def.'s Summ. J. Br. at 8 (emphasis added). But neither party disputes that, at the time of the merger, NorthShore did not know whether its MCO contracts "were better" than Highland Park Hospital's MCO contracts. PSOF ¶ 8 ("[NorthShore] did not know whether the [NorthShore] or [Highland Park Hospital] contracts were better."); Def.'s Resp. PSOF ¶ 8 ("NorthShore admits that [NorthShore] did not know whether its contracts were better than [Highland Park Hospital's] contracts before the merger."). If this is true, then NorthShore had not yet figured out, as of the time of the merger, whether its contracts or Highland Park Hospital's contracts charged higher rates for healthcare services (or for particular health services). NorthShore also fails to cite any evidence showing that its strategy was to go with whatever contract charged higher rates.[29] If there was any evidence to this effect, then NorthShore could plausibly argue that the MCOs had reason to know that the merger was anticompetitive and that they had suffered harm (in the form of higher prices) as of January 1, 2000. But the record evidence does not support this argument.

[29]It bears repeating that NorthShore claims that *one* letter it sent to *one* MCO put that MCO on notice that it would choose whichever contract—the MCO's preexisting contract with Northshore or its preexisting contract with Highland Park Hospital—was "more favorable" to NorthShore. *See* Def.'s Summ. J. Br. at 8. But again, that letter only implies that NorthShore and that one MCO would utilize whichever preexisting contract was "better," not that NorthShore was going to choose whichever preexisting contract charged higher rates. *See* Pls.' Resp. Br. at 5 n.3.

The point here is two-fold: First, it is unclear from the record evidence that NorthShore increased its prices as of January 1, 2000 when it chose which contract would govern post-merger. NorthShore argues that it chose the "more favorable" contract, but there is no record evidence supporting this contention as of the date of the merger; even NorthShore did not know which contract was more favorable. Likewise, the Class suggests that "[NorthShore] may have raised a handful of prices in the 40 days after the merger," but fails to cite to any evidence to support this assertion. Pls.' Resp. Br. at 7.

Second, and more importantly, to the extent the Class is trying to recover for any alleged overcharges it paid between January 1, 2000 and February 10, 2000—that is, alleged overcharges based on its preexisting contract with Northshore or Highland Park Hospital, whichever NorthShore identified would govern post-merger—those claims are time-barred. This is because those overcharges (if there were any) fall outside the limitations period. Section 16(i) only tolled the limitations period for any claims that accrued *after* February 10, 2000. In order to have timely raised any pre-February 10, 2000 claim, the Class must successfully invoke some other tolling doctrine. This it cannot do.

None of the possible tolling or accrual doctrines—equitable tolling, equitable estoppel, and the continuing violations doctrine—apply to toll the Class's *pre*-February 10, 2000 antitrust claims. Equitable tolling stops the statute of limitations from running where a plaintiff "despite all due diligence … is unable to obtain vital information bearing on the existence of his claim." *Cada*, 920 F.2d at 451. The

doctrine does not kick-in, however, until the plaintiff is "certain his rights ha[ve] been violated." *Id.* In many ways, equitable tolling is the tolling counterpart to the discovery rule: while the discovery rule determines when the limitations period begins to run based on the plaintiff's discovery of actual injury, equitable tolling functions to stop the statute of limitations until the plaintiff can, with due diligence, discover the facts supporting the claim. Put another way, the doctrine differs from the discovery rule "in that the plaintiff is assumed to know that he has been injured, so that the statute of limitations has begun to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant." *Id.* Based on the record evidence, equitable tolling does not apply in this case. There is simply nothing to suggest that the Class did not have the means available before the limitations period expired to determine that the injury was due to NorthShore's alleged anticompetitive conduct.

Equitable estoppel does not apply either. That doctrine "comes into play [when] the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations. *Cada*, 920 F.2d at 450-51. The Seventh Circuit has warned that "[e]quitable estoppel in the limitations setting is sometimes called fraudulent concealment, but must not be confused with efforts by a defendant in a fraud case to conceal the fraud." *Id.* at 451. The Class contends that "a jury could conclude that [NorthShore] concealed … the true purpose behind the merger" given that "[NorthShore] touted the supposed benefits of the merger, and emphasized increased efficiencies as a benefit for its customers." Pls.' Resp. Br.

at 27-28. The problem here, however, is that the Class has done exactly what the Seventh Circuit warned against: confused the equitable estoppel doctrine with NorthShore's alleged efforts to conceal its antitrust violations. In other words, the Class has "merge[d] the substantive wrong with the tolling doctrine." *Cada*, 920 F.2d at 451. So, equitable estoppel does not apply.

And, finally, the continuing violations doctrine also does not render the Class's pre-February 10, 2000 claims timely. As already discussed, *see supra* Section III.A.2.a.iii. at 23-27; Section III.A.2.b.iii. at 32-33, any price increase NorthShore instituted would not constitute an "independent predicate act" sufficient to start the limitations period anew: "Every merger contemplates that the post-merger firm will continue to sell the product. To regard each sale as an independent predicate act thus deprives the notion of 'independence' of all meaning." Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 320c5.

So, to the extent the Class asserts that class members paid a supracompetitive price for NorthShore's healthcare services *before* February 10, 2000, those claims are untimely. NorthShore's motion for summary judgment as to the Section 2 and Section 7 claims based on any alleged pre-February 10, 2000 supracompetitive price increases is therefore granted.

IV. Conclusion

For the reasons discussed above, NorthShore's motion for summary judgment based on the statute of limitations, R. 773, is denied in large part and granted to the limited extent explained in the Opinion.

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: September 9, 2016