**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TENNESSEE**
**WESTERN DIVISION**

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| **SUZANNE C. CLARKE, et al.,** | ) | |
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| **Plaintiffs,** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **No. 06-2377 Ma/V** |
| **BAPTIST MEMORIAL HEALTHCARE** | ) | |
| **CORP.; METHODIST HEALTHCARE,** | ) | |
| | ) | |
| **Defendants.** | ) | |
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**ORDER DENYING DEFENDANTS' MOTION TO DISMISS**
**AND DENYING AS MOOT DEFENDANTS' MOTION TO STAY DISCOVERY**

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Plaintiffs Suzanne Clarke ("Clarke") and Conise Dillard ("Dillard") bring suit on behalf of themselves and all others similarly situated against Defendants Baptist Memorial Healthcare Corporation and Methodist Healthcare, alleging conspiracy to depress wages and conspiracy to exchange compensation information, both in violation of section 1 of the Sherman Act, 15 U.S.C. § 1.

Before the court is Defendants' September 1, 2006 motion to dismiss Plaintiffs' class action complaint. Plaintiffs responded on October 4, 2006, and then filed an amended response on October 6, 2006. Defendants replied on October 10, 2006. A hearing was held on Defendants' motion on January 4, 2007.

Also before the court is Defendants' September 1, 2006 motion to stay discovery pending the court's resolution of Defendants' motion to dismiss, to which Plaintiffs responded on September 18, 2006 and Defendants replied on September 25, 2006.

**I. Jurisdiction**

This court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337(a).

**II. Background**

The complaint alleges the following facts.[1]

Clarke is a registered nurse ("RN") and was employed as an RN at hospitals operated by Methodist Healthcare from 1979 until 2006. (Compl. ¶ 7.) Dillard is an RN and was employed as an RN at the Baptist Memorial Hospital in Memphis from 1998 until 2004 and from 2005 until March 2006. (Id., ¶ 8.)

Plaintiffs bring this action on behalf of themselves and a class composed of "[a]ll persons employed by any defendant or co-conspirator to work in a hospital in the Memphis MSA as an RN at any time from June 20, 2002 until the present." (Id., ¶ 12.) The "Memphis MSA" is the Memphis Metropolitan Statistical Area, which consists of Fayette County, Shelby County, and Tipton County in Tennessee, as well as neighboring counties in Arkansas

[1] As requested by Defendants, the court takes judicial notice of the complaints in three similar lawsuits currently pending before federal district courts in New York, Illinois, and Texas. The court finds those complaints irrelevant to determining the adequacy of the complaint in the instant case.

and Mississippi. (Id., ¶¶ 1, 23.) Plaintiffs do not know the exact number of potential class members because Defendants have exclusive control of that information. (Id., ¶ 13.) As of 2005, more than 6,000 full-time-equivalent RNs were employed by Memphis area hospitals. (Id.)

Baptist Memorial Healthcare Corporation is a healthcare system that operates hospitals and health care facilities in the Memphis MSA. (Id., ¶ 9.) Methodist Healthcare is a healthcare system that operates hospitals in the Memphis MSA. (Id., ¶ 10.)

Hospitals in the Memphis MSA currently employ more than 6,000 full-time-equivalent RNs. (Id., ¶ 24.) This market is heavily concentrated. (Id., ¶ 25.) Defendants employ approximately 68% of the hospital RNs in the Memphis MSA. (Id.) Various other hospitals and individuals not named as defendants have participated as co-conspirators with Defendants in the conspiracies alleged in this case. (Id., ¶ 11.)

Beginning before June 2002 and continuing to the present, Defendants have conspired with each other and with other Memphis-area hospitals to depress the compensation paid to RNs employed at hospitals within the Memphis MSA. (Id., ¶ 26.) In furtherance of their conspiracy, Defendants and their co-conspirators have: (1) agreed to regularly exchange, and have regularly exchanged, detailed and non-public data about the compensation each is paying or will pay to its RN employees; (2)

agreed not to compete, and not competed, with each other in the setting of RN employee compensation; (3) paid RN employees at the same or nearly the same rate as each other; and (4) jointly recruited RNs at job fairs and elsewhere to avoid competing to attract new RNs to their respective hospitals. (Id., ¶ 27.)

During and before the class period, human resources employees working at defendant and co-conspirator hospitals have regularly surveyed each other to determine the compensation for RNs at competing hospitals, including any scheduled increases in RN compensation. (Id., ¶¶ 28, 29.) These information exchanges have increased in frequency and detail at the end of each fiscal year when hospitals draft budgets and decide on RN compensation levels for the following year. (Id., ¶ 29.) Hospital administrators in the Memphis MSA have used this information to set RN compensation. (Id.) Human resources employees have been evaluated by their superiors on their ability to accomplish this RN compensation coordination. (Id.)

Defendants' unlawful conspiracy has had the following effects, before and during the class period: (1) competition among Defendants and their co-conspirators in the recruitment and compensation of hospital RN employees in the Memphis area has been restrained; (2) compensation for hospital RN employees in the Memphis MSA has been at artificially low levels; and (3) Memphis-area hospitals have underutilized RNs, yielding low

nurse-to-patient ratios, forcing RNs to work harder for longer hours, and reducing patient quality of care. (Id., ¶ 31.)

Defendants' conspiracy to depress RN wages creates a serious healthcare problem because a collusive restriction on health-care-employee compensation could adversely affect the availability of health-care personnel. (Id., ¶ 32.) Numerous studies have shown a strong correlation between the numbers of RNs that a hospital employs per patient and the hospital's morbidity and mortality rates. (Id.) Although Defendants and their co-conspirators complain about the RN shortage, they have not offered RNs competitive wages to alleviate the shortage. (Id.)

During and before the class period, Plaintiffs have suffered substantial economic harm in the form of lost compensation as a direct result of Defendants and their co-conspirators' unlawful agreements to depress RN compensation and exchange RN compensation information. (Id., ¶ 33.)

A slight decrease in RN compensation from a competitive level could be imposed collectively by conspiring hospitals in the Memphis MSA without causing substantial numbers of RNs to move to non-conspiring hospitals in the Memphis MSA, to non-hospital employers in the Memphis MSA, or to employers outside the Memphis MSA. (Id., ¶ 42.) RNs often are constrained from moving between geographic areas because of region-specific

licensing requirements, professional obligations, and family obligations. (Id., ¶ 43.)

RNs employed by hospitals possess unique skills and gain industry-specific experience as they work, which renders them more valuable to hospitals than to non-hospital RN employers. (Id., ¶ 44.) As hospital RNs gain experience, hospitals become the only practical outlets for them to sell their services at an amount reflecting their skills and knowledge. (Id.) Other potential employers, such as doctors' offices, nursing homes, and outpatient clinics, offer RNs compensation substantially below that offered by hospitals. (Id.)

Memphis-area hospitals expend significant resources accumulating information about compensation paid to RNs at other hospitals in the Memphis MSA, but not about compensation paid to non-hospital RNs or RNs working outside the Memphis MSA. (Id., ¶ 45.) Memphis-area hospitals rely on this compensation information to set RN compensation levels, reflecting their own understanding that the relevant market involves only hospital RN employees in the Memphis MSA. (Id.)

Defendants and their co-conspirators comprise nearly 100% of the hospitals within the Memphis MSA. (Id., ¶ 46.) Collectively, they have substantial market power in the relevant market, including the power jointly to set hospital RN employee compensation below competitive levels. (Id.)

RNs cannot withhold their services until a later date as a means of negotiating for higher compensation because they depend on a regular income. (Id., ¶ 46.) This weakens RNs' negotiating position and enhances the hospitals' market power. (Id.)

On behalf of themselves and the plaintiff class, Plaintiffs seek to recover the compensation properly earned by RNs employed at Memphis-area hospitals but unlawfully retained by those hospitals as a result of the alleged conspiracies. (Id., ¶ 4.)

**III. Motion to Dismiss Standard**

"Under the liberal notice pleading rules, a complaint need only put a party on notice of the claim being asserted against it to satisfy the federal rule requirement of stating a claim upon which relief can be granted." Memphis, Tenn. Area Local, Am. Postal Workers' Union, AFL-CIO v. City of Memphis, 361 F.3d 898, 902 (6th Cir. 2004). When considering a motion to dismiss for failure to state a claim, the court regards all factual allegations in the complaint as true. Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988). Further, the court must construe the complaint in the light most favorable to the plaintiff. Memphis, Tenn. Area Local, Am. Postal Workers' Union, 361 F.3d at 902. If the plaintiff can prove no set of facts that would entitle him to relief based on a viable legal theory, the claim will be dismissed. Scheid, 859 F.2d at 437.

"The Federal Rules of Civil Procedure do not require a

claimant to set out in detail all the facts upon which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957). "To avoid dismissal under Rule 12(b)(6), a complaint must contain either direct or inferential allegations with respect to all material elements of the claim." Wittstock v. Mark A. Van Sile, Inc., 330 F.3d 899, 902 (6th Cir. 2003).

**IV. Analysis**

Defendants assert that Plaintiffs' complaint must be dismissed for two reasons. First, Plaintiffs fail to allege a plausible product market. Second, the complaint fails to plead facts sufficient to provide Defendants with fair notice of the grounds on which relief can be granted.

Plaintiffs assert that they have adequately alleged a plausible product market for the second count of their complaint and that the first count alleges a per se violation of the Sherman Act, which does not require the identification of a plausible product market. Plaintiffs also assert that they have sufficiently pled every element of both counts of the complaint and, therefore, that the complaint satisfies the notice-pleading requirements of Federal Rule of Civil Procedure 8(a).[2]

Section 1 of the Sherman Act provides in relevant part: "[e]very contract, combination in the form of trust or otherwise,

[2] Federal Rule of Civil Procedure 8(a) provides, in relevant part, that "[a] pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief[.]".

or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. "Because every contract could be construed as a restraint of trade, the Supreme Court has held that for a claim to be actionable under the Sherman Act, the restraint challenged must be 'unreasonable.'" Nat'l Hockey League Players Assoc. v. Plymouth Whalers Hockey Club, 419 F.3d 462, 469 (6th Cir. 2005)(citation omitted)(henceforth NHLPA). "Whether a restraint is unreasonable is determined either under a per se rule or the 'rule of reason.'" Id. (citation omitted).

Per se Sherman Act violations are "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978). "Per se illegal restraints on trade such as boycotts and price fixing do not require proof of market power." Lie v. St. Joseph Hosp. of Mount Clemens, Mich., 964 F.2d 567, 569 (6th Cir. 1992).

Under the rule of reason, "a plaintiff has the burden of demonstrating significant anti-competitive effects within a relevant market." NHLPA, 419 F.3d at 469. A relevant market is defined in terms of both product and geographic scope. Worldwide Basketball and Sport Tours, Inc. v. Nat'l Collegiate, 388 F.3d 955, 959 (6th Cir. 2004). "Because market definition is a deeply

fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market." Todd v. Exxon Corp., 275 F.3d 191 (2d Cir. 2001)(citing Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design, 244 F.3d 521, 531 (6th Cir. 2001)).

**A. Conspiracy to Depress Wages**

**1. Analytical standard**

Plaintiffs assert that Count I of their complaint, by alleging that Defendants conspired to fix RN wages at an artificially low level, states a claim for price-fixing, which is a per se violation of the Sherman Act. Defendants disagree and assert that the court should disregard Plaintiff's per se label and analyze Count 1 under the rule of reason.

A plaintiff's designation of his or her claim as a per se violation does not determine whether a per se or rule of reason analysis is appropriate; the court must consider the alleged activity to determine which level of analysis is required. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1108 (7th Cir. 1984); see also Found. for Interior Design, 244 F.3d at 529-30 (rejecting putative per se designation for group boycott claim and analyzing allegations under rule of reason).

"[A]ll forms of price-fixing are per se violations of the Sherman Act." United States v. Container Corp. of Am., 393 U.S. 333, 338 n.4 (1969). Price-fixing is illegal whether it is

practiced by sellers or buyers. See Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235 (1948) ("It is clear that the agreement is the sort of combination condemned by the Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers."); Nat'l Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421, 426-27 (7th Cir. 1965) (applying per se rule to agreement among pasta producers to standardize the amount of durum wheat they used in order to depress the price of durum wheat). Here, Plaintiffs allege that Defendants, purchasers of RN services, have conspired to depress RN salaries in what would otherwise be a competitive market for RN services. See Todd v. Exxon Corp., 275 F.3d 191, 201-02 (2d Cir. 2001) (employers' conspiracy to set employee salaries is a buyer-side antitrust conspiracy). Therefore, Plaintiffs have alleged a price-fixing conspiracy, which is a per se Sherman Act violation.

This case is analogous to Todd, in which the Second Circuit Court of Appeals recognized that wage-fixing, like price-fixing, can constitute a per se violation of the Sherman Act. In Todd, the plaintiff alleged that the defendants, major companies in the oil and petrochemical industry, agreed to share compensation information about their nonunion managerial, professional, and technical ("MPT") employees. The court explained that, because the plaintiff had only alleged an unlawful information exchange,

the claim would be analyzed under the rule of reason. Id. at 198-99. The court noted, however, that "[i]f the plaintiff in this case could allege that defendants actually formed an agreement to fix MPT salaries, [the] per se rule would likely apply." Id. at 198. In this case, Plaintiffs allege that Defendants have conspired to fix hospital RN's salaries. Therefore, Plaintiff's wage-fixing claim states a per se violation.

Defendants seek to analogize Plaintiffs' wage-fixing claim to Five Smiths, Inc. v. Nat'l Football League Players Ass'n, 788 F. Supp. 1042 (D. Minn. 1992). In Five Smiths, the plaintiffs alleged that the National Football League ("NFL") Players Association conspired with agents representing NFL players to exchange players' salary information and to fix players' minimum compensation. After stating that the exchange of salary information should be analyzed using the rule of reason, id. at 1046-47, the court considered whether the plaintiffs' wage-fixing allegation stated a per se violation.[3]

The court explained that, under the rules of the NFL draft, "virtually the entire supply of new players are apportioned amongst the clubs, with each team being assigned the exclusive rights to bargain with their draft picks." Id. at 1046. Under

[3] The court had previously determined that the plaintiffs had not alleged sufficient facts to state a claim for price-fixing. However, the court stated that "[e]ven if [it] were to construe plaintiffs' allegations as sufficient to state some broader price-fixing conspiracy," plaintiffs price-fixing claim did not constitute a per se violation. 788 F. Supp. at 1049.

that system, teams did not compete with each other for the services of college football players. Id. Noting that per se violations are those that "always or almost always tend to restrict competition," the court held that, given the unique characteristics of the NFL draft system, the alleged wage-fixing conspiracy did not constitute a per se violation. The court explained:

> Deprived of their ability to seek bids from competing clubs, players negotiating salaries are backed with no economic force and have virtually no opportunity to compete with one another. As a result, the court determines that plaintiffs could prove no set of facts to either support a per se violation based on their allegation that the NFLPA and the player-agents fixed compensation or to demonstrate how such an arrangement could have any possible anticompetitive effect because of plaintiffs' existing system of player restraints.

Id. at 1050.

The current case is distinguishable from Five Smiths because, unlike professional football players, RNs have the opportunity to apply for positions with multiple, competing organizations and to negotiate their salaries freely. In such an environment, a conspiracy between employers to depress RN salaries would have an anti-competitive effect. A per se rule is appropriate for Plaintiff's wage-fixing claim. Therefore, Plaintiffs are not required to allege a relevant market in support of that claim.

**2. Federal Rule of Civil Procedure 8(a)**

Defendants assert that Plaintiffs have not alleged

sufficient facts to state a claim for wage-fixing under Federal Rule of Civil Procedure 8(a). "To succeed on their conspiracy claim, Plaintiffs must allege sufficient facts to support the existence of an agreement between" the defendants. NHLPA, 419 F.3d at 475. "The essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's 12(b)(6) motion." Found. for Interior Design, 244 F.3d at 530.

Plaintiffs' complaint contains the following allegations bearing on their wage-fixing claim: beginning before June 2002 and continuing to the present, Defendants conspired with each other and with other Memphis-area hospitals to depress RN employee compensation (Compl. ¶ 26); Defendants and their co-conspirators have agreed not to compete and have not competed with each other in setting RN employee compensation (id. ¶ 27(b)); Defendants and their co-conspirators have paid RN employees the same or nearly the same salary (id. ¶ 27(c)). The complaint also contains various allegations about Defendants' information-sharing conspiracy, including that the Defendants have jointly recruited RNs at job fairs and elsewhere to avoid competing with each other.

Plaintiffs have not alleged facts that, if proven, would provide direct evidence of a conspiracy. However, in the Sixth Circuit, "circumstantial evidence can support a conspiracy claim,

so long as the evidence is not 'equally consistent with independent conduct.'" NHLPA, 419 F.3d at 475 (citation omitted). Courts should consider the following factors when weighing circumstantial evidence of a conspiracy claims: "(1) whether the defendants' actions, if taken independently, would be contrary to their economic self-interest; (2) whether the defendants have been uniform in their actions; (3) whether the defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy; (4) and whether the defendants have a common motive to conspire." Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995 (6th Cir. 1999).

In pleading the conspiracy at issue in NHLPA, the complaint alleged only that "[o]n information and belief, the [National Hockey League ("NHL")] conspired with one or more [Ontario Hockey League ("OHL")] officials-including the OHL's commissioner, defendant David Branch-in an effort to persuade the OHL Clubs to refuse to sign the 20 year-old U.S. college players seeking to move to the OHL." Nat'l Hockey League Players Assoc., et al., v. Plymouth Whalers Hockey Club d/b/a Plymouth Whalers, et al., No. 01-70968, slip op. at 12 (E.D. Mich. Dec. 8, 2003)(quoting Second Amended Complaint at ¶ 36). The Sixth Circuit concluded that "the district court erred in determining that Plaintiffs had failed to allege facts sufficient to support the existence of an agreement between the OHL and the NHL." NHLPA, 419 F.3d at 475-76. Although

the plaintiffs had not provided factual details relating the conspiracy itself, after considering the four factors relevant to establishing a conspiracy claim based on circumstantial evidence, the Sixth Circuit found that the plaintiffs had adequately stated a conspiracy claim.[4] Id. at 476.

In considering the controlling factors, and in light of the liberal pleading rules, Plaintiffs have stated facts sufficient to support their claim that Defendants conspired to depress RN employee compensation. Plaintiffs allege that Defendants have set RN salaries below the competitive market level. Were a single employer, acting independently, to set RN employee salaries below market level, RNs would stop working for that employer in favor of working for an employer paying a market salary. Therefore, although it may appear to be in an employer's economic interest to minimize the salaries it pays its employees, in fact the employer's economic interest would not be served by a unilateral decision to do so because the employer would not be able to hire and retain employees while paying below-market salaries. Without coordinated agreement among competitors not to raise RN salaries, it would not be in an individual competitor's economic interest to pay below-market wages.

[4] Although the Sixth Circuit found that the plaintiffs had provided sufficient factual allegations to support a finding that a conspiracy existed, the court affirmed the district court's dismissal of the plaintiffs' conspiracy claim because the plaintiffs did not show that the object of the conspiracy was a violation of the antitrust laws. NHLPA, 419 F.3d at 476.

Plaintiffs' assertion that Defendants have each paid RNs the same or nearly the same below-market salaries since the conspiracy began before June 2002 adequately alleges that Defendants have been uniform in their actions. Plaintiffs have also alleged that the defendants have exchanged information relative to the conspiracy and that Defendants have a common motive to reduce the salaries they pay to RN employees. Plaintiffs' allegations, if believed, could support a finding that Defendants conspired to depress RN salaries.

Defendants assert that courts presented with similar factual allegations have dismissed Sherman Act claims for failure to plead sufficient facts. However, the cases Defendants cite are not controlling. For example, Defendants rely heavily on Five Smiths, a case decided fifteen years ago in the District of Minnesota. In Five Smiths, the court held that the plaintiffs had failed to allege sufficient facts in support of their price-fixing claims because, apart from allegations of a salary-information exchange, the plaintiffs alleged no facts indicating "what acts [the defendant] took to fix prices, what agreements were entered into, with whom such agreements were made, or how the goals of the conspiracy were accomplished." 788 F. Supp. at 1048. Similar details are omitted here. However, the court in Five Smiths did not consider whether the plaintiffs could support their conspiracy claim based on circumstantial evidence.

Defendants also rely on Spare Tire World v. Waste Recovery Inc., et al., No. 02-2678, slip op. (W.D. Tenn. Feb. 11, 2004). In that case, this court held that Spare Tire World had not set forth sufficient facts to state a claim for antitrust conspiracy because its complaint failed to "set forth allegations describing the nature, object, and accomplishment of the alleged conspiracy and the purported anticompetitive effect on the market." Id. at 12. The complaint alleged only that the defendants chose to discontinue their contractual relationships with Spare Tire World and prevented it from competing in certain markets. Id at 13.

Here, in contrast to Spare Tire World, Plaintiffs have explained that the object of Defendants' conspiracy is to set RN compensation jointly at below-competitive levels so that Defendants will not have to compete with each other for RN employees on the basis of salaries. Plaintiffs have adequately alleged the nature and object of the conspiracy, and they have explained how the alleged conspiracy creates an anticompetitive effect. This case is, therefore, distinguishable from Spare Tire World. Moreover, Spare Tire World did not consider whether the plaintiff could support its conspiracy claim based on circumstantial evidence.

Reading the pleadings in the light most favorable to Plaintiffs, their allegations could support a finding that Defendants conspired to set RN wages at below-market levels.

Therefore, Defendants' motion to dismiss Plaintiffs' wage-fixing conspiracy claim is DENIED.

**B. Conspiracy to Exchange Compensation Information**

Plaintiffs concede that Count 2 of their complaint is subject to the rule of reason. Under a rule-of-reason analysis, the plaintiff must prove: "(1) that the defendant(s) contracted, combined, or conspired; (2) that such contract produced adverse anticompetitive effects; (3) within relevant product and geographic markets; (4) that the objects of and conduct resulting from the contract were illegal; and (5) that the contract was a proximate cause of plaintiff's injury." Care Heating & Cooling, Inc. v. Am. Standard, Inc., 427 F.3d 1008, 1014 (6th Cir. 2005).

Defendants argue that Plaintiffs have failed to satisfy the third prong of the rule-of-reason test because they have not alleged a plausible product market. Defendants also argue that Plaintiffs have not alleged a sufficient factual predicate to meet the requirements of Federal Rule of Civil Procedure 8(a).

**1. Plausible Product Market**

In the employment context, a "relevant market is one where employment positions are reasonably interchangeable with those offered by [the] defendant." NHLPA, 419 F.3d at 472. The burden is on the plaintiff to allege facts, such as cross-elasticity of demand, that demonstrate the alleged market is relevant. Id. at 472 n.3.

Although the Sixth Circuit has cautioned that market-definition is a highly fact-based analysis that generally requires discovery, courts will dismiss cases if the alleged market is not plausible. See Found. for Interior Design, 244 F.3d at 531 (affirming dismissal of antitrust claim after rejecting counter-plaintiff's contention that accredited interior design programs constitute a relevant product market; because accredited and non-accredited interior design programs compete with each other, the relevant market consisted of all interior design programs). A market definition is implausible if it clearly excludes reasonably interchangeable substitutes or if it fails to include factual allegations justifying its narrow contours. NHLPA, 419 F.3d at 473.

Plaintiffs assert that the relevant product market in this case is "services provided to hospitals by RN employees." Compl. ¶ 41. For this to be a valid market, RNs seeking to work in the Memphis MSA would need to view RN positions at hospitals as not reasonably interchangeable with RN positions at non-hospital employers. Defendants contend that this alleged market is implausible as a matter of law because hospital and non-hospital RN employment positions are reasonably interchangeable and Plaintiffs fail to include allegations that justify the narrow market scope.

Defendants first assert that, in determining whether

Plaintiffs' alleged market is reasonable, the court should consider a study published by the Institute for Women's Policy Research ("IWPR"). The IWPR study allegedly supports Defendants' contention that RN employment positions at hospitals are reasonably interchangeable with other RN employment positions, such as those in doctors' offices or nursing homes. Defendants state that the court can consider the IWPR study because Plaintiffs relied on the study in their complaint.

Courts should not consider matters outside the pleadings when ruling on a motion to dismiss. Weiner, D.P.M. v. Klais and Co., 108 F.3d 86, 88 (6th Cir. 1997). However, a written instrument attached as an exhibit to a pleading is considered part of the pleading. Berzon v. Morgan Stanley Distribs., Inc., 420 F.3d 598, 604 (6th Cir. 2005). If a plaintiff fails to introduce certain pertinent documents, the defendant may do so in order to prevent a plaintiff with a legally deficient claim from surviving a motion to dismiss "simply by failing to attach a dispositive document on which it relied." Weiner, 108 F.3d at 89. "[D]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." Id. at 89 (quoting Venture Assocs. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993)).

The court will not consider the IWPR study because

Plaintiffs do not refer directly to the study in their complaint and because the study is not central to their claims. One sentence in Plaintiffs' 16-page complaint refers to "numerous studies" that allegedly have shown a correlation between a hospital's RN-to-patient ratio and the hospital's morbidity and mortality rates.[5] (Compl. ¶ 32.) Although the IWPR may be one of the studies to which Plaintiffs refer, the reference is, at best, oblique. Moreover, the study is not central to Plaintiffs' claims. Although the study might be introduced at a later stage in support of Plaintiffs' claims, it is not dispositive of those claims. This case is distinguishable, therefore, from Weiner, in which the court permitted the defendant to introduce health plan documents that established the rights on which the plaintiffs' claims were based. 108 F.3d at 89.

Defendants also assert that the court can consider the study because "plaintiff's counsel has made the IWPR study public by posting it on its website." (Mem. in Supp. of Defs.' Mot. to Dismiss Pls.' Class Action Compl., p.4 n.3.) Although a court may consider public records when deciding a motion to dismiss, New Eng. Health Care Employees Pension Fund v. Ernst & Young, LLP, 336 F.3d 495, 501 (6th Cir. 2003), not every statement or document posted on a website is a public record appropriate for

[5] Defendants also assert that paragraph 3 of the complaint refers to the IWPR study. (Mem. in Supp. of Defs.' Mot. to Dismiss Pls.' Class Action Compl., p.4 n.3.) That paragraph does not refer to any study.

consideration. In Passa v. City of Columbus, 123 F. App'x 694, 697-98 (6th Cir. 2005), the court held that the district court had committed reversible error by considering, on a motion to dismiss, statements found on the Columbus City Attorney's website. The court held that the consideration of documents in the public record in deciding a motion to dismiss "is proper only for the fact of the documents' existence, and not for the truth of the matters asserted therein" and that "in general a court may only take judicial notice of a public record whose existence or contents prove facts whose accuracy cannot reasonably be questioned." Id. at 697. In this case, consideration of statements in the IWPR study is not appropriate. The court will not consider the IWPR study at this stage.

In support of their contention that hospital RN positions are a different market from RN positions with all other employers, Plaintiffs allege that hospitals in the Memphis MSA could impose a slight decrease in RN compensation without causing a considerable number of RNs to move to non-hospital employers.[6] (Compl. ¶ 42.) Assuming this allegation to be true, it indicates that there is not a high cross-elasticity of demand between

[6] The complaint also states that the conspiring hospitals could impose a below-competitive salary without causing substantial numbers of RNs to move to non-conspiring hospitals within the Memphis MSA. (Compl. ¶ 42.) However, because Plaintiffs define the relevant product market as all hospital RN employee positions, the alleged product market does not distinguish between conspiring and non-conspiring hospitals. In other words, Plaintiffs have not defined the relevant product market as RN employee positions at *conspiring* hospitals.

hospital RN positions and RN positions at non-hospital employers and, therefore, that hospital RN positions and non-hospital RN positions do not compete in the same market. See United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 400 (1956)("If a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication that a high cross-elasticity of demand exists between them; that the products compete in the same market.").

Plaintiffs explain that the narrow contours of the alleged market are justified because:

> Hospital RNs possess unique skill sets and gain industry-specific experience as they work, which renders them more valuable to hospitals than to non-hospital RN employers. As they gain experience, hospitals become the only practical outlets for hospital RNs to sell their services at an amount reflecting their skills and knowledge. Other potential employers, such as doctors' offices, nursing homes and outpatient clinics, offer RNs compensation substantially below that offered by hospitals.

(Compl. ¶ 44.) In Todd, the Second Circuit held that similar allegations were sufficient to defeat a motion to dismiss for failure to allege a plausible product market. 275 F.3d at 203-05.

The plaintiffs in Todd alleged that the relevant product market was the market for "the services of experienced, salaried, non-union, managerial, professional and technical (MPT) employees in the oil and petrochemical industry." Id. at 199. Defendants argued that the alleged market was under-inclusive because MPT

positions outside the oil and petrochemical industry were reasonably interchangeable with those in that industry.[7] After noting that common sense supported the plaintiff's claims that "employees' industry specific experience may cause them to suffer a pay cut if forced to switch industries," the court overruled the district court's dismissal of the case and held that "plaintiff's allegations about industry-specific expertise of MPT employees supports a plausible product market." Id. at 203-04.

It is possible that working as an RN in a hospital requires different skills than working as an RN for a non-hospital employer and that RNs' hospital-specific expertise might cause experienced hospital RNs to suffer significant pay cuts if forced to switch to a non-hospital employer.[8] That different skills might be required and that substantially different wages might be paid by hospital and non-hospital RN employers suggest that

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[7] Defendants seek to distinguish Todd by arguing that the alleged market in Todd suffered from the "opposite problem" from Plaintiffs' proposed market, in that the market in Todd was a broad, industry-based market whereas the market here "handpick[s] a single type of employer within that industry." (Mem. in Supp. of Defs.' Mot. to Dismiss Pls.' Class Action Compl., p.11 n.5.) The defendants in Todd, however, asserted that the alleged market was both over- and under-inclusive. The court considered the arguments separately. Defendants' argument here that Plaintiffs have omitted reasonably interchangeable employers from the alleged market is directly analogous to the under-inclusiveness argument considered in Todd.

[8] Entry-level hospital RNs would presumably not have acquired industry-specific skills and experience that would make them significantly more valuable to hospitals than to other employers. Based on this factor alone, therefore, Plaintiffs' alleged market, which includes the services of all hospital RNs, might appear over-inclusive. However, based on the other factors discussed below, the court cannot conclude that a market for the services of all hospital RNs is implausible. Plaintiffs have adequately alleged that all hospital RN positions are sufficiently distinct from all non-hospital RN positions.

Plaintiffs' alleged product market is plausible.

Defendants assert that Plaintiffs' proposed market is "based solely on alleged wage differences rather than the principle of reasonable interchangeability." (Reply Mem. in Supp. of Defs.' Mot. to Dismiss Class Action Compl., p. 5.) However, both parties agree that RN positions with different employers may differ in "benefits, hours, working conditions and other relevant factors." (Id.; Pls.' Am. Opp'n to Defs.' Mot. to Dismiss, p. 22 n.11.) Plaintiffs, therefore, are not suggesting that RN positions in hospitals differ from RN positions with non-hospital employers solely based on salary. Rather, there may be multiple significant differences between hospital and non-hospital RN positions. For example, if working hours and conditions for RNs employed by hospitals are significantly different from working hours and conditions for RNs employed by non-hospital employers, RNs are less likely to see hospital and non-hospital positions as reasonably interchangeable. If, as Defendants assert, RNs "move between higher-paying hospital jobs and lower-paying non-hospital jobs based on many factors other than salary" (Reply Mem. in Supp. of Defs.' Mot. to Dismiss Class Action Compl., p. 6.), the "many factors" that differentiate hospital employment from non-hospital employment suggest that the positions are not reasonably interchangeable.

Plaintiffs also allege that hospitals in the Memphis MSA

"expend significant resources accumulating information about compensation paid to RNs at other hospitals in the Memphis MSA, but not about compensation paid to non-hospital RNs or RNs working outside the Memphis MSA." (Compl. ¶ 45.) The Second Circuit has recognized that, although "industry recognition . . . would not save an alleged market that was clearly implausible otherwise[,]" a defendant's perception has probative value in defining a market, and industry recognition is "one factor to consider in the subtle, fact-specific inquiry [that] focuses on the ultimate issue of cross-elasticity and interchangeability." Todd, 275 F.3d at 206. Here, Plaintiffs' allegations that hospitals recognize hospital RN positions as distinct from non-hospital RN positions weighs in favor of finding Plaintiffs' alleged market plausible.

Defendants assert that Plaintiffs' complaint "implicitly admits interchangeability between hospital and non-hospital employment positions." (Mem. in Supp. of Defs.' Mot. to Dismiss Pls.' Class Action Compl., p. 9.) The complaint alleges that there is a national nursing shortage, that hospitals in the Memphis MSA have experienced high vacancy rates, and that "[t]he few compensation increases in the past several years have been far too small to substantially decrease the area's nursing shortage." (Compl. ¶ 3.) Defendants conclude that:

> [t]hese allegations constitute an admission that there are RNs not working in hospitals who would work for

> hospitals if the wages at hospitals were increased. Thus these nurses are working in jobs that are reasonable substitutes for hospital RN positions, and plaintiffs' own Complaint is inconsistent with its "narrow definition of the relevant market."

(Mem. in Supp. of Defs.' Mot. to Dismiss Pls.' Class Action Compl., p. 10.)

Defendants' argument is not persuasive. Both parties agree that RNs do not consider salary alone when deciding whether to work for a hospital or a non-hospital employer. Therefore, it does not appear that Plaintiffs are suggesting that RNs working for non-hospital employers would choose to work for hospital employers if hospital-RN wages were increased. Rather, the complaint appears to assert that there are too few RNs, working for hospitals or otherwise, and that more people would become RNs, in order to work at hospitals, if hospitals paid their RN employees more. That a person might choose to be a stockbroker rather than a nurse because RN wages are too low does not suggest that stockbroker positions and RN positions are reasonably interchangeable. Plaintiffs' complaint does not "implicitly admit" that hospital-RN positions are reasonably interchangeable with all positions that people might choose instead of nursing.

Finally, Defendants assert that Foundation for Interior Design is a "critical" case that requires the court to hold that Plaintiffs' alleged market must fail. As stated above, in that case the court rejected the counter-plaintiff's contention that

accredited interior design programs constitute a relevant product. The court explained:

> Market definition is a highly fact-based analysis that generally requires discovery. Here, however, definition of the relevant market requires relatively little factual analysis. Based on a review of the record, we find that the College competes with schools that have non-accredited interior design programs and with schools that have accredited programs. Thus, the relevant market in this case includes all interior design programs.

244 F.3d at 531.

Although the court in Foundation for Interior Design found it obvious that accredited and non-accredited interior design programs are reasonably interchangeable, this court does not find it obvious that hospital-RN positions and non-hospital RN positions are reasonably interchangeable. Discovery might reveal that Plaintiffs' alleged market is untenable. At this stage, however, it is not clear that Plaintiffs' alleged market excludes reasonably interchangeable alternatives, and Plaintiffs have alleged sufficient facts to support their narrow construction of the market.

**2. Federal Rule of Civil Procedure 8(a)**

Defendants assert that Plaintiffs have not alleged sufficient facts under Federal Rule of Civil Procedure 8(a) to support their claim that Defendants have conspired to exchange RN salary information. The complaint alleges that the defendants have agreed to exchange and have exchanged detailed and non-

public data about RN compensation, (compl. ¶ 27(a)), that human resources officers working at the defendant hospitals have regularly surveyed each other about current and future RN compensation rates, that the information exchanges have increased in frequency and detail at the end of each fiscal year when hospitals draft budgets and decide on RN compensation, and that hospital administrators use the information the human resource officers learned to set RN compensation (compl. ¶ 29). These allegations provide a sufficient factual basis to support Plaintiffs' claim that Defendants have conspired to exchange compensation information.

Plaintiffs allege that Defendants' conspiracy has anti-competitive effects, including restraining competition among defendants and their co-conspirators in RN compensation, (compl. ¶ 31(a)), and that Defendants' conspiracy has injured Plaintiffs by causing them to receive artificially low compensation (compl. ¶ 31(b)).

Plaintiffs' complaint alleges sufficient facts to put Defendants on notice of the nature of the claims against them, and Plaintiffs have alleged sufficient facts to state a claim for conspiracy to exchange compensation information. Therefore, Defendant's motion to dismiss count two of Plaintiffs' complaint is DENIED.

**C. Motion to Stay Discovery**

Defendants have moved to stay discovery pending the court's resolution of their motion to dismiss. Because the court has now ruled on Defendants' motion to dismiss, their motion to stay is DENIED as moot.

**V. Conclusion**

For the foregoing reasons, Defendants' motion to dismiss is DENIED, and Defendants' motion to stay is DENIED as moot.

So ordered this 17th day of May 2007.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE