

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER T. BORN, M.D. : CIVIL ACTION
: :
v. : :
: :
WILLIAM IANNAcone, M.D., : :
ROBERT DALSEY, M.D., : :
LAWRENCE DEUTSCH, M.D. : :
JOHN CATALANO, M.D., and : :
THE COOPER HEALTH SYSTEM : :
d/b/a COOPER HOSPITAL/ : :
UNIVERSITY MEDICAL CENTER : NO. 97-5607

MEMORANDUM AND ORDER

HUTTON, J.

September 29, 1998

Presently before the Court are the following: Motion to Dismiss the Amended Complaint pursuant to Rules 12(b)(1), 12(b)(6), and 12(b)(7) of the Federal Rules of Civil Procedure by Defendants William Iannacone, Robert Dalsey, Lawrence Deutsch and John Catalano (Docket No. 25), Plaintiffs' response thereto (Docket No. 29), Defendants Reply Brief (Docket No. 31), and Plaintiffs' Sur Reply Brief (Docket No. 32). Also before the Court is Defendant Cooper Health System's unopposed Motion to Dismiss Plaintiff Born's Qui Tam Claim (Docket No. 26). For the reasons that follow, the Defendants' motions are **GRANTED IN PART AND DENIED IN PART**.

I. BACKGROUND

The Plaintiff alleged the following facts in his complaint. Plaintiff Christopher T. Born charges the various Defendants with

violations of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 & 2 (1994), the Federal Trade Commission Act, 15 U.S.C. § 11 (1994), the False Claims Act, 31 U.S.C. § 3730 (1994), and with numerous violations of New Jersey law, in connection with a transaction in which The Cooper Health System ("Cooper") acquired University Orthopaedic Specialists ("UOS"), and South Jersey Medical Management Company ("SJMMC") and allegedly excluded Dr. Born from his medical practice.

Dr. Born is an orthopaedic surgeon and was a one-fifth partner in UOS, a medical partnership. He is an adjunct professor of orthopaedic surgery at both the University of Pennsylvania School of Medicine ("Penn") and at Jefferson Medical College ("Jefferson"). Until the events giving rise to this action, he was Assistant Division Head for Orthopaedic Surgery at Cooper Hospital/University Medical Center ("Hospital"), a hospital owned and operated by Defendant Cooper. UOS was a New Jersey general partnership, of which Dr. Born and Defendants William Iannacone, Robert Dalsey, and Lawrence Deutsch were partners,¹ and John Catalano was an employee ("Individual Defendants"). SJMMC was a New Jersey limited liability company that UOS established to collect payments from its clients.²

¹ UOS had a total of five partners, all orthopaedic specialists. The fifth partner was Dr. William G. DeLong.

² In his Amended Complaint, Plaintiff dropped UOS and SJMMC as plaintiffs in this action.

The Individual Defendants are all orthopaedic surgeons and former colleagues of Dr. Born at the Hospital. Cooper is a New Jersey non-profit corporation. It operates the Hospital, which is located in Camden, New Jersey. Cooper contracts with health care providers like the UOS partnership for the supply of medical services in physical facilities that it owns. Until the contested events took place, Cooper contracted with the UOS doctors, permitting them to use Cooper's operating rooms and other facilities in exchange for a 20% cut of the partnership's receipts.

This suit follows a transaction in which a group of three UOS partners dissolved the partnership and allowed Cooper to acquire its assets and take over as their direct employer. Dr. Born was not included. According to the Amended Complaint, Dr. Born made himself unpopular with the Hospital in the mid-1990's when he opposed several questionable Hospital practices. One was the Hospital's alleged practice of requiring surgeons to refer their patients to a Cooper physiatrist. Another was its alleged encouragement of doctors to sign patient charts even if only a resident had seen the patient. Dr. Born refused to participate in either practice, and retained a lawyer to investigate and stop the practice of mandatory physiatrist consults. Thereafter, Dr. Born claims that Defendant Cooper solicited and conspired with Defendants Iannacone, Dalsey, Deutsch, and Catalano, in their joint development and execution of a plan to assume control of

Plaintiff's practice, UOS's accounts receivable, a billing and collections company partly owned by Dr. Born (SMMJC), and to curtail Dr. Born's orthopaedic and orthopaedic traumatology practice in the relevant market area and thereby achieve monopoly power over those services.

Briefly, in the summer of 1996, Cooper began demanding that the UOS partners join the Cooper Physician Association (CPA), an entity that would own all receipts from the orthopaedic practice and pay the doctors a salary from them. This would replace the existing system in which UOS owned its own receipts and paid Cooper a 20% share. The UOS partners resisted Cooper's demands, and appointed Dr. DeLong to negotiate a more favorable arrangement with Cooper's representative Dr. Anthony DelRossi, Chief of the Department of Surgery. In a June 4, 1996 meeting, however, DelRossi and Dr. Albert R. Tama, President of the CPA, told the UOS partners that they had no choice but to join the CPA. In a July 31, 1996 letter, the UOS partners rejected Cooper's demands. Instead, DeLong continued to work for an alternate arrangement and the Individual Defendants appeared to support his efforts.

On September 26, 1996, however, without warning DelRossi terminated DeLong from his position as the Hospital's Chief of Orthopaedic Surgery. At the same time, Doctors Iannacone, Dalsey, Deutsch, and Catalano informed Dr. Born that they had worked out a secret deal with Cooper, from which he was excluded. According to

the deal, UOS would dissolve and Cooper would acquire all of the partnership's assets without compensating Dr. Born. In turn, they would join Cooper as its direct employees. In the fall and winter of 1996, the Individual Defendants performed the legal acts necessary to effectuate their plan. Cooper eventually offered Dr. Born employment under allegedly similar terms to the Individual Defendants.

Since the acquisition, Dr. Born complains that the Defendants have harmed him in numerous ways relevant to the present motion. He claims that he has been a victim of antitrust violations, tradename infringement, common law torts, and breach of contract. In Counts I through III, Dr. Born claims that the Defendants have colluded to destroy his medical practice in the relevant geographic market. First, he states, they have excluded him from his former position at the Hospital. Second, he states that they have cut off his supply of patients by instructing Hospital personnel and other physicians who maintain privileges at the Hospital not to refer patients to him, contacting Dr. Born's outside referring physicians, and contacting former patients. Third and finally, he claims that the Defendants have instituted an arrangement whereby the Individual Defendants receive all of the Hospital's referrals for trauma and unassigned emergency room patients.

Dr. Born filed this action on September 9, 1997. The Individual Defendants and Cooper filed the present motions to

dismiss the action.

II. MOTION TO DISMISS STANDARD

Federal Rule of Civil Procedure 8(a) requires that a plaintiff's complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief" Fed. R. Civ. P. 8(a)(2). Accordingly, the plaintiff does not have to "set out in detail the facts upon which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957). In other words, the plaintiff need only to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id.

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),³ this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)). The Court will only dismiss the complaint if "it is clear that no relief could be granted under any set of facts that could be proved

³ Rule 12(b)(6) states as follows:

Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted

Fed. R. Civ. P. 12(b)(6).

consistent with the allegations.'" H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

III. DISCUSSION

A. Failure to State a Claim Under Rule 12(b)(6)

1. Anti-Trust Claims

In Counts I and II of the complaint, Plaintiff alleges that the Defendants' actions constitute a violation of Section 1 and 2 of the Sherman Anti-Trust Act. See 15 U.S.C. §§ 1-2 (1994). Section 1 of the Sherman Act provides that, "[e]very contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Id. § 1. To maintain a cause of action under this statute, a plaintiff must prove:

(1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant products and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy.

Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991) (quotations and citations omitted), cert. denied, 505 U.S. 1221 (1992); see also Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 442 (3d Cir. 1997), cert. denied, 118 § Ct. 1385 (1998).

Section 2 of the Sherman Act states that: "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 15 U.S.C. § 2 (1994). To make out a private claim for monopolization: "a plaintiff must allege '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.'" Schuylkill Energy Resources v. PP&L, 113 F.3d 405, 412-13 (3d Cir.) (quoting Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 197 (3d Cir. 1992), cert. denied, 507 U.S. 921 (1993)), cert. denied, 118 § Ct. 435 (1997). Moreover, to maintain a private cause of action for damages under Section 2, a plaintiff must allege an "antitrust injury," defined as damages flowing from "'that which makes defendants' acts unlawful.'" Schuylkill Energy Resources, 113 F.3d at 413 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. 429 U.S. 477, 489 (1977)).

In Count III of Plaintiff's complaint, Plaintiff alleges that Defendants violated Section 7 of the Clayton Act. Section 7 states that: "no person . . . shall acquire the whole or any part of the assets of another person . . . where the effect of such acquisition may be substantially to lessen competition." 15 U.S.C. § 18

(1994).

In the instant case, Defendants argue that Plaintiff's Count I-III should be dismissed because: (1) the Plaintiff failed to allege sufficient relevant geographic markets in which Defendants exercise market power and (2) Plaintiff suffered no anti-trust injury. Defendants also argue that Plaintiff's Count I, a claim under Section 1 of the Sherman Act, should be dismissed under the doctrine of intracorporate immunity. Before addressing the merits of Defendants' motion to dismiss, this Court notes that in an anti-trust case, a court must balance the need for leniency when a plaintiff asserts such a claim against the harm caused by forcing a defendant to conduct discovery to defend a meritless claim. As Judge Buckwalter recently stated:

On one hand, we must be wary about dismissing an antitrust claim before the discovery period has commenced, since "the proof is largely in the hands of the alleged conspirators." Hosp. Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976) (quoting Poller v. Columbia Broad., 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962)). See also Commonwealth of Pennsylvania ex rel. Zimmerman v. Pepsico, Inc., 836 F.2d 173, 179 (3d Cir. 1988) ("[W]e should be extremely liberal in construing antitrust complaints.") (quoting Knuth v. Erie-Crawford Dairy Coop., 395 F.2d 420, 423 (3d Cir. 1968), cert. denied, 410 U.S. 913, 93 S.Ct. 966, 35 L.Ed.2d 278 (1973)). On the other hand, we should not shy away from dismissing an antitrust claim that is vague and conclusory in nature, for allegations of Section 1 conspiracy must be pled with a degree of specificity. "A general allegation of conspiracy without a statement of facts is an allegation of a legal

conclusion and insufficient of itself to constitute a cause of action. Although detail is unnecessary, the plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment." Pepsico, 836 F.2d at 182 (quoting Black & Yates v. Mahogany Ass'n, 129 F.2d 227, 231-32 (3d Cir. 1941), cert. denied, 317 U.S. 672, 63 S.Ct. 76, 87 L.Ed. 539 (1942)).

Rototherm Corp. v. Penn Linen & Unif. Serv., Inc., No.CIV.A.96-6544, 1997 WL 419627, at 12 (E.D. Pa. July 3, 1997).

a. Relevant Geographic Market

Defendants correctly argue that the Plaintiff must define the relevant product and geographic markets in which the alleged anticompetitive conduct takes place in order to prove his anti-trust claims under Counts I-III. See United States v. Marine Bancorporation, 418 U.S. 602, 618 (1974) (requiring definition of markets in Section 7 Clayton Act claim); Pastore v. Bell Tel. Co. of Pa., 24 F.3d 508, 512 (3d Cir. 1994) (requiring definition of markets in Section 2 Sherman Act claim); Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1229 (3d Cir.) (requiring definition of markets in Section 1 Sherman Act claim), cert. denied, 510 U.S. 994 (1993). The relevant geographic market in an anti-trust case is the geographic area in which Defendants "effectively compete with other businesses for distribution of the relevant product." Borough of Lansdale v. Philadelphia Elec. Co., 692 F.2d 307, 311 (3d Cir. 1982). The relevant geographic market is not defined in terms of the locale

where the seller attempts to sell its product or service, but rather it is defined as "the area where customers would look to buy such a product or service." See Tunis Bros. Co., 952 F.2d at 726. This Court notes that "[c]ourts have recognized the existence of market imperfections unique to the health care industry: 'the prevalence of third-party payment for health care costs reduces price competition, and a lack of adequate information renders consumers unable to evaluate the quality of the medical care provided by competing hospitals.'" Delaware Health Care, Inc. v. MCD Holding Co., 893 F. Supp., 1279, 1289 (D. Del. 1995) (quoting Jefferson Parish Hosp. v. Hyde, 466 U.S. 2, 27 (1984)).

In this case, the amended complaint alleges the following:

55. The relevant product markets are the professional service components of each of three markets: specialized orthopaedic procedures, such as tumors, complex hand surgery, complex knee surgery, complex joint replacement, complex spine surgery, and complex pediatric orthopaedics ("Specialized Orthopaedics Product Market"); urgent traumatology, involving muscle flap techniques, bone transport, severe and complex multiple fractures, and complex pediatric orthopaedic trauma ("Urgent Traumatology Product Market"); and fast-response or emergent orthopaedic traumatology, with expertise in severed limb replants, spine fractures (with or without spinal cord injury), severe complex pelvic fractures, acetabular fractures, pediatric orthopaedic trauma, and severe crush injuries with or without fractures ("Emergent Traumatology Product Market"). These services are not interchangeable with other professional medical services.

Pl.'s Compl. at ¶ 55. The amended complaint further alleges:

57. The geographic market for the Specialized Orthopaedics Product Market is Camden County, New Jersey. Within this geographic market, patients who need such services and are situated within that geographic area will travel or will be transported to Cooper for professional services associated with this product market, and managed care plans will contract with orthopaedic physicians to provide those professional services to persons situated within the geographic market at the time they need those services. However, patients will not travel or be transported out of this broader region for those professional services and managed care plans contract with the intention that those services will be provided within that region for patients situated in the region.

58. The geographic market for the Urgent and Emergent Traumatology Product Market is both Camden County and Philadelphia County. Within this geographic market, patients will travel or will be transported to one of several trauma units for services associated with these product markets, and managed-care plans will contract with professional providers for such professional services for patients residing in this region. However, patients will not travel or be transported out of this broader region for services associated with these product markets, and managed-care plans will generally contract outside of this region for such services for patients situated at the time of need within the region.

Pl.'s Compl. at ¶¶ 57-58. The Defendants contend that Plaintiff's allegations essentially admit that "the geographic market for all three products includes the Eastern District of Pennsylvania [which] is fatal to his claims." Defs.' Mem. of Law in Support of Mot. to Dismiss at 17. Thus, the Defendants argue that Counts I-III should be dismissed because the breadth and inconsistency of Plaintiff's alleged markets is fatally insufficient. Further, the

Defendants argue that it is "inconceivable" that the Defendants could exercise market power within these alleged markets.

This Court must disagree. By simply alleging that the relevant geographic market includes Philadelphia County, Plaintiff did not allege the market is the Eastern District of Pennsylvania. Furthermore, at this stage of the proceedings, Plaintiff has sufficiently met his burden of notifying the Defendants of the specific product market and relevant geographic market alleged to be adversely affected by Defendants' actions.

Moreover, this Court disagrees with Defendants' contention that Plaintiff's allegations are insufficient because there is no showing that the Defendants exert market power. As a threshold matter, "[m]arket power may be relevant in some Sherman Act section 1 claims but it is an essential factor to be considered in all Sherman Act section 2 claims." Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 877 (3d Cir.1995). Defendants offer no case holding that "market power" must be specifically pled in the complaint to support a Section 1 claim. See id. (determining that plaintiff need not plead market power for Section 1 Sherman Act claim). In addition, even though market power is relevant to the sufficiency of Plaintiff's Section 2 Sherman Act claim, this Court cannot agree with the Defendants that "it is inconceivable that defendants have a substantial percentage of the market for any of the defined product markets" See Defs.' Mem. of Law in Support of Mot.

to Dismiss at 18. While discovery may demonstrate that, as a matter of law, the Defendants do not possess the requisite market power to sustain a Section 2 Sherman Act claim, the Court certainly does not possess such information at this time. See Fineman v. Armstrong World Indus., 980 F.2d 171, 201 (3d Cir. 1992) (noting that a market share of 55% does not establish monopoly power as a matter of law in the Third Circuit).

b. Anti-trust Injury

Defendants next argue that, because the Plaintiff received an offer of employment with the alleged anti-trust conspirators, he failed to suffer a sufficient anti-trust injury to avoid dismissal of Counts I-III. Section 4 of the Clayton Act provides for a private cause of action for damages by "any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws." 15 U.S.C. § 15(a) (1994). In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977), the Supreme Court clarified that to show an anti-trust injury, the plaintiff must show: (1) harm of the type the anti-trust laws were designed to prevent and (2) injury to the plaintiff from the unlawful actions of the defendant. See id.; see also Gulfstream III Assoc., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 429 (3d Cir. 1993). Indeed, the Defendants admit that the issue of anti-trust injury is infrequently resolved at the motion to dismiss stage. See Brader, 64 F.3d at 876.

Defendants submit that the Plaintiff cannot plead an anti-trust injury sufficient to stave off dismissal because Cooper offered the Plaintiff employment similar, if not identical, to that of the Individual Defendants. Thus, the Defendants state: "Where a single physician voluntarily decides not to accept an offer of renewed employment--no matter what events led to that decision, and no matter what the terms of employment--and where the same physician continues to practice in the same geographic market, there simply is no injury, either to competition or to the individual, of the kind that the antitrust laws were intended to redress." Defs.' Reply Br. in Support of Mot. to Dismiss at 6.

This Court is unpersuaded by this argument. Rather, this Court is guided by the Third Circuit's decision in Fuentes v. South Hills Cardiology, 946 F.3d 196 (3d Cir. 1991). In Fuentes, the Third Circuit held that three elements must be alleged to sustain a cause of action under Section 1 of the Sherman Act: (1) a contract, combination, or conspiracy; (2) a restraint of trade; and (3) an effect on interstate commerce. Fuentes alleged that "the defendants acted in concert to deny Fuentes, a provider of cardiological services, access to the Pittsburgh cardiological market," and that "by eliminating him as a competitor, the boycott successfully reduced competition for the defendants' cardiological services." Id. at 202. The Third Circuit concluded that these allegations were sufficient to survive a motion to dismiss as "such

exclusion constitutes an unlawful restraint of trade." Id.

The Court finds that Counts I-III should survive Defendants' motion to dismiss because Plaintiff alleged an injury similar to that in Fuentes. Here, the amended complaint alleges:

The Plaintiff's injury coincides with the public detriment from the Defendants' antitrust violations. As a direct and proximate result of Defendants' contract, combination and conspiracy, Defendants have acquired sufficient market power to unfairly restrain or eliminate competitors and increase the cost of and/or reduce the quality of services associated with the Specialized Orthopaedics Product Market in Camden County, New Jersey, and the Urgent Traumatology Product Market and, the Emergent Traumatology Product Market in the geographic market of Camden County and Philadelphia County.

Pl.'s Compl. at ¶ 61. The amended complaint goes on to list a litany of injuries caused to the Plaintiff by the reduction in competition allegedly caused by the Defendants. See id. at ¶ 62 (a)-(d). This allegation satisfies the Supreme Court's requirements pronounced in Gulfstream as well as the Third Circuit's elements to survive a motion to dismiss under Fuentes. Moreover, this Court would set a dangerous precedent if it were to conclude that any offer of employment-- no matter what the terms-- precludes an action under the anti-trust laws. Dr. Born alleges that the offer he received was for less than half the amount he earned prior to the alleged conspiracy. If anti-trust violators could simply offer employment to their competition under unreasonable terms in order to avoid liability, then the anti-trust

laws would be rendered ineffective. Thus, this Court denies Defendants' motion to dismiss on this ground.

c. Intracorporate Immunity

Finally, Defendants contend that the doctrine of intracorporate immunity bars Plaintiff's claim under Section 1 of the Sherman Act (Count I). "A corporation can act only through its agents, thus the acts of corporate directors, officers, and employees on behalf of the corporation are the acts of the corporation and a corporation cannot conspire with itself." Tunis Bors. Co., 763 F.2d at 1496 & n.21; see also Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 771-72 (1984) (holding that a parent company and its wholly owned subsidiary are not legally capable of conspiring with one another under Section 1 of the Sherman Act). Therefore, to maintain a private cause of action under Section 2, there must be two economic actors. See id.

At this stage, the Court cannot determine whether the Individual Defendants and Plaintiff Born were employees of Cooper, and thus, satisfy the application of the intracorporate immunity doctrine. The Individual Defendants argue that they were employed by Cooper. Plaintiff claims that, during the time when Defendants allegedly committed anti-trust violations, they were not employed by Cooper. Furthermore, the amended complaint contains no allegations of employment by Cooper. Perhaps discovery will result in evidence that Cooper, the Individual Defendants and Born were

one single entity, and therefore, incapable of violating the anti-trust laws.⁴ Nevertheless, because this Court must accept the Plaintiff's allegations as true for the purposes of this motion, the Court denies Defendants' motion to dismiss on this ground.

2. False Claims Act

Defendant Cooper Health System filed a Motion to Dismiss in which Cooper: (1) adopts the arguments set forth in the Motion to Dismiss by the Individual Defendants and (2) argues that Plaintiff's False Claims Act and qui tam claim (Count IV) should be dismissed. Rule 7.1(c) of the Local Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania states that, except for summary judgment motions, "any party opposing the motion shall serve a brief in opposition, together with such answer or other response which may be appropriate, within fourteen (14) days after service of the motion and supporting brief. In the absence of a timely response, the motion may be granted as uncontested" E.D. Pa. R. Civ. P. 7.1(c). Because Plaintiff Born failed to make a timely response to this motion, the Court treats the motion (as it relates to Count IV) as uncontested pursuant to Rule 7.1(c). Therefore, the Court grants Defendant Cooper's motion to dismiss Count IV of Plaintiff's

⁴ Plaintiff also argues that an exception to the intracorporate immunity may apply. Because this Court concludes that the doctrine does not bar Plaintiff's claim for the purposes of this motion, the Court will not address whether the exception applies for now.

complaint.

3. Trademark Claims

Plaintiff alleges that the Individual Defendants' use of the names "University Orthopaedic Surgeons" and "UOS" constitutes an infringement of his tradenames "University Orthopaedic Specialists" and "UOS." Plaintiff seeks damages from Defendants' actions in this regard by alleging common law and statutory tradename infringement (Counts V and IX), false description (Count VI), Unfair Competition (Count VII), and Trademark Dilution (Count VIII). Defendants argue that Counts V-IX should be dismissed for two reasons. First, as to all trademark counts, Defendants contend that Plaintiff has inadequately plead ownership and/or a protected interest in the tradename "UOS." Second, as to Count VI (False Description) and Count VII (Unfair Competition), Defendants argue that "[t]o say that the continuation of the practice under an existing name constitutes false description that the orthopaedic services of the Individual Defendants 'are provided by, sponsored or authorized by, or affiliated with' Born (Amended Complaint, ¶85) is ludicrous on its face and warrants dismissal." Defs.' Mem. of Law in Support of Mot. to Dismiss at 29.

a. Ownership and Protectability of Trademark

A trademark may be any mark, name, symbol, device or any combination thereof which is adopted and used by a manufacturer or merchant to identify his or her goods and distinguish them from

those sold by others. See Smithkline Beecham Corp. v. Pennez Products Co., 605 F. Supp. 746, 749 (E.D. Pa. 1985). Generally, a tradename applies to a business and its goodwill. See Acme Chemical v. Dobkin, 68 F. Supp. 601, 606 (E.D. Pa. 1947). The existence of a tradename that is valid, legally protectable and owned by the Plaintiff is necessary to maintain a claim for trademark infringement, false description, unfair competition, and trademark dilution. See 54 Pa. C.S.A. § 1124 (1995) (defining statutory tort of trademark dilution as "likelihood of injury to business reputation or of dilution of distinctive quality of a mark registered under this chapter, or a mark valid at common law, or a trade name valid at common law"); Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 291 (3d Cir.) (setting forth elements for a tradename infringement including proof that the marks are valid and legally protectable and that the marks are owned by the plaintiff), cert. denied, 502 U.S. 939 (1991); Pennsylvania State Univ. v. University Orthopedics, Ltd., 706 A.2d 863, 868 (Pa. Super. 1998) (noting that unfair competition claim encompasses trademark infringement, and thus, proof that the mark is valid and owned by plaintiff is necessary).

If a tradename is not federally registered, the tradename's validity depends on proof of secondary meaning unless the tradename is inherently distinctive. See Ford Motor Co., 930 F.2d at 291. Secondary meaning is defined as follows: where, in the public

minds, the primary significance of a product fixture or term is to identify the source of the product itself. See id.

Defendants first argue that Plaintiff failed to allege sufficient ownership or protected interest in "UOS" to maintain any of his trademark cause of actions. This Court disagrees. In Paragraph 14 of Plaintiff's amended complaint, Plaintiff alleges:

"Through a predecessor partnership, Drs. Born and DeLong licensed to this partnership the practice names 'University Orthopaedic Specialists and UOS.'" Pl.'s Compl. at ¶ 14. Defendants contend that this is insufficient because "it may well be that given the license rights previously granted, the Individual Defendants are not infringing on the rights of the alleged owner; for example, the UOS Partnership may have had the right to convey a license to use its name and did so." Defs.' Mem. of Law in Support of Mot. to Dismiss at 28. Defendants fail, however, to offer any evidence concerning this license or the rights therein. Rather, the Defendants ask this Court to dismiss Plaintiff's trademark claims accepting their version of the facts. The Court is unwilling and unable to do so at this stage. Plaintiff alleges ownership in the tradename "UOS" and Defendants disagree. Thus, discovery is needed and Defendants motion to dismiss is denied on this basis.

2. Likelihood of Confusion

Defendants next argue that Count VI (False Description) and Count VII (Unfair Competition) should be dismissed because no

possibility of confusion exists in this case as a matter of law. "Likelihood of confusion exists when the consumers viewing the mark would probably assume that the product or service it represents is associated with the source of a different product or service identified by a similar mark." Dranoff-Perlstein Assocs. v. Sklar, 967 F.2d 852, 862 (3d Cir. 1992) (internal quotations omitted). Proof of actual confusion, though helpful, is not necessary; likelihood of confusion is all that need be shown. See Ford Motor Co., 930 F.2d at 292.

Defendant argues that there is no likelihood of consumer confusion because: (1) four of the six doctors in the former practice continue in the present practice; (2) the other two doctors, including the Plaintiff, now practice orthopedics in a different market; (3) the names of the doctors in the practice are prominently displayed on the sign, door and letterhead of the practice; and (4) Plaintiff was only one of six doctors who constituted the former practice. In response, Plaintiff argues that discovery will reveal confusion in the marketplace caused by Defendants' use of the tradename "deceptively similar to the one used in the practice Born and DeLong spent seventeen years developing." Pl.'s Mem. of Law in Opposition to Defs.' Mot. to Dismiss at 21.

This Court cannot say, as a matter of law, that confusion does not exist. Plaintiff alleges its present and prospective customers

have experienced actual confusion due to Defendants' adoption of its name and mark. Plaintiff must be given an opportunity to document this confusion with evidence gathered by discovery. Accordingly, the Court denies the motion to dismiss on this ground.

3. Common Law Tort and Contract Claims

a. Fraud and Misrepresentation

Defendants argue that Plaintiff fails to state claim for fraud (Count X) for two reasons. First, Defendants contend that there was no duty to speak on the part of the Defendants, and thus, their actions cannot constitute fraud. Second, Defendants claim that Plaintiff suffered no injury.

To state a claim for fraud, a plaintiff must allege: (1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will thereby be induced to act; (4) justifiable reliance by the recipient on the misrepresentation; and (5) damage to the recipient as a proximate result. See Scaife Co. v. Rockwell-Standard Corp., 285 A.2d 451, 454 (Pa. 1971), cert. denied, 407 U.S. 920 (1972); Woodward v. Dietrich, 548 A.2d 301, 307 (Pa. Super. 1988); see also Killian v. McCulloch, 850 F. Supp. 1239, 1252 & n.6 (E.D. Pa. 1994) (discussing damages element); Jewish Ctr. of Suffix County v. Whale, 86 N.J. 619, 624-25, 432 A.2d 521, 524 (1981) (listing elements for fraud under New Jersey law). "Silence in the face of an obligation to disclose may be fraud, since the suppression of

truth when it should be disclosed is equivalent to an expression of a falsehood." Baldasarre v. Butler, 254 N.J. Super. 502, 521, 604 A.2d 112, 121 (1992), aff'd in part, rev'd in part on other grounds, 132 N.J. 298, 625 A.2d 458 (1993).

Defendants cite Baldasarre for the proposition that Plaintiff does not state a claim for fraud because "[t]o constitute fraud, there must be a duty to speak; mere pursuit of available rights does not confer the requisite duty of disclosure." Defs.' Mem. of Law in Support of Mot. to Dismiss at 30. Thus, the Defendants argue that the allegation that they met in secret with Cooper and did not disclose this fact with Born is insufficient because silence is not actionable as a misrepresentation unless there is a duty to speak. See id. Defendants then cite numerous cases to support their contention that they had no duty to disclose to Born their negotiations because partners have the right to act in their self-interest. See, e.g., Heller v. Hartz Mountain Indus., 270 N.J. Super. 143, 152, 636 A.2d 599, 603-04 (1993) (holding that when the partnership dissolves, partners may reasonably expect the other to seek what is in their best interest, and thus, the elements of fiduciary obligations are not present); Fravega v. Security S&L Ass'n, 192 N.J. Super. 213, 223, 469 A.2d 531, 536 (1983) (holding that joint venturer has no duty of good faith with respect to transactions where the relationship between parties is by nature, adversarial).

Notwithstanding these arguments, the Court finds that the Plaintiff states a valid claim for fraud and misrepresentation.⁵ The Plaintiff alleges that: (1) Defendants misrepresented that they were unanimous in their rejection of Cooper's proposal; (2) Defendants conducted secret negotiations with Cooper to accept the proposal they purported to reject; (3) Defendants "induced Dr. Born to repeatedly support and vote for continuing negotiations between UOS and Cooper, when in fact Defendants were acting with Cooper to steal Born's professional service fees"; and (4) Plaintiff suffered damages as a proximate result. See Pl.'s Compl. ¶¶ 94-97. Thus, Plaintiff is not alleging that Defendants' failure to disclose their negotiations with Cooper was actionable as silence with a duty to speak. Rather, Plaintiff alleges that the Individual Defendants elected to speak, and thus, Plaintiff was entitled to rely on the statements made and harmed thereby. See Strawn v. Canuso, 271 N.J. Super. 88, 105, 638 A.2d 141, 149 (1994) ("Even where no duty to speak exists, one who elects to speak must tell the truth when it is apparent that another may reasonably rely on the statements made."), aff'd, 140 N.J. 43, 657 A.2d 420 (1995). Accordingly, the Defendants' motion is denied in this regard.

⁵ The elements of misrepresentation are: (1) A material misrepresentation of a presently existing or past fact, (2) made with knowledge of its falsity and (3) with the intention that the other party relied thereon, (4) resulting in reliance by that party to his detriment. See Jewish Center of Suffix County v. Whale, 86 N.J. 619, 624, 432 A.2d 521, 524 (1981). Because the elements of misrepresentation are nearly identical to the elements of fraud, the Court concludes that the Plaintiff states a claim for misrepresentation as well.

The Court also denies Defendants' motion to dismiss Plaintiff's fraud claim based on failure to allege sufficient injury. This Court already concluded above that Plaintiff alleged sufficient injury to make out claim under anti-trust laws. The Court concludes that Plaintiff alleged a sufficient injury to make out a claim for fraud or misrepresentation on similar grounds as discussed above.

b. Breach of Contract

In Count XI of his complaint, Born alleges that the Individual Defendants breached the partnership agreement by allegedly failing to remit compensation derived by the partners. Born also claims, in Counts XII and XIII, breach of duty and breach of the covenants of good faith and fair dealing implied in the partnership agreement. Id. In response, the Individual Defendants argue that the alleged diversion of revenue is the partnership's claim. Thus, because the partnership is not a plaintiff, Defendants urge this Court to dismiss these claims.⁶

In order to successfully assert a claim for breach of contract, a plaintiff must allege: "(1) the existence of a contract to which he and the defendants were parties, (2) the contract's essential terms, (3) breach of the contract by the defendants, and (4) damages resulting from the breach." Rototherm Corp. v. Penn

⁶ The Defendants also contend that the arguments for dismissal of Count X (Fraud) apply with equal weight for the dismissal of Plaintiff's breach of contract claim. Because the Court disagreed with Defendants' arguments for dismissal of the fraud claim, the Court does not revisit that issue here.

Linen & Unif. Serv., Inc. No.CIV.A.96-6544, 1997 WL 419627, at *12 (E.D. Pa. July 3, 1997) (citations omitted). In this case, Plaintiff alleges: (1) the existence of a contract in the form of the partnership agreement; (2) the essential term of sharing the profits derived amongst the partners; (3) breach by the Individual Defendants in failing to share revenue; and (4) damages to the Plaintiff. See Pl.'s Compl. at ¶¶ 98-111. Defendants simply state that the claim to revenue is that of the partnership, and not of the Plaintiff, without legal authority or referring to any specific provision of the partnership agreement. Therefore, the Court finds Plaintiff's allegations satisfy his burden at this stage of the proceeding.

c. Tortious Interference of Contract

In his complaint, Born alleges that the Defendants committed tortious interference with contractual relations (Count XIV) and tortious interference with prospective economic advantages (Count XV). Defendants move to dismiss arguing that their actions were privileged.

To successfully assert a cause of action for tortious interference under Restatement of Torts § 766, Born must allege: "(1) the existence of a contract, (2) that the defendant intended to harm by interfering with the contract, (3) the absence of privilege or justification for the interference, and (4) damages." Rototherm Corp., 1997 WL 419627, at *13 (citations omitted). In

support of Counts XIV and XV, Born alleges that: (1) Born maintained contractual and business relationships with his patients, referring physicians, managed care companies, insurance companies, and Cooper; (2) Defendants were aware of these relationships; (3) Defendants' actions interfered and sabotaged those relationships with malice; (4) Defendants acted without justification or privilege; and (5) damages as result of the interference. Pl.'s Compl. at ¶¶ 117-128.

Defendants contend that the action of interfering with contractual relations to protect their own existing economic interest is privileged. Moreover, Defendants argue that Plaintiff fails to make a non-conclusory allegation inconsistent with a proper exercise of individual or competitive rights. Thus, Defendants suggest that dismissal is warranted.

This Court disagrees. This Court notes that "[w]hile a party does have a right to enjoy the fruits and advantages of its own labor without unjust interference, a party 'has no right to be protected against competition.'" EZ Sockets, Inc. v. Brighton-Best Socket Screw Mfg., Inc., 307 N.J. Super. 546, 559, 704 A.2d 1364, 1370 (1996) (quoting Louis Kamm, Inc. v. Flink, 175 A. 62 (N.J. 1934)). In EZ Sockets, the court found that courts must determine whether a defendant's actions are privileged competitive efforts on a case-by-case basis. See id. Furthermore, the court used the Restatement formulation which states:

One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if

(a) the relation concerns a matter involved in the competition between the actor and the other; and

(b) the actor does not employ wrongful means; and

(c) his action does not create or continue an unlawful restraint of trade; and

(d) his purpose is at least in part to advance his interest in competing with the other.

Restatement (Second) of Torts § 768. This Court already concluded that Born has sufficiently pled claims for unlawful restraint of trade. Moreover, Plaintiff alleged that Defendants employed wrongful means by misrepresenting the nature of Defendants' negotiations with Cooper. See EZ Sockets, Inc., 307 N.J. Super. at 559, 704 A.2d at 1370 ("Wrongful means includes violence, fraud, intimidation, misrepresentation, criminal or civil threats, and/or violations of the law."). If Plaintiff proves these allegations of unlawful restraint and misrepresentation, Defendants' actions would not be privileged. Therefore, guided by these principles and taking the factual allegations within the Plaintiff's complaint as true, this Court finds that the Defendants' actions were not privileged for the purposes of this motion.

d. Civil Conspiracy

In Count XVI of his complaint, plaintiff alleges Defendants committed civil conspiracy. Defendants argue that Plaintiff's

claim for civil conspiracy should be dismissed because their motion to dismiss demonstrated that the underlying claim to the civil conspiracy is not cognizable. Because the Court denied Defendants' motion with respect to the underlying claim, it denies Defendants' motion with respect to this claim.

4. Attorney Fees

Plaintiff requests attorneys' fees with respect to each common law contract and tort claim. Defendants submit that this request should be dismissed because each party is required to bear its own litigation expenses. See Jugan v. Friedman, 275 N.J. Super. 556, 573, 646 A.2d 112, 120 (N.J. Super.), cert. denied, 138 N.J. 271, 649 A.2d 1291 (1994). This Court agrees and dismisses Counts X-XVI in so far as each count requests attorneys' fees.

5. Defendant Catalano

Defendants next argue that any claims brought by the Plaintiff in reliance upon Defendant Catalano's status as a partner should be dismissed because Plaintiff admitted Catalano was merely an employee of the partnership. Specifically, Defendants point to Count XII, which alleges a breach of duty by Defendant Catalano, and argue that Defendant Catalano should be dismissed from this claim because any alleged duty is based on the UOS partnership agreement. Plaintiff counters by arguing that the duty owed by Catalano was based on the contract between Catalano and the partnership.

The Court agrees with Plaintiff's argument. In his complaint, Plaintiff alleges that: "Pursuant to UOS Partnership Agreement, the New Jersey Uniform Partnership Law . . . and/or the common law of New Jersey, each Individual Defendant [including Defendant Catalano] owed a duty to Dr. Born not to interfere with Dr. Born's right to receive the continuing benefits of his position as a Partner of UOS." Pl.'s Compl. at ¶ 105 (emphasis added). Defendants argue that Defendant Catalano's status as an employee, and not a partner, precludes an action for breach of duty. However, Plaintiff alleged that Catalano owed a duty as an employee under the common law of New Jersey. New Jersey case law supports this proposition. See Platinum Management v. Dahms, 666 A.2d 1028, 1042 (N.J. Super. 1995) (holding that an employee "may not breach the undivided duty of loyalty he owes" by "acts of secret competition"); Auxton Comp. Enter. v. Parker, 174 N.J. Super. 418, 423-24, 416 A.2d 952, 955 (1980) (noting that an employee "may not solicit his employer's customers for his own benefit before he has terminated his employment" because "[t]his would constitute a breach of the undivided loyalty which the employee owes to his employer while he is still employed"). Therefore, this Court denies the motion to dismiss Defendant Catalano from Count XII.⁷

II. Failure to Join an Indispensable Party Under Rule 12(b)(7)

⁷ Defendants ask this Court to dismiss all claims based on Defendant Catalano's status as a partner. The Defendants, however, only address Plaintiff's allegation in Count XII. Therefore, this Court will consider Defendants' motion to dismiss Defendant Catalano only from Count XII.

Defendants argue that Dr. DeLong must be joined in this action. Defendants contend that he is a necessary party under Federal Rule of Civil Procedure 19(a) because he is an alleged co-owner of the tradename "UOS" under which the Plaintiff in this action has brought tradename infringement claims (Counts V-IX).

"Federal Rule of Civil Procedure 19 governs the question of whether persons not a party to a suit should be joined because they are necessary to a more complete settlement of a dispute."

Shetter v. Amerada Hess Corp., 14 F.3d 934, 938 (3d Cir. 1994).

Rule 19(a) provides in part:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party to the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (I) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). Ordinarily, courts are asked to decide whether an action can go forward in the absence of an asserted necessary party. See e.g., Shetter, 14 F.3d at 938; Scott Paper Co. v. National Casualty Co., 151 F.R.D. 577, 578 (E.D. Pa. 1993).

In the present case, the Court finds that Dr. DeLong is not a

necessary party under Rule 19(a)(1). The fact that Dr. DeLong may have some ownership in the tradename "UOS" is of no consequence to this Court.⁸ This Court concludes that Dr. Born can be accorded complete relief without the addition of Dr. DeLong as a party.

Likewise, Dr. DeLong is not a necessary party under Rule 19(a)(2). First, this Court finds that the Plaintiff will adequately protect Dr. DeLong's interest, and thus, cannot be required to join DeLong as a party under Rule 19(a)(2)(I). See Scott Paper, 151 F.R.D. at 579-80 (finding injured party's lack of interest in litigation indicative of potential prejudice in non-joinder). Second, there is little or no risk that the remaining parties will be subject to multiple obligations if Dr. DeLong is not a party. Dr. DeLong has already brought an action against the Defendants. There is little likelihood of additional litigation. In sum, Dr. DeLong is not a necessary party, and thus, the Court denies the motion to dismiss for failure to join an indispensable party under Rule 12(b)(7).

III. Lack of Subject Matter Jurisdiction Under Rule 12(b)(1)

Defendants argue that any remaining state law claims should be dismissed if the Court dismisses all of the Plaintiff's federal law claims. See Angst v. Mack Trucks, Inc., 969 F.2d 1530, 1535 (3d

⁸ Plaintiff states that Dr. DeLong has conveyed any rights of the tradename "UOS" for consideration to Dr. Born. The Defendants object to the Court's consideration of this evidence because of the suspicious timing of the transaction in light of their motion to dismiss. Because the Court concludes that Dr. DeLong is not a necessary part even as a co-owner of "UOS," the Court will not address this issue nor consider this evidence.

Cir. 1992). Because this Court denied Defendants' motion to dismiss as to some of Plaintiff's federal law claims, the Court retains supplemental jurisdiction over Plaintiff's pendent state law claims pursuant to 28 U.S.C. § 1367. Therefore, the Court denies Defendants' motion to dismiss Plaintiff's remaining state law claims for lack of jurisdiction.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER T. BORN, M.D. : CIVIL ACTION
 :
 v. :
 :
 WILLIAM IANNAcone, M.D., :
 ROBERT DALSEY, M.D., :
 LAWRENCE DEUTSCH, M.D. :
 JOHN CATALANO, M.D., and :
 THE COOPER HEALTH SYSTEM :
 d/b/a COOPER HOSPITAL/ :
 UNIVERSITY MEDICAL CENTER : NO. 97-5607

O R D E R

AND NOW, this 29th day of September, 1998, upon consideration of the Defendants William Iannacone, Robert Dalsey, Lawrence Deutsch and John Catalano Motion to Dismiss the Amended Complaint (Docket No. 25), Plaintiffs' response thereto (Docket No. 29), Defendants Reply Brief (Docket No. 31), Plaintiffs' Sur Reply Brief (Docket No. 32), and Defendant Cooper Health System's unopposed Motion to Dismiss Plaintiff Born's Qui Tam Claim (Docket No. 26), IT IS HEREBY ORDERED that the motions are **GRANTED IN PART AND DENIED IN PART.**

IT IS FURTHER ORDERED THAT:

(1) Defendants' Motion to Dismiss the Amended Complaint for failure to state a claim is denied with respect to Counts I-III and Counts V-XVI;

(2) Plaintiff Born's False Claims Act and Qui Tam Claim (Count IV) is dismissed;

(3) Counts X-XVI of Plaintiff's complaint are dismissed in so far as it requests attorneys' fees under common law contract and tort claims;

(4) Defendants' Motion to Dismiss the Amended Complaint for failure to join an indispensable party is denied; and

(5) Defendants' Motion to Dismiss the Amended Complaint for lack of subject matter jurisdiction is denied.

BY THE COURT:

HERBERT J. HUTTON, J.