other hospital supply providers. MSC's IS U.S.C, § 1 claims rest on these allegations. We examine MSC's claim under 1.5 U.S.C. § 2 first.l

1

Under the Sherman Act § 2, to state a claim for attempted monopolization, a plaintiff must plead: "(I) relevant market (including geographic market and relevant product market); (2) dangerous probability of success in monopolizing the relevant market; (3) specific. intent to monopolize; and (4) conduct in furtherance of such an attempt." TV Communications Network, Inc. v. Turner Network Televis.ion, Inc., 964F.2d 1022, 1025 (10th CU. 1992) (quotation omitted). To stale a monopolization claim under § 2. B plaintiff must allege: "(1) the po sion of monopoly power in the relevant market and (2) the will ful acquisition or rnuintenance of that power as distinguished rrom growth or develupmeru as a consequence of a superior product. business acumen, or historic accident" ld_,_ (quotation omitted); t:!!IL!Jr~y.PrJ)d::.. v. r:aston Sports, Inc., 182 F.3d 745, 756 (10th Cir. 1999). Th district (.ornt held ;lial tiE ami il subsidiaries do not compere in the relevant market of hospital supply e-comrnerce in North America and that OR could 1101. rhcrcfon-, hold monopoly power. or be

: While a conspiracy to monopolize is also forbidden under § 2, we restrict our analysis under that section to GE's actions as a: single entity since we do not read MSC's complaint as alleging conspiracy to monopolize.

atremprlng ɾo obtain monopoly power, in that market MSC presents nothing on appeal, that would convince us of district court error in [his regard.

Although MSC often treats GHX and Neoforma in its filinas as mere tools oroE. evidently because orOE's status as an initial shareholder of Gil X and GHX's relationship with Neoforma, and alleges. among other things. that "ft]he defendants have monopoly power in the relevant North American hospital supply e-cornmerce market through their subsidiaries:' (I Appellant's App, at 24)'. and mat GHX was ine --alLer ego" of GE. M:SC presents nctactual allegations to support these conclusory statements. The bald allegations in the complaint that OE alone contrulled GHX are nothing more than conclusory allegations that G violated antitrust laws. See TV Communications, 964 F.2d at]024 f'Condusory ellcgations thai the defendant violated [amitrusi] laws an; insufficient. "J. Not only is the allegation that GE and GHX should be considered one and the same company conclusory, it is inconsistent with thepress releases auached to the amended cornplalnt showing llUH GHX is a Hmited HabHlty company owned bya number of other companies, J II is also inconsistent with MSC's contention that

One of the press releases attached ɾo MSC' s amended complaint and dated before the Lime period at issue in this case states that "the privately held company (GHX] was founded in March 2000 and its membership now includes more than 100 suppl ier members and mare than 400 hospital members ... [and [hat ejquir members of GHX include [Ihe five jnitial members discussed in footnote L ~ and] Becton, Dickinson & Co.: Boston Scientific Corporation: C.R. Bard, lnc.;

continued ...)

these companies were actually Working together to restrict entry into tile relevant market. Since MSC makes no well-pleaded factual allegations that would support its conclusory legal allegation that GHX was Gb 's alter eao and should be held responsible for GE's actions, we see no reason 10 disturb the district court's conclusion that MSC failed to state a claim that GE had illegally monopolized or attempted to monopolize the North American hospital supply c-commerce market

MSCs rour claims unaer I,. U.S.C, § I also fail. To establish a viotanon of the Sherman Act § I, "the plaintiff must allege facts which show: the defendantjs] entered a contract, combination or conspiracy that unreasonably restrains trade in the relevnnt market." Full Draw Prods., 182 F.3d at 756 (quoting TV Communica1ions, 964 F.2d at 1027). Here. MSC alleges thai GE~s refusal to finance MSC's purchase of the Blue Springs office building improperly restrained trade in rhat it prevented MS("s entry into the hospital supply e-commerce market.

en if MSC s amended complaintwere read to allege that defendants agreed with GHX, a competitor of MS(' not to loan money to MSC. the district court found that this would be considered a vertical agreement and subject to the

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Guidant Corporation; Siemens Medical Solutions and Tyeo International, Ltd.'
(I Appellant's App. at Il2 .)

rule of rca son. 'Tile rule or reason ... requires "'the fact finder [to] weighlJ all or the circumstances of a ease in deciding whether a restrictive practice should be prohibited as imposing all unreasonable restraint on competition." Diu v, Farlev. 2] 5 F.3d urs. 1182 (lOlh Cir. 1000) (citation omitted). MSC argues that the district court should have read the amended complaint as alleging a horizontal agreement to harm MSC and thai such an agreement is a ncr se restraint of trade. "Per 51l analysis is reserved for agreements or practices which because of their pernlctcus effect on compettuon ana lack or any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their usc:' ld (quotation omitted), MSC has two di fferent theorjes us to why a horizontal Bnd l1.overtical agreement '..as alleged: (~) that the amended complaint alleged that fiE. a supplier, agreed with GHX, a customer, to injure another customer. MSC, and that this type of agreement should be treated as a hurlzorual restraint on trade. and (2) (hat the Formation and operation ofUHX should he treated as a horizontal agreement between suppliers with the purpose or. among other things, boycotting other hospital supply e-corarncrce marketplaces including MSC, and that GE refused to extend financing to MSC pursuant to this boycou.

MSC's argument fails because even if a horizontal agreement to boycott MSC existed, GE's failure to provide financing would not be considered an antitrust violation. First. "unless the defendants in a arouo boycott situation possess market power or excluslve access to an element essential to effective competition. the conclusion that expulsion of the plaintiff is virtually always likel)' to have an anticompetitive effect thereby invoking aper 51! analysis is not warranted.:" Id. at] 182-83 (quoting Northwest Wholesale Stalion ers. Inc. v. racine sralionery&. PrilHing co.. 472 U.S. 11S4, zse (II)~J). "To demonstrate market power a plaintiff may show evidence of either power to control prices QI the power 10 exclude competition." Westman Comm'n Co. v. Hobart InC]. Inc .. 79',6F.2d I!' 16,]215 n.3 (10th Cir ~986) (quotations omitted), Second. even where a per se violation of 151 J.S.C ~ I is involved. a plaintiff must still show that it suffered an antitrust injun'. "The per se rule. . doc!' not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages" All. Ric!lflelff CQ.~v. VSAec_(roleulll~o.:. 495 IJ S 32~ i41-42 (1990)

MSC's allegation that GE's refusal to loan it money nrcvemed MSC from entering the hospital supply e-cornmerce market and that it. therefore, suffered an antitrust injury is untenable. First, MSC did not have to purchase an office building to enter the hospital supply e-comrnerce market, In fact. its initial plan

was to rent office space. Second, while like any new business it did need funds to tart operations, there was no requirement thai it obtain these funds from GE. GE does not have market power in the financial market. The potential anti-competitive danger presented by an alleged agreement between major players in any market is that those players ,,'~II use the power they hold in that market. to stifle competition. An agreement between (hose same players to take actions in markets where (hey art' not major players and hold no market power poses no danger because consumers in those markets have other options from which to choose. Even if all the members of the alleged carte] agreed that OE should not make any loans to MSC, such an aareement is not Illegal in the absence of some sort of power in the commercial loan market.

MSC'S1lL1cmpLLo.J::atagorize the Joan it sought as a "unique rinancial instrument" that it could not replicate at any bank or in the venture funds markets is unpersuasive. Any "uniqueness" ofMSC's loan needs was caused by MSC's ~.cak financial position, not GE's status as a fender.

3

MSC also raised one Robinson-Patman Act Claim. 15 U.S.C. 5 l3(e)" which was dismissed by the district. court on the ground that the Act only bars price discrimination in the sale of commodities, not discrimination in the supply of a real estate lease or flnanemg. MSC does not argue trial court. error in regard

lO the disrn issal of th is claim. nor do we discern any error in that ruling or in the district court's dismissal of the stale law claims without prejudice following, dismissal of all of the federal claims.[4]

B

Defendants argue ~ıı their cross-appeal taut the district court abused its discretion by denying its motion for sanctions. Defendants allege that MSC's amended complaint violated the requirements of Fed. R. Civ. P. ll tb) that a pleading not be "presented for any improper purpose, such as to harass or Lo cause unnecessary delay or needless increase in the cost of litigation' and that "the lairns. defenses and other legal contentions therein arc warranted by existing

.~ MSC 's appellate l.ricfs also present Eı hLll1l ..ated argument that the amended complaint raised a ll!ti lalT! False Claims Act claim M~C's only support [01 this argument ıs the [ae! that the afl1cud~rl GOiilp!niilll alleged, m its description of the parties nf Ihf' 511i1, ~hal Jeffrey lrurnclt knew ih~j nit': alleged cousniracy would "C:lIIS.[~J M~rli(~ml' 'n he dr-fraurled (lui Or hi Hirms *nf* Jc.lJng over paid in artifieially iJlfllllled claims 101' device' imd prucc-Iures ulll'il.ing r+e carter ... Stipp] ies" and thal ılt t del re..sed access In he a Ithc~lfI:~" caused by the COIlSp ITI1I:y "would cause employers and health insurers 10 reduce cnveraae and hem-lib to the naucu's citizens leading to mjnry ilnci death.' tJ hIJjlCUdUI's App. at 55 56. This claim was llUL pruper ly pteud in the (~omp!f1im rhe arncneeu cnmptatm Iearly set forth and numbered the claims that were being raised. The complaint "must give the defendant fair notice of what the plaintiffs claim is and the grounds upon which it rests." Green COuntry Food Mkt", Inc. v. Bottling Group, LLC, 371 F.3d 1275, 1279 (lO(h en. 2004). Neither the parties nor the district court ever discussed the False Claims Act and itIs unreasonable to argue that defendants should have been on notice of such a claim.

law or by a nonfrivolous argument lor the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. ll(b). If a court, dt>termlnE'<;: ihM ~ pMry hPt<:.vinhuP,n Rlll .. 11(h). ~ cfmrf mH}' in itll. di~crelinl1 impose sanctions. Fed. R. Civ. P. JI(c)_ In making its decision whether Rule I] sanctions are meriicd: "a district court must apply an objective standard: it must determine whether a reasonable and competent attorney would believe in the merit Or an argument, In reviewing ◁ district courts decision to impose Rule ~~ sanctions, we apply an abuse of discretion standard." Dodd Ins. Servs., Inc, ıı RovaLhlS. Co. of Am., 935 F,2d 1152. J l53 (lOth Cir. 1991) (quotation omitted). In ml Memorandum and Order, the district court recognized that in an carf ier related case it bad reminded MSC's counsel of his obligations under Fed .R. .Civ. P. l l-and-eeutiened HH'Ill.4E)ake greater care if] the future in ensuring that claims he brought on behalf oC clients were supported by the law andthe facts. evertheless, the district court "vas unwilling to conclude that MSC"',s Amended Complaint was so meri,nless or otherwise frivolous as to warrant sanctions. The court also pointed to the fact that it had not addressed MSC's state law claims as a factor in its decision

Defendants are correct that Rule 11 sanctions can be imposed even when some claims are not fd volous. Dodd Ins. Se:rvs., Inc., 93 S F.2d at 1158. It is clear that at least MSC's claims against Jeffrey Imrnelt in his individual capacity

were frivolous in that no allegation was made that Immelt had any personal connection to MSC's alleged injury or even thai he knew MSC existed. Therefore. it w.rıs abuse of discretion not tn find that pnrtinn nf1llte amender! complaint frivolous. As for MSC' s other claims. the distriet court did not address she state claims and, considering our deferential standard of review, we cannot say that the district court abused its discretion ill refusing to award sanctions against MSC for bringing those claims.

III

Consequently. we **AFFIRM** the district court's dismissal of MSC' s federal claims on the merits and its dismissal of MSC's stale claims without prejudice. We RIEVERS[the district court's order denying defendants' motion [or Rule II sanctions and **REMAND** to the district court for a deterrmnation of the proper sanction to be assessed for MS("<; inclusion of Je ffrey Immelt as a defendant in his individual capacity.

Entered for the Court

Carlos F. Lucero
Circuit Judge

other hospital supply providers. MSC's 15 U.S.C. § 1 claims rest on these allegations. We examine MSC's claim under 15 U.S.C. § 2 first.[2]

1

Under the Sherman Act § 2, to state a claim for attempted monopolization, a plaintiff must plead: "(1) relevant market (including geographic market and relevant product market); (2) dangerous probability of success in monopolizing the relevant market; (3) specific intent to monopolize; and (4) conduct in furtherance of such an attempt." TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1025 (10th Cir. 1992) (quotation omitted). To state a monopolization claim under § 2, 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 historic accident." Id. (quotation omitted); Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745, 756 (10th Cir. 1999). The district court held that GE and its subsidiaries do not compete in the relevant market of hospital supply e-commerce in North America and that GE could not, therefore, hold monopoly power, or be

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[2] While a conspiracy to monopolize is also forbidden under § 2, we restrict our analysis under that section to GE's actions as a single entity since we do not read MSC's complaint as alleging conspiracy to monopolize.

attempting to obtain monopoly power, in that market. MSC presents nothing on appeal that would convince us of district court error in this regard.

Although MSC often treats GHX and Neoforma in its filings as mere tools of GE, evidently because of GE's status as an initial shareholder of GHX and GHX's relationship with Neoforma, and alleges, among other things, that "[t]he defendants have monopoly power in the relevant North American hospital supply e-commerce market through their subsidiaries," (I Appellant's App. at 24), and that GHX was the "alter ego" of GE, MSC presents no factual allegations to support these conclusory statements. The bald allegations in the complaint that GE alone controlled GHX are nothing more than conclusory allegations that GE violated antitrust laws. See TV Communications, 964 F.2d at 1024 ("Conclusory allegations that the defendant violated [antitrust] laws are insufficient."). Not only is the allegation that GE and GHX should be considered one and the same company conclusory, it is inconsistent with the press releases attached to the amended complaint showing that GHX is a limited liability company owned by a number of other companies.[3] It is also inconsistent with MSC's contention that

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[3] One of the press releases attached to MSC's amended complaint and dated before the time period at issue in this case states that "the privately held company [GHX] was founded in March 2000 and its membership now includes more than 100 supplier members and more than 400 hospital members . . . [and that e]quity members of GHX include [the five initial members discussed in footnote 1, supra, and] Becton, Dickinson & Co.; Boston Scientific Corporation; C.R. Bard, Inc.; (continued...)

these companies were actually working together to restrict entry into the relevant market. Since MSC makes no well-pleaded factual allegations that would support its conclusory legal allegation that GHX was GE's alter ego and should be held responsible for GE's actions, we see no reason to disturb the district court's conclusion that MSC failed to state a claim that GE had illegally monopolized or attempted to monopolize the North American hospital supply e-commerce market.

2

MSC's four claims under 15 U.S.C. § 1 also fail. To establish a violation of the Sherman Act § 1, "the plaintiff must allege facts which show: the defendant[s] entered a contract, combination or conspiracy that unreasonably restrains trade in the relevant market." Full Draw Prods., 182 F.3d at 756 (quoting TV Communications, 964 F.2d at 1027). Here, MSC alleges that GE's refusal to finance MSC's purchase of the Blue Springs office building improperly restrained trade in that it prevented MSC's entry into the hospital supply e-commerce market.

Even if MSC's amended complaint were read to allege that defendants agreed with GHX, a competitor of MSC, not to loan money to MSC, the district court found that this would be considered a vertical agreement and subject to the

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[3](...continued)
Guidant Corporation; Siemens Medical Solutions and Tyco International, Ltd." (I Appellant's App. at 112.)

rule of reason. "The rule of reason . . . requires "the fact finder [to] weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Diaz v. Farley, 215 F.3d 1175, 1182 (10th Cir. 2000) (citation omitted). MSC argues that the district court should have read the amended complaint as alleging a horizontal agreement to harm MSC and that such an agreement is a per se restraint of trade. "Per se analysis is reserved for agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Id. (quotation omitted). MSC has two different theories as to why a horizontal and not vertical agreement was alleged: (1) that the amended complaint alleged that GE, a supplier, agreed with GHX, a customer, to injure another customer, MSC, and that this type of agreement should be treated as a horizontal restraint on trade, and (2) that the formation and operation of GHX should be treated as a horizontal agreement between suppliers with the purpose of, among other things, boycotting other hospital supply e-commerce marketplaces including MSC, and that GE refused to extend financing to MSC pursuant to this boycott.

MSC's argument fails because even if a horizontal agreement to boycott MSC existed, GE's failure to provide financing would not be considered an antitrust violation. First, "unless the defendants in a group boycott situation 'possess market power or exclusive access to an element essential to effective competition, the conclusion that expulsion of the plaintiff is virtually always likely to have an anticompetitive effect thereby invoking a per se analysis is not warranted.'" Id. at 1182-83 (quoting Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 296 (1985)). "To demonstrate market power a plaintiff may show evidence of either power to control prices or the power to exclude competition." Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1225 n.3 (10th Cir. 1986) (quotations omitted). Second, even where a per se violation of 15 U.S.C. § 1 is involved, a plaintiff must still show that it suffered an antitrust injury. "The per se rule . . . does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages." Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 341-42 (1990)

MSC's allegation that GE's refusal to loan it money prevented MSC from entering the hospital supply e-commerce market and that it, therefore, suffered an antitrust injury is untenable. First, MSC did not have to purchase an office building to enter the hospital supply e-commerce market. In fact, its initial plan

was to rent office space. Second, while like any new business it did need funds to start operations, there was no requirement that it obtain these funds from GE. GE does not have market power in the financial market. The potential anti-competitive danger presented by an alleged agreement between major players in any market is that those players will use the power they hold in that market to stifle competition. An agreement between those same players to take actions in markets where they are not major players and hold no market power poses no danger because consumers in those markets have other options from which to choose. Even if all the members of the alleged cartel agreed that GE should not make any loans to MSC, such an agreement is not illegal in the absence of some sort of power in the commercial loan market.

MSC's attempt to catagorize the loan it sought as a "unique financial instrument" that it could not replicate at any bank or in the venture funds markets is unpersuasive. Any "uniqueness" of MSC's loan needs was caused by MSC's weak financial position, not GE's status as a lender.

3

MSC also raised one Robinson-Patman Act Claim, 15 U.S.C. § 13(e), which was dismissed by the district court on the ground that the Act only bars price discrimination in the sale of commodities, not discrimination in the supply of a real estate lease or financing. MSC does not argue trial court error in regard

to the dismissal of this claim, nor do we discern any error in that ruling or in the district court's dismissal of the state law claims without prejudice following dismissal of all of the federal claims.[4]

B

Defendants argue in their cross-appeal that the district court abused its discretion by denying its motion for sanctions. Defendants allege that MSC's amended complaint violated the requirements of Fed. R. Civ. P. 11(b) that a pleading not be "presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" and that "the claims, defenses, and other legal contentions therein are warranted by existing

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[4] MSC's appellate briefs also present a truncated argument that the amended complaint raised a qui tam False Claims Act claim. MSC's only support for this argument is the fact that the amended complaint alleged, in its description of the parties of the suit, that Jeffrey Immelt knew that the alleged conspiracy would "caus[e] Medicare to be defrauded out of billions of dollars over paid in artificially inflated claims for devices and procedures utilizing the cartel's supplies" and that the "decreased access to healthcare" caused by the conspiracy "would cause employers and health insurers to reduce coverage and benefits to the nation's citizens leading to injury and death." (1 Appellant's App. at 55-56.) This claim was not properly plead in the complaint. The amended complaint clearly set forth and numbered the claims that were being raised. The complaint "must give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Green Country Food Mkt., Inc. v. Bottling Group, LLC, 371 F.3d 1275, 1279 (10th Cir. 2004). Neither the parties nor the district court ever discussed the False Claims Act and it is unreasonable to argue that defendants should have been on notice of such a claim.

law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11(b). If a court determines that a party has violated Rule 11(b), a court may in its discretion impose sanctions. Fed. R. Civ. P. 11(c). In making its decision whether Rule 11 sanctions are merited: "a district court must apply an objective standard; it must determine whether a reasonable and competent attorney would believe in the merit of an argument. In reviewing a district court's decision to impose Rule 11 sanctions, we apply an abuse of discretion standard." Dodd Ins. Servs., Inc. v. Royal Ins. Co. of Am., 935 F.2d 1152, 1155 (10th Cir. 1991) (quotation omitted). In its Memorandum and Order, the district court recognized that in an earlier related case it had reminded MSC's counsel of his obligations under Fed. R. Civ. P. 11 ~~and cautioned him to~~ take greater care in the future in ensuring that claims he brought on behalf of clients were supported by the law and the facts. Nevertheless, the district court was unwilling to conclude that MSC's Amended Complaint was so meritless or otherwise frivolous as to warrant sanctions. The court also pointed to the fact that it had not addressed MSC's state law claims as a factor in its decision.

Defendants are correct that Rule 11 sanctions can be imposed even when some claims are not frivolous. Dodd Ins. Servs., Inc., 935 F.2d at 1158. It is clear that at least MSC's claims against Jeffrey Immelt in his individual capacity

were frivolous in that no allegation was made that Immelt had any personal connection to MSC's alleged injury or even that he knew MSC existed. Therefore, it was abuse of discretion not to find that portion of the amended complaint frivolous. As for MSC's other claims, the district court did not address the state claims and, considering our deferential standard of review, we cannot say that the district court abused its discretion in refusing to award sanctions against MSC for bringing those claims.

III

Consequently, we **AFFIRM** the district court's dismissal of MSC's federal claims on the merits and its dismissal of MSC's state claims without prejudice. We **REVERSE** the district court's order denying defendants' motion for Rule 11 sanctions and **REMAND** to the district court for a determination of the proper sanction to be assessed for MSC's inclusion of Jeffrey Immelt as a defendant in his individual capacity.

Entered for the Court

Carlos F. Lucero
Circuit Judge