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N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN RE: BLUE CROSS BLUE SHIELD ANTITRUST LITIGATION MDL. NO. 2406	Master File No. 2:13-CV-20000-RDP This document relates to: Subscriber Track cases [UNREDACTED – CONTAINS OUTSIDE COUNSEL ONLY MATERALS]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SUBSCRIBER PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE APPLICATION OF THE *PER SE* RULE

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I. INTRODUCTION

This motion involves one stubborn truth: through a vehicle they control, potential competitors have agreed not to compete at all on one another's assigned turf when using particular trademarks and brand names, and they have also agreed to put significant limits on their ability to compete on one another's assigned turf even when using any other trademark or brand name. Those agreements are properly and conclusively condemned *as a matter of law* under the Sherman Act. No further examination is permitted by the Court into the extent of the anticompetitive effects that the agreements have caused or any purported business excuse for them.

Under Section 1 of the Sherman Act, 15 U.S.C. § 1, it is *per se* unlawful for potential competitors to agree to divide and allocate markets into separate geographic territories on an exclusive basis. Time and again, the Supreme Court has held that such a market allocation agreement is an unlawful restraint against trade and is illegal *per se*. The result is no different when potential competitors accomplish this market allocation through a trademark owned by an entity they commonly control—i.e., by having that entity license out the trademark with exclusive geographical territories assigned to each of the potential competitors. Such a trademark licensing scheme is unlawful *per se* because it is another way for the competitors to divide and allocate territories, and thereby to agree not to compete. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350, 354 (1967).

This case falls squarely within the holdings of these Supreme Court precedents. The Defendants in this case are 36 independent companies that all sell health insurance (the "Member Plans"), plus an association those Member Plans collectively govern and control ("BCBSA"). The Member Plans have agreed not to compete with one another. They have entered into agreements with one another through their jointly-operated vehicle, BCBSA, which issues trademark license

agreements to each Member Plan. The BCBSA regulations and those licensing agreements with BCBSA are the means of implementing the unlawful scheme.

First, the Member Plans have agreed to divide up markets into separate territories, and to allocate to each Member Plan its own "exclusive service area" ("ESA") in which it alone may use the Blue Cross and Blue Shield trademarks ("Blue Marks"). Within each ESA, only one Member Plan may sell health insurance using the Blue Marks. Because this restraint is imposed upon each Plan through regulations and a license agreement issued by an entity (BCBSA) that those Member Plans collectively control, the restraint is, as a factual and legal matter, one that is agreed upon by the Member Plans themselves. It is an unlawful restraint imposed by a "horizontal agreement" among potential competitors. That is the square holding of the Supreme Court in *Sealy* and *Topco*, and it is controlling here.

Second, Defendants have not been content with agreeing not to compete using the Blue Marks inside each ESA. They have also agreed to substantially eliminate competition among the Member Plans even using brands or trademarks other than the Blue Marks, by employing restrictions and caps on non-Blue competition and giving them the brand name "Best Efforts Rules." These restrictions are readily appreciated as straightforward restraints on competition achieved by imposing output limitations. Under the so-called "Local Best Efforts Rule," a Blue must achieve at least 80% of its revenue within its Exclusive Service Area from business using the Blue Marks ("Blue-branded business"). Under the "National Best Efforts Rule," again no effort is required to actually promote the trademark, and instead competition is limited: Member Plans have agreed that none of them may generate more than one-third of its total revenue from business associated with a trademark other than the Blue Marks. Because the only way for a Member Plan to ever do business outside of its

ESA is through the use of a non-Blue Mark, this restraint imposes a fixed cap on the extent to which each Member Plan may do any business at all outside of its ESA.

In addition, the Member Plans have made a horizontal agreement to prevent any Plan from ever doing *any* business outside of its ESA using individualized trade names or trademarks that some Plans have invested considerable money to develop – names such as Anthem, Highmark, CareFirst, Premera, and others – that those Plans have previously used in conjunction with the Blue Marks. The Members have agreed to an absolute prohibition on any Plan doing business outside of its ESA using those individualized names even if they are used without any reference to the Blue Marks.

Each of the foregoing restrictions on competition – the so-called "Best Efforts" rules and the so-called "uncoupling" rules prohibiting use of individualized names previously used in connection with the Blue Marks – are themselves *per se* unlawful, regardless of their promotional names. They are each horizontal agreements to limit competition by allocating markets and limiting actual and potential competition. That makes them each and together *per se* unlawful. In addition, these restrictions show that the assignment of exclusive territories (the ESAs) in this case is even more clearly *per se* unlawful than were the restrictions the Supreme Court struck down as *per se* unlawful in *Sealy* and *Topco.*

The mechanism for enforcing Defendants' web of illicit agreements is the threat to revoke the use of the trademark, and thereby to permit another company to enter the exclusive geographic market of any Member Plan that violates the agreed-upon restrictions. Compliance is strictly monitored, and the agreements not to compete are enforced with the threat of a serious sanction.

It is undisputed that Defendants entered into the agreements described above and that despite each Member Plan being an independent company, they all agreed not to compete in each other's exclusive geographic markets for Blue branded health insurance through their License Agreements,

Membership Standards, and Guidelines. It is equally uncontested that the Member Plans control BCBSA. Taken together, these agreements constitute a set of *per se* illegal cartel rules used by businesses to restrict competition.

The material facts here are not in dispute. The challenged restraints are set forth in BCBSA's own documents, and its own personnel and those of its Member Plans have conceded repeatedly the horizontal nature of the restraints and their obvious anticompetitive effects. Defendants nonetheless argue that the *per se* rule has no place here and that a full-blown Rule of Reason inquiry is needed – an argument they made on a motion to dismiss under Rule 12(b)(6) and that the Court declined to consider at the time, saying it needed a fuller record. *In re Blue Cross & Blue Shield Antitrust Litig.*, MDL No. 2406, 26 F. Supp. 3d 1172, 1184 (N.D. Ala. 2014). That record now exists and unimpeachably demonstrates that *per se* treatment of the challenged practices is both appropriate and necessary to prevent ongoing elimination of competition and harm to consumers. This Court should therefore enter partial summary judgment holding that these restraints are unlawful *per se*.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

The following material facts are undisputed and more than sufficient for the adjudication sought here:

A. The Member Plans Are Potential Competitors.

1. The Member Plans are 36 independent companies. [redacted]

[redacted]

[1] [redacted]

[REDACTED] *see also* Ex. 9, Deposition of Robert Leahey, Jr. (June 20, 2017), at 156:22-157:4; 163:20-164:1; 265:8-13.

2. The Member Plans each sell health insurance. Exs. 10-33, Defendants' Responses to June 5, 2017 Requests for Admissions (responses to Request No. 2).

3. BCBSA does not underwrite any insurance policies. Ex. 34, BCBSA's Response to June 2, 2016 Interrogatories (response to Interrogatory No. 3); Ex. 9, Leahey Dep. at 226:6-9.

B. The Member Plans Control BCBSA.

4. The governance structure of BCBSA is set out in BCBSA's bylaws, which were approved by a vote of the Member Plans. [REDACTED] *see also* Ex. 9, Leahey Dep. at 228:2-24 (bylaws); Ex. 35, 30(b)(6) Deposition of Kari Hedges (July 11, 2017), at 46:22-23, 46:1-14.

5. The Board of Directors of BCBSA governs BCBSA. Ex. 36, BCBSA's Responses to June 5, 2017 Interrogatories, at 13; Ex. 35, Hedges Dep. at 24:14-18.

6. The Board of Directors of BCBSA manages BCBSA. Ex. 36, BCBSA's Responses to June 5, 2017 Interrogatories, at 13; Ex. 35, Hedges Dep. at 24:1-13; Ex. 9, Leahey Dep. at 107:10-17.

7. Because the BCBSA Board of Directors governs and manages BCBSA, the BCBSA Board of Directors controls BCBSA. *See* Undisputed Facts ¶¶ 5, 6.

[2] [REDACTED]

8. The Member Plans control the Board of Directors of BCBSA. Specifically, the Board of Directors of BCBSA is comprised of the Chief Executive Officers of each of the Member Plans plus the Chief Executive Officer of BCBSA. ; Ex. 9, Leahey Dep. at 166:6-18; Ex. 35, Hedges Dep. at 45:22-46:14.

9. By majority vote, the BCBSA Board of Directors elects the President of BCBSA on an annual basis. ; Ex. 9, Leahey Dep. at 245:23-246:4, 259:10-21.

10.

11. Because the Member Plans control the Board of Directors, and because the Board of Directors governs, manages, and controls the BCBSA, the Member Plans control the BCBSA. *See* Undisputed Facts ¶¶ 5-10.

12. Both through their control of the Board and through their powers under the BCBSA Bylaws, the Member Plans govern BCBSA. Undisputed Facts ¶¶ 5-7;

[4]

[5]

The President and all other officers of BCBSA serve at the pleasure of the Board of Directors, which consists of the 36 CEOs of the 36 Member Plans. *See* Ex. 9, Leahey Dep. at 234:18-24, 252:4-254:4 ("member Plans have the authority to establish . . . the constitutional framework . . . that affect fundamental aspects of the Blue system"), 255:15-256:10.

13. The BCBSA membership standards are determined by Member Plans. Ex. 9, Leahey Dep. at 229:6-10.

14. Every Chair of each committee is a CEO of a Member Plan. Ex. 35, Hedges Dep. at 129:1-130:3. The majority of the members of each one of those seven different committees are board members who are CEOs of Member Plans. *Id.* at 120:7-11.

15. The Member Plans may amend the bylaws by vote. Ex. 35, Hedges Dep. at 92:18-20; Ex. 43, BCBSA01406630 at '33.

[6]

[7]

[8]

[9]

C. Through the BCBSA that They Control, the Member Plans Have Agreed to Territorial Restraints on Where They Can Do Business.

16. BCBSA owns the Blue Cross and Blue Shield names and marks (the "Blue Marks"), and it grants licenses to the Member Plans to use the Blue Marks. Ex. 9, Leahey Dep. at 46:4-16, 47:16-17, 261:22-262:9.

17. Each Plan has signed a License Agreement with BCBSA. Exs. 123-157, Defendants' Responses to May 5, 2017 Requests for Admissions (responses to Request Nos. 9 and 10); Ex. 158, Defs' Stipulation as to Authentication and Admissibility of Certain License Agreements (ECF No. 1272); Ex. 9, Leahey Dep. at 265:21-23.

18. The Member Plans

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[11]

agreed to be bound by these exclusive service areas. Exs. 123-157, Defendants' Responses to May 5, 2017 Requests for Admissions (responses to Request No. 11).

19. The geographic territories that were agreed to by the Member Plans were reduced to writing by BCBSA in a "Map Book." Ex. 9, Leahey Dep. at 170:13-24, 177:6-15, 267:11-15; Ex. 159, 30(b)(6) Deposition of Roger Wilson (June 30, 2017), at 52:22-53:5, 270:13-15; Ex. 160, BCBSA03878675; Periodic updates: Exs. 161-174; Ex. 223, 30(b)(6) Deposition of Steve Putziger (June 16, 2017), at 16:23-17:6.

20. A supermajority of the Member Plans can modify or terminate the BCBSA license agreements. *See* [REDACTED] Ex. 35, Hedges Dep. at 82:17-22; Ex. 9, Leahey Dep. at 231:3-20.

[REDACTED]

21.

13

22.

Member Plans agreed to be bound by these provisions. Exs. 123-157, Defendants' Responses to May 5, 2017 Requests for Admissions (responses to Request Nos. 12 (Local Best Efforts) and 13 (National Best Efforts)).

23.

The Member Plans acknowledged that they have never violated these provisions. Exs. 10-33, Defendants' Responses to June 5, 2017 Requests for Admission (responses to Request Nos. 12 and 13); Ex. 223, Putziger Dep. at 27:22-28:7, 44:16-20.

24. The Member Plans have each agreed to a prohibition on separate use of a non-Blue brand that has been used in conjunction with the Blue Marks (so-called "uncoupling rule").

[14]

[15]

[16]

[REDACTED]; Exs. 10-33, Defendants' Responses to June 5, 2017 Requests for Admission (responses to Request No. 13).

25. The Member Plans agreed in 1999 to the prohibition on competition using non-Blue brand names once used in conjunction with Blue names. Ex. 34, BCBSA's Response to June 2, 2016 Interrogatories (response to Interrogatory No. 5).

26. Member Plans are subject to possible sanctions and/or termination by BCBSA for violations of the service area (in accordance with BCBSA rules and guidelines). [REDACTED]

[REDACTED]; Putziger Dep. at 48:15-49:25, 73:17-75:14.

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17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

27. The ESAs, the NBEs, and the uncoupling rule could all be eliminated if both of the following occurred: 1) Three-quarters of the board of directors voted to do so (on a one vote per member basis); and 2) Three-quarters of the Member Plans voted to do so (on a weighted basis, weighted by dues volume). Ex. 35, Hedges Dep. at 98:4-100:23.

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III. LEGAL STANDARD

Subscriber Plaintiffs move for partial summary judgment pursuant to Federal Rule of Civil Procedure 56(c) for a determination that the *per se* rule applies to Defendants' agreements not to compete. A party is entitled to summary judgment if "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden is on the non-moving party to designate specific facts showing a genuine issue for trial, *Celotex*

[20]

Corp. v. Catrett, 477 U.S. 317, 322 (1986), and a mere "scintilla" of evidence will not suffice to meet that burden. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The non-moving party will not satisfy its burden with rebuttal evidence that is "merely colorable, or is not significantly probative of a disputed fact." *Chandler v. Volunteers of Am., N. Alabama, Inc.*, 598 F. App'x 655, 66263 (11th Cir. 2015). Further, "summary judgment is appropriate even if '*some* alleged factual dispute' between the parties remains, so long as there is 'no *genuine* issue of *material* fact.'" *Garczynski v. Bradshaw*, 573 F.3d 1158, 1165 (11th Cir. 2009) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)) (emphasis in original).

"For cases in which the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." *Essex Ins. Co. v. McFadden*, No. 6:09-cv-00193, 2010 WL 2246293, at *3 (E.D. Tex. June 3, 2010). Summary disposition is "a vital procedural tool to avoid wasteful trials and is particularly important in antitrust litigation" to prevent needlessly costly and prolonged litigation. *Capital Imaging Assocs. v. Mohawk Valley Medical Assocs., Inc.*, 996 F.2d 537, 541 (2d Cir.), *cert. denied*, 510 U.S. 947 (1993).

IV. LEGAL ARGUMENT

Under controlling Supreme Court and Eleventh Circuit authority, the exclusive service areas agreed upon by the Member Plans, standing alone, constitute horizontal geographic market divisions that violate Section 1 of the Sherman Act as a matter of law. But the ESAs do not stand alone: the Member Plans have fortified them with a wall of additional restraints (euphemistically labeled "Best Efforts") and other anticompetitive measures that go well beyond the restrictions that the Supreme Court has condemned as *per se* violations of Section 1 of the Sherman Act. When looked at independently and in isolation, these additional restraints are *per se* unlawful. When all of the restrains are looked at together as part of an overall scheme, the *per se* invalidity of that scheme

becomes overwhelmingly clear, and far worse than the schemes the Supreme Court struck down as *per se* unlawful in *Sealy* and *Topco*.

Defendants have put forth the declaration of an economist named Kevin Murphy to argue that Rule of Reason, rather than the *per se* rule, should apply to Defendants' practices. That declaration is a lengthy argument for this Court to overrule the Supreme Court's decisions in *Topco* and *Sealy* and otherwise to set aside its duty to apply legal precedent faithfully, including the *per se* rule established by the Supreme Court. While this may be grist for an article for an economics journal, opinions on a legal issues are the province of the Court, not an economist.[21]

A. Binding Precedent Establishes That Geographic Market Divisions Among Potential Competitors Constitute *Per se* Violations of the Sherman Act.

Section 1 of the Sherman Act bars "[e]very contract, combination in the form of trust or otherwise, or conspiracy" that is "in restraint of trade." 15 U.S.C. § 1. The Supreme Court has identified a narrow category of concerted actions that constitute *per se* violations of Section 1: "certain 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

[21] At trial, if required, Plaintiffs would show that Dr. Murphy's analysis falls far short of justifying the restrictions on competition here, as reflected in a letter sent by the American Hospital Association ("AHA") to the United States Department of Justice on February 29, 2016 in connection with the proposed merger of Anthem and CIGNA. *See* Ex. 200. That letter points out that the Blue brand barriers operate as a significant deterrence to new entry in healthcare markets, as evidenced by Anthem's own experience in Texas. *Id.* at 4-5. The letter lays out in detail the market dominance that Blue Plans exert throughout the United States. *Id.* at 6-8. BCBSA rules only enhanced these barriers. *Id.* at 9-11. The AHA correctly contended that Anthem's acquisition of CIGNA would force it to absorb CIGNA into the Blue System, a concern that, as noted above, the district court also voiced. Ex. 200 at 12-13. And with respect to health insurance exchanges, the AHA noted that in states where Member Plans were dominant, they proposed rate increases in excess of 20 percent, with some exceeding 40 or 50 percent. *Id.* at 18-19. "These studies seem to suggest that Blue premiums are higher in states where they are dominant and any network efficiencies they enjoy as a result do not translate into lower premiums for consumers." *Id.* at 18.

elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *see also Topco*, 405 U.S. at 607 ("certain business relationships are *per se* violations of the Act without regard to a consideration of their reasonableness").

"One of the classic examples of a *per se* violation of Section 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition." *Topco*, 405 U.S. at 608. A market allocation agreement between or among potential competitors forecloses *any* kind of competition whether on price, on product quality, on innovation, or otherwise that may benefit consumers. For this common sense reason, "[i]t would be a strange interpretation of antitrust law that forbade competitors to agree on what price to charge, thus eliminating price competition among them, but allowed them to divide markets, thus eliminating *all* competition among them." *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) (emphasis added); *see also In re Terazosin Hydrochloride Antitrust Litig.*, 352 F. Supp. 2d 1279, 1319 (S.D. Fla. 2005).[22]

This *per se* rule on geographic market allocations proscribes so-called "horizontal" agreements – agreements between actual or potential competitors – and has been affirmed and reaffirmed in a long and unbroken line of binding Supreme Court precedents. *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) ("Restraints that are *per se*

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[22] Federal antitrust enforcement agencies take a similar view of such arrangements. "Agreements of a type that always or almost always tends to raise price or reduce output are *per se* illegal. . . . Types of agreements that have been held *per se* illegal include agreements among competitors to . . . divide markets . . . . The courts conclusively presume such agreements, once identified, to be illegal, without inquiring into their claimed business purposes, . . . procompetitive benefits or overall competitive effects." Ex. 201, Dep't of Justice/FTC 2000 Guidelines on Collaborations Among Competitors, at § 3.2.

unlawful include horizontal agreements among competitors . . . to divide markets."); *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (quoting *Topco* and reaffirming that horizontal market division is "[o]ne of the classic examples of a *per se* violation of § 1" and thus "unlawful on its face"); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58 n.28 (1977) ("there is no doubt" that horizontal market allocations are "illegal per se"). As even Defendants have acknowledged, "[u]nder section 1 of the Sherman Act, *any* agreement between competitors to divide markets or allocate business is unlawful . . . [including] arrangements to confine the marketing of goods or services to different geographic areas . . . and agreements to refrain from selling competing products or services. In each case, the effort is to avoid direct competition, and in each case, that effort is unlawful." Ex. 202, BSC2_01220883 at '90.

B. Binding Precedent Holds that Potential Competitors Cannot Evade *Per Se* Liability by Establishing Geographic Market Divisions through Trademark Licenses Issued by a Licensor that the Competitors Control.

In determining whether any given geographic market allocation is horizontal or vertical, the courts "look at substance rather than form." *Sealy*, 388 U.S. at 352. "[C]ompetitors are not allowed to make an otherwise horizontal agreement vertical by merely setting up a licensing corporation to 'impose' market-dividing agreements on its licensee-stockholders." *Abadir & Co. v. First Miss. Corp.*, 651 F.2d 422, 426 (5th Cir. Unit A July 1981). The Supreme Court has "repeatedly found" that antitrust violations could be effected through entities that, whatever their formal status, are "controlled by a group of competitors and serv[e], in essence, as a vehicle for ongoing concerted activity." *American Needle, Inc, v. National Football League*, 560 U.S. 183, 191 (2010).[23]

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[23] Courts of appeals have repeatedly recognized the same principles. *See, e.g.*, *N. Texas Specialty Physicians v. F.T.C.*, 528 F.3d 346, 356 (5th Cir. 2008) ("[w]hen an organization is controlled by a group of competitors, it is considered to be a conspiracy of its members"); *Fraser v. Major League Soccer, L.L.C.*, 284 F.2d 47, 48 (1st Cir. 2002) (listing "a situation in which dealers or franchises,

In *Sealy* and *Topco*, the Supreme Court held that geographic market allocations effected through trademark licenses granted by an association to its members are *per se* unlawful when that association is controlled by its members. *Topco* 405 U.S. at 608–09; *Sealy*, 388 U.S. at 353-54. As discussed below, both cases involved *lesser* competitive restraints than are at issue here.

In *Sealy*, the defendant licensor allocated mutually exclusive territories among its controlling stockholders, whom it licensed to produce and sell mattresses using the Sealy trademark. *Sealy*, 338 U.S. at 351-52. Under their licenses, each stockholder-licensee agreed not to produce or sell Sealy trademarked mattress products outside of its designated territory, although each "could make and sell his private label products anywhere he might choose." *Id.* at 352.

Whether the *Sealy* agreement among potential competitors constituted a *per se* violation of Section 1 depended on whether the territorial division was properly regarded "as the creature of the licensor . . . or as the product of a horizontal arrangement among the licensees." *Id.* Looking to "substance rather than form," the Court emphasized that the licensees owned substantially all of the licensor's stock, that the licensor's by-laws required that each member of the Board of Directors be a stockholder or a stockholder-licensee's nominee, and that the members of the licensor's executive committee were all stockholder licensees. These facts established the licensees' formal control over their licensor. *Id.* at 352. Further, "control [did] not reside in the licensees only as a matter of form":

> "It is exercised by them in the day-to-day business of the company including the grant, assignment, reassignment, and termination of exclusive territorial licenses. Action of this sort is taken either by the board of directors or the executive committee

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by control or coercion, make the manufacturer or franchiser impose on them restrictions the dealers or franchisees select" as an example of horizontal coordination); *Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022 (9th Cir. 1988) ("evidence that physicians occupied a majority of the organization's board seats supported an inference that the organization is an agent of its member physicians" and thus a horizontal agreement).

> of Sealy, both of which, as we have said, are manned, wholly or almost entirely, by licensee-stockholders."

Id. at 353. On these facts, the Supreme Court readily concluded:

> "The territorial arrangements must be regarded as the creature of horizontal action by the licensees. It would violate reality to treat them as equivalent to territorial limitations imposed by a manufacturer upon independent dealers as incident to the sale of a trademarked product. Sealy, Inc., is an instrumentality of the licensees for purposes of the horizontal territorial allocation. It is not the principal."

Id. at 354. Having found that the agreement to divide the market was horizontal, the Court condemned the restraint as a *per se* violation of Section 1. *Id.* at 357-58.

The defendant association in *Topco* likewise allocated territories among its members – independently owned and operated regional supermarket chains – in which they were licensed to sell Topco's trademarked products. *Topco*, 405 U.S. at 598–605, 607–08. Each member was barred from selling Topco's trademarked products outside the territory in which it was licensed. *Id*. at 602. As in *Sealy*, though, the members were free to sell non-Topco trademarked products outside their allocated markets.

Most of the licenses in *Topco* were exclusive, and the few nominally non-exclusive licenses generally proved to be exclusive in fact. *Id*. The association's members owned all of the association's stock and controlled the association's Board of Directors, officers and committees; the members therefore had "complete and unfettered control over the operations of the association." *Id*. at 598–99. The Supreme Court concluded the case was "on all fours" with *Sealy*. *Id*. at 609.[24]

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[24] Although some scattered scholars have criticized *Sealy* and *Topco* and some lower courts have questioned their continuing validity, *see, e.g*., *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 212, 229 (D.C. Cir. 1986); *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 592–94 (7th Cir. 1984), the Supreme Court itself has never questioned these decisions. To the contrary, the Supreme Court has repeatedly cited their holdings and analysis, as have most courts of appeals. *See infra* p. 21.

The Supreme Court has repeatedly cited *Topco* and *Sealy* as good law. *See e.g. American Needle, Inc, v. National Football League*, 560 U.S. 183, 191 (2010) (citing *Sealy*); *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (quoting *Topco* and reaffirming that horizontal market division is "[o]ne of the classic examples of a *per se* violation of § 1" and thus "unlawful on its face"). The Supreme Court has never expressed any doubt about the binding validity of both *Sealy* and *Topco*, and certainly has never overturned them. In particular, the Supreme Court quoted *Topco* in its unanimous decision reversing the Eleventh Circuit's application of the rule of reason to a horizontal market division. *Palmer*, 498 U.S. at 49-50.

Given this clear direction from the Supreme Court, the Eleventh Circuit – like all other Courts of Appeals – has likewise repeatedly recognized the continuing validity of applying the *per se* rule to market allocation schemes. The Eleventh Circuit (like numerous other Courts of Appeals) also has repeatedly quoted *Topco* in those opinions. *Valley Drug Co. v. Geneva Pharm., Inc.*, 344 F.3d 1294, 1304 (11th Cir. 2003) (quoting *Topco* for the proposition that a territorial allocation agreement among competitors is a "classic example" of a *per se* violation of the Sherman Act); *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1334 (11th Cir. 2010) (quoting *Topco* and stating that "[e]xamples of such per se illegality include . . . horizontal market division—business relationships that, in the courts' experience, virtually always stifle competition."); *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1569 (11th Cir. 1991) (horizontal market allocation is "[o]ne of the classic examples of a per se violation of § 1"); *accord In re Blue Cross Blue Shield Antitrust Litig.*, 2016 WL 6124143, at *8-9 (N.D. Ala. Oct. 20, 2016) (Proctor, J.). As noted, in the isolated case where the Eleventh Circuit strayed from using a *per se* standard for a market allocation scheme, the Supreme Court unanimously and summarily reversed that decision, citing *Topco*. *Palmer*, 498 U.S. at 49-50.

C. The BCBS Scheme Is Unlawful *Per Se*.

The appropriateness of *per se* liability here is clearer than in *Topco* and *Sealy*. The BCBS scheme includes not only exclusive territorial divisions of the sort the Supreme Court has consistently condemned, but also other anticompetitive restrictions that, both together and independently, are subject to *per se* condemnation under Section 1.

1. The Member Plans' Agreement on Exclusive Service Areas Constitutes a Horizontal Geographic Market Division that Is Unlawful *Per Se* under *Topco* and *Sealy*.

The Plans are independent businesses. Like the licensees in *Sealy* and *Topco*, the Member Plans are independent and autonomous businesses. Each Plan has its own Board of Directors and its own senior management. Blue Cross and Blue Shield of Alabama, for example, is, by its own admission, "an independent corporation operating under a license from the Blue Cross and Blue Shield Association, an association of independent Blue Cross and Blue Shield plans. The Blue Cross and Blue Shield Association permits us to use the Blue Cross and Blue Shield service marks in the state of Alabama. Blue Cross and Blue Shield of Alabama is not acting as an agent of the Blue Cross and Blue Shield Association." Ex. 203, BCBSAL_0001305032 at '40.[25]

[25] It is enough that the Member Plans are independent businesses and accordingly they are actual or potential competitors. The Member Plans also admit they are potential competitors absent their rules. *See, e.g.*, Ex. 204, 30(b)(6) Deposition of Tony Carter (June 28, 2017), at 44:16-46:18 (BCBSAL representative defining a competitor as anyone that "sells a similar product" and testifying that other Blues are not competitors because "if they're coming into Alabama, they would ask our permission. We would ask permission if we went into another state."). We also know that the Plans formerly competed vigorously against one another. *See, e.g.,* Ex. 205, Rotunno Ex. 2-A (list prepared by BCBSA's Rule 30(b)(6) deponent acknowledging overlapping use of Blue Marks by 28 different plans in 13 States). The Member Plans are not merely potential competitors who "ha[ve] never competed in the same market, but ha[ve] simply agreed to allocate markets"—though that would suffice to establish per se liability. *Palmer*, 498 U.S. at 49. Rather they were actual competitors who "previously competed in the [same] market," id. at 49–50.

The Plans control BCBSA. Like the associations in *Sealy* and *Topco*, BCBSA "is owned and controlled by the member plans," *Central Benefits Mut. Ins. Co. v. Blue Cross and Blue Shield Ass'n*, 711 F. Supp. 1423, 1424-25 (S.D. Ohio 1989), and it is operated for their collective benefit. Indeed, [26] BCBSA does not itself underwrite any insurance policies. Ex. 34, BCBSA's Response to June 2, 2016 Interrogatories (response to Interrogatory No. 3); Ex. 9, Leahey Dep. at 226:6-9. Critically, it serves "as a vehicle for [the members'] ongoing concerted activity." *In re Blue Cross Blue Shield Antitrust Litig.*, 2016 WL 6124143, at *8 (quoting *American Needle*, 560 U.S. at 191).

The Board of Directors governs and manages BCBSA, and the Board of Directors is comprised of the 36 CEOs of the 36 Member Plans, plus a President that is elected by the rest of the Board and can be fired by the rest of the Board. Undisputed Facts ¶¶ 5-10.

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In carrying out its responsibilities,

Thus, like the licensees in *Topco* and *Sealy*, the Members constitute and control BCBSA's Board of Directors, which, in turn, controls the operations of the association.[32] "Control does not reside in the [Member Plans] only as a matter of form." *Sealy*, 388 U.S. at 353. Rather, through their voting at plenary meetings and their control of the Board of Directors and the Organization and Governance Committee, the Plans exercise *de facto* as well as *de jure* control over the entire

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[32] That the BCBSA Board members may claim to wear two hats—one when serving as the CEO of their respective Plan, the other when serving as a member of BCBSA's Board—does not alter the analysis. As the Court explained in *Sealy*, it is "the central substance of the situation, not its periphery" that a court must seek when ascertaining whether the licensor is an instrumentality of the licensee; "and in this pursuit," what matters is "the identity of the persons who act, rather than the label of their hats." *Sealy*, 388 U.S. at 353. Here, as in *Sealy*, those persons who manage the individual Member Plans are identical with those who sit on the BCBSA Board. At all times while acting as Board Members, those Member Plan CEOs are representing the interests of their respective Member Plans, and have a fiduciary obligation to do so. Ex. 35, Hedges Dep. at 66:16-69:20.

decision-making process at BCBSA, including its day-to-day business and the grant, assignment, reassignment, and termination of exclusive territorial licenses.

BCBSA's role in this multi-faceted conspiracy of territorial divisions, "Best Efforts" rules that are actually output restraints, and acquisition/expansion impediments does not convert this horizontal agreement into a vertical one. Given that the Member Plans control BCBSA, the Plans' division of the market "must be regarded as the creature of horizontal action by the licensees." *Sealy,* 338 U.S. at 354. Because this restraint is imposed upon each Plan through agreed-upon regulations and a license agreement issued by an entity (BCBSA) that those Member Plans collectively control, the restraint is, as a matter of fact, of law, and of basic logic, an agreement among the Member Plans as horizontal competitors.

It is enough that the structure and rules of BCBSA and Member Plans establish that the restrictions on competition here are horizontal restraints. It is also true that internal documents reveal that the Blues themselves understand that they are the ones responsible for the exclusive market areas precisely because of their control of BCBSA. As the CEO of BCBS-MD candidly acknowledged, "we are in the position of determining whether or not our licenses to the individual plans continue." Ex. 207, BCBSA00083755 at '55; [redacted]

[redacted] Ex. 208, BCBSA-CID-068173 at '74 (Pursuant to BCBSA's "unique

[33] [redacted]

structure," the "Blue Cross and Blue Shield companies are [its] customers, [its] Member Licensees, and [its] governing Board.").

The Blues agreed to geographic market divisions. As in *Sealy* and *Topco*, there can be "no dispute that exclusive territories were allotted to the" Member Blues, that BCBSA, as licensor, "agreed with each licensee not to license any other person to . . . sell in the designated area" and that "the licensee agreed not to . . . sell" BCBS insurance "outside the designated area." *Sealy*, 388 U.S. at 352. In short, an agreement exists, binding on all Blues, that prevents each from selling Blue-branded insurance outside its own exclusive service area. As the Supreme Court has "reiterated time and time again," such horizontal market divisions "are per se violations of the Sherman Act." *Topco*, 405 U.S. at 608 (internal citations omitted).

The ability of a Member Plan to sell branded service in the territory of another Member Plan is part of the essence of competition. The conferral of ESAs on such Plans granted them an artificial exclusivity that eliminated competitive pricing and consumer choice, all in the name of maintaining market share and/or keeping high levels of revenue for such Plans.[34]

2. Defendants' Restraints on Competition under Non-Blue Brands Are, Separately and Together with the ESAs, *Per Se* Illegal

Topco and *Sealy* control this case, and, without more, justify a judgment that the Member Plans' contrivance of ESAs constitutes a *per se* unlawful agreement under the federal antitrust laws. But there ***is*** more. In this case, additional anticompetitive restrictions that go well beyond those

[34] As reflected in a 2008 email, demand for such Blue-branded competition was being requested by customers, but routinely denied to them because of the agreed-upon ESAs. *See* Ex. 209, IBC-00011181. And an executive of Defendant Anthem testified under oath that Anthem would like to compete for National Accounts in all fifty states, and that being able to do so would be "exhilarating." Ex. 175, *United States v. Anthem, Inc.*, No. 16-CV-1493 (D.D.C. Nov. 23, 2016), trial transcript at 656.

condemned in *Topco* and *Sealy*, that are independently *per se* unlawful, and that, considered alongside the unlawful territorial allocation, render the application of the rule of *per se* illegality beyond any reasonable dispute.

First, the Member Plans have agreed to place a hard "cap" on the amount of revenue a Plan can generate from outside its ESA using a ***non-Blue*** Mark. [REDACTED] Because the other BCBSA rules prohibit Member Plans from generating *any* revenue from outside their ESA other than through the use of a non-Blue brand that has never previously been coupled with a Blue Mark, this 33.3% ceiling limits the ability of Member Plans to generate revenue from – *i.e.*, to compete – outside of their ESAs, *regardless of brand*. By capping the amount of revenue a Member Plan may generate from its non-Blue-branded business at a percentage of its total revenue, these rules restrain each Member Plan's ability to compete against other Member Plans, ***even when they are not using Blue Marks***.

The Member Plans' agreement to place a hard "cap" on the amount of revenue they can each generate from outside their ESA using even a non-Blue Mark that has *never* been used in conjunction with a Blue Mark is unlawful *per se*. Because the other BCBSA rules prohibit Member Plans from generating *any* revenue from outside their ESA other than through the use of a non-Blue brand that has never previously been coupled with a Blue Mark, this 33.3% cap places an absolute limit on the

[35] [REDACTED]

ability of Member Plans to generate revenue from outside of their ESAs. It is therefore an agreement to divide and allocate markets among the Member Plans, and hence is unlawful *per se*.

Thus, even if the Member Plans' division of the market into exclusive geographic territories were somehow lawful with respect to Blue-branded insurance (and, as demonstrated above, it is not), the Plans' restraints on the sale of non-Blue-branded insurance would still be unlawful *per se*. These are independent agreements to divide and allocate territories, and are therefore independent *per se* violations of Section 1 of the Sherman Act.

These horizontal restrictions are *per se* unlawful as a restraint on output, and the allowance for *some* amount of revenue outside of a Plan's ESA – at a level agreed upon by would-be horizontal competitors – is not even a fig leaf, and cannot save the restraints from *per se* condemnation. The

fact that the restriction on competition allows some amount of revenue to be generated outside of a Plan's ESA does not change the fact that it is an agreement that *restrains* the extent to which each Plan may compete outside of its ESA. Just as an agreement to fix "price lists" is unlawful *per se* even when conspirators may charge less than the listed price, so too is an agreement to restrain output, including restraining the extent to which co-conspirators can compete outside of their assigned territories. *See generally In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002); *Plymouth Dealers' Ass'n of No. Cal. v. United States*, 279 F.2d 128, 132 (9th Cir. 1960); *see also Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 572 (5th Cir. 1978) (observing "that the evil of territorial allocation is the restriction on the distributor's ability to sell outside his territory"); *United States v. Andreas*, 216 F.3d 645, 667 (7th Cir. 2000) (finding *per se* illegal a sales volume allocation agreement, an output restriction, that necessarily furthered a practice of price-fixing).

Second, BCBSA licensing agreements contain other so-called "Best Efforts" clauses containing restrictions on local competition. Under Local Best Efforts, "at least 80% of [each Member's] revenue within [its exclusive service area] must come from Blue-branded products". *United States v. Anthem, Inc.* 855 F.3d 345, 350 (D.C. Cir. 2017).

It is enough that the so-called "Best Efforts" rules restrict and cap the amount of competition among the Plans. Beyond that, Defendants' internal documents confirm that these rules were adopted precisely for this anticompetitive reason—to [REDACTED] and to accommodate the views of some of the Blues "that unbranded competition should be prohibited or regulated," Ex. 211, IBC-00738417 at '17. The anticompetitive scope of the BCBSA scheme again

goes beyond that condemned in *Topco* and *Sealy*: as noted in *Sealy*, manufacturer-licensees "could make and sell [their] private label products anywhere [they] might choose," without restriction. 388 U.S. at 352. Here, the scheme nakedly restrains such competition that does not involve licensed marks.

The Member Plans are well aware that the rules restricting non-Blue competition, and labeled as Best Efforts, heighten the antitrust concerns raised by their exclusive service areas. In a letter sent to the President of BCBSA before the first rule restricting non-Blue competition was agreed upon, one Member Plan representative wrote:

> The requirement imposed by the Standard and the interpretive guideline, that 80% of the Plan's licensable services in its designated service area be licensed under the licensed marks . . . could be *deemed an unreasonable restriction,* even if it is arguably directed at obtaining a Plan's best efforts at promoting the licensed marks. In other words, there *appear to be far less restrictive means to advance the Association's goal of maximizing the worth and value of the mark.* Furthermore, there was no evidence presented that percentage of unbranded or diversified activity has any relationship to the value of the brand in a particular franchise territory. In fact, the most recent studies, by the Association's own staff, of financial stability, growth, and customer satisfaction show no relationship between the value of the 'Blue' brand and the percentage of unbranded or diversified activities.

Ex. 212, BCBSA03833584 at '85 (emphasis added).

Third, the BCBSA agreements restrict each Blue's use of any individual tradenames. Specifically, any use of an independent trade name by a Plan in conjunction with a Blue Mark – which can only occur *within* the Plan's ESA – operates as a poison pill *outside* of its ESA. Member Plans that have invested in non-Blue names such as Anthem, CareFirst, Highmark, Premera, and others cannot sell insurance under those independent names outside of their ESAs (even subject to the 33% cap), at all and in perpetuity, if they have ever sold Blue-branded insurance using that name

in association with the BCBS name or mark.

This absolute prohibition on the use of individualized trade names that have previously been used in conjunction with the Blue Marks constitutes a horizontal market allocation that is unlawful *per se*. This restraint was put in place in 1999. Ex. 34, BCBSA's Response to June 2, 2016 Interrogatories (response to Interrogatory No. 5). There can be no question that if, at that time, Highmark and Anthem agreed not to compete in one another's assigned ESA using their individualized trade names, that would have been a *per se* violation of the Sherman Act. It is an even more egregious violation for Highmark and Anthem to have a continuing agreement to such a market allocation not only with one another, but with each of the other 34 Member Plans, thereby ensuring that *no Plan* may ever compete *at all* outside of its ESA using an individualized trade name if that name has ever been previously used in conjunction with a Blue Mark.

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The restraints summarized above on the sale of *non-Blue branded insurance* were not present in *Sealy* and *Topco*. [REDACTED] They are part of the foundational restraints and agreements not to compete.[38] Like the ESAs, these rules were also enacted despite reservations about their legality:

> I am very concerned about *the antitrust implications* of the Best Efforts Standard and the interpretive guidelines. . . The imposition of additional restrictions, even under the guise of an attempt to secure a licensee's 'best efforts' to promote the service marks, might be considered an unreasonable additional restraint on a licensee under Section 1 of the Sherman Act.

Ex. 212, BCBSA038335845 at '85 (emphasis added).[39]

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[38] [REDACTED] Nonetheless, some Plan members viewed others who engaged in such competition as "traitors. Ex. 211, IBC-00738417 at '17. [REDACTED]

[39] [REDACTED]

D. Defendants' Asserted Justifications for Their Market Allocation Scheme Are Meritless.

In earlier stages of this litigation, Defendants argued that their horizontal market allocation agreement is not *per se* unlawful, contending that it serves pro-competitive purposes and reflects the historical trademark rights of the individual Blue Members. Defendants have submitted a report by economics Professor Kevin M. Murphy that amplifies these purported justifications. Even if the Court considers Professor Murphy's report in the context of this *question of law* (which it should not), the purported justifications are insufficient to avoid *per se* liability. The justifications are exclusively a pretext for asking this Court to ignore binding Supreme Court and Eleventh Circuit case law.

For example, Dr. Murphy, while trying to justify *per se* illegal restraints, establishes the predicates that under Supreme Court law require *per se* condemnation here. He admits that the ESA rules enable Member Plans to capture returns on their investments in building branded business "without concern that another Blue can enter marketing Blue insurance." Ex. 218, Report of Prof. Kevin M. Murphy (July 3, 2017) at 23, ¶ 25. Dr. Murphy further explained the impact of the ESAs: "Without ESAs, every other Plan is a *potential competitor* offering Blue-Branded insurance . . . ." *Id.* at ¶ 60 (emphasis added).[40] This echoes the constraints noted by the district court in *United States v. Anthem, Inc.*, No. 16-CV-1493, 2017 WL 685563, at *21 (D.D.C. Feb. 21, 2017), *aff'd*, 855 F.3d

[40] In some states, like Alabama, there is a monopoly and only one BCBSA Plan servicing the entire state. In other states, multiple BCBS Plans exist, and the state is gerrymandered by BCBSA into separate geographical regions controlled by the respective plans. Ex. 160, BCBSA03878765. For example, in Washington State, Cambia Health Solutions (a BCBSA Licensee) controls Western Washington, Premera (another BCBSA licensee) controls Central and Eastern Washington, and Regence Blue Shield of Idaho (a third BCBSA licensee) controls the Southeast corner of Washington adjacent to the Idaho border. Ex. 165, BCBSA03878687.

345 (D.C. Cir. 2017) ("*Anthem*"), "[t]he Blue Cross Blue Shield association imposes exclusivity rules, which are defined by geography."

1. Defendants' Purported Pro-Competitive Justifications Are Irrelevant.

Defendants' argument "that the *per se* rule is inapplicable because their agreements … have procompetitive justifications" reflects "a misunderstanding of the *per se* concept." *Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332, 351 (1982). Like Defendants here, the defendant in *Topco*—an association of small and medium-sized regional supermarket chains—attempted to defend its territorial market division as promoting competition with others, arguing

> that it need[ed] territorial divisions to compete with larger chains; that the association could not exist if the territorial divisions were anything but exclusive; and that by restricting competition in the sale of Topco brand goods, the association actually increase[ed] competition by enabling its members to compete successfully with larger regional and national chains.

405 U.S. at 605. The *Topco* Court brushed aside the justifications proffered by the defendant, explaining that in applying *per se* rules, "the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition." *Id*. at 610.

The Supreme Court has recognized only a narrow exception to the rule of *per se* liability under the Sherman Act, where "horizontal restraints on competition are essential if the product is to be available at all." *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 (1984) ("What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed."); *see also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) ("*BMI*") (rejecting challenge to blanket licenses issued by clearinghouses for commercial use of

millions of copyrighted works of music owned by tens of thousands of authors and components – "ASCAP does set the price for its blanket license, but that license is quite different from anything any individual [copyright] owner could issue").

These cases have no application here. As an initial matter, these cases do not support the broad proposition, advanced by Defendants and suggested by some lower courts, that *per se* rules apply only to "naked" restraints rather than to restraints that supposedly facilitate procompetitive activity. Neither *BMI*, nor *NCAA*, nor *American Needle* framed its holding in such broad terms. Nor did any of these cases so much as question – let alone purport to overrule – *Topco* or *Sealy*.

More generally, neither the Supreme Court nor the Eleventh Circuit has ever applied the narrow exception to *per se* liability recognized in *BMI* and *NCAA* to a horizontal agreement allocating *exclusive geographic territories* among actual or potential competitors. And they certainly have not done so in a case presenting the same fact pattern as *Topco* and *Sealy*. We are aware of no decision holding such an arrangement to be anything other than unlawful *per se*. Even if this Court could somehow conclude that *BMI* and *NCAA* marked a retreat *in other contexts* from the mode of analysis applied in *Topco* and *Sealy*, the Court is still bound to follow *Topco* and *Sealy* in cases raising the same fact pattern as those cases. *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) ("We reaffirm that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

In any event, the exception recognized in *BMI* and *NCAA* does not apply to this case. That exception applies when the "horizontal restraints on competition are *essential if the product is to be available at all.*" *NCAA*, 468 U.S. at 101 (emphasis added). In *BMI*, the product that would otherwise have been unavailable was a blanket copyright license offered by a performing rights

organization to permit the use of millions of compositions owned by tens of thousands of entities – which, obviously, no individual copyright owner could offer. Here, Defendants do not offer a product that would otherwise be unavailable. Rather, the product offered by the Member Plans here is *health insurance*. Health insurance was and would be an available product regardless of the horizontal restraints on trade imposed by Defendants.

Defendants quibble even with the simple definition of a new product, seeking to define the "product" not as health insurance, but as "a national network of healthcare services." Defs.' Motion to Dismiss (ECF No. 120), at 29. Regardless of the product's characterization, health insurance on any basis is not a "new product" or a product that would otherwise not be "available." Other health insurance companies offer nationwide insurance coverage through a "national network of healthcare services" without agreeing to allocate and divide markets with their competitors. There is nothing unique about health insurance, nationwide insurance coverage, or a national network of healthcare services that requires an agreement among competitors not to compete with one another by dividing markets, imposing constraints on acquisitions and growth, and restraining output, innovation, and efficiency, and/or raising price.

The fact that a group of small companies may choose – or even need – to cooperate in order to offer a particular product on terms that are competitive with those offered by larger companies does not transform that product into a "new product." Otherwise, the antitrust laws would grant carte blanche to a subset of companies in a market to form cartels in order to compete against others in the market.[41]

[41] Although this Court need not resolve the issue, Member Plans asserted "local focus" is subject to serious question given the extensive consolidation of Plans that has occurred over the past 35 years. Many of the Plans have evolved into massive, multi-State companies, such as Anthem, a Fortune 50 behemoth that operates in over ten states and serves millions of subscribers, Health Care Service

The argument that a group of competitors may collude in order to compete against other competitors was made to and squarely rejected by Judge Posner and the Seventh Circuit in *General Leaseways, Inc. v. National Trucking Ass'n*, 744 F.2d 588 (7th Cir. 1984). In that case, an association of local firms engaged in leasing trucks argued that exclusive leasing territories were necessary to a reciprocal service arrangement among the members of the association that enabled each firm to provide its customers with emergency repair service anywhere in the nation. The defendants claimed that this arrangement was necessary to compete with large, national truck-leasing companies. *Id*. at *589. The court rejected that argument, explaining that the association's "members could—were it not for the territorial restrictions—compete in each other's territories while continuing to provide each other emergency repair services of a specified quality at a specified price." *Id.* at 594.[42]

Moreover, even if some level of cooperation were somehow justifiable to allow the Member Plans to compete with national insurers for large national accounts (such as through the Blue Card program, which Subscribers are ***not*** challenging), that cooperation would certainly not include an absolute agreement to divide and allocate geographic markets for all customers.

Corporation, which serves 13 million customers in five states, and Highmark, which serves 5 million customers in three states. Internal documents reveal that some of the Plans opposed the deliberate consolidation to "only one Plan per state" on the ground that it was "[d]iametrically opposed" to the concept of a "community-oriented organization, governed and directed by members of the community for the benefit of the community." Ex. 219, BCBSA00247902 at '08.

[42] Internal documents likewise make clear that the Blues are aware of and have considered alternatives to exclusive service areas, such as converting those areas into "primary service areas," Ex. 220, BCBSA00028854 at '919, "taking advantage of the economies of scale of large plans through joint ventures and franchising agreements," Ex. 221, BCBSA00115411 at '20, and drawing "a parallel to the State Farm and McDonalds approach where agents are granted use of name and mark but have no defined territories," Ex. 222, BCBSA00083662 at '67-68.

Finally, if the Member Plans want to enter into a cooperative venture of some kind that limits competition among themselves, they are likely required first to seek clearance from the federal antitrust regulators for either a joint venture or a merger. 15 U.S.C. § 18a(a); 16 C.F.R. § 801.40. They have done neither. They are not free to invoke the types of arguments they might use to persuade regulators to allow a joint venture that limits competition when they have failed to seek or obtain such regulatory approval.

2. Defendants' Horizontal Market Allocation Scheme Is Not Justified by the Blues' Supposed Historical Trademark Rights.

Defendants have attempted to shield themselves from *per se* liability by asserting that the individual Members acquired geographically exclusive trademark rights for each of their respective territories prior to the formation of BCBSA, either as a matter of common law or pursuant to licenses in the 1950s allegedly issued under the auspices of the American Hospital Association ("AHA") or the American Medical Association ("AMA"). Defs.' Motion to Dismiss (ECF No. 120), at 20-24; Defs.' Reply In Support of Motion to Dismiss (ECF No. 178), at 6-16. Defendants cannot and have not traced the current ESAs back to common law trademarks predating the 1950s, or to licenses issued by entities not controlled by their licensees. Moreover, any suggestion that the world would look identical today without any BCBSA rules or licenses (or licenses issued by any other entity controlled by their licensees) would be flatly inconsistent with the massive and undisputed changes that the Member Plans have jointly implemented through BCBSA, including (1) the almost complete merger of the previously existing Blue Cross Plans with the previously existing Blue Shield Plans—two entirely separate insurance platforms that were actual, or at least potential, competitors throughout the nation, (2) the massive consolidation of the more than 100 Plans that existed in 1982,

when BCBSA was formed, to only 36 today, and (3) the indisputable elimination of Cross-on-Cross or Shield-on-Shield competition in at least some (and, more likely, many) parts of the country.[43]

Regardless of this history, any argument about the "but for" world without the restrictions on competition here would have no relevance to the *Sealy*/*Topco* holding that the territorial restrictions in the BCBSA licenses are unlawful *per se*. Antitrust defendants may not escape *per se* condemnation for a price-fixing agreement even if defendants could show the "but for" competitive prices would have been the same without the price-fixing agreement. Defendants here likewise cannot escape *per se* condemnation of existing market allocation rules by arguing that if they had continued with their historic trademarks, the world would have looked the same. At most, Defendants' argument is relevant only to the nature and extent of damages and injury.

For numerous reasons, whatever historical trademark rights the Member Plans may have had do not and cannot protect the geographic market division that Defendants have agreed to and jointly enforce through BCBSA from *per se* invalidity.

First, it is well-settled that a "trademark license may not be used to avoid Sherman Act liability." *Evans v. S. S. Kresge Co.*, 544 F.2d 1184, 1191 n.24 (7th Cir. 1976); *see also Timken*

[43] As a legal matter, in order for each Member Plan to have any common law rights at all, each one would have to show that it (or its predecessor) began using the Blue Marks without any intent to benefit in any way from the reputation goodwill associated with the prior use of those marks by other Plans. *See Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403 (1916); *United Drug Co. v. Theodore Rectanus Co.,* 248 U.S. 90 (1918); *Michael Caruso and Co., Inc. v. Estefan Enterprises, Inc.*, 994 F. Supp. 1454, 1462 (S.D. Fla. 1998). Further, to show that any common law rights would have conferred geographical exclusivity to the territories currently assigned to each Member Plan, each Plan would have to show that no other Plan ever had a reasonable expectation or common law right to expand into that territory, or beyond the territory in which it first began. *Tally-Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1023 (11th Cir. 1989) (a "senior user" can bar a "junior user" from "operating in a market into which the senior user should be allowed to expand at a later time").

Roller Bearing Co. v. United States, 341 U.S. 593, 599 (1951); *Palmer*, 498 U.S. at 47–50; *Topco*, 405 U.S. at 601–05, 608–09; *Sealy*, 388 U.S. at 356 n.3; *accord Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 55-56 (2nd Cir. 1997) ("trademark agreements that in reality serve to divide markets . . . have been condemned as illegal per se under the antitrust laws") (citation omitted); *Fontana Aviation, Inc. v. Beech Aircraft Corp.*, 432 F.2d 1080, 1084 (7th Cir. 1970) ("nor can the restraints of trade be justified as reasonable steps taken to implement a valid trademark licensing system"); *cf. Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 75 (1993) ("[A] manufacturer's successful action enforcing . . . restrictive provisions in a license to use a patent or a trademark . . . may evidence, or even constitute, violations of the antitrust laws."); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 652 (1977) ("The enforcement of restrictive provisions in a license to use a patent or a trademark may violate the Sherman Act.").[44]

Second, the horizontal market division invalidated in *Sealy* itself originated as vertical license agreements with a licensor that was *not* owned by its licensees. The Sealy trademarks were originally owned by a company called Sugar Land Industries that licensed those marks to mattress manufacturers in exchange for royalties. *United States v. Sealy, Inc.*, No. 60 C 844, 1964 WL 8089, at *4–5 (N.D. Ill. Oct. 6, 1964). These agreements assigned each manufacture-licensee an exclusive territory, outside of which each licensee was barred from manufacturing or selling Sealy-branded products. *Id.* at *6–7. The manufacturer-licensees subsequently created the Sealy Corporation, which purchased the Sealy trademarks and continued to license them subject to the same territorial restrictions. *Id.* at *7–8, 14. Despite the lawful vertical origins of the exclusive territories granted

[44] Defendants' internal documents reveal that some of the Blues have harbored antitrust concerns about maintaining ESAs because of the "view that the right to control name and market may not extend to the ability/right to enforce exclusivity." Ex. 222, BCBSA00083662 at '67–68.

each licensee, the Supreme Court condemned these exclusive territories as horizontal market divisions that were unlawful *per se* in light of the joint control that the licensees had acquired over the licensor. *Sealy*, 388 U.S. at 352-54, 357-58.

Third, even assuming that each Member Plan had the *unilateral* right to control use of the Blue Marks within its historical territory, the Members' agreement to exercise these rights *in concert* with one another to create a nationwide system of territorial allocations is still unlawful *per se*. After all, each Plan also has the unilateral right to set its own prices, but if the Member Plans had entered a joint agreement to fix prices, the agreement would nevertheless constitute a *per se* violation of Section 1. *See, e.g.*, *Maricopa County*, 457 U.S. at 344-48. "The antitrust laws do not countenance such a concerted individual exercise of the otherwise legal rights of the members of a conspiracy to achieve a combined effect in restraint of trade in excess of that possible were the conspirators to act alone." *ES Dev., Inc. v. RWM Enterprises, Inc.*, 939 F.2d 547, 556 (8th Cir. 1991).

The difference between BCBSA rules requiring exclusivity and the possible existence of trademark rights is supported by Defendants' own documents. Going back to the White Paper on the Assembly of Plans in 1987, BCBSA has admitted that "the service marks could be preserved even if the exclusive service areas were abandoned." Ex. 220, BCBSA0028854 at '921. Thus, the ESAs were not, in fact, essential for the protection of the value of the claimed Blue trademarks or the efficacy of the products or services. But BCBSA nonetheless chose to enact ESAs. Defendants did so despite serious reservations about their illegality:

> Most regard the maintenance of exclusive service areas as a must in order to avoid chaos within the system. There was concern that this issue be handled cautiously *in view of antitrust implications* and various court cases pending in Ohio and elsewhere. There was a view that the right to control name and market may not extend to the ability/right to enforce exclusivity. One alternative which surfaced drew a parallel to the State Farm and McDonalds approach but have no defined territories.

Ex. 222, BCBSA00083662 at '67-68 (emphasis added); *see also* Ex. 212, BCBSA03833584 at '85 ("You are well aware that BCBSA's exclusive territorial licensing of its service marks is potentially subject to antitrust scrutiny."). Yet another CEO wrote, "BCBSA's ability to define exclusive service areas and its ownership of the name and the mark *are far from assured*. . . . BCBSA could lose in a serious challenge to its authority." Ex. 211, IBC-00738417 at '19 (emphasis added).

V. CONCLUSION

For the foregoing reasons, this Court should hold that the restrictions on competition agreed to by the Member Plans are subject to a rule of *per se* illegality.

This the 17th day of July, 2017

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