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

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

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 MATERIALS]**

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON SECTION 1, *PER SE*, AND QUICK LOOK CLAIMS, AND IN SUPPORT OF SUBSCRIBER PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANTS' "SINGLE ENTITY" DEFENSE

"The finest trick of the devil is to persuade you that he does not exist." – Charles Baudelaire

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I. INTRODUCTION

Despite overwhelming factual evidence documenting their antitrust liability, Defendants in this case have moved for partial summary judgment that: (1) concerted conduct in violation of Section 1 of the Sherman Act (15 U.S.C. §1) cannot exist with respect to the conduct charged here *as a matter of law* because they constitute a "single entity" for purposes of the conduct challenged here; and (2) even if their conduct is subject to Section 1, *none* of the challenged agreements, regardless of type, are *per se* illegal – or, indeed, can even be found unlawful unless they are subjected to an exhaustive, expensive, full-blown "rule of reason" evaluation. The first of these arguments is contrary to settled law, and not only should Defendants' motion be denied, but the Court should grant Plaintiffs' cross-motion and find that Defendants are not a single entity. The second argument is also contrary to settled Supreme Court precedent and is belied by Defendants' own documents.

Defendants are not a single entity in fact, law, or common sense. It is beyond dispute that they are 36 independent companies that each sell health insurance (the "Plans") plus an association that those Plans collectively govern and control ("BCBSA"). Defendants do not cite their own documents or testimony to this Court that admit they are not a single entity; but they do exist. Documents like the CEO Workgroup on brand strategy, which just one month before this case was filed in February 2012 recognized that "the single entity model is not a good analogy for the Blue system." SX224, Ark BCBSe - 0135129 at '135. Or as the President of BCBSA testified on July 25, 2017: "the member Plans operate as individual independent financial entities . . . they do not operate as a integrated economic system." SX248, 7/25/17 Serota Dep. 104:1-5.

And contrary to Defendants' reasoning, the Supreme Court has never endorsed a test that would allow vesting of a single function (such as "governance of the Blue marks") in an organization controlled by its members (the BCBSA) to, in turn, extend single-entity immunity from Section 1 to those members and find them incapable of conspiring with one another. Cartelists everywhere undoubtedly would cheer such a rule-swallowing exception. The absurdity of Defendants' single entity assertion – tellingly, dredged from a footnote in their dismissal papers to be their lead argument in this motion – is borne out not only by their own documents but also by the derision that their own executives have heaped on the suggestion at their depositions in this action. Subscribers' Additional Undisputed Facts ("SAUF") ¶ 2. Pursuant to BCBSA's Bylaws, each of the Plans is [redacted] by their own leaders' statements they are "not a single entity"; and as to the Blue Brands on which their single-entity argument is premised, each Member Plan has an interest in the brands that "rises far above that of a traditional franchisee." Far from bearing their burden of demonstrating the absence of a genuine issue of material fact, as they must to prevail on summary judgment, Defendants have offered illusory assertions of single-entity status. Defendants' one-sided presentation to this Court pretends their previous statements do not exist. But the relevant facts here, including Defendants' own statements, establish *to the contrary beyond any reasonable dispute*.

Defendants' single-entity argument is a strategic necessity for them. They are engaged in continuing agreements – implemented through their jointly-operated BCBSA – not to compete with one another, through territorial divisions and output restraints that they cannot deny. They are [redacted] competitors[1] who have signed agreements not to compete on a geographic basis, as well as to restrict output of their business. Those are the types of concerted conduct that not only fall squarely within Section 1 of the Sherman Act, but give rise to anticompetitive effects that are readily apparent, are presumed to be pernicious and have no procompetitive value, and require of the courts no

[1] [redacted]

elaborate market analysis of impacts to condemn. Such conduct has repeatedly been recognized as such, including in Supreme Court precedent condemning as *per se* unlawful arrangements markedly similar to Defendants' conspiracy here to agree upon and maintain territorial allocations via a licensing scheme for a trademark owned by an entity they commonly control. *See United States v. Sealy, Inc.*, 388 U.S. 350, 354 (1967) ("*Sealy*"); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972) ("*Topco*").

Furthermore, [redacted]

In 1994, one Plan wrote to BCBSA stating "**I am very concerned about the antitrust implications of the Best Efforts Standard** and the interpretative guidelines." SX212 at '85 (emphasis added). Again in 2001, "antitrust questions were raised" by BCBSA members, including "**antitrust analysis of the exclusive service areas and other issues**, as well as **legal implications of the various regulatory tools that the Association uses** (*e.g.*, License Agreements, License Standards, Guidelines to the Licensure Standards, and Brand Regulations)." SX228, HMK05514539 at '39 (emphasis added) (resulting in an "Antitrust Panel" being held). Defendants noted in 2002 that their **antitrust issues "are held together by a thin string**. The concern is that the more we work together as a unit with our sister Plans, **the more the antitrust issues will come into play**." SX229, BSC772323 at '24 (emphasis added). And in 2015, one Anthem executive asked another: "How can Scott [Serota, President of BCBSA] argue that the rules are not anticompetitive and then turn around and say Blues are worried about a fellow Blue competing in their markets. They are playing with fire." Anthem CEO Joe Swedish replied: "**Great question we can leave for the courts to handle**." SX230, WLP-07174914 at '14 (emphasis added).[2]

The time to handle that question has arrived. From a legal perspective, this Court should now determine that each of Defendants' challenged practices are *per se* unlawful.[3] The application of a prolonged and expensive full-blown rule of reason analysis to all of Defendants' anticompetitive agreements is a requirement that the Court need not and should not undertake, one to which Defendants have failed to show that they are entitled, and one that would do a disservice to the purpose of the same antitrust laws that Defendants have repeatedly acknowledged.

II. RESPONSE TO DEFENDANTS' ASSERTED "UNDISPUTED RELEVANT MATERIAL FACTS"

A. Defendants' "Undisputed Relevant Material Facts" Are Immaterial and Disputed.

As an initial matter, none of the facts listed in Defendants' Undisputed Relevant Material Facts ("URMF") are material to the issue here; the only facts that matter to a finding of *per se* application relate to control of BCBSA by the Plans, in accordance with the principles in *Topco* and *Sealy*. ECF No. 1352, at ¶¶ 1-28 ("Subs.' Br."). Further, the alleged history provided by Defendants is replete with unsupported legal conclusions and mischaracterization of source documents that do not actually support the facts alleged.[4]

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[2] This evidence exists despite one group of defense counsel defining "Tips to Compliance with Antitrust Laws" as "Don't send an email if a phone call will do" and "At least once a year, reduce the quantity of paper and electronic files that you maintain or for which you are responsible." SX231, Crowell & Moring Presentation: "Keep Up Your Antitrust Guard" (pagination added for clarity).

[3] Alternatively, at most, these restrictions should be subject to a "quick look" rule of reason examination (under which Defendants bear the burden of overcoming the plain anticompetitive effects, which they have not done).

[4] Subscribers do not challenge, as a matter of fact, ¶¶ 1, 2, 6, 9, and 17 of Defs.' URMF, though like each asserted fact they dispute the materiality of those allegations to the question of whether a *per se* standard should be applied. Subscribers do dispute as a matter of fact ¶¶ 39 and 40 of Defs.' URMF and incorporate by reference Providers' responses to ¶¶ 39 and 40. Subscribers' Response to Defendants' URMF is referenced herein as "Subs.' RURMF"

3. To remedy a situation where "a subscriber prepaid at one hospital, but desired services from a different hospital at the time of illness," ESAs were not required; instead, both Blue Cross ("BC") and Blue Shield ("BS") Plans had policies in place to reimburse hospitals or physicians with whom they had not negotiated a contract. DX1[5] at '745, '828, '869. And contrary to Defendants' allegation, geographically exclusive areas were not "the norm" at this time; as Robert Cunningham wrote in his definitive history of the Blues': "[i]nter-Plan competition had been a fact of life from the earliest days . . . ." DX2 at '873; *infra* ¶ 8.

4. The St. Paul Plan began using the BC Mark in 1934, and shortly thereafter "new Plans springing up spontaneously all over the country were appropriating [the BC] symbol . . . ." *Id.* at '667. The Buffalo Plan began using the BS Mark in 1939, and the creator "encouraged his colleagues to share the design" and "supplied it [the symbol] to other Plans." *Id.* at '704-705.

Those other Plans did not "acquire[] local trademark rights and the accompanying ability to preclude other entities from using confusingly similar marks in the same area" as Defendants allege. First of all, the alleged acquisition of trademark "rights" is not a fact (let alone an undisputed fact), but rather an unsupported conclusion of law. Indeed, in the very testimony cited by Defendants, counsel for BCBSA objected that questions concerning acquisition of trademark rights "call[ed] for a legal conclusion." DX8 at 36:1-9. And despite repeated questioning of various Defendant witnesses, no evidence has been provided of any actual acquisition of trademark rights as a matter of fact; even Defendants' expert relies solely on the word of Defendants' attorneys for this legal conclusion. SX232, Murphy Dep. 37:14-38:25. In fact, this conclusion is legally unsustainable.[6]

[5] "DX" refers to Defendants' Exhibits, ECF No. 1353. "SX" refers to Subscribers' Exhibits (including SX 1-223 from ECF No. 1352).

[6] Controlling Supreme Court authority holds that only the senior user of a mark can establish common law rights, unless a junior user is: (1) geographically remote from the senior user, **and** (2) innocently adopted its mark without any intent to benefit from the reputation goodwill associated with the prior use of those marks by the senior user. *United*

Both the St. Paul Plan and the Buffalo Plan acquiesced in, and even encouraged, other Plans to use the BC and BS Marks during this time. DX2 at '667, '704-05. Thus, all junior users of the BC and BS Marks began use: (1) with the knowledge of the St. Paul Plan's (for BC) or the Buffalo Plan's (for BS) senior use, and (2) with the senior user's acquiescence. Moreover, many of the junior users were not "geographically remote" as required by the *Rectanus/Tea Rose Doctrine*. The St. Paul Plan allowed Plans in every bordering state (North Dakota, South Dakota, Wisconsin, and Iowa) to use the BC Marks. DX1 at '722-23. The Buffalo Plan allowed use by Plans in Syracuse and Rochester, which are close to Buffalo, and by other Plans in New York. *Id.* at '853. Thus, as a matter of law, none of the junior user Plans could have established common law rights.

With respect to the statement that Plans had the "ability to preclude other entities from using confusingly similar marks in the same area," this is also a legal conclusion and not a matter of fact. As a matter of law, only the Buffalo and St. Paul Plans originally had the "ability to preclude".[7] The Buffalo and St. Paul Plans waived such ability through their acquiescence in the junior uses and failure to exercise quality control over such uses.[8] Both the St. Paul Plan and the Buffalo Plan engaged in naked licensing, or uncontrolled use of their respective marks by third parties, and abandoned their rights.[9] Defendants' own documents acknowledge this basic fact. SX220 at '906

Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 100 (1918) ("*Rectanus*"); *Hanover Milling Co. v. Metcalf*, 240 U.S. 403, 413-14 (1916) (commonly referred to as the *Rectanus/Tea Rose* doctrine).

[7] *Rectanus*, 248 U.S. at 100 (only senior users own common law rights, which include the right to preclude junior users from continued use).

[8] The St. Paul Plan never licensed the use of the BC Marks by other BC Plans, nor did it control the quality of services offered by other BC Plans under the BC Marks, nor did it enter into any concurrent use agreements whereby it agreed that another Plan owned rights to the BC Marks in another territory. SX233, Rotunno Dep. 38:1-39:8, 42:20-25, 44:24-45:4. Similarly, the Buffalo Plan never controlled the quality of the services being offered by other Plans identified by the BS Marks, nor did it enter into any concurrent use agreements whereby it agreed that another Plan owned rights to the BS Marks in another territory. *Id.* 124:l-125:1, 128:18-25.

[9] "[W]hen a service mark owner engages in naked licensing, without any control over the quality of the services rendered by the licensee, such a practice is inherently deceptive and constitutes abandonment of any rights to the service mark by the licensor." *CNA Fin. Corp. v. Brown*, 922 F. Supp. 567, 574 (M.D. Fla. 1996), *aff'd in part on point, rev'd in part on other grounds*, 162 F.3d 1334 (11th Cir. 1998). *See also*, *Eva's Bridal Ltd. v. Halanick*

("Along with this right, the owner of the mark has a duty to prevent others from using the names and marks without a license. If unlicensed entities were allowed to use the marks, the marks could become diluted and eventually cease to function as an indicator of a single source. This type of unlicensed and unauthorized use can result in abandonment of these valuable marks.").

5. The AHA standards merely suggested that new BC Plans not be established where the community was already being "adequately served by existing Blue Cross Plans." DX1, at '829. The use of the word "Plans" in the standard even indicates a lack of exclusivity. The AMA only required a Plan to "have approval of the State medical association – or if local, of the county medical society in whose area it operates." *Id*. at '003. To the extent that the Plans allege that AHA or AMA standards required ESAs, the Plans had great influence over those standards. The approval program for BC Plans was controlled by the Blue Cross Commission, which in turn was controlled by the BC Plans. *Id.* at '826-27; *see also* SX220 at '904 (referring to relationship with AHA as "sponsorship" only). Similarly, the American Medical Association set up the Associated Medical Care Plans ("AMCP") "to administer the approval program" for Blue Shield Plans. DX2 at '725. The AMCP was controlled by the BS Plans. DX19 at '127-28.

7. Defendants' conclusion is contradicted by the evidence cited above. Furthermore, ESAs were far from natural; since at least the 1940s, ESAs were reduced to writing in "service manuals", which were binders that "outlined what the service areas were in which each one of these Plans was operating" and later in a "Map Book." SX159, Wilson Dep. 52:22-53:5, 243:3-7, 270:13-15; SX160-SX174. Some Defendants have admitted in their own documents that the purpose of the ESAs is the

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Enterprises Inc., 639 F.3d 788, 789 (7th Cir. 2011) (trademark owner abandoned mark "by engaging in naked licensing-- that is, by allowing others to use the mark without exercising 'reasonable control over the nature and quality of the goods, services, or business on which the [mark] is used by the licensee.'"); Restatement (Third) of Unfair Competition §33 (1995)); *Barcamerica Int'l USA Trust v. Tyfield Importers Inc.,* 289 F.3d 589 (9th Cir 2002) (trademark held to be abandoned by owner's failure to exercise quality control over licensee.).

"lessening of competition." SX234, BCBSA00115429 at '31; *see also* SX235, BCBSF-00181533 at '34 ("agreements could break down" and "Plans would not be able to protect themselves from out of area competition"); SX240, BCBSA00083737 at '38 ("Plans benefit from the exclusive areas because it eliminates competition from other Blue Plans. Otherwise there would be open warfare.").

With respect to Defendants' claim of "individual trademark rights," the choice of the modifier "individual" is especially telling, as there is no concept of "individual trademark rights" under trademark law.[10] To the contrary, if there are multiple users of a mark, in order to avoid consumer confusion, the law requires a licensing program with a single owner of the mark who controls the quality of the services offered by its licensees. *Id.* One did not exist for the Plans until the 1950s, when the Plans created and entered into a license agreement for the BC Marks and a pooling agreement for the BS Marks, but by this time it was too late. SX236, BCBSA02906130 (1952 BS agreement); SX237, BCBSA00128623 (1954 BC agreement); SX38, at '604 (1952 and 1954 agreements were "the ***beginning*** of standards relating to Brand use") (emphasis added). Two decades of uncontrolled use had transpired and any common law rights were abandoned in the 1930s; thus, there were no valid rights left by the 1950s to license.

8. There have been many instances of inter-Blue competition. DX1 at '720-21 (in 1947, Cross-on-Cross competition throughout North Carolina, in California, in Illinois, where "an aggressive plan has invaded territory claimed by other plans as being within their jurisdiction," and in certain other counties "served by two plans"); *id*. at '852 (in 1947, Shield-on-Shield competition throughout North

[10] A trademark or service mark must identify and be controlled by a single source. *Thomas Pride Mills, Inc. v. Monsanto Co.*, 155 U.S.P.Q. 205, 1967 WL 7489, at *4 (N.D. Ga. June 14, 1967). Only in the rare circumstances set forth under the *Rectanus/Tea Rose Doctrine*, can there be even **two** owners of common law rights in the same mark, and those two users must be geographically remote in order to avoid consumer confusion. Yet Defendants assert that **dozens** of different entities, in bordering and sometimes overlapping service areas, owned "individual trademark rights."

Carolina, Oregon, and California); DX2 at '733 (in the 1940s, "Plans sought invariably to enlarge their own areas. . . . The most bitter fights were between intrastate rivals who lacked even a theoretical definition of where one Plan's territory stopped and another's started"); *id*. ("Bickering over nonexistent boundaries was perpetual between Pittsburgh and Philadelphia. . . ."); *id*. at '744.[11] There was also competition between Cross and Shield Plans. DX1 at '852 (in 1947, relationship between Cross and Blue Plans sometimes involved "outright competition"); DX2 at '725 (describing "bitter competition" between BC and BS Plans). BCBSA produced a summary chart of these and other examples of overlapping ESAs involving 28 different Plans in 13 states over many decades. DX16; SX205.

10. From 1947, Defendants had a successful system of syndicates to address national accounts, described as follows: "[T]he Plan in the area of a given company's home office negotiated a deal for the desired benefits and price. Plans in other regions or states where the company has branch operations were given details of the arrangement. Those Plans then could choose to participate in the arrangement to whatever extent they chose." DX2 at '735.

11. Syndicates were a major success for the Blue System; within five years, "some 250 syndicates were providing coverage to about 1.2 million people . . . ." *Id*. Defendants were very successful in achieving national accounts, and at one point advertised that they "enroll[ed] seven out of ten of the Fortune 500." SX238, RMC00008927 at '956. Such syndicate arrangements were used at least through the 1980s. *Id.* at.'956-57.[12]

[11] Competition continued throughout the next several decades. *See, e.g.,* SX238, RMC00008927 at '947-48 (in 1985, BCBSA President describing competition among Plans in Oregon, D.C., Virginia, and concluding, "[a]nd on and on, I could go across the country and point out more.")

[12] The Plans could have also engaged in a joint venture agreement, which their own documents admit would have solved the problems that Defendants allege. *See id.* at '030; SX313, BCBSA00303611 at '635; SX207 at '757.

12. The validity of Defendants' trademark registrations is disputed. Neither national organization obtained an assignment of rights from the St. Paul Plan or the Buffalo Plan prior to filing the applications with the U.S. Patent and Trademark Office ("USPTO"). DX20-DX22, DX28 (trademark applications first filed by AHA and Blue Shield Medical Care Plans[13] ("BSMCP") in 1947 and 1949, respectively); SX233, Rotunno Dep. 56:14-57:2 (assignment of BC Marks did not occur until 1954), 135:14-137:9 (assignment of BS Marks did not occur until 1952). Instead, AHA and BSMCP claimed the dates of first use by the St. Paul Plan and the Buffalo Plan on their applications, despite not having received an assignment of those rights. DX20-DX28. Without such assignment, the trademarks are unsupported.

13. As discussed *supra* ¶ 4, both senior users acquiesced in the uncontrolled use of the marks and abandoned their rights before the AHA/AMCP attempted to own and register the marks.

14. As discussed above, the legal conclusion that the Plans owned "independently acquired common law trademark rights" is disputed, and so the Plans could not have licensed these supposed trademark rights to AHA and AMCP.[14] Secondly, with respect to the BS Marks, Defendants misrepresent the factual record. The 1952 agreement contains no references to: 1) common law rights owned by any Plan; 2) an assignment of any rights to BSMCP; 3) any license of rights to the Plans by BSMCP; 4) any quality control to be exercised by BSMCP; or 5) service areas, either exclusive or non-exclusive. SX236. Under the 1952 Agreement, the BS Plans were granted "permission" to use the BS marks in interstate and foreign commerce. *Id.* at '131. Rotunno testified that both an assignment of rights and a license back to the Plans are implicit in the 1952 agreement. SX233,

[13] AMCP adopted the name BSMCP in 1950. DX19 at '197.
[14] Contrary to Defendants' Statement, BSMCP, not AMCP, is the actual party to the 1952 agreement. SX236.

Rotunno Dep. 156:9-159:7. However, an assignment of trademark rights cannot legally be implicit. 15 U.S.C. § 1060(a).

15. Multiple options, including syndicates and joint ventures, were available to service national accounts. *Supra* ¶¶ 10-11; *infra* ¶ 22.

16. An independent reason for Plans' national account issues was their "unsophisticated" technology; in the 1950s, the insurance industry was just beginning to adopt computer technology, and the Plans lagged behind other commercial insurers in adopting that technology, which would have contributed to their inefficiencies. DX19 at '169-171.

17. Subscribers do not dispute any alleged decline in business, but they do dispute that this decline required the anticompetitive activity described *infra* ¶¶ 33-35.

18. As the 1980s approached, the Plans became more aggressive in trying to eliminate inter-Plan competition. SX241, BCBSA00032683 at '700 (decrying "Blue Sharking" and noting that "out-of-area bid[s]" would "add more fuel to antagonism within the system with the potential perverted result of weakening mutual support and heightening the type of anxiety that leads to destructive competition."); SX242, BCBSA00125018 at '48 ("The Plan will face the challenges presented by . . . the 'Blue Sharking' efforts of other Blue Cross and Blue Shield Plans . . . .").

19. [redacted] the Marks were brought under the newly-formed BCBS, though there remained questions about the extent of the Association's ownership of the marks through the 1980s. [redacted]; SX220 at '876. But even after the merger of the BC and BS groups, "there was a lingering temptation for many Plans to adopt a go-it-alone attitude, the notion that survival should be determined by according history to the strong and defeat to the weak . . . ." DX2, at '851-52.

20. Up through the early 1980s, there often existed multiple BC and BS Plans per state, and 115 Plans in total across the country. SX243, BCBSA00351201. Some of those Plans were direct

competitors within their states. SX159, Wilson Dep. 208:4-209:16; SX238 at '947. To stave off this type of Blue-on-Blue competition, the Plans devised the Long-Term Business Strategy ("LTBS") in 1982. SX244, BCBSA02722175. The Plans adopted several recommendations, including two specifically requiring consolidation of Plans and elimination of competition: Proposition 1.1, requiring that "[a]ll Plans to be joint Blue Cross and Blue Shield Plans, except where the Board of Directors agrees that business reasons dictate otherwise, by the end of 1984"; and Proposition 1.2, requiring there to be "[o]nly one Plan per state, except where the Board of Directors agrees that business reasons dictate otherwise, by the end of 1985." *Id.* at '80. The stated purpose of the LTBS was to effectuate "a substantial reduction in the number of Plans." SX245, BCBSA00023110 at '11. In 1985, the Task Force on Reassessment of Propositions 1.1 & 1.2 noted that the LTBS has made "major progress to date" in eliminating 21 Plans, and recommended extending the deadlines for compliance until January 1, 1987. *Id.* Along with that extension, to coerce Plans into continuing to merge, the task force recommended "a set of specific consequences for noncompliance with the propositions" including "suspension or non-renewal of BCBS membership." *Id.* at '21, '23. With these rules and threats of sanctions, the LTBS was extraordinarily successful in reducing the number of Plans and, consequently, competition between the Plans. SX238 at '947 (mergers of competing Plans "would not have taken place if the Plans hadn't adopted that proposition in November of 1982"); SX220 at '72 ("little doubt" that LTBS "influenced many consolidations and mergers"). In 1980, there were 115 Plans; by 1990, there were just 77. SX243.[15]

The LTBS was not a cure-all for competition, and in the 1980s, a change in IRS tax policy led many Plans to create subsidiaries that competed with other Plans. DX2 at '873. As BCBSA

[15] Some Plans viewed this forced consolidation as unnecessary and anti-competitive. SX246, BCBSA00247902 at '02-03.

counsel described it, "We went from 50 or 60 nationally to where there's now 400 and some." *Id.* As Mr. Cunningham explained: "The subsidiaries kept running into each other—and each other's parent Blue Plans—in the marketplace. . . . The stronger business pressures became, the stronger the temptation was to breach the service area boundaries for which Plans were licensed." *Id.* [redacted]

[redacted]

[redacted] All of this competition served as a catalyst for codifying ESAs through the Assembly of Plans ("AOP"). [redacted] DX2 at '874.

The AOP began in April 1987 [redacted]. *Id.* Prior to the AOP, BCBSA surveyed the Plan CEOs and developed a white paper on the AOP outlining the major issues to be addressed. SX220. The strong majority of Plan CEOs complained that "the exclusive areas" were being subjected to "competitive pressures and the actions of some Plans as well as the Association . . . ." *Id.* at '865. Some Plans also complained about "[t]he effects of activities of some Plan affiliates and subsidiaries in the competitive arena." *Id.* at '866.

Given recent litigation like the Ohio Litigation, the AOP was tasked with looking at whether the ESAs should be maintained. *Id.* at '917. One of the alternatives that was examined was use of "primary" rather than "exclusive" service areas to allow Plans to compete outside their ESAs in limited circumstances. *Id.* at '919. Another option contemplated that ESAs may become unenforceable through "an adverse antitrust decision." *Id.* at '920. In considering the alternatives, "[a] strong majority support[ed] maintenance of the exclusive service areas although some CEOs reflected doubt as to whether this would be lawful." *Id*. at '921. In the end, the AOP developed an "agreement" that "Plans and subsidiaries operating under the Blue Cross and Blue Shield name would be bound to honor the limits of their service areas and to refrain from invading each other's territory." DX2 at '875; SX247, BCBSA00149393.

21. Both the LTBS and AOP impacted ESAs. Up through the 1980s, there was vigorous competition among the Blues. *Supra* ¶ 8. The LTBS succeeded in limiting the number of competitors within each state, and in some cases reduced the number of Plans in a state to a single Plan. SX220 at '73 (by 1987, majority of states had a single Plan). The AOP, through agreement of the plans, codified ESAs and each Plan's commitment "to refrain from invading each other's territory" and gave BCBSA the right to enforce the ESAs. DX2 at '875. [redacted] The Plans agreed to be bound by these ESAs. SX123-SX157.

22. In 1992, BCBSA approved an out-of-area coverage system, which was later renamed BlueCard in 1994. DX32 ¶ 35. When the program was implemented in 1992, there was no mention of the LTBS, AOP, or ESAs. DX46. Defendants have produced no factual evidence or empirical analysis that the BlueCard program could not exist without ESAs. When asked whether a Blue could withdraw from the BlueCard system today and still compete for national accounts, Defendants' expert responded, "[W]ho knows." SX232, Murphy Dep. 193:3-194:15. There is also no evidence that the BlueCard program was the only way for the Plans to provide nationwide service. Other options from Plans' own documents and testimony include: a) a "separate national account corporation or other entity," SX220 at '900; b) syndicates (*supra* ¶¶ 10-11); c) "a system of transfer

prices," SX232, Murphy Dep. 65:18-23; or d) rental networks, SX248, 7/25/17 Serota Dep. 236:21-237:7.

23. Multiple internal documents show that limitations on unbranded business were unnecessary and that unbranded business had no impact whatsoever on the value of the marks. [redacted] SX211 at '417 (Plan CEO calling limits on unbranded competition "an illegal allocation of markets"); SX212 at '85 ("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."); SX210 at '752; [redacted]

In 1994, BCBSA conducted a survey of the Plans regarding unbranded business. SX250, IBC-01644098. The plurality of Plans agreed with the following position on unbranded competition: "Competition is good for the consumer and that is who we are obliged to serve. It makes the Plans more effective. No harm has ever been demonstrated to the Name and Marks from unbranded competition. It would be impractical to regulate and likely a violation of antitrust law." SX251, BCBSA00026101 at '05 (27 voting for, as opposed to 23 against and 5 neutral or hybrid); SX252, BCBSM_1534440 at '713 [redacted]

Despite these acknowledgements, [redacted] The real purpose of LBE was to prevent Blue-on-Blue competition and had nothing to do with using best efforts to promote the marks; after adoption of LBE, it was acknowledged that the rule "was an important step in trying to protect plans from becoming competitors in the same geographic area . . . ." SX253, Ark BCBSe - 0172840 at '40.

24. [redacted] The acquisition rule works in tandem with the National Best Efforts rule ("NBE"), discussed below, to stifle a Plan's growth by limiting the amount of non-branded business a Plan can acquire. SX255, BCBSVT-00189371 at '71.

25. [redacted] *see also* SX257, BCBSA02786714 at '38 (NBE was rejected when first proposed in 2001). [redacted] SX258, BCBSA00807666 ("No question: ESAs and unbranded are interrelated."); [redacted] SX248, 7/25/17 Serota Dep. 173:10-174:8. The 66 2/3% proportion was chosen as a compromise between those who wanted "no standard or 50.1% and others who were recommending 80% . . . ." [redacted] DX32 ¶ 37.[16]

26. NBE has the effect of discouraging Plans from developing non-Blue branded business or acquiring a non-Blue company to grow their unbranded business. [redacted]

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16 [redacted]

[redacted] SX263, WLP-05203857 at '59; SX264, WLP_05253686 at '86; SX210 at '751; SX265, WLP-05210165 at '70 (BCBSA rules are a "problematic growth constraint"); [redacted].

27. Further, the rules do not promote intra-brand competition; instead, they harm the ability of any Plan to develop as a national competitor in its own right. [redacted]. And ESAs restrict Plans' growth and thus intra-brand competition outside of their ESA. [redacted][17]; SX175 at 655:25-656:16 (Anthem national accounts representative describing Anthem as "a national plan that operates in 14 states" because of the ESA rules and noting that "we have any number of customers and consultants that express an interest in working with us, and we're prohibited from doing that").

28. The challenged rules are not necessary for the provision of joint products such as BlueCard; indeed, as outlined in Defendants' own facts, both LBE and NBE *postdate* the creation of BlueCard in 1992. Defs.' URMF ¶¶ 22, 23, 25. And *exclusive* service areas are not necessary for BlueCard to exist; there continued to be Blue-on-Blue competition throughout the 1990s and even today, and yet BlueCard is in effect. SAUF ¶ 6; SX271, BCBSAL_0000757427 at '33 (in 1996 court filing, BCBSA

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[17] For a Plan like BCBS-AL, who has a near monopoly within Alabama, the only growth opportunities are outside of the state. SX268, BCBSAL_0000286752; SX269, BCBSAL_00001077788 at '90, '96; [redacted].

admits that "some of its members compete in certain geographic and product markets"); *id.* at '44-45 (for four years after implementation of BlueCard, BCBSA did not enforce ESAs in Ohio); SX272, BCBSF-00198169.

29. ESAs are not required to encourage a Plan to invest in its local area; in areas of competition, Plans with overlapping ESAs are among the highest-performing. [redacted] SX273, BCBSA02417051 at slides 10, 12; SX274, BCBSA01787061 at slide 12; *infra* ¶ 30; *see also* SX316, Rubinfeld Decl. ¶ 62. Nor are they required to prevent consumer confusion. *Id.* ¶63. Plans' own internal metrics prove that service areas are not necessary to prevent consumer confusion. For two years during the Class Period, BCBSA maintained data concerning the Blue Experience Metric ("BEM"). In a memorandum from BCBSA to a Member Plan challenging calculation of the BEM score, BCBSA admitted that customer confusion was not an issue even where two Blues compete in a single service area:

> Blue on Blue Confusion/Competition
> The third and final market level adjustment raises the need for adjusting for the effect of carrier confusion that may exist when competing Blue Plans share a common service area. We are not sure why multiple Blue Plans in a market should affect the ability of each to provide an effective member experience for their customers (presumably members know from their cards which Plan they actually have). The data shows that in comparing BEM scores from Blue Plans with overlapping/competing service areas with all other Blue Plans, we find exactly the same BEM score (7.9 vs. 7.9).

SX275, BCBSA03082337 at '42.[18] And both Defendants and Subscribers have testified that confusion is not an issue post-sale because a Subscriber's card indicates which Plan provides their health insurance. SX276, Sadler Dep. 100:13-25; SX277, 7/27/17 Serota Dep. 533:9-536:8.

[18] Another internal document suggests that "public confusion" is actually caused by "arbitrary boundary lines." SX242 at '39.

30. Plans have both a local and national focus and are impacted by both local and national accounts. SX278, BCBSTN_00082344 (membership loss of Wal-Mart, an Arkansas account, led to first financial loss for BCBS-AL in 20 years). Further, there is no evidence that the restraints are necessary to maintain a provider network. [redacted] And there is evidence that competition might increase revenue for the Plans, which would eliminate the "thin or negative" margins Plans complain about. SX280, CBC00067854 (Plan CEO crediting Blue-on-Blue competition for "an increase in Blue business overall" in her Plan's service area). Nothing cited by Defendants supports the notion that removing the rules would affect the strengths it alleges in this paragraph.

31. Defendants cite no evidence that eliminating the restraints would lead them to leave their geographic areas; in fact, Prof. Murphy's report and deposition are replete with assertions that it is their local focus that makes the Plans competitive. DX32 ¶¶ 41-45. There is no evidence that the Plans would eliminate what allegedly makes them competitive if the restraints were removed, and there is evidence that Plans would seek to expand outside of their ESAs to cover neighboring states, offering consumers more options. SX281, BCBSAL_0000291100 (BCBS-AL expressing interest in "providing plans in other neighboring states through . . . an inter-state exchange" but stating they were unable to do so based on BCBSA rules); SX175 at 655:25-656:16.

32. While BlueCard may indeed rely on "joint operational assets," BlueCard is not the only way for a Plan to offer nationwide coverage for Subscribers, nor are ESAs necessary for the provision of BlueCard. *Supra* ¶¶ 22, 28. Plans make much out of the fact that Blue enrollment increased from 65 million in 1995 to 100 million in 2013. DX32 ¶ 68. But there is no evidence, from Prof. Murphy's

report or otherwise, that BlueCard alone caused the growth in Blue enrollment, nor has Prof. Murphy conducted any study of the issue beyond looking at the correlation in time between implementation of BlueCard and growth in enrollment. *Id.* (reporting only correlation and not causation); SX232, Murphy Dep. 117:4-119:6.

33. It is disputed that: a) BlueCard is the only means of providing efficiencies to Subscribers, and b) that the ESAs and LBE/NBE rules are required for the provision of BlueCard. *Supra* ¶ 28. Defendants cite to absent class member ("ACM") Dollar General for the proposition that "[i]t would be an administrative nightmare" to eliminate BlueCard. DX81. This egregiously misrepresents the testimony; Dollar General was asked, "Would it be feasible for you to contract with each of the Blue Plans that make up the nationwide Blue Cross-Blue Shield system?" DX81, Dep. 45:19-46:3. There is no evidence that such an extreme hypothetical would emerge from removal of the restraints at issue in this case. *Supra* ¶¶ 10-11, 22.

34. Subscribers do not dispute that Plans have jointly-operated programs. They do dispute that ESAs and the LBE and NBE rules are required to make those programs work, especially given that they work even where Plans still compete head-to-head in some areas. *Supra* ¶ 8; SAUF ¶ 6.

35. Despite continued Blue-on-Blue competition to this day, Plans continue to thrive, disproving the allegation that competition would undercut the Blue System. SAUF ¶¶ 6-8; SX316, Rubinfeld Decl. ¶¶ 68-74.

36. Subscribers have noted their dissatisfaction with high BCBS premiums and year-over-year increases. SX282, Burnett (AEMS) Dep. 40:21-41:6, 52:8-53:11; SX283, Bhuta Dep. 85:10-20.

In Alabama, while premiums are technically regulated pursuant to Ala. Code ¶10A-20-6.10, in practice, it was uncovered in this litigation that BCBS-AL used a rate variance program that systemically misrepresented its actual rate charges in its rate filings to the regulators. SX284, Carden Dep. 161-87, 193-96, 199, 213-14, 226-31.

37. The notion that reducing payments to providers is directly correlated with subscriber premiums has been discredited by expert research, as cited by the Pennsylvania Insurance Commissioner in 2009:

> Our nationally renowned economic expert, LECG, rejected the idea that using market leverage to reduce provider reimbursements below competitive levels will translate into lower premiums, calling this an "economic fallacy" and noting that the clear weight of economic opinion is that consumers do best when there is a competitive market for purchasing provider services. LECG also found this theory to be borne out by the experience in central Pennsylvania, where competition between Highmark and Capital Blue Cross has been good for providers and good for consumers.

SX285, BC-IDAHO_MDL000139285 at '86; [redacted].

38. As discussed in Mr. Strassberg's declaration, medical loss ratio ("MLR") is not an accurate measure of "profit margins". SX315, Strassberg Decl. ¶¶ 14-18.[19] BCBS-AL has extraordinarily high surplus levels, far beyond what would be necessary to weather an economic downturn and far in excess of what is required by BCBSA and state law. SX315 ¶¶ 5-11. These provide little marginal value and lead to higher premium costs. *Id.* ¶ 6. Because MLRs do not accurately reflect profit margins, Prof. Murphy's analysis of the correlation between market share and profitability is not reliable. DX32 ¶ 102 and Ex. 13 (relying on MLR for correlation analysis).

40. It is not disputed that Plans have broad and deep provider networks, but there is no evidence that the restraints are required for those networks. *Supra* ¶ 30.

[19] *See, e.g.*, SX314, BCBSAL_0000485740 (describing profitable investment income for BCBS-AL that is not encompassed in MLR calculations).

41. Plaintiffs do not dispute that the Plans provide healthcare insurance for over 106 million Americans, though this is not an accurate measure of customer satisfaction because, as Plans point out, in some cases Blue coverage is the only option. Def.'s URMF ¶31. Defendants rely on and misrepresent unscientific, self-serving survey data that they themselves (i.e., not a disinterested third party) have prepared to attempt to establish Subscribers' satisfaction with the Plans. DX90, DX99, DX101, DX102, and DX103 (all of which do not explain methodology, make-up of the respondents, or any other hallmarks of a statistical analysis). In one case, Defendants cite to their own promotional headline, absent any supporting data, to support this notion. DX96 at slide 3.

Defendants also cite uninformed and speculative testimony from their hand-picked ACMs, including testimony from one ACM who speculated that two individuals with decision-making authority did not want to get rid of BCBS-AL coverage because they viewed BCBS-AL "like a good family friend . . . ." DX104. Defendants omit the rest of the ACM's quote: "Honestly, it was probably more in the good old boy context because I could tell you neither [individual] would actually do any analysis." *Id*.

42. Defendants misrepresent their cited testimony when they allege that numerous subscribers testified that Blue Plans provide the best insurance. *E.g.*, DX70 at 54:25-55:3 ("Q: Have you heard the slogan from Blue Cross-Blue Shield of Alabama that it is the best local healthcare delivered nationally? A. Yes."). Defendants ignore Subscribers who testified that BCBS was their only option, so they have nothing to evaluate it against. SX286, Johnson (Pettus) Dep. 177:25-178:14. Defendants also ignore Subscribers who testified that they would love the opportunity to get a bid from an out-of-state Plan. SX276, Sadler Dep. 99:12-22; *see also* SX287, BCBSTN-00046242 (ESAs prevent consumer choice).

43. Defendants misrepresent the testimony of named Subscriber Plaintiff Pearce, Bevill, Leesburg, Moore, P.C., who did not testify about [redacted].[20] Defendants ignore testimony from other Subscribers who testified about rising and increasingly unaffordable rates. *Supra* ¶ 36.

44. The 1947 United States Public Health Service review of the Blue Cross system was not conducted as a legal review of the Plans' exclusive service areas. DX1 at '711 (study's "purpose is to appraise the advantages and limitations of Blue Cross Plans"). The review mentions service areas, but nowhere does it formally approve of their use or comment on their legality.[21]

45. The 1979 FTC Bureau of Competition report was not conducted as a legal review of the Plans' ESAs. DX15 at '397 ("This report presents the results of the Bureau of Competition's investigation into the extent, impact, and legality of medical participation in the control of Blue Shield and other open-panel medical prepayment plans."). The review mentions ESAs, but nowhere does it formally approve of their use or comment on their legality.

46. While it is true that the Department of Justice "took no action" with respect to ESAs in 1985, that investigation focused on a potential merger of two Blues (as BCBSA itself noted in response to the DOJ's inquiry), and not specifically the legality of ESAs. DX108 at '835. And while the DOJ

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[20] This abusive practice of questioning a Subscriber Plaintiff on an internal BCBS document that the witness had never seen and had no knowledge about, which Judge Putnam referred to as "sandbagging" and contrary to "basic fairness, litigation fairness," was prohibited after the deposition Defendants cite. SX288, 4/21 Magistrate Conference Tr. Excerpts 74:17-23; 87:12-13.

[21] Defendants' citations to section of the report that supposedly "called for overlapping Plans, Cross and Shield Plans, and sub-state Plans to merge" do not exist within the document.

cleared the Anthem/Wellpoint merger in 2004, it specifically noted that "readers should not draw overly broad conclusions regarding how the Division is likely in the future to analyze other collaborations or activities . . . . This statement does not bind the Division in any future enforcement action." DX109 at '939.

47. Defendants' allegation that the DOJ "suggest[ed]" the NBE proportion of 66 2/3% is contradicted by ***Defendants' own expert***, who writes in his report that the NBE proportion was chosen as a compromise between those who wanted "no standard or 50.1% and others who were recommending 80% . . . ." DX32 ¶ 37 (citing SX259).

48. Plaintiffs do not dispute that the Plans have testified to Congress in 1946 and 1971, but neither instance concerned the legality of ESAs (or even focused on or substantively discussed ESAs in any way). DX113 (in 1946, director of Blue Cross Commission presenting about "administration of voluntary health service, and its management and achievements"); DX114 (in 1971, president of Blue Cross Association presenting on the "High Cost of Hospitalization"). Nothing in either presentation represents an implicit or explicit endorsement of ESAs.

49. This paragraph contains legal argument that Plaintiffs have previously distinguished. *See* ECF No. 149, at 32-33. It is inappropriate for inclusion in a statement of undisputed facts.

50. This paragraph contains legal argument that Plaintiffs have previously distinguished. *Id.* at 33 n.22. It is inappropriate for inclusion in a statement of undisputed facts.

51. This paragraph contains legal argument that is inappropriate for inclusion in a statement of undisputed facts. Further, it is specious for Defendants to claim that the District Court in *Anthem v. Cigna* approved of the restraints when it actually enjoined the merger of Anthem and Cigna and found it to be anticompetitive, specifically citing the impact of the NBE rule. *United States v. Anthem, Inc.*, No. CV 16-1493 (ABJ), 2017 WL 685563, at *2, *53 (D.D.C. Feb. 21, 2017) (unsealed

version, signed Feb. 8, 2017 and filed Feb. 21, 2017). For the reasons discussed *infra* SAUF ¶¶ 1-4, the Plans are not a single entity.

52. This paragraph contains legal argument that is inappropriate for inclusion in a statement of undisputed facts, and is disputed for the reasons discussed *supra* ¶¶ 45-51.

B. Subscriber Plaintiffs' Additional Undisputed Facts

1. The Plans Are Not a Single Entity.

1. The Plans are [redacted]36 Independent Companies[redacted] SX271 at '433 (in answer to complaint in Ohio Litigation, admitting that "members are independent insurance companies"). [redacted]

2. The Plans are financially independent entities. SX248, 7/25/17 Serota Dep. 85:1-18 ("Plans operate as individual independent financial entities."); SX290, Kellogg Dep. 245:24-247:20; SX9, Leahey Dep. 163:20-164:1; SX291, Swedish Dep. 46:20-24 (Plans are "economically separate from one another"); *id.* 48:8-13 (Plans do not pool revenues); SX229 at '26.

3. Defendants freely admit that they are not a single entity. [redacted] SX224 at slide 135; SX9, Leahey Dep. 265:8-13 ("[T]hey are not a single company."); SX290, Kellogg Dep. 126:9-12 ("It's not a single entity."); SX291, Swedish Dep. 48:4-7 (Plans do not function as "one enterprise, in large measure because we don't have economic relationships with other plans"); *id.* 104:3-4 (Plans "do not operate as a[n] integrated economic system"); SX292,

BCBS-ND_MDL000281943 at '45; SX248, 7/25/17 Serota Dep. 103:10 - 104:5 (BCBSA President testigies that "the member Plans operate as individual independent financial entities. They do not integrate as a -- they do not operate as a integrated economic system."). In fact, their own letterhead reads, "BlueCross BlueShield Association . . . An Association of Independent Blue Cross and Blue Shield Plans." SX228 at '539.

4. Nor are the Plans a single entity with respect to the names and marks, as they now claim without any factual basis. SX293, BCBSA00189561 at '62-63 ("The BCBSA, because of its historical development, cannot be likened to a 'garden variety' franchiser, which wields unfettered authority over the use of the Brands. Each Plan in the Association has an interest in the Brands that, we believe, rises far above that of a traditional franchisee."); *see also id.* at '563 ("[T]he rights of the Plans in the Association extend well beyond those secured by the license agreements."); SX248, 7/25/17 Serota Dep. 104:9-10 (BCBSA CEO does "not consider [Plans] franchisees of the Association").

2. Competition Would Be Good for the Blue System and Consumers.

5. BCBS-AL testified that a competitor is "anybody that sells a similar product." SX204, BCBS-AL 30(b)(6) (Carter) Dep. 44:22-23. Defendants' expert admits that without ESAs, every Plan would be a potential competitor of other Plans. DX32 ¶ 60. Through the BCBSA, the Blues have an agreement in which one Blue will not enter another Blue's territory without permission from that Blue. SX204, BCBS-AL 30(b)(6) (Carter) Dep. 46:11-18; SX281 ("Currently the BCBS Association rules would not allow us to market out of state absent some agreement by the affected plans and approval from the Association."); SX294, WLP-01815251 at '51.

6. As discussed *supra* Subs.' RURMF ¶ 8, competition among the Blues has been a fact of life for decades, and yet the Blue System has persisted. Even to this day, Plans compete head-to-head on

a Blue-branded basis in several states, including California, New York, and Pennsylvania. SX295, 6/30/17 Hogan Lovells Defendants' Interrogatory Responses, at 7; SX296, 7/3/17 CBC's Interrogatory Responses, at 6; SX297, BCBSA-CID-050561 at slide 10.

7. There is no evidence supporting the notion that competition among the Blues would bring about the demise of the Blue System; as the President and CEO of BCBS of Western New York wrote in 2001:

> [N]o information to date has been presented that persuasively demonstrates that Blue Brand equity is undermined in overlapping service areas or that the Brands[22] are in any manner diminished in overlapping situations. If any conclusion can be drawn, it is that the Brands are strengthened in overlapping service areas where two Plans are able to compete freely. In fact, the Plans have done so for many years.

SX293, BCBSA00189561 at '61; *id.* at '63 (noting overlapping service areas for over 60 years).

8. Numerous Defendants have admitted that intra-Blue competition is good for the Blue System. SX280, CBC00067854 (Plan CEO predicting that with expanded overlapping service areas, "the strength of the Blue brands may be increased even beyond what it is today"); SX211 at '417 (Plan CEO writes, "Others of us believe that competition is good for all of us, has not materially harmed any Plan, and has served consumers."); SX299, HMK00038180 at '235 (over seven years of inter-Blue competition, Capital has "been driven to be better, more efficient, more customer-focused, and more innovative").

9. Competition is also good for subscribers. *Id.* at '185 (CBC report to PA Insurance Department: "Competition is good for consumers; it improves efficiencies, innovation, quality, price,

[22] The Plans use the term "Brands" to describe the Blue System and not the Blue Cross and Blue Shield marks. SX298, BCBSA00924528 (BCBSA VP of Consumer Brand Strategy: "The point I was making is when we use the 'Brands' we are often describing the Blue system and the business structures that make it work.") So when the Plans discuss protecting the "Brands," they are often discussing ways to protect their own business, and not any particular IP.

and choice."); *id.* at '236 (noting that "Blue vs. Blue competition benefits consumers by promoting price competition"); *id.* at '238 (inter-Blue competition "could lead to greater efficiency of Highmark's and IBC's operations that could benefit consumers"); SX312, WLP-05573074 at '74.

3. Plans Have Recognized for Decades the Potential Illegality of the Challenged Restraints.

10. Many defendants recognize the potential illegality of the exclusive service areas. SX207 at '755 (the President of BCBS-NC conveying to BCBSA his belief that "the current licensing arrangements are 'illegal'"); SX211 at '19 ("BCBSA's ability to define exclusive service areas and its ownership of the name and mark are far from assured."); SX228 at '539 (special BOD meeting on "antitrust analysis of the exclusive service areas"); SX212 at '585 ("You are well aware that BCBSA's exclusive territorial licensing of its service marks is potentially subject to antitrust scrutiny."); SX300, BSC2_01220901; SX301, BSC2_01476372; [redacted] [redacted] [redacted].

11. Defendants recognize the potential illegality of the LBE and NBE rules. SX212 at '417 (BCBS-IN calling limitations on unbranded competition "an illegal allocation of markets"); SX230, WLP-07174914; [redacted]; SX303, BCBSA03516572 at '73; SX304, BCBSA03518020 at '21.

III. LEGAL STANDARD

With respect to Defendants' "single entity" claim, Subscriber Plaintiffs cross-move for summary judgment and ask the Court to make factual findings that Defendants are not a single entity. 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 Defendants' to designate specific facts showing a genuine issue for trial, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) – *i.e.*, to provide evidence sufficient to rebut Subscriber Plaintiffs' indisputable evidence from Defendants' own documents and sworn testimony to support Defendants' claim that they are a single entity. A mere "scintilla" of evidence will not suffice to meet that burden. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

With respect to Defendants' motion for partial summary judgment, for the reasons stated below and in Plaintiffs' opening brief, the motion should be denied and Plaintiffs' own motion should be granted. "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 may be particularly important in antitrust litigation" to prevent needlessly costly and prolonged litigation. *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 541 (2d Cir.), *cert. denied*, 510 U.S. 947 (1993). This case is particularly ripe for summary disposition of the issue of legal standard.

IV. LEGAL ARGUMENT

A. Defendants' "Single Entity" Argument Is Without Merit.

Defendants' lead argument is that the 36 Plans became a "single entity" for purposes of licensing the Blue marks when, they assert, they "contributed their separately owned, geographically limited trademark rights to BCBSA's predecessors in interest . . . ." *See* ECF No. 1353-1 ("Defs.' Br.") at 23. Defendants contend that "they are not capable of concerted action or 'conspiracy' under Section 1 with respect to that function." *Id.*

Defendants' purported licensing "silver bullet" misses the mark entirely. In addition to the fact that they have agreed-to restrictions concerning not only use of the Blue marks but also each Member Plan's sale of *non-Blue-branded* insurance, Defendants' summary judgment motion is inconsistent with the precedent on which they rely, as well as their own factual admissions. Indeed, the Supreme Court in *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010) ("*American Needle*") *reversed* the Seventh Circuit's decision, which had found that "single entity" status could be applied on a function-by-function basis. Moreover, under an appropriate analysis, the facts here are conspicuously *incompatible* with the notion that the BCBSA and its members are incapable of conspiring and can only support a finding that the Plans are not a single entity.

1. Section 1 of the Sherman Act Applies Where, As Here, an Agreement Eliminates Independent Centers of Decisionmaking.

Defendants' invocation of a "single entity" formulation is simplistic and wrongheaded. The Supreme Court has said that the relevant inquiry as to whether members of an association are capable of conspiring is:

> sometimes described as asking whether the alleged conspirators are a single entity. That is perhaps a misdescription, however, because the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved 'seem' like one firm or multiple firms in any metaphysical sense. The key is whether the alleged 'contract, combination . . ., or conspiracy' is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a 'contract, combination . . . or conspiracy' amongst 'separate economic actors pursuing separate economic interests . . . .

American Needle, 560 U.S. at 195 (internal citations and quotation marks omitted). The Court expressly invoked both *Sealy* and *Topco* in support of its analysis, explaining that it had "repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *Id.* at 191 (citing *Sealy*); *see also id.* at 192 (reaffirming that the licensor in *Sealy* "was not a separate entity, but . . . an instrumentality of the individual manufacturers," and that "[i]n similar circumstances" it had "found other formally distinct business organizations covered by § 1") (citing, *inter alia*, *Topco*).

Applying this analysis in *American Needle*, the Supreme Court unanimously held that the licensing activities of a corporation formed by the 32 National Football League ("NFL") teams to develop, license, and market their intellectual property rights constituted concerted action within the meaning of Section 1. In reaching this conclusion, the Court emphasized that "each of the teams is a substantial, independently owned, and independently managed business." *Id*. at 196.

It did not matter to the Court that the "NFL teams have common interests such as promoting the NFL brand," for "they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned." *Id*. at 198. Furthermore, "illegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties." *Id*. Nor was the Court moved by the facts that the NFL teams had formed "a separate corporation with its own management" to market their intellectual property and that "most of the revenues generated" by this corporation were "shared by the teams on an equal basis." *Id*. at 200. Although the Court recognized that "the business interests of the teams will often coincide with those of the [licensing corporation] as an entity in itself," it dismissed "that commonality of interest" as something that "exists in every cartel." *Id*. at 201. For all of these reasons, the Court concluded that the licensing corporation was "'an instrumentality' of the teams," like the licensors in *Sealy* and *Topco*. *Id*. (quoting *Sealy*, 388 U.S. at 353–54, and citing *Topco*, 405 U.S. at 609).

The same conclusion – that Defendants are separate entities – applies here. Like the NFL teams in *American Needle*, each Member Plan "is a substantial, independently owned, and independently managed business." 560 U.S. at 196; *supra* SAUF ¶¶ 1-4. As the Chairman and CEO of BCBS Alabama testified, "the member Plans are individual business[es] and make their own decisions." SX290, Kellogg Dep. 144:15-20. The formation of BCBSA did not alter the Plans' fundamental independence and autonomy. Indeed, [redacted]. In addition, the Plans are potential and, in at least some cases, actual *competitors* with separate economic interests that, though perhaps sometimes coinciding, "are not necessarily aligned." *American Needle*, 560 U.S. at 196–98. To an individual or company purchasing health insurance, the Plans are "potentially competing suppliers." *Id.* at 197.

The fact that the Plans have formed the BCBSA to license the Blues marks does not change the analysis. BCBSA "is owned and controlled by the member plans," *Cent. Benefits Mut. Ins. Co. v. Blue Cross and Blue Shield Ass'n*, 711 F. Supp. 1423, 1424-25 (S.D. Ohio 1989). As in *American Needle*, the Plans "remain separately controlled, potential competitors with economic interests that are distinct from [BCBSA's] financial well-being." *American Needle*, 560 U.S. at 201; *see also* SX290, Kellogg Dep. 144:4-11 (Chairman and CEO of BCBS-AL acknowledging that "the Member Plans control the association"). Indeed, the potential divergence in interests between the individual Plans and the corporation they control is significantly greater here than in *American Needle*. For while "most of the revenues generated by" the licensing corporation in *American Needle* were "shared by the teams on an equal basis," *American Needle*, 560 U.S. at 200, Defendants here do not pool or share earnings, profits, capital, management, or advertising resources. SX290, Kellogg Dep. 266:9-268:6. For all of these reasons, decisions regarding licensing of the Blue marks, "although nominally made by [BCBSA], are for all functional purposes choices made by the [36] entities with potentially competing interests." *American Needle*, 560 U.S. at 202 n.9.[23]

2. Defendants Fundamentally Misconstrue the Analysis Of Whether They Are Legally Capable of Conspiring.

Rather than confront these facts, Defendants instead tout a fiction: that "the two key determinations attendant to the single entity analysis" under *American Needle* are "the proper definition of the function at issue" and "the extent to which formally separate entities have integrated assets necessary to perform that function." Defs.' Br. at 20. Contrary to Defendants' argument, the Supreme Court has never held that a multi-member organization or association is a single entity with respect to some functions but not with respect to others. It was the *court of appeals* that employed this function-specific test in *American Needle*. 560 U.S. at 188 (explaining that the court of appeals "limited its inquiry to the particular conduct at issue, licensing of teams' intellectual property"). The Supreme Court *reversed* and did not embrace this aspect of the lower courts' reasoning. Indeed, it had no reason to do so, for the Court's finding that the trademark licensing corporation was controlled by the 32 NFL teams compelled the conclusion that the teams were engaged in concerted action even if it analyzed in isolation only the corporation's function of licensing of the teams' intellectual property. *See id.* at 201.[24] In this case, likewise, the Plans control the BCBSA, and thus

[23] Notably, contrary to Defendants' naked assertion, see Defs.' Br. 22 n.2, the Plans have integrated their operations relating to their trademarks no more than had the defendants in *Topco* and *Sealy*—decisions on which the court in *American Needle* expressly based its analysis. *See* 560 U.S. at 191–92, 201. In those cases, as here, ownership of the trademarks was technically vested in a separate licensor. *Sealy*, 388 U.S. at 351–52; *Topco*, 405 U.S. at 596. In those cases, as here, licenses were issued by that licensor. *Id*. Indeed, integration was more extensive in *Topco* and *Sealy* than in this case, for in those cases the trademarked grocery products and mattresses sold by the defendants were identical. Here, by contrast, there is no standard "Blue" insurance plan mandated or created by BCBSA and sold by all of the Plans—to the contrary, each Plan designs and sells its own health insurance products.

[24] Also unavailing to Defendants' proffer of a function-by-function test are the Seventh Circuit's decision in *Chicago Professional Sports Limited Partnership v. National Basketball Association*, 95 F.3d 593 (7th Cir. 1996), and the district court decisions in *Washington v. NFL*, 880 F. Supp. 2d 1004, 1006 (D. Minn. 2012), and *Spinelli v. NFL*, 96 F. Supp. 3d 81, 114 (S.D.N.Y. 2015). The court in *Chicago Professional Sports* did not hold that the single-entity determination should be made on such a basis, and commented only that it did "not rule out the possibility that an

even if it were appropriate to look only to the BCBSA's specific function of licensing the Blue Marks, Defendants' conduct is concerted.

In addition to their general control of the BCBSA, the Plans specifically control licensing decisions of the BCBSA. *See generally* Subs.' Br. at ¶¶ 1-28. The Plans agreed on the license agreements and set the membership standards. DX2 at '875. BCBSA cannot independently modify any of the license agreements with a Member Plan; any such changes can be made only by a vote of three-fourths of the Plans. SX35, Hedges Dep. 98:4-100:23; *cf. American Needle*, 560 U.S. at 201 ("Unlike typical decisions by corporate shareholders, [the NFL's licensing corporation's] licensing decisions effectively require the assent of more than a mere majority of shareholders"). Only the Plans, by a super-majority vote, have the right to terminate a Plan's license. [redacted]; SX35, Hedges Dep. 82:17-22; SX9, Leahy Dep. 231:3-20. Indeed, the CEO of BCBS-MD candidly acknowledged that "we [*i.e.*, the Plans] are in the position of approving our own licenses as members of the association." SX207 at '755.

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organization such as the NBA is best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment, but is best understood as a joint venture when curtailing competition for players who have few other market opportunities." 95 F.3d at 600. In *Washington* and *Spinelli*, the district courts concluded that despite *American Needle*, the NFL and its teams are a single entity under the Sherman Act for purposes of licensing game footage and photos because they "contain intellectual property owned by the NFL and at least one NFL Club . . . and in many cases two NFL Clubs" and because "the NFL and NFL Clubs 'must cooperate to produce and sell these images; no one entity can do it alone.'" Defs.' Br. at 22-23 (quoting *Spinelli*, 96 F. Supp. 3d at 114). Simply put, such an analysis answers the wrong question. It is contrary to the Supreme Court's decisions in *BMI* and *NCAA*, which found concerted action even though cooperation was necessary "if the product is to be available at all." *Nat'l Coll. Athletic Ass'n v. Bd. of Regents of Univ. Of Okla.*, 468 U.S. 85, 101 (1984) ("*NCAA*"); *see also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 10 (1979) ("*BMI*"). As the Court explained in *American Needle*, "[t]he justification for cooperation is not relevant to whether the cooperation is concerted or independent action" and "[m]embers of any cartel could insist that their cooperation is necessary to produce the 'cartel product' and compete with other products." *Id.* at 199 & n.7. Further, in both *Washington* and *Spinnelli*, "unlike in *American Needle*, the intellectual property involved is historical football game footage, something that the individual teams do not separately own, and *never have separately owned*." *Washington,* 880 F. Supp. 2d at 1006 (emphasis added). But Defendants here insist that the Blue marks *were* separately owned by the individual Plans prior to their conveyance to BCBSA's predecessors in interest. *See, e.g.*, Defs.' Br. at 24–25.

3. Prior to Litigation, Defendants Did Not View Themselves as a Single Entity.

Defendants "single entity" claim is a last-gasp theory propounded by lawyers for this case. Unable to deny their written agreement to geographically divide markets for decades, the Plans attempt to recast their conduct under the guise of a legal "single entity." For years, however, internal documents and testimony reveal that BCBSA is not a single entity for any purpose. Less than a year ago, at trial and under oath, Gerald Kersetz (Anthem National Accounts Vice President, and Head of New Sales) when asked "are the Blue Plans a single competitor?," answered: "They are not. . . . each Blue Plan is a license holder, and it's operated independently. Some of them pursue national customers well, some of them pursue them less well. . . . So they're independent competitors." SX175 at 654:2-9; *see also* SX305, 11/29/16 Anthem Tr. 1205:1-6 (another Anthem witness describing how the Plans are "independent" and have different "go-to-market strategies"); *see also* SX229 at '36 ("[W]e remain independent Plans on separate systems."); SX293 at '563 (BCBSA "should not be viewed as a centralized, autonomous franchisor"). Indeed, going back as far as 2005, Plans concluded that "federal requirement for a single entity conflicts with exclusive service areas of the Plans." SX292 at '45. Today, if this Court were to go on Facebook, it "can find 28 different [Plan] pages, each with different positioning, content and tonality." SX224 at '140. Thus in advertising the Blue marks, the Plans do not act as one.

Similarly, as noted in the Introduction, internal BCBSA and Member Plan documents repeatedly reflect the recognition that the Plans are potentially exposed to liability for their actions undertaken through BCBSA, a concern that would not exist if they truly viewed themselves as a "single entity." Given the mountain of evidence disproving Defendants' "single entity" claim, the Court should deny Defendants' motion and grant Subscriber Plaintiffs' cross-motion.

B. Defendants Have a Continuing Agreement to Engage in Anticompetitive Practices Long Held to be Subject to *Per Se* Condemnation under the Sherman Act.

The Supreme Court's decisions in *Sealy* and *Topco* establish that horizontal agreements allocating exclusive geographic market territories among actual or potential competitors are illegal *per se*. *See* Subs.' Br. at 16-22. These cases make clear, moreover, that such "competitors 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 1981). None of the Supreme Court or Eleventh Circuit cases cited by Defendants cast a shadow over *Sealy* and *Topco*, for none of them addressed a horizontal allocation of exclusive geographic territories among actual or potential competitors. Tellingly, even though *American Needle* did not involve a geographic market division, it nonetheless cited *Sealy* favorably for the proposition – fatal to Defendants here – that "the Court has repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." 560 U.S. at 184 (citing *Sealy*, 388 U.S. at 352–56); *see also id*. at 192 (citing *Topco* for the proposition that "[i]n similar circumstances, we have found other formally distinct business organizations covered by § 1").[25]

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[25] Defendants cite the Supreme Court's decision in *Texaco, Inc. v. Dagher* 547 U.S. 1 (2006) ("*Dagher*") in passing, but this case involved a formal joint venture that had been "approved by consent decree, subject to certain divestments and other modifications, by the Federal Trade Commission, . . . as well as by the state attorneys general of California, Hawaii, Oregon, and Washington." *Id*. at 4. The Court held that this joint venture had not engaged in illegal price fixing when it set a single price for its product because "[w]hen 'persons who would otherwise be competitors pool their capital and share the risk of loss as well as the opportunities for profit . . . such joint ventures [are] regarded as a single firm competing with other sellers in the market." *Id*. at 6 (quoting *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 356 (1982)). Defendants here are conspicuously unlike the *Dagher* joint venturers, who had exited the market and operated only through the government-approved joint venture. Indeed, the [redacted]; *see also* SX306, Government Accountability Office, "Blue Cross and Blue Shield: Experiences of Weak Plans Underscore the Role of Effective State Oversight" 28 (Apr. 1994) ("The agreement does not constitute a partnership or joint venture, and the Association has no obligation

Defendants have recognized that *Sealy* and *Topco* are specifically relevant to their conduct. And Subscriber Plaintiffs have demonstrated at length, in a partial summary judgment motion seeking application of the *per se* rule, that Defendants' allocation of the market into ESAs here is not materially different from the geographic market divisions condemned in those cases as unlawful *per se*. Subs.' Br. at 22-32.

Accordingly, Defendants instead question the continuing viability of these two Supreme Court decisions, proposing that this Court find that they are "inconsistent with modern antitrust jurisprudence" and need not be followed. Defs.' Br. at 39 n.7. Notably, the Supreme Court has repeatedly cited *Sealy* and *Topco* as good law. *See* Subs.' Br. at 17-18 (collecting cases). But even if the Supreme Court had openly questioned *Sealy* and *Topco* (which it has not), the Supreme Court has repeatedly made clear 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." *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997); *see also, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

Nor should this Court accept Defendants' invitation to find the application of the *per se* rule in *Sealy* and *Topco* to have been rejected by the Eleventh Circuit or implicitly overturned. Defendants make much of the Eleventh Circuit's recent decision in *Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072 (11th Cir. 2016), but the principal holding in that case was that the challenged conduct was *unilateral*, and thus not subject to Section 1 at all. *Id.* at 1082. The *Procaps* court did not apply the *per se* rule because it did not have experience with a case in which a "Collaboration Agreement" that

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for the debts of member plans."). Nor do the Plans "pool their capital and share the risk of loss as well as the opportunities for profit." 547 U.S. at 6; *see also* SX290, Kellogg Dep. 266:9-268:6. *Dagher* is thus inapposite.

all agreed was "lawful at its inception," *id.* at 1080, was alleged to have been transformed into an unlawful market allocation through a subsequent acquisition that required the removal of assets from the market. *Id.* The Eleventh Circuit properly rejected the argument that "a lawful, procompetitive joint venture was somehow transmuted into an unlawful horizontal market allocation by the unilateral conduct of one of the parties." *Id*. at 1083. Defendants' conduct is nothing like the novel question presented to the Eleventh Circuit in *Procaps* (and, notably, there was thus no reason for the Eleventh Circuit even to mention *Sealy* or *Topco* in its decision). Defendants' conduct does not involve a legitimate joint venture or unilateral conduct following a merger, but rather the *concerted* agreement of the Plans to the geographic market allocation and output restraints at issue.[26]

Nor is Defendants' position advanced by the Supreme Court's decision in *FTC v. Actavis, Inc.*, 133 S.Ct. 2223 (2013) ("*Actavis*"), or the Eleventh Circuit's decision in *Valley Drug Co. v. Geneva Pharm., Inc.*, 344 F.3d 1294 (11th Cir. 2003) ("*Valley Drug*") – and, indeed, Defendants omit the fact that *Valley Drug* specifically quotes *Topco* for the proposition that a horizontal agreement to allocate markets is a "classic example" of a *per se* violation of Section 1. *Id.* at 1304. *Actavis* and *Valley Drug* involved reverse-payment settlements between holders of drug patents and potential generic manufacturers of the same drugs. While the 11th Circuit suggested in *Valley Drug*

[26] The authority offered by Defendants from other circuits is likewise inapposite. The court in *In re Sulfuric Acid Antitrust Litigation*, 703 F.3d 1004, 1009 (7th Cir. 2012) addressed an agreement in which domestic marketers of sulfuric acid agreed to shut down their production capacity and become distributors for two Canadian companies that produced sulfuric acid as a waste product of their mining operations. The Court applied the rule of reason to this *vertical* arrangement because "the shutdown agreements might be found to be an innocent species of exclusive dealing" and "[i]t is not *per se* illegal to insist that a distributor agree not to carry a competing line of goods to the supplier's." *Id.* at 1010. In *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48 (1st Cir. 2001) ("*Augusta News*"), the plaintiff challenged the joint efforts of wholesale magazine distributors to win region-wide contracts with the major chains. But although the plaintiff alleged a territorial market division, the court found "nothing to suggest that there was any agreement among the defendants or the defendants and others to divide markets in the sense of promising not to compete." *Id*. at 48. Finally, the factual oddity of the agreement at issue in *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185 (7th Cir. 1985), involved a covenant not to carry competing products at two adjoining stores that two retailers with complementary product lines established in order to co-locate in a *single building*.

that reverse payment settlements could be viewed as a type of market allocation, the Supreme Court in *Actavis* did not embrace that characterization, but rather viewed them as novel, indeed unique, agreements, with which it had no prior experience. 133 S.Ct. at 2237-38.

1. Defendants' Purported Potential Procompetitive Justifications for Their Conduct Are Both Irrelevant and Illusory.

Defendants claim that the *per se* rule of *Sealy* and *Topco* applies only to "'naked' agreement[s] with no purpose except to stifle competition," not to agreements that "*could* facilitate productive cooperation that *might* lead to benefits such as more efficiency or new products." Defs.' Br. at 28 (emphases in original). But this argument reflects a fundamental "misunderstanding of the *per se* concept." *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 351 (1982) ("*Maricopa*"). Defendants' territorial allocations fall squarely within the scope of the *per se* rule articulated in *Topco* and *Sealy*, and supposed procompetitive justifications for the conduct are thus irrelevant. Indeed, the defendants in *Topco* advanced supposed procompetitive justifications for the geographic market division at issue there that are remarkably similar to those suggested by Defendants here. *See Topco*, 405 U.S. at 605. Likewise, in *Palmer v. BRG of Georgia, Inc*., 498 U.S. 46 (1990), the Supreme Court summarily reversed an Eleventh Circuit decision that had subjected a horizontal geographic market division to the rule of reason rather than the *per se* rule in part because the lower court had determined that the challenged agreement was "not a 'naked agreement' between competitors to allocate the market."

2. Defendants' Attempts to Distinguish Their Conduct As Unique Are Unavailing.

Contrary to Defendants' implication, courts are not required to have lengthy experience with facts specific to particular defendants or a specific industry in order to find concerted action by them to be unlawful *per se*. Rather, "[o]nce experience with a particular *kind* of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." *Maricopa*, 457 U.S. at 344 (emphasis added). This Court need only determine here that Defendants have engaged in a *type* of practice that the Supreme Court has previously held unlawful *per se*. Each instance of that practice "is presumed unreasonable without inquiry into the particular market context in which it is found" and "without inquiry into the special characteristics of a particular industry." *Board of Regents*, 468 U.S. at 100 & n.21.

This case does not involve a wholly novel practice necessary for a type of product to exist at all, as was the case with blanket music licensing in *BMI*, 441 U.S. at 10 ("[w]e have never examined a practice like this before"), or collegiate team sports, as in *NCAA*.[27] It involves a product ("medical insurance" as conceded by Defendants' expert Prof. Murphy (SX232, Murphy Dep. 21:3-12, 22:15-20)) and practices (horizontal divisions of geographic markets and agreements to restrain output) with which the courts are quite familiar and which should be condemned as *per se* unlawful.[28]

Defendants' attempts to factually distinguish *Topco* and *Sealy* are likewise unavailing. First, Defendants contend that the horizontal market divisions at issue in those cases did not facilitate

[27] *National Bancard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986) ("*National Bancard*") is not to the contrary. In *National Bancard*, the Court determined that setting fixed interchange fees as part of the credit card system did not constitute price fixing because a uniform fee was *necessary* for the creation of the type of product, specifically because "universality of acceptance—the key element to a national payment system—could not be guaranteed absent prearranged interchange." *Id*. at 602, (citing *BMI*, 441 U.S. at 21). The Court accordingly concluded that setting fixed interchange fees was not properly characterized as price fixing, but as "an internal accounting procedure between joint venturers that shifts a portion of the revenues from the merchant-signing partner to the card-issuing partner." *Id.* at 602-03.

[28] Defendants cannot back into a "new product" claim by asserting that the Plans are "small" and "locally focused," and therefore need to band together in order to compete with national health insurance companies. *See Gen. Leaseways, Inc. v. Nat'l Trucking Ass'n*, 744 F.2d 588, 594 (7th Cir. 1984) (finding "nothing distinctive about the product involved in this case" which is offered by "[m]any firms"; cooperation among defendants "merely makes it easier for small firms to offer it"). Even if some level of cooperation among the Plans were justifiable to allow them to compete with national insurers for large national accounts, that cooperation would certainly not necessitate an agreement to allocate exclusive geographic markets for *all* customers—including even the small group and individual customers who are members of the Subscriber class. *See, e.g., id.* at 594 (identifying many industries in which firms compete in some aspects of their relationship but cooperate in others); *id*. at 595 (explaining that firms can cooperate "in providing reciprocal services" while still competing against one another).

"ongoing productive cooperation" of the sort that Defendants claim results from the horizontal market divisions challenged here. Defs.' Br. at 39. But the defendants in *Topco* defended their agreement not to compete on essentially the same grounds. *See Topco*, 405 U.S. at 605. The argument fares no better here.

Second, Defendants argue that the defendants in *Topco* and *Sealy* "did not possess exclusive trademark rights in their own territories prior to the challenged agreement." Defs.' Br. at 39. Even if that were factually demonstrated (and it is not), the Supreme Court condemned the agreement in *Sealy* even though the geographic market division in that case originated from presumptively lawful trademark licenses issued by the original trademark holder.[29]

Third, Defendants seek to distinguish *Sealy* on the ground that the agreement condemned there involved price fixing as well as a horizontal geographic market division. Defs.' Br. at 40. But the Supreme Court specifically rejected this argument in *Topco*: "To the extent that *Sealy* casts doubt on whether horizontal territorial limitations, unaccompanied by price fixing, are *per se* violations of the Sherman Act, we remove that doubt today." 405 U.S. at 609 n.9.

Fourth, Defendants contend that the health insurance market is more complex than the retail markets at issue in *Sealy and Topco*. Defs.' Br. at 41. Even if it were, it is well settled that a *per se* rule applies to a covered practice "without inquiry" into either "the particular market context in which it is found" or "the special characteristics of a particular industry." *NCAA*, 468 U.S. at 100 & n. 21; *see also No. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

[29] *Sealy* thus teaches the common-sense conclusion that practices may begin lawfully, but nevertheless through subsequent agreements between or among the parties evolve over time into prohibited concerted action among actual or potential competitors. Contrary to Defendants' assertion that "a restraint is evaluated at the time it was adopted, even if circumstances later change," Defs.' Br. 44, it is the *current* agreement among the Plans—not its alleged historical antecedents—that is relevant here.

Finally, Defendants seek to distinguish *Topco* and *Sealy* on the ground that the defendants in those cases "actively modified territories throughout the conspiracy," Defs.' Br. at 41, while Defendants' exclusive service areas "merely codified existing territories" that, supposedly, have remained unchanged since at least 1972. Even if that were established, "[t]he basic notion underlying [the] *per se* offense [of horizontal market division] is that two competitors may not agree not to compete for customers," *Augusta News*, 269 F.3d at 48, not whether they occasionally redraw the borders of their exclusive markets *while still continuing that agreement not to compete where they otherwise could*. And notably, since BCBSA was formed in 1982, the number of Plans has, in fact, been reduced from more than 100 to just 36 today, as Defendants have attempted to consolidate Plans to achieve a territorial allocation of no more than one Plan per State. *Supra* Subs.' RURMF ¶ 20.

Indeed, those distinctions that exist between this case and *Topco*/*Sealy* all cut against Defendants. Defendants here not only have agreed to divide the market for Blue-branded insurance into exclusive geographic territories among themselves, they have also restricted competition among Plans selling non-Blue-branded insurance, both through their so-called "best efforts" rules and their "uncoupling" rule prohibiting Plans from selling health insurance solely under well-established tradenames such as Anthem and CareFirst.

And for the avoidance of any doubt that may be inferred from Defendants' brief, no judicial, executive, or legislative body has concluded that Defendants' ESAs or practices challenged by Subscriber Plaintiffs here comply with Section 1. *See supra* Subs.' RURMF ¶¶ 45-52. The absence of any FTC or DOJ action do not reflect any tacit approval. *Id.* ¶¶ 45-48. The 1947 study by the Public Health Service not only predates the formation of BCBSA by 35 years, but was conducted by an agency with no charge in antitrust enforcement. *Id.* ¶ 44. And none of the cases that, according to

Defendants, rejected antitrust challenges to the ESAs in fact addressed the issues raised in this litigation. Indeed, the case that Defendants claim "explicitly distinguished *Sealy*" did so in the context of a *trademark* suit brought by BCBSA to enforce its exclusive foreign rights to the Blue marks against an attempt by one of the Plans to *register those marks in its own name abroad. Blue Cross and Blue Shield Ass'n v. Grp. Hosp. & Med. Servs., Inc.*, 744 F. Supp. 700, 719-20 (E.D. Va. 1990).

Tellingly, though, Defendants do not explain why several of them were sued by the States of Maryland and Ohio and agreed to abandon their claims to exclusive geographic territories in those states as a term of settlement. As an example, the Maryland Attorney General ("AG") challenged in the mid-1980s the use of ESAs within its state as a *per se* violation of the Sherman Act. As it explained in its brief seeking to apply the *per se* rule, there was collusion between Blue Plans in Maryland and Washington, DC. SX307, *Md. v. BCBSA et al.*, Civ. No. HM 84-3839, Dkt. No. 62 (D. Md. Apr. 9, 1986) ("State of Maryland's Memorandum Regarding the Applicability of the Per Se Rule to Defendants' Market Allocation Agreement"). Historically, Montgomery and Prince Georges Counties were serviced primarily by DC Plans while suburban Baltimore was serviced by Maryland Plans. *Id.* at 3-4. The Baltimore and DC Plans were concerned about minimizing comparison shopping by subscribers and "plan hopping" at rate review time. *Id.* at 4. So, the two sets of Plans met in 1960 to "define a line to be drawn through Montgomery and Prince George's Count[ies] that would be used as the line to divide the enrollment activities in the state." *Id.* In June of 1972, the two groups of Plans entered into licenses with BCBSA that granted ESAs to each and adopted the boundaries of each group's extant marketing territories. *Id.* at 6-7. Fred Gloth, Vice President and General Counsel of the Maryland Plans, noted in a 1974 memorandum that the DC and Maryland Plans should not compete because such competition would ensure subscribers "of the lowest possible costs for its health care program." *Id.* at 14. The DC Plans subsequently commissioned a "Maryland Marketing Study." *Id.* at 10. The study noted that one of its objects was "to prevent open competition among the Plans in Maryland and Prince George's County." *Id.* at 15.

Ultimately, BCBSA and the Plans entered into a settlement agreement that permitted Blue-on-Blue competition in Maryland for a while. SX307, SX308. The Plans viewed this suit and the similar Ohio litigation in which the Ohio AG intervened as a major threat, saying the litigation "could result in a decision where the BlueCross Blue Shield Association would not be able to license the use of the name and mark by geographic area. The fear is that all out competition between plans would result." SX310, BCBS-WY_MDL000074351 at '61.

As mentioned in the Introduction, BCBSA's current confidence about the antitrust legality of its practices is belied by its own contemporaneous documents. These questions led to the convening of a special Board "Antitrust Forum" in January of 2001 at which an outside panel (including Clifford Stromberg of Hogan & Hartson (now Hogan Lovells)) was present. This was the same Clifford Stromberg who is the subject of a meritless clawback claim (ECF No. 1395) that will be included in the record upon this Court's ruling (Subscribers believe this document will conclusively end the charade about the legality of BCBSA's collective conduct).[30] Similarly, in 2012, a co-branded presentation was made by BCBSA and Crowell & Moring, defense counsel in this litigation, to Blues lawyers on avoiding antitrust problems. SX231. As an example of "core misconduct" – *i.e.*, the type of conduct subject to per se treatment under the Sherman Act – the presentation lists "customer allocation—agreeing which firm will do business with which customers." *Id.* at 13. In its list of ways to avoid collusion, the presentation states that Plans should

[30] On the eve of this filing, Defendant BS-CA clawed back another several dozen documents. Subscriber Plaintiffs also reserve the right to supplement the record with these documents should they prevail on challenging that request.

not "discuss or reveal to any competitor accounts to which the plan will or will not market" and should not "discuss or reveal the plan's intentions for marketing outside its current service area." *Id.* at 25. These types of communications occur often and are in fact ingrained in the Plans' day-to-day business.

3. Defendants' Supposed Historical Trademark Rights Do Not Insulate Their Agreements from *Per Se* Liability.

Defendants claim that their ESAs "derive from independently acquired common-law trademark rights, not any unlawful agreement." Defs.' Br. at 20. Noting that the [redacted] Defs.' Br. at 25, Defendants assert that their partial summary judgment motion is well-taken because their "current license agreements merely codify service areas as they already existed." Defs.' Br. at 44.

This argument is counterfactual. Defendants have not traced even one – much less, each and every one – of their current exclusive service areas back to the service areas that, they say, were defined by common-law trademarks, "in the 1930s and 1940s," Defs.' Br. at 24, or to licenses issued by a licensor that they did not control. Nor can they. The map of the Blue world today looks nothing like it did before the formation of BCBSA in 1982, let alone like it did in the 1930s and 1940s. The Plans have deliberately and largely successfully sought to merge Blue Cross and Blue Shield Plans, to consolidate local Plans so that there is only one Plan per State, and to eliminate overlapping service areas. And the Plans have continued to refine the rules governing their use of the Blue service marks since the establishment of BCBSA. Indeed, the Plans debated whether to continue their ESAs as recently as 1987 – five years after BCBSA was formed. *Supra* Subs.' RURMF ¶ 20. And while Defendants quote language [redacted]

[redacted] in support of their claim that these agreements merely "reaffirm the Blue Plans' pre-existing exclusive trademark rights," they omit the rest of the operative language of these agreements, which [redacted]. This language makes clear what is evident from the changes in the ESAs, LBEs and NBEs, and throughout the Blue world that have occurred since BCBSA was formed – that Defendants' conspiratorial agreements not only have continued in force but continued to evolve. This case is thus entirely distinguishable from *VMG Enterprises, Inc., v. F. Quesada & Franco, Inc.*, 788 F. Supp. 648 (D.P.R. 1992), where the settlement agreement simply froze in place "the trademark territory" that each party "had developed to the point that litigation ensued," *id.* at 657, but did not provide for any future revisions or continuing coordination between the two trademark holders.

C. At Most, Defendants' Agreements to Divide Markets and Restrain Output Should Be Examined – and Condemned – Under a Quick-Look Rule of Reason Analysis

As this Court has observed, there is an abbreviated "quick look" approach to the antitrust rule of reason that can be applied "when the anticompetitive nature of an agreement is so blatant that a detailed review of the surrounding marketplace would be unnecessary." *In re Blue Cross & Blue Shield Antitrust Litig.*, 26 F. Supp. 3d 1172, 1185-86 (N.D. Ala. 2014). That approach applies when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Procaps*, 845 F.3d at 1084 n.3 (quoting *California Dental Ass'n v. FTC,* 526 U.S. 756, 770 (1999)).

The "quick look" approach does not require the plaintiff to establish every aspect of anticompetitive effect before the burden shifts to the defendant to demonstrate any offsetting procompetitive effects of the challenged restraint. For example, in *Board of Regents*, the Supreme Court adopted a "quick look" approach to a limitation on the number of NCAA football games that could be shown on television, emphasizing that "no elaborate industry analysis is required to demonstrate the anticompetitive character" of what constituted an agreement among competitors limiting output. 468 U.S. at 109.

Nor should any undue burden of an elaborate rule of reason analysis be borne by Subscriber Plaintiffs here, in view of the highly suspicious nature of Defendants' agreements, as described by Prof. Rubinfeld, and borne out by Defendants' own (pre-litigation) acknowledgements not only of the restraints' obvious anticompetitive effects but also their intent, as well as their potential illegality. *See generally* SX316, Rubinfeld Decl. Consider, for example, evidence presented in *Maryland v. Blue Cross & Blue Shield Ass'n*, 620 F. Supp. 907 (D. Md. 1985), including the statement by the general counsel of the Maryland Blue Plan that the DC and Maryland Plans should not compete because competition would ensure subscribers "of the lowest possible costs for its health care program." SX307 at 14.

Despite acknowledging being competitors (*supra* n.1), Defendants have a "Map Book" dividing up sales territories in the United States pursuant to their ESAs. SX159. Defendants were overt when describing the effect of such ESAs: CEO interviews revealed that the "major advantage of an exclusive franchise area was seen in lessening of competition." SX234 at '31. Or as BCBS-AL states, "[w]e are simply not licensed to do business in other states and there are mandates that create roadblocks." SX311, BCBSAL_0000110178 at '80. [redacted] One does not need a degree in economics to ascertain the connection between the BCBSA rules and their anticompetitive impact.

[redacted]

[redacted] Again, the impact of such a [redacted] restriction does not require an in-depth analysis.

If the Court were not to find each of the challenged practices *per se* unlawful, as Subscriber Plaintiffs respectfully submit is required by the case law, then the quick look analysis is the only test that should be applied. A "quick look" analysis may require a truncated market analysis, but here, Defendants' expert, Prof. Murphy, has agreed with Subscriber Plaintiffs on that market definition: "health insurance products." SX232, Murphy Dep. 21:3-12.

While the Eleventh Circuit did not apply a "quick look" approach in *Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072 (11th Cir. 2016), that was a function of its lack of experience with the kind of case involved and the absence of any evidence of anticompetitive effects. Here, quite to the contrary, horizontal market divisions have been deemed unlawful *per se* in *Sealy, Topco,* as well as in other Supreme Court and Eleventh Circuit decisions for years. The courts have had plenty of experience with such cases. Moreover, anticompetitive effects of the challenged agreements in this case abound. As in the 1984 *NCAA* case, for example, the NBEs' limitations on unbranded business by the Blue Plans unquestionably restrain output, and Defendants' own documents reflect that such restraints are not needed for the protection of their trademarks or otherwise. Nevertheless, the NBE restrictions were put in place in 2005 by agreement of the Plans.

Defendants have failed to advance any potential pro-competitive benefits that are non-speculative and necessitate the restraints. Prof. Rubinfeld has noted that he had not seen any compelling evidence to support these claims. SX316, Rubinfeld Decl. ¶¶ 11, 61. Blues compete head-to-head in several states successfully without any obvious dilution in the value of the trademark or any brand confusion. *Id.* ¶ 62. Plans that compete against other Blue licensees in local markets have strong brand presence. *Id.* ¶ 63. Furthermore, in his view, the trademarks can be protected and enhanced without horizontal agreements among competitors to allocate territories or otherwise limit competition. *Id.* ¶ 66. In particular, he concluded that from an economics perspective the restraints were not necessary for the Plans to compete against other insurers for local accounts. *Id.* ¶ 67.

Documents from Defendants support this conclusion. [redacted] And a 2013 BCBSA e-mail notes that "the brands are not protected by the ESAs but the

ESA[s] protect the Plans' business model . . . the Brands themselves are not dependent upon a specific business structure." SX298.

In short, Defendants have wholly failed to meet their burden to show that, as a matter of law, the Court must undertake and Subscriber Plaintiffs must satisfy a full rule of reason inquiry as to each of the challenged practices.

V. CONCLUSION

For the foregoing reasons, Defendants' Motion should be denied in its entirety and Subscriber Plaintiffs' Cross-Motion for Summary Judgment on Defendants' "Singly Entity" Defense should be granted.

This the 18th day of August, 2017

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