

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

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

This document relates to:
Subscriber Track cases

IN RE: BLUE CROSS BLUE SHIELD
ANTITRUST LITIGATION

MDL NO. 2406

[UNREDACTED – CONTAINS
OUTSIDE COUNSEL ONLY
MATERIALS]

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

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I. INTRODUCTION

Defendants cannot reasonably dispute what was stated plainly in the first sentence of Subscriber Plaintiffs’ moving brief: that “through a vehicle they control, potential competitors [Defendants] have agreed not to compete at all on one another’s assigned turf when using particular trademarks and brand names, and have also agreed to put significant limits on their ability to compete on one another’s assigned turf even when using any other trademark or brand name.” ECF No. 1352 at 1 (“Subs.’ Br.”). Instead, Defendants focus principally on two disingenuous assertions:

(1) that they are *immune* from Section 1 of the Sherman Act, 15 U.S.C. § 1, because the 36 independently owned and controlled Member Plans and the BCBSA all constitute a *single entity* that cannot conspire as to matters that may relate to the “governance of the marks”;¹ and

(2) that each of their restraints on competition – territorial market divisions (ESAs) as well as restraints on output (the so-called “best efforts” rules), instituted by potential horizontal competitors – must be evaluated under a full-blown rule of reason if, Defendants say, they can offer *any* plausible procompetitive justification for their “Blue System” generally.

Defendants’ arguments are not only contrary to the facts and the law, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ Defendants also assert that their continuing allocation of and abidance by exclusive service areas (“ESAs”) among themselves should not be considered an agreement subject to Section 1 because it “evolved from” purported common law trademark rights. ECF No. 1432 at 1 (“Defs.’ Opp.”).

[REDACTED]

[REDACTED] and this Court should condemn such blatant horizontal agreements. The Court can take comfort that the proffered “necessity” of ESAs to protect the marks was admitted to be a fiction by BCBSA’s own corporate representative: “Q: But are the Exclusive Service Areas necessary to protect the brands? . . . A: The Exclusive Service Areas support the brands. As I testified earlier, I have no particular opinion one way or another on whether they’re necessary.” SX326, 8/29/17 Hedges Dep. (BCBSA 30(b)(6)) 270:13-20; *see also id.* 223:24-224:8 (“no opinion” on any appropriate size of any ESA); SX328, BCBSA0378167 at ‘174 (“ESAs and Unbranded are two sides of the same coin”).

Defendants cannot shelter an anticompetitive restraint from *per se* condemnation by surrounding it with *other* restraints, labeling their practices generally a “Blue System,” and claiming that they may be able to assert a procompetitive justification for the scheme. As discussed herein,

² [REDACTED]

Defendants concocted this standard – a perverse incentive that plainly would eviscerate the categories of *per se* restraints established by the Supreme Court – from cases that the individual courts expressly conceded involved unique *types* of restraints not present here.

This Court has the authority to evaluate each of the challenged restraints under Section 1, and as to each of them, it should hold the restraint to be unlawful *per se*. In the alternative, it should find these restraints unlawful under a “quick look” rule of reason.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

Defendants concede that ¶¶ 2-6, 9, 15, 16, and 17 of Subscribers’ Statement of Undisputed Material Facts are indeed undisputed. Together with the paragraphs that remain undisputed in any material respect (¶¶ 11, 13, 18, 20, 21, and 26), they are more than sufficient for the adjudication sought by Subscriber Plaintiffs. That showing is unaltered in any material way by Defendants’ assertion of purported “Additional Undisputed Relevant Material Facts” for the reasons stated herein.³ Nonetheless, Subscriber Plaintiffs respond to Defendants’ assertion of “Additional Undisputed Relevant Material Facts” as follows:

53. In 1947, the United States Public Health Service (“USPHS”) observed the service areas in which Plans operated and noted the governance structure in place for Blue Cross and Blue Shield Plans. Subs.’ Br. at Subs.’ Response to Defs.’ Undisputed Material Relevant Facts (“Subs.’ RUMRF”) ¶ 5. To the extent the Plans imply that the service areas arose organically, that is disputed. *Id.* ¶¶ 5, 7. The rest of this paragraph is not disputed.

³ Subscriber Plaintiffs have sought to provide the Court with a comprehensive picture of the challenged restraints. It is not necessary, of course, for the Court to find all of the proffered facts to be undisputed to rule in Subscriber Plaintiffs’ favor. And contrary to Defendants’ implication (*see* Defs.’ Opp. at 23 n.3), summary judgment is not determined or precluded by the length of briefing or number of exhibits.

54. The ESAs have been reduced to writing in “service manuals” since at least the 1940s. SX159, Wilson Dep. 52:22-53:5, 243:3-7, 270:13-15.

55. Service manuals were later converted to “Map Books”, which describe on a county-by-county basis which Plan is allowed to offer Blue-branded health insurance in each county in the country. SX160-SX174. Far from being on the public record, these Map Books are extremely sensitive at BCBSA and are not even distributed to the Plans; they are only distributed to a limited number of BCBSA employees, and those employees are instructed not to disseminate the Map Book and to shred any pages when replaced. SX319, BCBSA03878588.

56. Inter-Blue competition, in which multiple Plans used the Blue marks within the same area, has been prevalent throughout the Plan’s history, with no apparent detrimental effect to the Blue System. Subs.’ RUMRF ¶ 8; SX316, Rubinfeld Decl. ¶ 62.

57. The system of forced mergers created through the Long Term Business Strategy significantly reduced competition, through combining competing Blue Cross and Blue Shield Plans and through consolidating multiple Plans within a state. Subs.’ RUMRF ¶ 20.

58. Prior to the 1950s “license agreements”, Plans made unlicensed, uncontrolled use of the Blue Cross and Blue Shield marks without any license from the senior users (the St. Paul Plan and Buffalo Plan), resulting in abandonment of common law trademark rights. ¶¶ 4, 7. Even if one assumes the 1952 and 1954 Agreements between the national organizations and the Plans to be “license agreements,” by that time the marks had been abandoned, and there were no legitimate rights to be licensed. *Id.*

59. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Any fiduciary duty owed to BCBSA must be consistent with and cannot trump the duties those Board members owe to their own respective Plans; Anthem’s CEO testified that he did not “abandon and relinquish [his] fiduciary duties to Anthem and Anthem shareholders” when he acted as a BCBSA Board Member. SX291 28:20-25. When asked recently what he would do if there was a conflict between BCBSA and the Plans, he testified that he “could not speculate” what he would do and that he had to be “mindful of my role with Anthem”—directly contradicting Plan’s current position that a Board member owes a greater duty to BCBSA than to his own Plan. *Id.* 29:1-32:6.

60. – 62. It is disputed that the uncoupling rules were in any way required to protect the value of the marks. When the rules were adopted, Plans challenged their necessity and the underlying basis for their adoption. DX145 (“The research does not make a compelling case that overall Blue brand equity has declined.... To attribute a one point drop in 1998 to double branders is quite a stretch.”) When discussing the adoption of uncoupling rules, BCBSA’s Brand Development and Promotion Committee admitted that any uncoupling regulations it adopted “are premature because Brand strength may rebound without these actions.” SX320, BC-IDAHO-MDL000216279 at ‘294.

63. The BlueCard does not require the challenged restraints, nor is BlueCard the only method by which the Plans could service national accounts. Subs.’ RUMRF ¶ 22. There is no evidence that removing the restraints would impact the Plans’ local focus. *Id.* ¶¶ 30-31.

64. [REDACTED]

65. Defendants' contentions concerning the legal impact of terminating the license agreements are inappropriate for a statement of undisputed facts. Furthermore, it is disputed that the Plans have independently acquired common law trademark rights in the first instance, let alone common law trademarks with geographical exclusivity that matches the ESAs Defendants have imposed. Subs.' RUMRF ¶¶ 4, 7. Even Defendants' expert could not testify unequivocally that a single Blue Plan could not compete for national accounts. SX232, Murphy Dep. 193:3-194:15. Multiple alternatives to the current restraints exist that would allow Plans to service national accounts. RUMRF ¶ 22. And there is no evidence that removing the restraints would cause Plans to lose their local focus. *Id.* ¶ 31. At any rate, Defendants' own hand-picked subscriber witness testified that "it really doesn't matter" that the Plan providing her insurance was local. SX325, 9/13/17 Fohrd (Seneca Foods) Dep. 68:22-69:10.

III. LEGAL ARGUMENT

Defendants alternatively argue that: (i) this Court cannot subject their conduct to scrutiny under Section 1 of the Sherman Act and (ii) if it can, it would be "unprecedented in judicial history", Defs.' Opp. at 2, for the Court to evaluate any of the restraints under anything short of a full-blown rule of reason analysis. Neither of these contentions has merit.

A. The Anticompetitive Restraints Are Subject to Section 1 of the Sherman Act.

1. The BCBSA and the 36 Member Plans Are Not a “Single Entity.”

a. Defendants Have Repeatedly Disclaimed Being a Single Entity.

Defendants cannot deny that they are actual or potential competitors, that they have entered into a geographical allocation of the market for the provision of health insurance, and that they have otherwise agreed to limit competition among them through the NBEs and LBEs. So instead, Defendants have promoted a footnote in their dismissal papers to their lead argument here – contending that Section 1 of the Sherman Act does not apply at all because the 36 Member Plans and the BCBSA should be treated as a “single entity” with respect to the challenged conduct. Defs.’ Opp. at 19.

Defendants’ single entity argument finds no support in the law, as discussed below, or in the facts.⁴ As Mark Twain observed, “If you tell the truth, you don’t have to remember anything.” The truth is that Defendants’ executives have freely admitted—indeed *insisted*—in testimony here, and in documents over the decades, that they are *not* a single entity. *See, e.g.*, [REDACTED]

[REDACTED] SX224 at slide 135; SX9, Leahey Dep. 265:8-13 (“they 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 at ‘45; SX248, 7/25/17 Serota Dep. 103:10 - 104:5 (according to BCBSA President, “the member Plans operate as individual independent financial entities. They do not integrate as a -- they do not operate

⁴ For the same reasons, the Court should grant Subscriber Plaintiffs’ cross-motion for summary judgment on the single entity defense.

as a[n] integrated economic system.”); SX228 at ‘539 (letterhead reading “BlueCross BlueShield Association . . . An Association of Independent Blue Cross and Blue Shield Plans”); SX321, WLP-08105309 at ‘310 (suggesting a correction to any advertising “that tend[s] to create or enhance the public’s misperception of the Blues as a unified national entity”); SX322, WLP-05573078 at ‘083 (Anthem CEO Swedish: “[T]here’s this presumption that somehow all of Blue Cross Blue Shield functions as one company. Simplistically put, that simply is not the case.”); SX326, Hedges Dep. 247:23-248:4 (in response to whether the Blue Plans are a single entity, BCBSA’s corporate representative stated “the member Blue Plans are independent companies who are part of the Blue Cross Blue Shield Association”).

Moreover, Defendants have recognized for decades the potential illegality of the challenged conduct under Section 1 of the Sherman Act. *See, e.g.*, SX207 at ‘755 (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 Board of Directors 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; SX301; [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

separate for the purposes of incorporation or formal title, they are controlled by a single center of decisionmaking and they control a single aggregation of economic power. Joint conduct by two such entities does not deprive the marketplace of independent centers of decisionmaking.

American Needle, 560 U.S. at 194 (internal quotations omitted).

Thus, the foundation of Defendants' argument – a function-by-function toggle switch for single entity status – lacks support.⁵ Indeed, for nearly a century, the Supreme Court has treated joint ventures, trade associations, and similar organizations' rules or bylaws imposing duties and restrictions on the conduct of their members' separate business as agreements among those members subject to scrutiny under Section 1, regardless of the function involved.⁶

Furthermore, the basic holdings of *American Needle* make clear that the challenged conduct here is subject to Section 1. In *American Needle*, the Supreme Court declared that the relevant inquiry in making the single entity determination is “whether there is a ‘contract, combination . . . or conspiracy’ among separate economic actors pursuing separate economic interests.” 560 U.S. at

⁵ Defendants also rely on *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996), as support for their function-by-function argument. However, the court in that case merely hypothesized about the possibility of such a test for the conduct of a sports league, *id.* – a hypothesis never adopted in *American Needle*.

⁶ See, e.g., *California Dental Ass'n v. FTC*, 526 U.S. 756, 759-60 (1999) (dental association rule limiting members' advertising); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 451 (1986) (dental association rule forbidding members from submitting x-rays to insurers); *NCAA v. Bd. Of Regents*, 468 U.S. 85, 99 (1984) (association plan restricting members' licensing of television rights); *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 357 (1982) (medical society's schedule of maximum prices); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 681 (1978) (engineering society's ethical canon barring competitive bidding); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 781-83 (1975) (bar association's fee schedules); *Topco*, 405 U.S. at 602-03 (joint-venture bylaws setting exclusive territories for members); *United States v. Sealy, Inc.*, 388 U.S. 350, 352-54 (1967) (same); *Associated Press v. United States*, 326 U.S. 1, 4, 8 (1945) (news service bylaws prohibiting members from selling news to nonmembers); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 461-63 (1941) (apparel guild rules prohibiting sales to certain retailers); *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (commodities exchange rule governing members' off-exchange transactions).

195. It added that an agreement is concerted action if it “deprives the marketplace of independent centers of decisionmaking . . . and thus of actual or potential competition.” *Id.* As in *American Needle*, each Member Plan “is a substantial, independently owned, and independently managed business” with distinct and potentially competing interests. *Id.* at 196.⁷ And as in *American Needle*, the Plans are separately controlled, potential competitors with economic interests that are distinct from BCBSA’s financial well-being. *See id.* at 201. Here too, but for the collective decisions made through BCBSA, “there would be nothing to prevent each of the [Plans] from making its own market decisions” as to where it determined to do business. *See id.* at 200.⁸

Indeed, the Supreme Court stressed in *American Needle* that it had “repeatedly found instances in which members of a legally single entity violate § 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*, 388 U.S. at 352-56). *See also American Needle*, 350 at 192 (reaffirming that the licensor in *Sealy* was “an instrumentality of the individual manufacturers,” and that it had previously “found other formally distinct business organizations covered by § 1” and citing, *inter alia*, *Topco*, 405 U.S. at 609).

⁷ Defendants argue in a footnote that this fact does not establish concerted conduct, relying in part on *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5-8 (2006). (Defs.’ Opp. at 26 n.1) They fail to note that the defendants in that case had exited the market, leaving only the joint venture to operate going forward.

⁸ Defendants attempt to distinguish *American Needle* on the ground that the NFL teams separately owned the trademarks involved, arguing that here “no Plan has ever owned the assets necessary to govern the use of the Blue Marks nationwide” but instead integrated their previously individually owned trademarks into the BCBSA, which holds the applicable federal registrations. Defs.’ Opp. at 19-20. Notably, however, in both *Topco* and *Sealy* (both of which were relied upon in *American Needle*), formal ownership of the trademarks was vested in the licensor. *See Sealy*, 388 U.S. at 351-52; *Topco*, 405 U.S. at 596. Nevertheless, the territorial divisions involved were subjected to analysis under Section 1.

Finally, Defendants' reliance on *Washington v. NFL*, 880 F. Supp. 2d 1004 (D. Minn. 2012), and *Spinelli v. NFL*, 96 F. Supp. 3d 81 (S.D.N.Y. 2015), for their single entity theory is misplaced. Both of those cases involved the licensing of historic game footage and photos – *i.e.*, the intellectual property involved had always been owned in whole or part by the NFL itself – and thus the product *could not* be produced by any one entity. *See Spinelli*, 96 F. Supp. 3d at 114; *Washington*, 880 F. Supp. 2d at 1006. Furthermore, as the Supreme Court explained in *American Needle*, “[t]he justification for cooperation is not relevant to whether the cooperation is concerted or independent action,” as indeed, “[m]embers of any cartel could insist that their cooperation is necessary to produce the ‘cartel product’ and compete with other products.” 560 U.S. at 199 & n.7.

2. Even Assuming, *Arguendo*, That the Plans' Service Areas Stemmed From Common-Law Trademark Rights, That Would Not Excuse Subsequent Antitrust Violations.

Defendants also claim their conduct cannot be scrutinized under Section 1 because, they assert, “Plan service areas stem from pre-existing common-law trademark rights, not an unlawful agreement to allocate markets.” Defs.’ Opp. at 20. Regardless of whether there were service areas prior to Defendants’ allocation of ESAs, that does not insulate a subsequent agreement and adherence to an unlawful territorial market division. ECF No. 1352 at 38-42. That is the fundamental difference between this case and the Supreme Court’s decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). In *Twombly*, the Supreme Court found insufficient factual allegations to support a ruling that the defendant telephone companies plausibly may have entered into an agreement to divide their geographic markets, as distinguished from a unilateral determination of each to continue to act as in the past. *Id.* at 566-69. No such uncertainty of a subsequent agreement exists here. Thus, what may once have been lawful unilateral conduct pursuant to any claim the Plans had to geographic exclusivity through concurrent geographic trademark registrations permitted

under the Lanham Act (a claim we dispute), nonetheless became subject to analysis under Section 1 of the Sherman Act once they admittedly agreed to the ESAs.

Relying on *VMG Enterprises, Inc. v. F. Quesada & Franko, Inc.*, 788 F. Supp. 648, 657 (D.P.R. 1992), Defendants contend that “an agreement that does not ‘create a trademark territorial division [but] merely recognized it’ does not violate § 1.” Defs.’ Opp. at 21. The district court’s (questionable) decision in *VMG* did not so hold. The parties in that case had obtained concurrent use trademark registrations containing territorial limitations, as permitted under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052. However, parties may not use such trademarks to violate the antitrust laws. 15 U.S.C. § 1115(b)(7).⁹ The defendant counterclaimed that the parties had entered into a subsequent agreement to divide geographic markets in violation of Section 1 of the Sherman Act. *VMG*, 788 F. Supp. at 653.

The district court dismissed the counterclaim for a number of reasons: (i) no specific facts had been alleged to support the conclusory market allocation contention in the counterclaim; (ii) the defendant had alleged no facts required to state a valid claim under Section 2 of the Sherman Act; and (iii) antitrust policy had not been violated because the parties had continued to compete, albeit with the defendant using a different trademark. *Id.* at 657-58. The court did not explain why it evaluated the claim under Section 2, rather than Section 1, pursuant to which the claim had been made. And the district court did not hold that the trademark laws permit parties to enter into agreements dividing geographic markets – indeed, 15 U.S.C. § 1115(b)(7) prohibits such

⁹ See *Phi Delta Theta Fraternity v. J.A. Buchroeder & Co.*, 251 F. Supp. 968 (W.D. Mo. 1966), sending to trial a claim that the owner of a concurrent use registration had used it to violate the antitrust laws.

agreements.¹⁰

B. Defendants’ Agreements Are Not Exempt From – And Properly Should Be Addressed Under – The Rule of *Per Se* Liability Made Clear in *Sealy* and *Topco*.

1. The Restraints Are Anticompetitive On Their Face and Not “Unique.”

Each of Defendants’ practices challenged by Subscriber Plaintiffs falls into a category of restraints of trade long recognized by the Supreme Court as *per se* unlawful – allocation of geographic markets among potential competitors and horizontal agreements to restrain output.¹¹ The fact that Defendants’ collusion is taking place in the health insurance business or that Defendants label their restraints euphemistically cannot change the nature of those restraints. And contrary to Defendants’ assertion, it is not the law that unless the courts have “examined such restraints arising in the particular fact pattern at issue, the *per se* rule cannot apply.” Defs.’ Opp. at 42. “The Supreme Court has held that it is the court’s experience with the type of restraint that is relevant in applying the *per se* rule, not the industry or the precise factual circumstances of the case.” *In re Terazosin Hydrochloride Antitrust Litig.*, 352 F. Supp. 2d 1279, 1312 n.32 (S.D. Fla. 2005) (citing *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 357 (1982)); *see also In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 900 (6th Cir. 2003).

Also contrary to Defendants’ argument (*see* Defs.’ Opp. at 23), these defined categories of *per se* unlawful restraints have not been revisited by the Supreme Court or the Eleventh Circuit so

¹⁰ *Lone Star Steakhouse & Saloon, Inc. v. Longhorn Steaks, Inc.*, 106 F.3d 355, 365-66 (11th Cir. 1997), the other decision relied on by defendants, Defs.’ Opp. at 20, merely stands for the proposition that concurrent use trademarks are permitted under the Lanham Act.

¹¹ From an economic perspective, too, as observed by a former head economist for the Antitrust Division, “the ESAs and the best efforts clauses are restraints on competition on their face that have recognized anticompetitive effects.” SX316, Rubinfeld Report ¶ 14. Economically, the ESAs and the best efforts clauses represent, respectively, “an agreement not to compete by dividing geographic markets” and a limitation on “the ability of individual Blues to compete outside their designated service areas.” *Id.* ¶¶ 40, 47.

that they must be presumed to be subject solely to evaluation under a full-blown rule of reason *unless* plaintiffs can demonstrate the absence of any “plausible” procompetitive justification for the specific restraint at issue. Such a case-specific, burden-shifting articulation is not found in the cases cited by Defendants – and for good reason: it would defeat the purpose of the long-established selection of *per se* categories.¹² The Supreme Court has made clear that the lower courts should follow its precedent *even if* it “appears to rest on reasons rejected in some other line of decisions.” *see Agostini v. Felton*, 521 U.S. 203, 237 (1997). An example is the much-criticized *per se* rule against resale price maintenance (vertical price fixing) set forth in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), overruled by the Supreme Court 96 years later in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

Moreover, here Defendants have offered *no* persuasive authority to find the application of the *per se* rule in *Sealy* and *Topco* to have been effectively overturned. To the contrary, each of the handful of cases relied upon by Defendants for their *ipse dixit* that “*Sealy* and *Topco* cannot control”, Defs.’ Opp. at 27, instead demonstrates that departures from the *per se* standard for agreements in those families of classic horizontal restraints¹³ have been rare and occurred only when courts found

¹² The fact that most types of conduct are evaluated under the rule of reason rather than treated as *per se* unlawful (*see* Defs. Opp. at 23) only underscores the importance of adherence to the *per se* rule for select categories of horizontal restraints. The recognition of such types of restraints by economists as inherently anticompetitive is notable since, as Dr. Rubinfeld observed, “like most economists, [I] tend[] to like rule of reason because that creates more work for economists.” SX327, 9/1/17 Rubinfeld Dep. at 82:19-21. It is not germane that Dr. Rubinfeld did not “study” the effects of the restraints on different segments of the healthcare market, despite repeated questioning at his deposition. Rather, it is his economic opinion that such study is not necessary with respect to ESAs and best efforts restraints because the restraints are anticompetitive “on their face”. *Id.* 32:13-33:6.

¹³ Notably, Defendants include *Leegin* and *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), as support for their argument that the *per se* rule should not be applied to the horizontal market divisions and output restraints challenged here. *See* Defs.’ Opp. at 23, 25. Both of those cases, however, involved *vertical* restraints. The nature of the *challenged* agreements here, not of

themselves in truly *uncharted territory* such that *stare decisis* did not apply:

- *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), and *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 344 F.3d 1294 (11th Cir. 2003), involved temporal (not territorial) market divisions through the 180-day exclusivity period established by *Congress* – what the Supreme Court called “Hatch-Waxman’s unique regulatory framework.” *Actavis*, 133 S. Ct. at 2235. And the *Actavis* Court’s decision to analyze the patent settlement agreement under the rule of reason turned on the unique legal context in which such agreements are made, including (1) the interplay between the exclusionary rights granted under patent law and the procompetitive principles of antitrust law, *id.* at 2231, (2) a background of Supreme Court precedents holding that some patent settlement agreements do not violate the antitrust laws, *id.* at 2231-33, and (3) the “general legal policy favoring the settlement of disputes,” *id.* at 2234. None of these unique considerations is present here.

- *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979) (“*BMI*”), and *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984), as the Court knows well at this point, were cases in which the restraint was “essential if the product is to be available at all.” *NCAA*, 468 U.S. at 86. Unlike a blanket license for millions of compositions that no entity could offer in *BMI* and collegiate sports in *NCAA*, the product here is a familiar one, as conceded by Defendants’ proffered expert Dr. Murphy – simply “medical insurance” that not only is offered by other insurers, but concededly could be offered in tandem by Blues together using transfer fees. SX232, Murphy Dep. 22:15-20, 65:18-21.

- *Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072 (11th Cir. 2016) did not involve a classic category of restraint. Indeed, the Eleventh Circuit panel expressly observed that there was “not [] a

other understandings or other relationships between or among parties, is what is at issue – and it is plainly horizontal.

great deal of experience with the kind of case [] here” (*id.* at 1084)-- *unilateral* action by one party (and thus not subject to Section 1 at all) relative to a lawful joint venture that subsequently *resulted* in what *might be called* a market division. The appellate panel expressly noted that distinguished *Procaps* from *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990), and indeed found the case to really be a breach of contract case masquerading as an alleged antitrust violation. *See Procaps*, 845 F.3d at 1087. That could hardly be more different than the *expressly agreed-upon restraints of trade* at issue in this litigation.

- Defendants also rely heavily on two decisions by Judge Posner in the Seventh Circuit: *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985), and *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004 (7th Cir. 2012). The extraordinary factual distinguishability of *Polk Bros.* (an ancillary restraint emanating from a joint venture by two retailers in the construction of a single building) and the express language of *Sulfuric Acid* (“we have never seen or heard of an antitrust case quite like this, combining such elements as involuntary production and potential antidumping exposure,” 703 F.3d at 1011) underscore that those *sui generis* cases neither alter the applicable *per se* categories nor have any relevance here.

Defendants proffer purported factual distinctions between their conduct and that at issue in *Topco* and *Sealy*, none of which have merit, for reasons already well-articulated to the Court. ECF No. 1435 at 40-42 (“Subs.’ Opp.”); *see also* ECF No. 1431 at 41-44 (“Provs.’ Opp.”). Defendants’ long-winded claims of purported procompetitive justifications, like *Topco*’s assertion that its exclusive territorial divisions were necessary to compete with larger regional and national chains, do not spare the restraints from *per se* treatment. At bottom, Defendants’ principal argument is that *Topco* and *Sealy* “cannot control” in light of newer law, but such a rejection of precedent is inappropriate, both legally as well as factually.

2. At Most, Defendants’ Conduct Can Be Addressed By a “Quick Look” Analysis

Subscriber Plaintiffs submit that *per se* condemnation of each of the challenged restraints properly should be the end of the inquiry here, and have moved for partial summary judgment accordingly. Regardless, the challenged restraints are inherently suspect. In the event that the Court were to determine that any of them merits a “quick look,” or very limited factual review, to assess whether Defendants can shoulder the burden that shifts to them to rebut the *per se* presumption, *see Terazosin Hydrochloride*, 352 F. Supp. 2d at 1310-11, Subscriber Plaintiffs respectfully submit that it is clear the restraints would not survive such an examination.¹⁴ The advantages of either application of a *per se* rule or a quick look analysis are speed and efficiency. Both are important here because Defendants’ conduct is impeding the availability of lower prices to subscribers, artificially restraining output, and limiting subscriber choices.

The Court need not look to argument by Subscriber Plaintiffs or conclusions by economists in this litigation for that evidence. The anticompetitive effects of the Blue System restraints challenged here are manifest, apparent, and real – as articulated in studies of the Blues by the American Hospital Association (“AHA”) and a worldwide consulting firm, Law and Economics Consulting Group (“LECG”), in unrelated merger contexts. In a copiously-annotated February 29, 2016 letter brief to the DOJ, challenging the contemplated merger between Anthem and CIGNA,¹⁵ the AHA pointed out that “Blue plans currently dominate the health insurance market in most states”

¹⁴ These are not restraints that are merely “ancillary” to lawful exploitation of trademarks – and indeed, [REDACTED]

¹⁵ The AHA, of course, is the same organization cited by Defendants as setting the standards governing the use of the Blue marks back in the 1940s.

and control 105 million lives. SX200 at 2. Collectively, the Blues are three times bigger than any other health plan, *id.* at 7, and they had \$244 billion in revenue in 2013, making them larger than all Fortune 500 companies other than Wal-Mart and Exxon Mobil. *Id.* In many states, they are “many times larger than their largest competitor.” *Id.* at 3. With respect to commercial fully insured health care coverage, the Blues command the largest share in 45 states and the District of Columbia, holding above a 50% market share in 35 states and 85% in others. *See id.* at 7-8.

The AHA observed that the BCBSA rules prevented Anthem from negotiating discounts with providers for its non-Blue business outside its assigned territory; it gave the example of Anthem buying the insurance units of John Hancock and Massachusetts Mutual in 1996 and Methodist Health Care in 2002, and operating them under the UniCare (non-Blue) label. Anthem tried to negotiate discounts with providers for UniCare outside of its ESAs but the BCBSA rules prevented that. Anthem transferred the UniCare business to HCSC in 2009. *Id.* The reason, according to both AHA and Anthem, was that “it could not compete effectively outside its assigned territories against another Blue.” *Id.* The result was loss of output, consumer choice and competition. The AHA concluded therefore that the BCBSA rules actively prevent Blue-on-Blue competition, including even unbranded competition. As it stated, “[t]he majority of Blue plans do not compete in the sale of their products” and have little financial incentive to do so outside their respective ESAs. *Id.* at 12. The AHA noted that:

The absence of sales opportunities is a product of both the Association’s rules and the terms of the Blue licensing agreements. The rules restrict each Blue plan to sales within a specific geographic territory. The license agreement prevents a Blue from selling or advertising Blue products and from contracting with providers outside of its assigned territories, called a Service Area. While Blue plans may own non-blue subsidiaries, Association rules prevent those subsidiaries from growing large enough to pose a competitive threat to another Blue plan.

Id. (footnote omitted). Blue plans also dominate public health exchanges. *Id.* at 7. This leads to

higher prices for subscribers, as explained by the AHA:

A recent study looking at pricing changes on 34 state exchanges found that the “largest insurance company in each state on average increased their rates 75 percent more than smaller insurers in the same state,” and increases did not appear to be related to higher medical costs. “In most states insurers with large market share [overwhelmingly Blue plans] have proposed rate increases in excess of 20 percent for next year.” These studies seem to suggest that Blue premiums are higher in states where they are dominant and any network efficiencies they enjoy as a result do not translate into lower premiums for consumers.

Id. at 18 (footnote omitted). The contemplated increases ranged from 21 to 52 percent. *Id.* at 18-19.

These kinds of tactics once again limit output, restrict consumer choice and cause consumers to pay higher rates for health insurance.

Similarly, when the Pennsylvania Insurance Department commissioned a study by in 2009 in connection with its examination of the proposed merger of two Blue plans (Highmark and IBC), it sought to evaluate the argument that Blue-on-Blue competition resulted in less insurance leverage with healthcare providers, and higher medical costs that were passed on to subscribers. SX324, CAREFIRST_ESI_02765237. LECG concluded to the contrary: when there is monopoly power in health insurance in a state, the leverage thereby exercised by a monopsonist insurer to cause healthcare providers to lower their prices does *not* result in reduced prices being passed on to subscribers in the form of lower premiums, but instead leads to *increases* in that dominant insurer’s profit margins. *Id.* at ‘245. Further, LECG concluded that “[o]verall, not only does the existence of monopsony in health insurance create the risk that health care customers will pay higher nominal premiums, but that they will likely also suffer from the quantity and quality of provider care.” *Id.*

IV. CONCLUSION

For the foregoing reasons, each of the challenged restraints is subject to a *per se* rule, and none requires the undertaking of a full-blown rule of reason analysis to find it anticompetitive.

This the 15th day of September, 2017

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