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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:** **ALL CASES**

PROVIDER AND SUBSCRIBER PLAINTIFFS' JOINT OPPOSITION TO DEFENDANTS' MOTION TO DISMISS ARGUMENTS COMMON TO BOTH PROVIDERS AND SUBSCRIBERS

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INTRODUCTION

Provider and Subscriber Plaintiffs, by undersigned counsel, respectfully submit this Joint Opposition to Defendants' Motion to Dismiss Arguments Common to Both Providers and Subscribers. The Provider Plaintiffs and Subscriber Plaintiffs are filing separate oppositions to respond to Defendants' arguments that are not common to both Providers and Subscribers.

ARGUMENT

I. DEFENDANTS' HORIZONTAL MARKET ALLOCATION IS A *PER SE* VIOLATION OF THE SHERMAN ACT.

Defendants claim that their agreement to allocate markets is not a *per se* violation of the Sherman Act for three reasons. First, they argue that their "service areas" did not result from a horizontal agreement. [Dkt. 120 at 26-28]. To the contrary, the Supreme Court has made clear that agreements potential competitors make with a licensing organization they control constitute horizontal agreements among competitors. Second, Defendants claim that their service areas have procompetitive benefits. [*Id.* at 28-38]. This argument reflects a basic misunderstanding of the *per se* rule; if a practice is unlawful *per se*, then a court does not look for or consider procompetitive benefits arising from that practice. Third, they contend that judicial experience has not demonstrated that "service areas" (i.e., dividing markets among competitors on a geographic basis) are manifestly anticompetitive. [*Id.* at 38-40]. This argument is simply false. Time and again, the Supreme Court and Eleventh Circuit have condemned horizontal market allocations as so repugnant to competition that they are unlawful *per se*. *Topco* and *Sealy*, which Defendants struggle unsuccessfully to distinguish, are just two examples in an unbroken line of cases confirming that potential competitors cannot allocate markets among themselves, period. *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967). Moreover, all three arguments suffer from the same fatal flaw: they cannot be

credited on a motion to dismiss because they contradict or ignore the well-pleaded allegations of the Complaints.

A. Dismissal Under Rule 12(b)(6) Is Inappropriate Because Defendants' Arguments Rest on Disputed Issues of Fact.

Defendants' basic argument—that neither the Subscriber Plaintiffs nor the Provider Plaintiffs allege a *per se* antitrust claim and that the Subscriber Plaintiffs fail to allege a rule of reason antitrust claim—stumbles at the outset because it raises factual issues that cannot be decided on a motion to dismiss. The Eleventh Circuit has held that "[w]hether to apply a per se or rule of reason analysis is a question of law . . . , predicated on a factual inquiry." *Nat'l Bancard Corp. (NaBanco) v. VISA U.S.A., Inc.*, 779 F.2d 592, 596 (11th Cir. 1986).[1] "Moreover, the Court [should be] mindful that in antitrust actions, where the proof is largely in the hands of the alleged conspirators, summary dismissals prior to allowing the plaintiff ample opportunity for discovery should be granted even more sparingly." *Ben Sheftall Distrib. Co., Inc. v. Mirta de Perales, Inc.*, 791 F. Supp. 1575, 1579 (S.D. Ga. 1992). Throughout their motion to dismiss, Defendants try to create several factual disputes by ignoring important allegations in the Complaint and relying on purported facts not contained in them. Below are only a few examples:

- Defendants claim their licensing agreements are vertical because they originated with the American Hospital Association ("AHA") and American Medical Association ("AMA"),

[1] *See also In re High-Tech Employee Antitrust Litig.*, 856 F. Supp.2d 1103, 1122 (N.D. Cal. 2012) ("whether *per se* or rule of reason analysis applies . . . is more appropriate on a motion for summary judgment"); *In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d 827, 865 (N.D. Ill. 2010) (noting that the district court denied summary judgment because "outstanding factual disputes preclude a decision at this point on the applicable legal rule in this case"); *Cont'l Airlines, Inc. v. United Air Lines, Inc.*, 120 F. Supp. 2d 556, 565 (E.D. Va. 2000), *vacated on other grounds*, 277 F.3d 499 (4th Cir. 2002) ("Whether the agreement here at issue should be treated as *per se* unlawful under Section 1 must await the development of a factual record on the nature and effects of the restraint in the relevant market."); *In re Beer Distribution Antitrust Litig.*, 188 F.R.D. 557, 564 (N.D. Cal. 1999) (deferring consideration of whether plaintiffs alleged a *per se* or rule of reason violation to a later stage of the proceedings); *CSR Ltd. v. Fed. Ins. Co.*, 40 F. Supp. 2d 559, 564-65 (D.N.J. 1998) ("At this early stage of the proceeding, the court does not find it necessary to determine which mode of analysis it will ultimately employ in evaluating the defendants' activities. Without discovery, the court cannot make a decision as to whether the conduct alleged is such as would 'always or almost always tend to restrict competition and decrease output' and is, thus, *per se* unreasonable.").

[Dkt. 120 at 27], but they ignore the Complaints' allegations that the current territorial allocation resulted from Defendants' "Long Term Business Strategy," which required all existing Blue Cross plans and Blue Shield plans to consolidate at a local level by the end of 1984, and all consolidated Blue Cross Blue Shield plans within a state to further consolidate, ensuring that each state would have only one Blue Plan by the end of 1985. [Dkt. 86 ("Prov. Compl.") ¶¶ 154-56; Dkt. 99-1 ("Sub. Compl.") ¶ 325]. The "Long Term Business Strategy" was developed long after the AHA and AMA dissociated themselves from the Blues.

- Defendants claim several procompetitive benefits that have no basis in the Complaints. For instance, they contend that because the District of Columbia Circuit once held that certain restrictions on competition increased the efficiency of a van line, the Court should assume that the Blues' service areas increase the efficiency of health care. [Dkt. 120 at 32–33]. Defendants make no attempt to explain how a conclusion like this can be made on a motion to dismiss, and their lack of justification is especially glaring because the case in question, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), did not address a horizontal market allocation.
- Defendants claim that market allocation allows them to create a new product that otherwise would not exist. [Dkt. 120 at 29-31]. An argument that a restraint of trade is necessary to the existence of a product "is an inherently factual contention that cannot be properly resolved on a motion to dismiss." *Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d 1127, 1131 (N.D. Cal. 2005).
- Defendants argue that regulators have concluded that service areas are beneficial. [Dkt. 120 at 38-39]. These arguments rest on erroneous assertions drawn from Defendants' hand-picked excerpts from documents that are not properly before the Court. [*See* Sec. II(B), (D)].

Because these and other issues of fact infect Defendants' arguments, the Complaints cannot be dismissed.

B. Under Binding Precedent, Horizontal Market Allocation Is Unlawful *Per Se.*

As much as Defendants try to distance themselves from binding case law, it is a fundamental principle of antitrust jurisprudence that market allocation among potential competitors is *per se* illegal. *See Palmer v. BRG of Georgia*, *Inc.*, 498 U.S. 46, 49 (1990) ("the District Court and the Court of Appeals erred when they assumed that an allocation of markets or submarkets by competitors is not unlawful unless the market in which the two previously competed is divided between them"); *Topco,* 405 U.S. at 608 ("We think that it is clear that the restraint in this case is a horizontal one, and, therefore, a per se violation of § 1."); *Sealy*, 388 U.S. at 357-58 ("arrangements for territorial limitations . . . are unlawful under § 1 of the Sherman Act without the necessity for an inquiry in each particular case as to their business or economic justification, their impact in the marketplace, or their reasonableness"); *see also Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 768 (1984) ("Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se."). In *Topco*, the Supreme Court could not have been clearer:

> "One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. . . . This Court has reiterated time and time again that 'horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.'"

Topco, 405 U.S. at 608 (quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)). The Court held that, "after considerable experience with [these] business relationships," it had determined that horizontal market allocation agreements are *per se* violations of the Sherman Act. *Topco*, 405 U.S. at 607-08.

Defendants contend that *Topco* and *Sealy* "no longer represent the Supreme Court's mode of analysis for the per se rule," [Dkt. 120 at 35], but that is simply false. More recently, in *Palmer*, the Eleventh Circuit had applied a rule of reason analysis to the claim that a trademark licensing agreement between competing bar review courses amounted to illegal horizontal market allocation. *Palmer*, 874 F.2d at 1424-26. The Supreme Court *summarily* reversed, rejecting the Eleventh Circuit's attempt to limit—even in a small way—the applicability of the *per se* doctrine to horizontal market allocation. *Id.* at 48-50. The Court quoted and relied on *Topco*, concluding that "[e]ach [defendant] agreed not to compete in the other's territories. Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other." *Id*. at 49-50.[2] Since *Palmer* was decided, the Supreme Court has cited *Palmer* and *Topco* for the proposition that "[r]estraints that are per se unlawful include horizontal agreements among competitors to fix prices or divide markets." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). Overall, the Court has cited *Topco* thirty-two times and *Sealy* seven times, never implying that these cases are infirm.[3]

Defendants do not cite a single case in which the Supreme Court has questioned the vitality of *Topco* and *Sealy*, because none exists. Instead, they cite several opinions in which the Court has narrowed the scope of the *per se* rule in other areas. [Dkt. 120 at 36-37]. But none of these cases removed horizontal market allocation from *per se* treatment. It is a testament to the indefensibility of horizontal market allocation that it remains unlawful *per se* even after the *per*

[2] In light of *Sealy*, *Topco*, and *Palmer*, it is frivolous for the Blues to argue that "the per se rule does not apply to trademark and similar intellectual-property restraints." [Dkt. 120 at 33]. All of these cases applied the *per se* rule to the defendants' use of their trademarks.

[3] *See also* Gregory J. Werden, *The Application of the Sherman Act to Joint Ventures: The Law After* American Needle, 12 Sedona Conf. J. 251, 258 (Fall 2011) (observing that *American Needle* "did extensively and approvingly cite the *Sealy* and *Topco* decisions which applied the per se rule to joint ventures. That is significant because some commentators presumed these decisions had been overruled *sub silentio.*").

se doctrine has become so limited. Moreover, dismissal would be especially inappropriate here because only one of the cases Defendants cite was decided on a motion to dismiss[4]—*FTC v. Actavis, Inc.*, in which the Supreme Court held that the respondent's settlement agreement did not have an obvious anticompetitive effect. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2237 (2013)—and that case is of no use to Defendants, because the applicability of the *per se* rule was not even at issue. Rather, the question was whether reverse payment settlement agreements resolving patent disputes in the pharmaceutical industry are immune from antitrust attack in the first place. *Id.* at 2227. In that very different context, the Court acknowledged that "the anticompetitive consequences [of such agreements] will at least sometimes prove unjustified," and that defendants may be able to justify such agreements under the rule of reason. *Id.* at 2235–36. To the extent that this acknowledgement constitutes a holding that the rule of reason governs such agreements, it turned on the unique legal context in which such agreements are made, including the interplay between two federal legal schemes, patent and antitrust law, *id.* at 2231, a background of Supreme Court precedents holding that patent settlement agreements do not always violate the antitrust laws, *id.* at 2231–33, and the "general legal policy favoring the settlement of disputes," *id.* at 2234. Here, by contrast, none of those unique considerations are present: there is no collision between two federal legal schemes (as explained below in Sec. III, federal trademark law cannot be used to circumvent the Sherman Act's mandates), there are no

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[4] *See Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57–59 (1977) (decided at trial); *Broad. Music, Inc. v. Columbia Broad. Sys. (BMI)*, 441 U.S. 1, 2, 9-10 (1979) (decided at trial; the Supreme Court cited *Topco* as an example of a horizontal arrangement that after "considerable experience" should be subject to the *per se* rule); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla. (NCAA)*, 468 U.S. 85, 99 & nn.18 & 19, 101 (1984) (decided at trial; the Supreme Court cited *Topco* and *Sealy* as examples of horizontal restraints that "ha[ve] often been held to be unreasonable as a matter of law"); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) (decided on summary judgment; the Supreme Court cited *Topco* as an example of the benefits of the *per se* rule); *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997) (decided on summary judgment); *Leegin*, 551 U.S. at 886 (decided at trial; the Supreme Court cited *Palmer* for the proposition that horizontal agreements to divide markets are *per se* unlawful); *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203-04 (2010) (decided on summary judgment; the Supreme Court repeatedly cited *Sealy* and *Topco*).

Supreme Court precedents upholding the validity of horizontal market allocation agreements, and there is no general legal policy favoring such agreements. Defendants' agreements to allocate markets are of a kind so obviously anticompetitive that the Supreme Court has repeatedly condemned them "without the necessity for an inquiry in each particular case as to their business or economic justification, their impact in the marketplace, or their reasonableness." *Sealy*, 388 U.S. at 357–58. In fact, *Actavis* cited the "agreement to divide territorial markets" in *Palmer* as an example of an unlawful agreement not to compete. 133 S. Ct. at 2230. Therefore, there is no basis in Supreme Court precedent to question that horizontal market allocation remains unlawful *per se*.[5]

Furthermore, the Eleventh Circuit also has affirmed the validity of the *Sealy* and *Topco* line of cases, stating that "[a]n agreement between competitors to allocate markets is . . . clearly anticompetitive. Such an agreement has the obvious tendency to diminish output and raise prices." *Valley Drug Co. v. Geneva Pharm., Inc.*, 344 F.3d 1294, 1304 (11th Cir. 2003) (citing *Palmer* and *Topco*). Just four years ago, the Eleventh Circuit reiterated that "[e]xamples of such per se illegality include . . . horizontal market division—business relationships that, in the courts' experience, virtually always stifle competition." *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1334 (11th Cir. 2010) (citing *Topco*). Again, Defendants do not cite a single Eleventh Circuit case suggesting that *Sealy* and *Topco* are bad law.

[5] Defendants also cite two articles and two opinions of the courts of appeals for the proposition that *Topco* and *Sealy* are bad law. [Dkt. 120 at 37-38]. Whatever the debatable intellectual merit of the articles, they do not change the Supreme Court's consistent reaffirmation of the *Topco* and *Sealy* line of cases. The court of appeals opinions correctly note that the *per se* doctrine does not apply to all horizontal restraints, but neither questions the principle that horizontal market allocation is unlawful *per se*. *See Augusta News Co. v. Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001); *Rothery*, 792 F.2d 210.

C. Defendants' Agreement Not to Compete Is Classic Horizontal Market Allocation.

Sealy and *Topco* make clear that it is *per se* unlawful for potential competitors to divide their geographic markets through license agreements issued by an association that those potential competitors own and control. In *Sealy*, the licensor association allocated exclusive territories among its Sealy manufacturer-licensees. *Sealy*, 338 U.S. at 351–52. The Sealy licensees operated independently, owned substantially all of the licensor's stock, and controlled the licensor's Board of Directors and its Executive Committee, which ran the business of the licensor. *Id.* at 352–53. On these facts, the Court found that "Sealy was a joint venture of, by, and for its stockholder-licensees; and the stockholder-licensees are themselves directly . . . in charge of Sealy's operations." *Id.* at 353. The Supreme Court easily concluded, with "little room for debate," that "[t]he territorial arrangements must be regarded as . . . horizontal action by the licensees. It would violate reality to treat them as equivalent to territorial limitations . . . incident to the sale of a trademarked product. Sealy, Inc., is an instrumentality of the licensees for purposes of the horizontal territorial allocation." *Id*. at 353–54.

Similarly, the defendants' association in *Topco* allocated exclusive territories in which the defendants could sell Topco's trademarked products, along with other restrictions. *Topco*, 405 U.S. at 598–605, 607–08. As in *Sealy*, the association's members owned all of the association's stock, controlled the association's Board of Directors, officers and committees, and therefore had "complete and unfettered control over the operations of the association." *Id*. at 598–99. The Supreme Court stated that *Sealy* was "on all fours with this case [*Topco*]": "[j]ust as in this case, *Sealy* agreed with the licensees not to license other[s] . . . in a designated territory in exchange for the promise of the licensee who sold in that territory not to expand its sales beyond the area demarcated." *Id*. at 609. The Court held that "it is clear that the restraint in this

case is a horizontal one, and, therefore, a *per se* violation of § 1." *Id.* at 608; *see also Abadir & Co. v. First Miss. Corp.*, 651 F.2d 422, 426 (5th Cir. Unit A July 1981) (citing *Sealy* for the proposition that "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"). Thus, when defendants "divide markets through the subterfuge of creating a jointly owned association, which then assigns them exclusive licenses, the fundamental arrangement must be regarded as horizontal." 12 Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 2033b at 231 (2d ed. 2005).

This case is indistinguishable from, and "on all fours with," both *Sealy* and *Topco*.[6] Defendants own and control the Blue Cross and Blue Shield Association ("BCBSA"), and they agreed to allocate their geographic markets and prohibit competition among themselves through the use of BCBSA's licensing agreements, membership standards and guidelines, and other concerted conduct. [Prov. Compl. ¶¶ 106, 154–72; Sub. Compl. ¶¶ 333–73]. Indeed, Defendants' agreements are even more egregious then those set forth in *Sealy* and *Topco* because they restrict the sale of Blue and non-Blue products, both inside and outside Defendants' exclusive territories. [*Compare* Prov. Compl. ¶¶ 161–63 *and* Sub. Compl. ¶¶ 352–55 *with Sealy*, 338 U.S. at 353 ("A manufacturer could make and sell his private label products [i.e., products not carrying the Sealy trademark] anywhere he might choose.")]. Given the inescapable similarity between this case and *Sealy* and *Topco*, the Plaintiffs have alleged far more than they

[6] Unlike each of the Supreme Court cases Defendants cite, [Dkt. 120 at 36–37], *Topco* and *Sealy* involved horizontal territorial market allocation. *Cont'l T. V.*, 433 U.S. 36, involved vertical price restraints, not horizontal ones; *BMI*, 441 U.S. 1, involved blanket licensing, not horizontal territorial market allocation; *NCAA*, 468 U.S. 85, involved output limitations, not horizontal territorial market allocation; *Nw. Wholesale Stationers*, 472 U.S. 284, involved claims of a co-op's group boycott and refusal to deal, not horizontal territorial market allocation; *State Oil*, 522 U.S. 3, dealt with maximum-resale agreements, not horizontal territorial market allocation; *Leegin*, 551 U.S. 877, dealt with minimum-resale agreements, not horizontal territorial market allocation; *Am. Needle*, 560 U.S. 183 involved the practice of joint trademark licensing, not horizontal territorial market allocation; *Actavis*, 133 S. Ct. 2223, involved the limited monopolies granted by the patent system, not horizontal territorial market allocation.

need to preclude dismissal. *See Cont'l Airlines*, 120 F. Supp. 2d at 56 (holding that to defeat a motion to dismiss, a plaintiff need only allege "a restraint on trade in the form of a horizontal agreement among competitors not to compete . . . that is arguably analogous to horizontal agreements that have been held to be *per se* illegal").

Nevertheless, Defendants argue that their market allocation is not a horizontal restraint because their "service areas did not arise from agreements among Blue Plans," arising instead from the Blues' own use of their trademarks, or vertical agreements with the AHA or AMA. [Dkt. 120 at 26]. As with so many of their arguments, Defendants are simply trying to controvert the allegations of the complaints. Plaintiffs have alleged that Defendants' market restrictions began to take their current form when, "[i]n September 1982, the Board of Directors of the combined BCBSA adopted a Long Term Business Strategy under which Blues agreed not to compete with each other. The BCBSA was aware *at the time* that Blues were violating the antitrust laws." [Prov. Compl. ¶ 154 (emphasis added); *see also* Sub Compl. ¶ 329 (alleging that the Blues' "Assembly of Plans" in 1987 was held for the purpose of restraining competition)]. Defendants have added to these restrictions over time in ways that have nothing to do with the Blues' historical use of their trademarks or any purported vertical agreement with the AHA or AMA: consolidating Blue Cross plans with Blue Shield plans, ensuring that no more than one Blue Cross and Blue Shield plan could operate in each state, limiting competition from non-Blue subsidiaries, and adding obstacles to the purchase of a Blue Plan by a non-Blue plan. [Prov. Compl. ¶ 128, 155–62; Sub Compl. ¶¶ 325, 352–55, 368–73]. Defendants took all of these steps to ensure that they could enforce their chosen market allocation.[7] [*See* Sec. II(C)]. Therefore, Defendants are not entitled to a presumption that their agreement is anything but horizontal.

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[7] Defendants miss the point when they claim that "Plaintiffs' challenges to other restrictions on a licensee's non-Blue business and on the acquisition of Blue licensees also do not amount to a per se claim." [Dkt. 120 at 40

Even if Defendants' version of the facts could be considered on a motion to dismiss, their argument still fails because the illegal market allocation in *Sealy* arose under very similar circumstances. In the early 1920s, a company called Sugar Land Industries owned the Sealy trademarks, and it licensed them to mattress manufacturers in exchange for royalties. *United States v. Sealy, Inc.*, No. 60 C 844, 1964 WL 8089, at *4-5 (N.D. Ill. Oct. 6, 1964). Sugar Land's license agreements assigned each manufacturer an exclusive territory, outside of which the manufacturer was not allowed to manufacture or sell Sealy-branded products. *Id.* at *6-7. This market allocation was vertical because the manufacturers did not own or control Sugar Land. In 1925, however, the manufacturers created Sealy Corporation, which purchased the Sealy trademarks from Sugar Land. *Id.* at *8. The manufacturers owned 75% of Sealy Corporation, which continued to license the Sealy trademark to the manufacturers with the same territorial restrictions.[8] *Id.* at *7-8, 14. The district court held that these territorial restrictions did not violate Section 1 of the Sherman Act because "there has never been a central conspiratorial purpose on the part of Sealy and its licensees to divide the United States into territories in which competitors would not compete." *Id.* at *17. This is the ruling the Supreme Court reversed, holding that the territorial restrictions "must be classified as horizontal restraints," *Sealy*, 388 U.S. at 352, which were therefore unlawful *per se*, *id.* at 357–58. The vertical origins of the manufacturers' trademarks made no difference to the Court's analysis.

As in *Sealy*, whatever Defendants may wish to argue about the historical origins of their trademarks is irrelevant because the individual Plans own and control BCBSA, and therefore the

(citation omitted)]. The restrictions on non-Blue business constitute horizontal market allocation because they severely limit the amount of business that a Blue Plan can conduct outside of its exclusive territory. Therefore, they are *per se* unlawful. The restrictions on the acquisition of Blue licensees are used as an enforcement mechanism; they ensure that an outside company will not gain enough power to change the rules limiting competition.

[8] By the time the case reached the Supreme Court, Sealy manufacturers owned substantially all of Sealy's stock. *Sealy*, 388 U.S. at 352-53.

market allocations in the BCBSA trademark licenses "must be classified as horizontal." *Id.* at 352. To apply any other rule would create an absurd result: so long as potential competitors could show that at one time in the past there was a truly vertical trademark license agreement, they would be free to acquire that trademark through a commonly controlled company, and to use that company to implement a market allocation agreement, thereby violating the antitrust laws with impunity, for all time. If "[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise," *Topco*, 405 U.S. at 610, it is inconceivable Congress would have left such a gaping hole for conspirators like the Blues to exploit.

The Seventh Circuit's decision in *In re Sulfuric Acid*, 703 F.3d 1004 (7th Cir. 2012) (Posner, J.), does not support dismissal generally, or the Blues' argument in particular that their territorial restrictions are not horizontal. [*See* Dkt. 120 at 27–28]. First, in *Sulfuric Acid*, the district court's decision to apply the rule of reason was made shortly before trial, after nine years of litigation. *Sulfuric Acid*, 703 F.3d at 1006–07; *see also Sulfuric Acid*, 743 F. Supp. 2d at 865 (denying summary judgment because "outstanding factual disputes preclude a decision at this point on the applicable legal rule in this case"). Second, Judge Posner held that the agreements were horizontal, but applied the rule of reason because he had "never seen or heard of an antitrust case quite like this, combining such elements as involuntary production and potential antidumping exposure. It is a bad idea to subject a novel way of doing business . . . to per se treatment under antitrust law." *Sulfuric Acid*, 703 F.3d at 1011. Defendants' conspiracy, however, is not novel. It is the same type of naked market allocation that the antitrust laws have made illegal for more than a century. Third, Judge Posner noted that "a plaintiff who proves that the defendants got together and agreed to raise the price . . . —which is what the plaintiffs in this case would have had to prove under the per se rule to establish liability and obtain damages—has

made a prima facie case that the defendants' behavior was unreasonable." *Id*. at 1007. Given the Plaintiffs' allegations that Defendants got together and agreed to allocate markets, Judge Posner's reasoning would compel the conclusion that the Plaintiffs have made a prima facie case that Defendants' agreement was both horizontal and unreasonable.[9]

D. The Purported "Procompetitive Benefits" of Defendants' Horizontal Market Allocation Are Irrelevant.

Defendants argue that even if "service areas were the product of a purely horizontal agreement, they nonetheless would have to be evaluated under the rule of reason because they admittedly produce potential procompetitive benefits." [Dkt. 120 at 28]. Of course, Plaintiffs have never admitted that service areas have procompetitive benefits.[10] But even if they had, the Supreme Court has rejected this very argument: "The respondents' principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept." *Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332, 351 (1982); *Topco*, 405 U.S. at 609-10 ("Our inability

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[9] In addition, Judge Posner's overly broad pronouncement that horizontal price-fixing agreements and other restraints "are governed by the rule of reason, rather than being per se illegal, if the challenged practice when adopted could reasonably have been believed to promote 'enterprise and productivity,'" is simply inconsistent with Supreme Court precedent. Judge Posner relied on *BMI*, 441 U.S. at 23, which created a very narrow exception to the *per se* rule for restraints that are necessary to make the product at all (*see* Sec. I(D)), but he completely ignored the Supreme Court's subsequent decision in *Maricopa County*, 457 U.S. at 351, which expressly rejected the argument that the *per se* rule is inapplicable to horizontal restraints when the challenged practice is believed to have procompetitive justifications.

[10] [*See* Prov. Compl. ¶ 6 ("The BCBS Market Allocation Conspiracy has significantly decreased competition in the market for healthcare insurance and, accordingly, in the market for payment of healthcare provider services. . . . As a result of decreased competition, healthcare providers, including Plaintiffs, are paid much less than they would be absent the BCBS Market Allocation Conspiracy."); *id.* ¶ 8 ("Defendants' agreements have also harmed competition by decreasing the options available to healthcare consumers. . . . The only beneficiaries of Defendants' antitrust violations are Defendants themselves); *id.* ¶¶ 185-95 ("Antitrust Injury"); Sub. Compl. ¶ 9 ("The Individual Blue Plans' anticompetitive conduct has also resulted in higher premiums for their enrollees…. This anticompetitive behavior, and the lack of competition the Individual Blue Plans face because of their market alllcation scheme and monopoly power and anticompetitive behavior, have prevented subscribers from being offered competitive prices and have caused supra-competitive premiums charged to Plan customers"); *id.* ¶ 10 ("Competition is not possible so long as the Individual Blue Plans and BCBSA are permitted to enter into agreements that have the actual and intended effect of restricting the ability of thirty-seven of the nation's largest health insurance companies from competing with each other.")].

to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules."). When a restraint of trade is *per se* unlawful, any alleged procompetitive benefits are irrelevant. *Leegin*, 551 U.S. at 886 ("The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work. . . . Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices or to divide markets.") (internal citations omitted).

In *Nat'l Society of Professional Engineers v. United States,* 435 U.S. 679 (1978), the Court held that an engineering association's canon of ethics that prohibited all competitive bidding by its members interfered with the setting of price by free market forces, and like agreements to fix prices, was *per se* illegal under the Sherman Act. 435 U.S. at 679. The Court thus rejected the defendant's defense that restricting all price competition among members was justified because it was adopted for the purpose of minimizing the risk that competition would produce inferior engineering work and endanger the public safety. *Id.* at 694.

Thus, even if denying choice to patients and providers through horizontal market allocation could somehow be said to have some procompetitive benefits (as Defendants claim), it is still *per se* unlawful, making any procompetitive justification irrelevant: "Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused." *Copperweld*, 467 U.S. at 768; *see also In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 909 (6th Cir. 2003) (citing *Maricopa County* for the proposition that "the per se rule . . . allows courts to presume that certain behaviors as a class are anticompetitive without expending judicial resources to evaluate the actual anticompetitive effects or procompetitive justifications in a particular case").

Brushing aside this unequivocal binding precedent, Defendants misleadingly assert that "[a]t this stage, . . . in order to conclude that plaintiffs have not stated a per se claim, [the court] need only decide that service areas 'might plausibly' have potential procompetitive benefits." [Dkt. 120 at 28]. For horizontal market allocation agreements, that is simply not the law. The Supreme Court has never held that a showing of "plausible" potential procompetitive benefits is sufficient to deactivate the *per se* ban on such restraints or any other restraints that it had previously held were subject to the *per se* rule.[11] In addition, in *Topco*, the Supreme Court rejected the same argument about potential procompetitive benefits, even after a trial. *Topco*, 405 U.S. at 597. In *Topco*, as here, the defendant argued that "it needs territorial divisions to compete with larger chains; that the association could not exist if the territorial divisions were anything but exclusive; and that by restricting competition . . . the association actually increases competition by enabling its members to compete successfully with larger regional and national chains." *Id.* at 605. The Supreme Court still held the market allocation agreement *per se* unlawful, despite the trial court's finding that "Topco was doing a greater good by fostering competition between members and other large supermarket chains." *Id.* at 610. The procompetitive benefit in *Topco*, thus, was not merely potentially plausible, but was actually proven—and *still* the Court rejected the argument. Here, it would be particularly inappropriate to dismiss this case because the Complaints allege only anticompetitive effects.

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[11] None of the cases Defendants cite in support of this proposition discusses the standard of review on a motion to dismiss, or involved straightforward allegations of horizontal market allocation. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999) (*per se* issue decided after trial; case involved restrictions on dentists' advertising); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 263, 267 (3d Cir. 2012) (*per se* issue decided after trial; case involved exclusive dealing arrangements); *Sulfuric Acid*, 703 F.3d at 1007 (*per se* issue decided just before trial after nine years of litigation; alleged restraints were distribution and shutdown agreements, not "garden-variety price-fixing agreements," and vertical territorial restraints); and on summary judgment after discovery, *Augusta News*, 269 F.3d at 48 (*per se* issue decided on summary judgment after discovery; although the plaintiff alleged a "horizontal market division," it "point[ed] to 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").

Defendants also make a similarly meritless claim that their horizontal market allocation is permissible because it "facilitated the creation of a new product—a Blue System offering businesses and consumers a national network of healthcare services." [Dkt. 120 at 29].[12] Once again, this is a factual argument that cannot be decided on a motion to dismiss. *Brennan*, 369 F. Supp. 2d at 1131 (denying a motion to dismiss because the argument that a restraint is necessary to the existence of a product "is an inherently factual contention that cannot be properly resolved on a motion to dismiss"). Moreover, Defendants' description of their new product as "a Blue System" shows that it is not a new product at all.[13] In *American Needle*, the court of appeals had held that NFL teams were immune from antitrust scrutiny because their coordinated trademark sales "are necessary to produce 'NFL football.'" 560 U.S. at 199 n.7. The Supreme Court disagreed:

> "defining the product as 'NFL football' puts the cart before the horse: Of course the NFL produces NFL football; but that does not mean that cooperation amongst NFL teams is immune from § 1 scrutiny. Members of any cartel could insist that their cooperation is necessary to produce the 'cartel product' and compete with other products."

Id. By claiming that they need to allocate markets to produce a "Blue System," the Blues are merely saying that their cooperation is necessary to create a cartel product.

Accordingly, this case is not analogous to those Supreme Court cases holding that certain restraints may not violate the antitrust laws if they are "essential if the product is to be available

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[12] In making this argument, Defendants claim that "Plaintiffs agree" that service areas facilitate the creation of a new product. Nowhere in the complaints do Plaintiffs agree with this contention. The paragraphs of the Complaints that Defendants cite merely describe the BlueCard program, explaining how it harms healthcare providers, [Prov. Compl. ¶¶ 174-77], and explain that Defendants created the predecessor to BCBSA to ensure "national cooperation" and thereby *forestall* the increasing competition among them, [Sub. Compl. ¶ 320].

[13] Defendants also fail to establish when their alleged "new product" was created or to discuss why the anticompetitive conduct from 1982 had anything to do with the "new product." While the new product defense is legally unsupportable in this case, it will require the development of far more facts at trial before a jury or the Court could assess it.

at all." *NCAA*, 468 U.S. at 101; *see also BMI*, 441 U.S. 1. In *BMI*, the Supreme Court declined to apply the *per se* rule against price-fixing to a blanket license for recordings, even though it "fixed" a "price" in some literal sense. *BMI*, 441 U.S. at 8-9. After an eight-week trial on the merits, it was established that "[a] middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided." *Id.* at 20. The Court observed that a blanket license "is quite different from anything any individual owner could issue," *id.* at 23, and that a "necessary consequence of an aggregate license is that its price must be established," *id.* at 21. The product and corresponding "conditions both in copyright law and antitrust law [were] *sui generis*." *Id.* at 10 (internal quotation marks omitted). Similarly in *NCAA*, which also involved an "extended trial," 468 U.S. at 88, the Court applied the rule of reason to broadcast restrictions on college football games that involved some elements of price fixing, *id.* at 99-100. It justified this approach on the theory that, in college football, "horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 101.

There is no basis (factual or otherwise) to assert—let alone to conclude on a motion to dismiss—that Defendants' horizontal market allocation is essential to anything other than their outsized profits. *See United States v. Andreas*, 216 F.3d 645, 668 (7th Cir. 2000) ("Here, the district court found nothing in the record that rose to the level of the special circumstances in *NCAA* and *Broadcast Music* to warrant departure from *per se* treatment. Nothing suggests that a market allocation was necessary to maintain a competitive industry."). Indeed, it defies logic to assert that, to develop a nationwide insurance system (the purported "new product"), the nation must first be divided into discrete service areas; service areas in no way foster the creation of a nationwide insurance system. Perhaps this is why Defendants gloss over the issue, using the generic term "cooperation" when attempting to squeeze into the very narrow new product

exception. [Dkt. 120 at 30]. If anything, invalidating Defendants' market allocation agreements would *promote* a competitive nationwide "Blue System" because Defendants would be free to offer "nationwide coverage for subscribers," [Dkt. 120 at 30], rather than being restricted to covering subscribers and contracting with providers only in their service areas.[14]

Finally, Defendants assert that "[a]ny restraints associated with the licensing agreements are ancillary to these overarching procompetitive benefits," and "[f]or this reason as well, the per se rule does not apply." [Dkt. 120 at 31]. The "ancillary" argument can be summarily rejected, as it relies on a laundry list of unproven factual assertions.[15] By now, it should be clear that there are no procompetitive benefits to which the Blues' horizontal market allocation is ancillary, and certainly none that could be considered on a motion to dismiss. Moreover, Defendants do not cite a single case in which a complaint alleging *per se* illegal restraints was dismissed because the defendant claimed that the restraints were "ancillary to appropriate, cooperative activities." Instead, Defendants cite *NaBanco* for the proposition that the "per se rule does not apply when [an] agreement 'potentially could create an efficiency enhancing integration to which the restraint is ancillary.'" [Dkt. 120 at 31 (quoting *NaBanco*, 779 F.2d at 592)]. But in *NaBanco*, a case decided after a nine-week trial, the Eleventh Circuit held that "[w]hether to apply a per se or rule of reason analysis is . . . predicated on a factual inquiry." *NaBanco*, 779 F.2d at 596. The

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[14] For the same reason, the Supreme Court's decision in *American Needle* does not require the Court to apply the rule of reason here, as Defendants claim. [Dkt. 120 at 26, 28]. *American Needle* focused almost exclusively on a different question: whether the thirty-two teams of the NFL should be treated as a single economic entity. In three paragraphs at the end of the opinion, the Court merely reiterated its holding in *NCAA* that the rule of reason applies when "restraints on competition are essential if the product is to be available at all." *Am. Needle*, 560 U.S. at 203 (quoting *NCAA*, 468 U.S. at 101). Given the obvious similarity between professional and college football, the Court recognized that certain collective decisions by the NFL teams may be justified. *Id.* at 2217. *American Needle* did not expand on *NCAA*, and certainly did not broadly hold, as Defendants suggest, that any horizontal restraint must be evaluated under the rule of reason if it has potential procompetitive benefits. [Dkt. 120 at 28]. Therefore, *American Needle* does not support dismissal for the same reasons that *NCAA* does not support dismissal. Moreover, *American Needle* was decided on summary judgment, not a motion to dismiss. *Am. Needle*, 560 U.S. at 2207.

[15] [Dkt. 120 at 32–35 (stating that service areas "enhance efficiency," "encourage[] … investments," "curb free-riding," "assure consistent quality," "prevent customer confusion," and "promote interbrand competition")].

Blues also cite the Department of Justice and Federal Trade Commission's *Antitrust Guidelines for the Licensing of Intellectual Property* for general principles governing the rule of reason, but these guidelines also acknowledge that "[i]n some cases, however, the courts conclude that a restraint's 'nature and necessary effect are so plainly anticompetitive' that it should be treated as unlawful per se . . . . *Among the restraints that have been held per se unlawful are . . . market division among horizontal competitors . . . .*" *Id.* at § 3.4, p. 16 (Apr. 6, 1995), http://www.justice.gov/atr/public/guidelines/0558.pdf (last visited Jan. 13, 2014) (emphasis added) (citations omitted). Any alleged ancillary benefits of Defendants' scheme, even if they existed, could not overcome the *per se* illegality of horizontal market allocation.

Defendants also wrongfully rely on *Rothery*, 792 F.2d 210, which was decided on summary judgment, not a motion to dismiss. *Rothery* dealt with the issue of group boycotts and a concerted refusal to deal, not horizontal market allocation, and therefore is not analogous—either factually or legally—to this case. *Id.* at 211, 216. The court did note that not "all horizontal restraints are illegal per se," *id.* at 226, and therefore, "not all concerted refusals to deal should be accorded per se treatment," *id.* at 216 (quoting *Nw. Wholesale Stationers*, 472 U.S. at 297). But *Rothery* never held or even suggested that the horizontal market allocation agreements addressed in *Topco* and *Sealy*, and alleged here, were lawful. Moreover, in case after case decided since *Rothery*, the Supreme Court has affirmed that horizontal market allocation agreements are *per se* illegal, twice citing *Topco* and *Sealy* as examples of *per se* illegal restraints. *See Palmer*, 498 U.S. at 49–50; *Am. Needle*, 560 U.S. at 191-92; *see also Leegin*, 551 U.S. at 886 (citing *Palmer*, 498 U.S. at 46). For these reasons, *Rothery* cannot save the Blues' "ancillary" argument.

E. Judicial Experience Has Emphatically and Repeatedly Demonstrated That Horizontal Market Allocation Is Manifestly Anticompetitive.

Defendants' final argument against the *per se* illegality of their horizontal market allocation is that "[t]he per se rule applies only when judicial experience demonstrates that a practice has 'no purpose except stifling of competition.'" [Dkt. 120 at 38 (quoting *White Motor*, 372 U.S. at 263)]. While this statement is true, it offers no help to Defendants because the Supreme Court has "reiterated time and time again" that horizontal market allocation is a *per se* violation of the antitrust laws:

> "It is only after *considerable experience* with certain business relationships that courts classify them as *per se* violations of the Sherman Act. One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. . . . *This Court has reiterated time and time again that '(h)orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.' White Motor Co. v. United States*, 372 U.S. 253, 263, 83 S.Ct. 696, 702, 9 L.Ed.2d 738 (1963). Such limitations are *per se* violations of the Sherman Act."

Topco, 405 U.S. at 607–08 (emphasis added) (citation omitted). When Defendants ask this Court to hold that judicial experience has *not* shown that the only purpose of horizontal market allocation is to stifle competition, they ask it to disagree with the fundamental premise of *Topco*, *Sealy*, *Copperweld*, *Palmer*, and the many Supreme Court and Eleventh Circuit cases that have cited their conclusions with approval.[16] [*See* Sec. I(C)]. Plaintiffs have stated a claim that Defendants' horizontal market allocation is unlawful *per se*.

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[16] Defendants also state that "[f]or more than 25 years, federal courts have acknowledged that exclusive licenses have 'possible procompetitive influences on a given market.'" [Dkt. 120 at 38 (quoting *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 420 (11th Cir. 1984))]. Again, this statement offers no help to Defendants. None of the cases Defendants cite for this proposition involved horizontal market allocation. *See L.A. Draper & Son*, 735 F.2d at 417–19 (suit by one competitor against another for unfair competition); *E&L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 29 (2d Cir. 2006) ("The complaint alleges a vertical restraint between a supplier . . . and a distributor . . . ."); *Seacoast Motors of Salisbury, Inc. v. DaimlerChrysler Motors Corp.*, 271 F.3d 6, 8 (1st Cir. 2001) (suit against an auto manufacturer by one of its dealers); *Wis. Interscholastic Athletic Ass'n v. Gannett Co.*, 658 F.3d 614, 615–16 (First Amendment case involving a dispute between an athletic association and a

Moreover, it is simply untrue that "[c]ourts and regulators have specifically reviewed the Blue System's service areas," [Dkt. 120 at 39], as Plaintiffs explain below. [*See* Sec. II(D)-(E)]. That governmental agencies may previously have failed to discover or prosecute the antitrust violations challenged in this case does not mean this Court should overlook those violations. In *Sealy*, the defendants' horizontal market allocation had been in place for more than 40 years when the Supreme Court ruled it violated the Sherman Act. *Sealy*, 388 U.S. at 351. As the Court said in *American Needle*, "It is true, as respondents describe, that they have for some time marketed their trademarks jointly. *But a history of concerted activity does not immunize conduct from § 1 scrutiny.*" 560 U.S. at 198 (emphasis added).[17] The mere longevity of Defendants' unlawful market allocation agreements does not shield them from antitrust scrutiny.[18]

II. THE BLUES' ALTERNATIVE VERSION OF HISTORY DOES NOT SUPPORT DISMISSAL.

If Defendants had not entered into license agreements that allocate the entire United States among them, they would compete with each other under their various Blue names and under the other non-Blue brands they have developed. Plaintiffs allege a history of vigorous competition between different Blue Cross and Blue Shield plans, which largely ended in the 1980s and 1990s when the Plans agreed not to compete. [Prov. Compl. ¶¶ 147, 154–68; Sub.

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newspaper); *Home Box Office, Inc. v. FCC*, 587 F.2d 1248, 1251–52 (suit involving exclusive contracts between film distributors and broadcasters).

[17] *American Needle* forecloses Defendants' claim that they must be treated as a single economic entity because they "have never competed with respect to the function at issue in this case: the nationwide licensing and governance of the Blue Marks." [Dkt. 120 at 20 n.14]. As the Supreme Court pointed out, such a lack of competition "may simply be a manifestation of the anticompetitive agreement itself." *Am. Needle*, 560 U.S. at 198.

[18] Defendants, in a footnote, also offhandedly assert that Plaintiffs' claims are untimely. [Dkt. 120 at 33 n.16]. Throwing out such an argument in such a passing manner hardly suffices to adequately raise it as a grounds for dismissal. In any event, Defendants' argument has no merit: they fail to cite the binding case law that makes clear that for continuing antitrust violations, the statute of limitations "begins to run anew" with "each overt act that is part of the violation and that injures the plaintiff." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); *Klehr v. A.O. Smith Corp.,* 521 U.S. 179, 189 (1997); *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 828-29 (11th Cir. 1999), *amended in part* 211 F.3d 1224 (11th Cir. 2000). Plaintiffs have continued to suffer injury as a result of Defendants' ongoing anticompetitive agreements, and thus, Plaintiffs' claims are within the statute of limitations. [Prov. Compl. ¶¶ 6, 8; Sub. Compl. ¶¶ 9-10].

Compl. ¶¶ 310-20]. Defendants are unwilling to accept Plaintiffs' well-pleaded allegations as true, as they are required to do. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rather, they impermissibly rely on sources outside the Complaints to create an alternative history, in which they barely competed with each other from the time of their founding until 1982, after which nothing important ever happened.

Even if Defendants' alternative history could be considered on a motion to dismiss (and it cannot), it is untrue and omits the period from 1982 to the present, when the Blues entered into the anticompetitive agreements at the heart of this case. Nor can Defendants point to any statement by any government body that their anticompetitive agreements comply with the Sherman Act.

A. Before the 1980s, the Blues Competed Vigorously.

Although Blue Cross plans and Blue Shield plans were created for different purposes, they often became fierce competitors. Originally, Blue Cross plans were designed to cover the cost of hospital care, and Blue Shield plans were designed to cover the cost of physicians' services. [Prov. Compl. ¶ 145; Sub. Compl. ¶ 312]. Those roles expanded over time, and Blue Cross plans began to compete with Blue Shield plans. [Prov. Compl. ¶ 147; Sub. Compl. ¶ 316].

An earlier attempt to control the use of the Blue Shield marks through an approval program was rejected by the AMA due to antitrust concerns. [Prov. Compl. ¶ 149; Sub. Compl. ¶ 314]. The AMA remarked, "It is inconceivable to us that any group of state medical society Plans should band together to exclude other state medical society programs by patenting a term, name, symbol, or product." [Sub. Compl. ¶ 314]. "During the early decades of their existence, there were no restrictions on the ability of a Blue Cross plan to compete with or offer coverage in an area already covered by a Blue Shield plan." [*Id.* ¶ 316].

Competition among the individual Blue Plans existed for decades. [Sub. Compl. ¶¶ 316-20, 326]. Such competition was "tolerated by the national Blue Cross agency for lack of power to insist on change." [*Id.* ¶ 310].

By 1975, Blue Cross plans had a total enrollment of 84 million subscribers, and Blue Shield plans had a total enrollment of 73 million subscribers. [Sub. Compl. ¶¶ 311, 315]. In some states, Blue Cross plans also competed with other Blue Cross plans, and Blue Shield plans competed with other Blue Shield plans. [Prov. Compl. ¶ 146; Sub. Compl. ¶¶ 309–10].

The individual Blue Cross entities, and the then-separate Blue Shield entities, transferred their rights in their respective trademarks and trade names to national entities that then merged in 1982 to become the BCBSA. [Sub. Compl. ¶ 324]. Even at the time of this 1982 merger, the individual Blues were competing head-to-head. [*Id.* ¶ 326].

In 1986, Congress revoked the Blues' tax-exempt status, leading many of the Blue Plans to form for-profit subsidiaries (and even those that formally did not convert committed themselves to maximizing profits for their officers and senior management). [Sub. Compl. ¶ 327]. Thereafter, the amount of competition among the Blues under their non-Blue brands increased substantially. [*Id.* ¶¶ 329–30].

In certain parts of the country, limited competition between some Blue Plans continues today. For example, Highmark Blue Shield competes with Capital Blue Cross in certain parts of Pennsylvania. [Prov. Compl. ¶ 170]. And as this Court learned in the litigation involving Dr. Kathleen Cain, Blue Plans are permitted to contract with providers one county into each other's territory, creating areas like Leavenworth and Douglas County, Kansas, where a provider can contract with Blue Cross and Blue Shield of Kansas or Blue Cross and Blue Shield of Kansas City. [2:12-cv-02532-RDP, Dkt. 240 at 1-2]. Plaintiffs intend to prove that when the Blues have

not entered into "gentlemen's agreements" not to compete with each other, competition naturally occurs. [Prov. Compl. ¶ 165].

Because Plaintiffs' well-pleaded allegations must be accepted as true on a motion to dismiss, this should be the end of the discussion about the Blues' history of competition. *Iqbal*, 556 U.S. at 678. For purposes of deciding this motion, the Court must assume that the Blues competed with each other from the 1940s to the early 1980s.

B. Judicial Notice Cannot Be Used to Prove Disputed Facts.

Defendants ask the Court to disregard the Complaints and take judicial notice of documents that supposedly show a lack of competition or approval of a lack of competition by government authorities. Foremost among these documents is a set of excerpts from "Blue Cross and Medical Service Plans," a 1947 report written by a staff member in the United States Public Health Service, which Defendants cite at least twenty-nine times. [Dkt. 120-2 ("1947 USPHS Report")]. Although Defendants' explanation for attaching this document is cursory, they appear to assert that it is judicially noticeable because it is a public record. [Dkt. 120 at 6 n.5].

Defendants misunderstand the basic principles of taking judicial notice, which is "a highly limited process." *Shahar v. Bowers*, 120 F.3d 211, 214 (11th Cir. 1997). Federal Rule of Evidence 201 permits judicial notice only of facts that are "not subject to reasonable dispute because [they] . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." One person's research report does not come close to meeting this standard. *Shahar*, 120 F.3d at 214 (refusing to take judicial notice of a person's conduct based on newspaper accounts).

Through judicial notice, Defendants also ask the Court to preclude Plaintiffs from introducing contrary evidence at any point in this litigation. *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) ("the effect of taking judicial notice under Rule 201 is to preclude a

party from introducing contrary evidence and in effect, directing a verdict against him as to the fact noticed"). What *is* beyond dispute is that an alleged fact does not become subject to judicial notice simply because it appears in a government publication. *Weinstein's Federal Evidence* § 201.13(c) (citing cases). The same is true for the Congressional testimony that Defendants also try to sneak into the record. *Id.* (citing cases).[19]

Defendants also take these exhibits out of their historical context, namely, a time when, among other things, the Blue Cross and the Blue Shield systems were not yet unified and operated on a different scale and on a non-profit basis. Thus, it was impossible for these regulatory entities to have provided any "review," much less approval, of the type of restraints Defendants have in place now and that are alleged in the Complaints.

Even if it were somehow proper for Defendants to build their opposition on sources outside the Complaints, the 1947 USPHS Report largely confirms Plaintiffs' allegations. First, Plaintiffs allege that Blue Cross plans competed with Blue Shield plans. The report's maps of these Plans' service areas, which Defendants include in their brief, [Dkt. 120 at 9–10], show that by 1947 Blue Cross plans operated alongside Blue Shield plans in most states. [1947 USPHS Report at 17, 151]. The report also notes that nine states had passed legislation allowing plans to offer both hospitalization and medical services, [*id.* at 79–80], a trend that continued after 1947 and paved the way for increasing competition between Blue Cross plans and Blue Shield plans.

Second, the report's maps confirm Plaintiffs' allegation that Blue Cross plans competed with each other, as did Blue Shield plans. The maps show Blue Cross plans competing with each

[19] To support their argument for judicial notice, Defendants cite *Hope v. Pelzer*, 240 F.3d 975 (11th Cir. 2001), *rev'd*, 536 U.S. 730 (2002), in which the Eleventh Circuit took judicial notice of a report by the Department of Justice. But the court did not take judicial notice of the facts contained in the report, only that the report existed and that Alabama officials were aware of its contents. *Id.* at 978–79 & n.8. Similarly, when this Court took judicial notice of an EEOC charge in *Hicks v. City of Alabaster, Ala.*, No. 2:11-cv-4107, 2013 WL 988874, at *7 n.5 (N.D. Ala. Mar. 12, 2013), the Court did not imply that the allegations in the charge were indisputably true.

other in California and North Carolina, and Blue Shield plans competing against each other in California, North Carolina, and Oregon. [1947 USPHS Report at 17, 151]. The report also describes competition between Blue Cross plans in Illinois and points out that in 1946, the Hospital Service Plan Commission eliminated its requirement that Blue Cross plans serve exclusive areas to be reapproved. [*Id.* at 130]. Although Blue Shield plans were relatively new in 1947, the report suggests that competition among them was poised to grow: by 1947, the AMA had approved 22 Blue Shield plans in the State of Washington alone. [*Id.* at 147 & n.7].

Defendants' remaining efforts to downplay their history of competition are no more successful. Their only response to Plaintiffs' allegations concerning the main source of competition, Blue Cross plans competing with Blue Shield plans, is to say that this competition "typically involved controversy over just a subset of medical services provided in a hospital setting, such as radiology, pathology, or anesthesiology." [Dkt. 120 at 10 (citing Dkt. 120-6, Robert Cunningham III & Robert M. Cunningham Jr., *The Blues: A History of the Blue Cross and Blue Shield System* 21 (1997) ("Cunningham")]. But Defendants' source material does not say that this was the full extent of competition between Blue Cross plans and Blue Shield plans throughout their history; it merely says that the issue of payment for these hospital-based specialists was contentious, and that similar controversies marked the development of Blue Cross plans in the 1930s. [Cunningham at 21–22 (attached as Exh. 1)]. Competition between Blue Cross plans and Blue Shield plans then heightened in the 1940s, when plans began to offer both hospitalization and medical services. The Blues say nothing about competition between Blue Cross plans and Blue Shield plans in this era.

Defendants also quibble with the details of competition between Blue Cross plans in the 1930s and 1940s, [Dkt. 120 at 10–11 & n.7], but overlook two larger points: this competition did

exist, and it continues to this day in certain parts of the country. Anthem Blue Cross of California, for example, still competes with Blue Shield of California. [Prov. Compl. ¶ 170].

Similarly, Defendants' reliance on an excerpt from a 1971 Congressional hearing in which a then-president of the Blue Cross Association was asked to comment on the "exclusive territorial arrangements" and whether this meant that "the Blue Cross Plans in fact do not offer competition to each other," [Dkt. 120-13 at 3], is misplaced. The president's response to the question—"I cannot reflect accurately the rationale behind these standards when they began"—merely shows that the issue was fleetingly raised but not explored.

Likewise, Defendants' reliance on an excerpt from a 1979 FTC report that allegedly "recognized that 'Blue Shield plans generally do not compete with each other'" [Dkt. 120 at 17], is misplaced. In addition to taking this quote out of its historical context, it also misrepresents the nature of the reported investigation. In truth, this report was focused on the entirely different question of the role of medical providers in controlling the Blues and other "medical prepayment plans," and did not analyze the separate question of the Blues' territorial restrictions, merely mentioning them in two passing sentences in a background discussion. [Dkt. 120-4 at 68].

C. Since the 1980s, Defendants Have Agreed to Stifle Competition.

Defendants' account of their history ends in 1982, [Dkt. 120 at 14-16], as if nothing noteworthy has happened in the past thirty years. The Blues' activities since 1982 are critical to this case. Plaintiffs allege that the Blues responded to increased competition from other insurers by agreeing in 1982 to reduce competition among themselves through a "Long Term Business Strategy." [Prov. Compl. ¶¶ 153-55; Sub. Compl. ¶ 325]. As part of this strategy, they required all existing separate Blue Cross plans and Blue Shield plans to consolidate at a local level by the

end of 1984,[20] and agreed that all consolidated Blue Cross Blue Shield plans within a state should further consolidate, ensuring that each state would have only one Blue Plan by the end of 1985. [Prov. Compl. ¶ 156; Sub. Compl. ¶¶ 325].

Then, in 1987, the Blues agreed to maintain exclusive service areas when operating under the Blue brand, thereby eliminating "Blue on Blue" competition. [Prov. Compl. ¶ 157; Sub. Compl. ¶ 329].

Despite these efforts and agreements, some of the Plans found a loophole in these restrictions: without using the Blue name, they competed using non-Blue brands, usually through for-profit subsidiaries, which they began to establish after they lost their tax-exempt status in 1986. [Prov. Compl. ¶ 157; Sub. Compl. ¶¶ 327-28, 330]. Facing increased competition from each other's use of these non-Blue brands, the Blues again agreed to stifle competition, this time by placing strict limits on the amount of revenue a Blue Plan could earn through its subsidiaries, both inside and outside of its exclusive service area, even where the Blue Cross or Blue Shield name was *not* used. [Prov. Compl. ¶¶ 158-62; Sub. Compl. ¶¶ 330-31].

In 1996, the Blues further insulated themselves from competition when they agreed to make it impossible for a non-Blue plan to gain control of a Blue Plan without the approval of a majority of all the Blue Plans. [Prov. Compl. ¶ 128; Sub. Compl. ¶¶ 368–73].

Defendants' restrictions on competition have had their intended effect. The number of Blue Plans has fallen from 110 in 1984 to 38 today, and competition between Blue Plans is minimal in most parts of the country. The Blues' community focus, which they tout so highly in their brief, has withered during this wave of consolidation. For example, the non-profit Blue Cross and Blue Shield of Indiana has now become Wellpoint, a for-profit, publicly traded

[20] As discussed above, there were a few exceptions, including California and Pennsylvania.

company in the Fortune 50 that operates in fourteen states and has annual revenue exceeding that of Coca-Cola, Google, and Goldman Sachs. [*See* "Fortune 500," *Fortune Magazine*, *available at* http://money.cnn.com/magazines/fortune/fortune500/2013/full_list/]. In 2012, Wellpoint paid its CEO more than $20 million despite terminating her employment in August of that year. ["Schedule 14A Information," Wellpoint Inc. (April 2, 2013) at p. 55, available at http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDk5NjMwfENoaWxkSUQ9NTM5NDQ1fFR5cGU9MQ==&t=1]. Other giants that have arisen since the 1980s are Health Care Service Corporation (13 million subscribers in five states; CEO earned $16 million in 2012), and Highmark (5 million subscribers in three states; CEO earned $3.3 million in 2012 despite being fired in April). [Andrew L. Wang, "Blue Cross Parent CEO's Compensation Rockets Past $16 Million," *Crain's Chicago Business* (Apr. 11, 2013), *available at* http://www.chicagobusiness.com/article/20130411/NEWS03/130419970/blue-cross-parent-ceos-compensation-rockets-past-16-million#; Bill Toland, "Highmark CEO Compensation Tops $6M," *Pittsburgh Post-Gazette* (Mar. 16, 2013), *available at* http://www.post-gazette.com/business/businessnews/2013/03/16/Highmark-CEO-compensation-tops-6M.print].

The contemporary framework created by the market allocations and other anticompetitive agreements entered into by the various Blue Plans would have been unrecognizable to the AMA, which feared in the 1940s that creating a national agency for all Blues would violate the antitrust laws, [Prov. Compl. ¶ 149; Sub. Compl. ¶ 314], as well as to the AHA, which severed its relationship with Blue Cross in 1972.

By virtue of its anticompetitive agreements, Defendants have transformed themselves from an association of community-focused plans into a powerful cartel that includes many of the country's largest insurers. *See Leegin*, 551 U.S. at 893 ("A horizontal cartel among competing

manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful."). Through their agreements, Defendants decrease output by limiting the territory in which they can compete, both under their Blue brands and their non-Blue brands.[21] Freed from a major source of potential competition, they charge supracompetitive prices to subscribers and/or pay infracompetitive prices to providers, allowing them to amass billions of dollars in profits, as well as surpluses that far exceed what is required by law or prudent management. [Prov. Compl. ¶¶ 196–213; Sub. Compl. ¶¶ 2, 8-9, 418-28]. If a Blue Plan cheats, it suffers the severest of consequences: it is kicked out of the cartel and has to pay millions of dollars to BCBSA to help fund its replacement. [Prov. Compl. ¶ 172; Sub. Compl. ¶¶ 5, 342-43, 361-62]. By ending their description of their history in 1982, Defendants ignore all of this.

D. The Government Has Never Endorsed the Blues' Anticompetitive Agreements.

Defendants claim that "the Blue System has been the subject of governmental scrutiny, much of it focusing on Blue Plans' rights to use the Blue Marks exclusively in their service areas." [Dkt. 120 at 16]. The so-called "scrutiny" to which Defendants refer is, at best, a handful of inferred acknowledgments that Defendants have separate sales territories. Moreover, most of the examples Defendants cite precede the formation of the anticompetitive agreements at issue in this case and are therefore irrelevant. Most importantly, Defendants cannot point to a single decision by any court or regulatory body that has analyzed the legality of the market

[21] Defendants argue that "Plaintiffs allege that BCBSA prevents licensees from exceeding certain thresholds for non-Blue business, but they do not assert that any licensee has ever approached those thresholds." [Dkt. 120 at 16–17]. But it does not matter whether non-Blue business has approached the limits prescribed by the license agreements. By design, the limits on non-Blue business reduce the incentive for the Blues to invest in their non-Blue subsidiaries, so it should not be surprising if these subsidiaries generate little revenue. [Prov. Compl. ¶ 161 ("[The restrictions on non-Blue business] directly limit the ability of each Blue to generate revenue from non-Blue branded business, and thereby limit the ability of each plan to develop non-Blue brands that could and would compete with other Blues")].

allocation agreements in the BCBSA licenses, let alone the full combination of territorial and acquisition restraints challenged in this case. No court has done so, and therefore no court has ever ruled that these challenged restrictions are legal under the Sherman Act.

Likewise, the Executive Branch has never suggested that it approves of Defendants anticompetitive agreements. The 1947 USPHS Report, for example, is irrelevant because it represents one author's views of the Blue Plans as they existed in their infancy, decades before BCBSA even existed.

Defendants also cite a 1979 report by the staff of the Federal Trade Commission, discussed above, whose first page states, "The Federal Trade Commission has not adopted this staff report." [Dkt. 120-4 at 1]. Adopted or not, the report focuses on the role of medical providers in controlling the Blues and other medical prepayment plans; it never analyzes the separate question of the Blues' territorial restrictions (such as they existed at the time), merely mentioning them in a background discussion. [*Id.* at 68].

Finally, Defendants cite a Department of Justice press release on the closing of its investigation into Anthem's acquisition of WellPoint Health Networks. [Dkt. 120 at 17 (citing DOJ Antitrust Div. Issues Stmt. on the Closing of Its Investigation of Anthem, Inc.'s Acquisition of WellPoint Health Networks, Inc. (Mar. 9, 2004))]. This document mentions the Blues' territorial restrictions without purporting to examine whether these restrictions comply with the antitrust laws; the statement focuses instead on whether Anthem's acquisition of WellPoint would increase Anthem's market power in the states in which it operates. [*Id.*]

Even if the government has failed to discover or prosecute Defendants' antitrust violations, that is no basis for this Court to dismiss the complaint or to rubber stamp the existence of an illegal cartel. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473

U.S. 614, 634–35 (1985) (stating that "the private cause of action plays a central role in enforcing this [antitrust] regime").

Congress also has done nothing to indicate that it approves of Defendants' anticompetitive agreements. Defendants offer two pieces of testimony that predate the main allegations in this case: a 1946 prepared statement to the Senate by Blue Cross Commission Director C. Rufus Rorem, and the 1971 Senate testimony of Blue Cross President Walter J. McNerney. [Dkt. 120-12, 120-13]. Rorem's statement briefly mentions that "[a]s a general principle, only one Blue Cross Plan is established in each enrollment area." [Dkt. 120-12 at 7]. McNerney testified that Blue Cross plans did not need to compete against each other because they competed against other insurers. [Dkt. 120-13 at 210–11]. There is no indication in either document that any member of Congress believed that Defendants' lack of competition was lawful. Unless Defendants would like to argue that Congress agrees with every statement ever made before a Senate committee, and that Congress is bound by that agreement even when circumstances change decades later, this testimony is meaningless.

E. No Court Has Approved the Cartel Agreements At Issue.

No court has ever held that Defendants' anticompetitive agreements, including their division of territories, comply with the Sherman Act. Defendants cite one case in which a court rejected an antitrust counterclaim to BCBSA's efforts to preclude a Blue Plan's unauthorized use of the Blue marks *overseas*. *Blue Cross & Blue Shield Ass'n v. Grp. Hospitalization & Med. Servs. Inc*. 744 F. Supp. 700 (E.D. Va. 1990). The court did ***not*** address the legality of the anticompetitive restraints at issue here.

Defendants also cite two cases in which a court enforced the territorial restrictions in BCBSA licenses, but neither case addressed an antitrust challenge on the merits. In the first, there was no antitrust claim at all. *Grp. Hospitalization & Med. Servs., Inc. v. Blue Cross &*

Blue Shield of Va., No. 85-1123-A (E.D. Va. Apr. 8, 1986), *aff'd*, 819 F.2d 1138 (4th Cir. 1987) (unpublished) (attached as Exh. 2).

In the second, the court enjoined a Blue Plan's non-Blue subsidiary from using the Blue marks to deceive customers into buying non-Blue insurance policies. *Cent. Benefit Mut. Ins. Co. v. Blue Cross & Blue Shield Assoc.*, 711 F. Supp. 1423 (S.D. Ohio 1989). In the one paragraph of the opinion addressing antitrust law, the court held that the subsidiary lacked standing to raise an antitrust claim as a defense. *Id.* at 1434. The court also noted that all four of Ohio's then-existing Blue Plans were competing with each other throughout the state, further undermining the Blues' contention that they have rarely competed with each other. *Id.* at 1427. "'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'" *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). There is no use citing opinions that simply "noted that Blue Plans operate in service areas." [Dkt. 120 at 18 (citing *Grp. Hospitalization*, 744 F. Supp. at 704; *Grp. Hospitalization & Med. Servs., Inc. v. Blue Cross & Blue Shield Ass'n*, 1 U.S.P.Q.2d 1893, 1895 (D.C. Super. Sept. 26, 1986))].

If any opinion is on point, it is one Defendants ignore: *Maryland v. Blue Cross & Blue Shield Ass'n*, 620 F. Supp. 907 (D. Md. 1985), in which the State of Maryland challenged Defendants' division of territories in Maryland as a violation of Section 1 of the Sherman Act. The court denied the defendants' motion to dismiss, describing the territorial restrictions as "horizontal market allocation among insurance companies." *Id.* at 915.[22]

[22] Of the cases Defendants cite, the only one decided since Defendants implemented all of their trade restraints is *Powderly v. Blue Cross & Blue Shield of North Carolina*, No. 3:08-cv-109 (W.D.N.C.). In *Powderly*, the court held that the BlueCard program is not a restraint of trade. [Dkt. 120-14 (Tr. of Mot. Hr'g 70–71)]. But the plaintiff in *Powderly* had alleged that the BlueCard program was part of an illegal boycott against his medical practice.

III. THE COURT SHOULD REJECT DEFENDANTS' EFFORT TO CHARACTERIZE THE UNLAWFUL TERRITORIAL RESTRICTIONS IN THE BCBSA LICENSE AGREEMENTS AS "MERELY CONFIRMING" THE COMMON LAW.

Defendants claim that the territorial restrictions in the BCBSA license agreements are lawful because they merely confirm what Defendants claim was always required by the common law. [Dkt. 120 at 20-24]. According to the Defendants, "the license agreements did not create the service areas"; instead, those "service areas arose independently from Blue Plans' historic use of the Blue Marks in their service areas—long before BCBSA or the license agreements existed." [*Id.* at 20-21]. The Court should reject the foregoing argument for any one of at least four independent reasons:

- First, Defendants' assertion that each Plan historically enjoyed territorially-limited exclusivity *directly contradicts* Plaintiffs' allegations. Both Complaints allege numerous facts showing extensive competition among the Blues prior to the organization of the BCBSA and the imposition of the market allocation agreements through the BCBSA license agreements. [Sub. Compl. ¶¶ 309-10, 316, 319, 326, 329-31, 350-67; Prov. Compl. ¶¶ 137, 144, 147, 157-63]. This confirms that the Plans themselves viewed their use of the Blue marks to be *non-exclusive* and to allow for competition within the same territories.
- Second, Defendants' common-law trademark argument cannot render legal what the Supreme Court has repeatedly held to be illegal: i.e., it is a *per se* violation of the Sherman Act for potential competitors to control a licensing organization that licenses trademarks with territorial restrictions that prevent potential competitors from competing. Common-law trademark principles do not preempt federal antitrust law or their *per se* prohibitions.

[*Powderly* Compl. ¶¶ 44–54 (attached as Exh. 3)]. Here, Provider Plaintiffs allege that Defendants use the BlueCard program as part of a price-fixing conspiracy, an allegation not before the court in *Powderly*.

- Third, Defendants are simply wrong about what the common law provided. From long before the Blue marks had been invented in 1934, the common law held that where multiple parties used a similar trademark in different locations, with full knowledge that others were doing the same thing, then those parties did *not* have any right to exclusivity. The only way multiple parties could each claim the exclusive right to use a similar trademark in different locations was if each party could show that it adopted the mark without any knowledge of any prior user's adoption of the same mark (or, in some jurisdictions, without any intention to benefit from the goodwill associated with the first user's use of the mark). Defendants do not, and cannot, come close to showing that they have satisfied this common-law doctrine.
- Fourth, Defendants' argument that the BCBSA license agreements merely codify pre-existing common law rights is belied by the fact that the license agreements impose numerous anticompetitive restrictions that even Defendants do not try to claim would have existed under the "common law": for example, the BCBSA license agreements impose severe restrictions on the ability of a Plan to generate revenue outside of its assigned territorial service area *even if* the revenue comes from a business that is *not* sold under any Blue brand.

A. Defendants' Common-Law Argument Contradicts The Allegations Of Plaintiffs' Complaints.

The Court must reject Defendants' common law trademark argument because it directly contradicts Plaintiffs' well-pleaded allegations that the Plans competed vigorously against each other prior to imposition of the territorial restrictions in the BCBSA licenses. As previously set forth, the Complaints allege numerous instances of "fierce" Cross-on-Cross, Shield-on-Shield, and Cross-on-Shield competition even through the 1980s. [Sub. Compl. ¶ 326 ("In the early 1980s, for example, Blue Cross of Northeastern New York and Blue Shield of Northeastern New

York competed head-to-head."); Prov. Compl. ¶ 153 ("From 1981 to 1986 . . . . the amount of competition among Blue plans . . . increased substantially")]. From the 1980s to 1990s, the Blues agreed to limit not only direct competition, but also competition through their subsidiaries. [Prov. Compl. ¶ 157; Sub. Compl. ¶¶ 329-31].

Defendants never explain how all of this competition can be squared with their assertion that each Plan has historically enjoyed absolute territorial exclusivity as a matter of basic common law. In any event, because the Court must accept Plaintiffs' allegations of actual competition among the Plans as true, it cannot accept Defendants' contrary argument that the common law never permitted any such competition to exist.

For the same reason, Defendants' claim that "[s]ervice areas also would continue to exist even if the Court were to grant plaintiffs' requested relief to enjoin the license agreements," [Dkt. 120 at 24]—the "we'd just keep doing it anyway" defense—cannot be credited on a motion to dismiss. *Per se* illegal agreements cannot be justified on the ground that the result of the illegal agreement is the same as would result from competition. Without the license agreements, there is every reason to believe, as Plaintiffs have alleged, that the Blues and their non-Blue subsidiaries would engage in competition that would be even more vigorous than in the era before the restrictive agreements.

B. Defendants' Common Law Argument Contradicts Supreme Court Precedent.

Defendants' common-law trademark argument cannot cure what Supreme Court *has repeatedly* held to be illegal: for actual or potential competitors to control a licensing organization that licenses trademarks with territorial restrictions that prevent the potential competitors from ever competing. The Supreme Court has held it to be a *per se* violation of the Sherman Act for potential competitors to use a trademark licensing scheme to create exclusive

territories. *See, e.g., Sealy*, 388 U.S. at 357 n.3 ("But the Court summarily rejected the argument, as we do here. It pointed out that the restraints went far beyond the protection of the trademark and included nontrademarked items, and it concluded that: 'A trademark cannot be legally used as a device for Sherman Act violation.'" (quoting *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 599 (1951))); *Topco*, 405 U.S. 596. Specifically, both *Sealy* and *Topco* held that when potential competitors control a trademark licensor, the terms of the trademark licenses entered into between the licensor and its member-licensees must be analyzed as horizontal agreements among competitors, rather than vertical agreements. *Sealy*, 388 U.S. at 352-53; *Topco*, 405 U.S. at 608-09. The common law cannot trump the federal antitrust laws.

The Supreme Court has long recognized that intellectual property rights cannot be used to create anticompetitive arrangements involving price-fixing or market allocations. *See Standard Sanitary Manufacturing Co. v. United States*, 226 U.S. 20 (1912) (striking down patent licensing agreements that fixed prices and restricted markets in which licensees could operate); *Timken*, 341 U.S. at 596 (striking down arrangement in which parties with same trademark agreed to allocate markets and restrict competition). Similarly, when Congress enacted the Lanham Act, it expressly provided a defense to a trademark infringement suit when "the mark has been or is being used to violate the antitrust laws of the United States." 15 U.S.C. § 1115(b)(7).[23] Thus, both the Supreme Court and Congress have repeatedly rejected the notion advanced by Defendants here that traditional trademark law somehow authorizes competitors to divide and allocate markets through a series of licenses containing express territorial restrictions.

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[23] This language reflected concerns identified by Congress as it considered the scope of the protection it would grant trademarks under the Lanham Act. In particular, the Department of Justice submitted a report with an appendix titled "Trade-Marks as Instruments of Monopoly and Restraint of Trade." 4 Harry Aubrey Toulmin, Jr., *Anti-Trust Laws of the United States* § 27.34 (1949), *quoted in Phi Delta Theta Fraternity v. J. A. Buchroeder & Co.*, 251 F. Supp. 968, 978 (W.D. Mo. 1966). The Justice Department noted that trademarks had recently been used as vehicles for "Geographical Division of Fields" and "Monopolistic Control Through Use of Trade-Marks," among other evils. *Id.*

If there were any merit to Defendants' argument that the common law itself requires exclusive territories for potential competitors who use the same trademark, then that argument would have been mentioned in *Sealy* and *Topco*. It was not. To the contrary, the relief granted in *Sealy* and *Topco* led to the competitors in those cases using their common trademarks in the same territories. *See Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 824 (7th Cir. 1978) (explaining that "After the Supreme Court's decision, Sealy revised its licensing agreement, eliminating exclusive selling territories"); *United States v. Topco Associates, Inc.*, 1972 WL 669, at *1 (N.D. Ill. Sept. 26, 1972) (ordering Topco "to amend its bylaws, Membership and Licensing Agreements, resolutions, rules and regulations to eliminate therefrom any provision which in any way limits or restricts the territories within which or the persons to whom any member firm may sell Topco brand products"). There is no case law suggesting that this relief raised a problem under the common law.

Moreover, whatever the common law might under some circumstances permit, it cannot trump the prohibitions of the Sherman Act. As *Sealy* and *Topco* make clear, where potential competitors control a trademark licensing organization, the Sherman Act prohibits that licensor from imposing territorial restraints in its trademark licenses. None of the cases relied on by Defendants for their common law argument even cites to *Sealy* or *Topco*. [Dkt. 120 at 20-24]. That is because none of Defendants' cases involves a group of competitors who created a licensing entity that they control, and that limits the ability of the competitors to compete with one another through "trademark licensing" agreements. The clear prohibitions of the Sherman Act cannot be overridden by any claim as to what the common law may sometimes permit.

C. The Blue Plans Did Not (And Do Not) Have a Common Law Right to Territorial Exclusivity.

Defendants' common law argument must also be rejected because there is simply no support for their assertion that, long before there were any BCBSA license agreements, "each Blue Plan's service area was inherently exclusive by operation of law because it could exclude others from using the Blue Marks in that geographic area." [Dkt. 120 at 22]. A basic review of the applicable common law shows that this is not true.

First, Defendants have not cited any case, and Plaintiffs are not aware of one, holding that any one of the individual Blue Plans (let alone all of them) had the common law right to prevent any of the other Plans from competing within the specific territory in which that Plan operated. Yet they ask this Court to so hold—without the benefit of any authority. If, under common law, each Plan had territorial exclusivity that prevented competition from any other Plan, then a court would presumably have at some stage declared and enforced that exclusivity against attempted infringers. Yet that never happened. Moreover, had the common law truly created the territorial exclusivity that Defendants claim, the Defendants would never have had the need to create the territorial exclusivity set forth in their BCBSA license agreements.

Second, the common law allowed different parties to enjoy exclusivity in different territories only where those parties developed their trademarks without knowledge of one another's use of the marks. Defendants cannot possibly show that any (let alone all) of the Plans satisfied that requirement, and therefore cannot establish that each of the Plans enjoyed territorial exclusivity.

Defendants never address the two Supreme Court decisions that underlie (and are cited in) the cases cited by Defendants, and which established the *requirements* for the exceptional instance in which multiple parties may claim exclusive rights to the same trademark in different

locations. It is telling that Defendants quote such lower court cases to suggest that territorial exclusivity is the norm under the common law, without ever addressing these governing Supreme Court cases, which established the "good faith remote user" doctrine that underlies the cases they cite. By doing so, they ignore the *requirements* for that doctrine, which the Blue Plans could not possibly have satisfied. Those Supreme Court decisions are *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403 (1916) and *United Drug Co. v. Theodore Rectanus Co.* (*Rectanus*), 248 U.S. 90 (1918).

Hanover and *Rectanus* established the common law doctrine of the "good faith remote user" defense to trademark infringement: if one party (the "junior user") began using a trademark "without knowledge" that the same or a similar trademark had been previously developed by a different party (the "senior user") in a geographically remote area, then the junior user is entitled to use that mark in its territory, notwithstanding the prior use of the mark in another territory by the senior user. *Hanover*, 240 U.S. at 412 ("the Hanover Company had adopted 'Tea Rose' as its mark in perfect good faith, with no knowledge that anybody else was using or had used those words in such a connection"); *Rectanus*, 248 U.S. at 96 (holding that first party to use trademark "Rex" for medicinal products in one geographic area could not preclude a later party from using that mark in a geographically remote area where the two marks were developed wholly independent of one another, with "*neither side having any **knowledge** or notice of what was being done by the other*") (emphasis added). Both cases recognized this holding as an *exception* to the general rule that "the exclusive right to the use of a trade-mark is founded on priority of appropriation." *Hanover*, 240 U.S. at 415; *Rectanus*, 248 U.S. at 100 ("Undoubtedly, the general rule is that, as between conflicting claimants to the right to use the same mark, priority of appropriation determines the question").

Thus, the general rule is that multiple parties *cannot* claim exclusive rights to use the same trademark. However, under the *Hanover / Rectanus* holdings there is a "good faith remote user" exception to this general rule that applies when the junior user (a) developed the mark innocently and good faith, and (b) operated in a geographically remote area in which the senior user was not active. *Rectanus*, 248 U.S. at 100. The two basic requirements of this exception are articulated by one of the cases cited by Defendants. *Emergency One, Inc. v. American Fire Eagle Engine Co., Inc.*, 332 F.3d 264, 271 (4th Cir. 2003) (junior user can hold rights to a mark in a specific area only "(1) if the area was 'geographically remote' from the senior user's market at the time that the junior user appropriated the mark and (2) if the junior user was acting in good faith at the time").[24]

The requirement that the junior user have developed its use of the trademark in "good faith" typically means that the junior user had to have *no knowledge* that other parties were already using that trademark. As stated in a leading treatise on trademark law: "The majority of case law and commentary adopt the view that proof of the junior user's knowledge of the senior user's mark at the critical date is sufficient to destroy the 'good faith' element of the territorial defense." 5 McCarthy on Trademarks and Unfair Competition § 26:9 (4th ed.); *see also Money Store v. Harriscorp Finance, Inc.,* 689 F.2d 666, 674 (7th Cir. 1982) ("A good faith junior user is one who begins using a mark with no knowledge that someone else is already using it"); *Weiner King, Inc. v. Wiener King Corp.*, 615 F.2d 512, 522 n.6 (C.C.P.A. 1980) ("it is clear that appropriation of a mark with knowledge that it is being used by another is not in good faith").

[24] Several of the cases relied on by Defendants cite and rely on the *Hanover / Rectanus* doctrine. *Compare Huber Baking Co. v. Stroehmann Bros. Co.,* 252 F. 2d 945, 955 (2d Cir. 1956) (citing *Hanover* and *Rectanus*); *Tana v. Dantanna's*, 611 F.3d 767, 780 (11th Cir. 2010) (citing *Hanover*); *Emergency One*, 332 F.3d at 267 (citing *Hanover* and *Rectanus*) *with* Dkt. 120 at 22 (citing *Huber*, *Tana*, and *Emergency One*).

Here, Defendants admit that the use of the Blue Cross symbol "proliferated across the country" shortly after it was first developed in 1934. [Dkt. 120 at 6]. The Plans adopted the Blue marks precisely because they knew other Plans were doing so, and they all wanted to benefit from being associated with the marks. Thus, the Plans could not possibly have satisfied the common law requirement of having no knowledge of any senior user having used one of the Blue-related marks. Absent the BCBSA License Agreements, therefore, no individual Blue could prevent another Blue from competing in its market, because, as the junior user adopting the mark with knowledge of the senior user's mark, the common law right to exclude others from using the mark would be unavailable to it.[25]

The lack of innocent use by the Plans of the Blue Cross and Blue Shield marks distinguishes this case from those Defendants cite. In none of Defendants' cases did a court find that a junior user who knowingly used a senior user's mark had the right to exclude others from using the mark in any specifically-defined territory of the junior user (or anywhere). *E.g.*, *Tana*, 611 F.3d at 778 (there was "scant evidence of any intention of Defendants to misappropriate Plaintiff's mark" and the distance between the two users made it unlikely the junior user had knowledge of the senior); *Allard Enters., Inc. v. Advanced Programming Resources, Inc.*, 249 F.3d 564, 572 (6th Cir. 2001) ("for procedural reasons . . . . we must determine the rights of the

[25] A minority of circuits holds that a junior user's knowledge of prior use does not automatically prevent the junior user from holding common law rights, but instead is a factor that weighs heavily against a finding of good faith. Restatement (Third) of Unfair Competition § 19 (1995) ("Use of a designation with knowledge of its previous use on similar goods, services, or businesses by another, however, raises an inference of bad faith. Some cases elevate this inference to a rule of law precluding a remote subsequent user with knowledge of the prior use from claiming use in good faith. Other cases, although recognizing the relevance of such knowledge, evaluate the subsequent user's good faith based upon the totality of circumstances surrounding the use of the mark."); *see e.g. GTE Corp. v. Williams*, 904 F.2d 536, 541 (10th Cir. 1990) ("While a subsequent user's adoption of a mark with knowledge of another's use can certainly support an inference of bad faith, mere knowledge should not foreclose further inquiry. The ultimate focus is on whether the second user had the intent to benefit from the reputation or goodwill of the first user."). Even under this minority case law, the junior user Plans would not be able to satisfy the "good faith remote user" requirement: they clearly *did* have an "intent to benefit from the reputation or goodwill" of the prior use of the Blue marks.

parties in the context of a junior user with a valid federal registration," requiring the court to assume a good faith junior user).

Similarly, the case on which Defendants rely most heavily, *VMG Enters., Inc. v. F. Quesada & Franco, Inc.*, 788 F. Supp. 648 (D.P.R. 1992), involved two parties that independently and without knowledge of one another had developed the "BABY'S CHOICE" trademark for their diaper products in two different territories. *Id.* at 651 (Finding ¶ 7); *see also id.* at 654 ("Occasionally, however, two or more entities independently and unknowingly develop rights to use identical trademarks on the same or similar goods"). Under those circumstances, it was permissible for the parties to obtain what is called a "Concurrent Use Registration" from the Patent and Trademark Office ("PTO"), pursuant to 15 U.S.C. § 1052(d). In upholding that concurrent use registration against an antitrust challenge, the *VMG* court relied heavily on the fact that the PTO had approved the concurrent usage only after very careful review, and based on its finding that there had been a "good faith" agreement between the parties. *VMG*, 788 F. Supp. at 656. In this case, there has been no "concurrent use" registration by the PTO of *any* trademark rights held by *any* of Defendants (let alone all of them), and no showing has been or can be made that the individual Blues could have satisfied the requirements of showing "concurrent use" or qualifying for the exceptional "concurrent use registration" under 15 U.S.C. § 1052(d). And it is too late now for the PTO to grant concurrent use registrations to Defendants, now that the Blue marks and names have already been registered to the BCBSA as the sole holder.

In addition, in *VMG*, the court relied on the fact that the plaintiff and the other party with whom it had a "concurrent use" agreement were both able to compete in one another's territories by using brand names other than the trademark that was the subject of the concurrent use

agreement. *VMG*, 788 F. Supp. at 658. By contrast, in this case, Defendants have expressly agreed (through BCBSA) to restrict the ability of any individual Plan to compete outside its assigned territory *even if* that Plan is doing so through the use of a brand that does not use the Blue Cross or Blue Shield mark. [Sub. Compl. ¶¶ 6-7, 329-31, 352-55].[26]

D. The Restrictions in the BCBSA License Agreements Prove That Defendants' Common Law Argument Has No Merit.

If the common law automatically created territorial exclusivity for each Plan, then Defendants would not have felt the need to impose that exclusivity through the BCBSA license agreements. Defendants do not explain why any agreement among them is necessary given their interpretation of trademark law. Thus, the license agreements themselves disprove the Defendants' common-law argument.

In addition, Defendants' common-law argument ignores several other critical features of the BCBSA licensing scheme:

- When they were originally created, the BCBSA licenses forced independent Blue Cross plans and Blue Shield plans to consolidate with each other, eliminating one major source of competition among Blue Plans. [Prov. Compl. ¶ 156].
- They then required further consolidation of all Blue Cross and Blue Shield plans within each state, leaving most states with just one Blue Plan. [*Id.*]. The end result of this consolidation was to reduce the total number of Plans from 110 in 1984 to just 38 today. [*Id.*].

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[26] Likewise, the other two cases Defendants cite as upholding the right of two parties to use similar marks in different locations both involved either a concurrent use registration or the innocent use of the mark by a junior user. *See Lone Star Steakhouse & Saloon, Inc. v. Longhorn Steaks, Inc.*, 106 F.3d 355, 365 (11th Cir. 1997) ("we find that in territorially restricting Plaintiff's and Defendant's marks, the district court must have issued a **concurrent** registration"); *Fuddruckers, Inc. v. Fudpucker's, Inc.*, 436 F. Supp. 2d 1260, 1263, 1268 (N.D. Fla. 2006) (quoting settlement agreement between the parties as stating "that 'Fudpucker's, without knowledge of the Fuddruckers service mark, began using the service mark Fudpucker's in March 1982, in connection with restaurant and bar services in Destin, Florida,'" and rejecting fraud claim as time-barred and because "Plaintiffs have not offered evidence to support a reasonable inference that Defendants had knowledge of the Fuddruckers service mark prior to their use of the Fudpucker's service mark.").

- More recently, the BCBSA license agreements have imposed severe limits on the amount of revenue any Blue Plan can earn from business that is *not* sold under a Blue trademark, but instead is sold under another, independently generated trademark or brand. [Sub. Compl. ¶¶ 352-53; Prov. Compl. ¶¶ 158, 160-62].
- The BCBSA licenses make it impossible for an outside entity to gain control of a Blue Plan without approval from a majority of all the Blue Plans. [Sub. Compl. ¶¶ 368-73; Prov. Compl. ¶ 128].

Defendants do not even try to justify any of the above features of their anticompetitive license agreements as "merely confirming" the requirements of the common law. There is no common-law doctrine that has ever purported to impose these requirements, and the Sherman Act expressly prohibits them.

IV. THE MCCARRAN-FERGUSON ACT DOES NOT BAR PLAINTIFFS' CLAIMS.

Defendants' last-ditch argument is that their anticompetitive activities are permissible because the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, ("MFA") "exempts from antitrust challenge conduct that (1) constitutes the business of insurance and (2) is regulated by state law." [Dkt. 120 at 55 (citing 15 U.S.C. § 1012(b)); *see generally id.* 54–59].[27] However, Defendants' horizontal market allocation agreements fall under neither prong of this exemption.[28] Defendants' market allocation agreements are not the "business of insurance." *See In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 358 (3d Cir. 2010) ("a horizontal agreement not to compete for renewal business . . . is not within the scope of activity exempted by the

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[27] All of Defendants' MFA-related arguments are based on unsupported factual assertions, inappropriate for consideration, much less, resolution on a motion to dismiss. *United States v. Stricker*, 524 F. App'x. 500, 505 (11th Cir. 2013) ("When it considers a motion to dismiss under Rule 12(b)(6), a district court accepts the factual allegations in the complaint as true").

[28] Defendants appear to have improperly conflated the claims of the Provider and Subscriber Plaintiffs, in summarily characterizing Plaintiffs' claims as "an attack on premiums." [Dkt. 120 at 55]. While both plaintiff tracks allege an explicit agreement to divide the market and to fix prices, only Subscriber Plaintiffs pay premiums.

McCarran-Ferguson Act"). And as evidenced by the fact that the market allocation agreements here are interstate (in fact, nationwide), they are neither authorized nor regulated by any state.

In fact, prohibiting these territorial market allocation agreements, which constitute *per se* violations of federal antitrust law, would complement rather than "invalidate, impair or supersede" state regulations, as it would foster competition in the health insurance markets of each state. *See Humana, Inc. v. Forsyth*, 525 U.S. 299, 314 (1999) ("Because RICO advances the State's interest in combating insurance fraud, and does not frustrate any articulated Nevada policy, we hold that the McCarran-Ferguson Act does not block the respondent policy beneficiaries' recourse to RICO in this case."); *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 463 (1969) (MFA does not prohibit enforcement of federal securities laws involving insurance because "Arizona has not commanded something which the Federal Government seeks to prohibit").

A. Defendants' Agreements to Allocate Territorial Markets Are Not the Business of Insurance.

The Supreme Court made clear in *Royal Drug* that the MFA exempts only "the 'business of insurance,' not the 'business of insurers.'" *Group Life & Health Ins. Co., a/k/a Blue Shield of Texas v. Royal Drug Co.*, 440 U.S. 205, 211 (1979); *see also Nat'l Sec.*, 393 U.S. at 459-60 ("Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does the statute apply"); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 132 (1982) (quoting *Royal Drug*, 400 U.S. at 217, and concluding that "To grant the practices a § 2(b) exemption on such a showing 'would be plainly contrary to the statutory language, which exempts the "business of insurance and not the business of insurance companies'"). Thus, the only court to address the issue held that an antitrust challenge to the market allocation agreements in the BCBSA license agreements is *not* barred by the MFA. *Maryland v. BCBSA*, 620 F. Supp. at 918.

1. Horizontal Market Allocation of Subscriber Territories Is Not the "Business of Insurance" Under the MFA.

In determining whether conduct constitutes the "business of insurance," the focus is "on the relationship between the insurance company and the policyholder." *Nat'l Sec.*, 393 U.S. at 460. A cartel formed for the purpose of horizontally allocating markets concerns *the insurance companies' interstate conspiracy to protect their own economic self-interests*, not the contractual relationship between an insurer and its policyholders. This is why the court in *Maryland v. BCBSA* ruled that "the [Blue Plans'] decision not to market at all in a particular geographic area is one step removed from . . . the insured/insurer relationship." 620 F. Supp. at 918.

Defendants' agreements to refuse to provide insurance across state lines is inconsistent with the MFA, because "Congress intended [by the MFA] to encourage, not discourage, provision of insurance services." *Id.* at 916; *see also Topco*, 405 U.S. at 608 ("This Court has reiterated time and time again that horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition") (citations omitted).

If Defendants' arguments were correct, then ***all*** insurance companies throughout the country, and not just health insurers, could run amok, carving up markets to create, as the BCBSA has, "exclusive service areas" wholly unrelated to any trademark without fear of liability under the Sherman Act or any other federal regulation. That is not, and cannot be, the law. It would create a "gap" in enforcement "where neither federal nor state law applied, and the public would be left wholly unprotected." [Charles Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 Duke L.J. 587, 607 (1978)].

2. Defendants' Contracts with Providers Do Not Constitute the "Business of Insurance" Under the MFA.

Royal Drug also made clear that an insurance company's contracts with healthcare providers do not constitute "the business of insurance" for purposes of the MFA. In that case,

the Texas Blue Shield plan offered every pharmacy in the state the opportunity to participate in a "pharmacy agreement," under which Blue Shield's subscribers could buy prescription drugs from the pharmacy for $2 and Blue Shield would pay the pharmacy the remainder of the cost. Non-participating pharmacies sued for violations of Section 1 of the Sherman Act, alleging that the Blue Plan had fixed the price of drugs and caused its subscribers to boycott non-participating pharmacies. *Royal Drug*, 440 U.S. at 207-10. Blue Shield claimed that its conduct was exempt from the antitrust laws because it was the "business of insurance" within the meaning of the MFA. *Id.* at 207. The Supreme Court held that Blue Shield's conduct was not the "business of insurance":

> "The Pharmacy Agreements thus do not involve any underwriting or spreading of risk, *but are merely arrangements for the purchase of goods and services by Blue Shield*. By agreeing with pharmacies on the maximum prices it will pay for drugs, Blue Shield effectively reduces the total amount it must pay to its policyholders. The Agreements thus enable Blue Shield to minimize costs and maximize profits. Such cost savings arrangements may well be sound business practice, and may well inure ultimately to the benefit of policyholders in the form of lower premiums, but *they are not the 'business of insurance.'*"

Id. at 214 (emphasis added). The implications of this holding for agreements between Defendants and Provider Plaintiffs are undeniable:

> "Provider agreements in the jurisprudence of the McCarran-Ferguson Act are those arrangements concluded between, on the one hand, one or more insurers and, on the other hand, entities that are not insurers but that provide services or merchandise to the insureds in order to assist the insurers in the discharge of their contractual obligations towards those insureds. *Such agreements are not considered, in the jurisprudence of the Supreme Court set forth in [Royal Drug] part of the business of insurance* because they do not involve the activities peculiar to that business, such as the spreading and underwriting of risk and the direct contractual relationship between the insurer and the insured."

[116 A.L.R. Fed. 163, § 13 (1993) (emphasis added)]. Although *Royal Drug* is controlling Supreme Court precedent on point, Defendants fail to cite it, except for a passing mention of its discussion of legislative history. It appears that Defendants focused so intently on their (meritless) arguments concerning their contracts with subscribers that they neglected to develop any argument that applies to their separate agreements with providers. But it is a mistake to assume, as Defendants seem to do, that imposing service areas on providers is permissible if service areas can be lawfully imposed on subscribers.[29] It is easy to imagine an arrangement in which subscribers are bound by service areas, but providers may choose which Blue Plan (or Plans) to contract with. Therefore, Defendants have not explained why the MFA exempts service areas—as applied to providers—from the antitrust laws.

3. Defendants' Market Division Does Not Satisfy the Supreme Court's Three-Pronged "Business of Insurance" Test.

The Supreme Court has announced three criteria for determining if conduct constitutes the "business of insurance": whether it (1) has "the effect of transferring or spreading a policyholder's risk"; (2) is "an integral part of the policy relationship between the insurer and the insured;" and (3) is "limited to entities within the insurance industry." *Pireno*, 458 U.S. at 129; *Royal Drug*, 440 U.S. at 211, 215, 221.[30] Courts should consider all three criteria and none is

[29] This is the Provider Plaintiffs' best guess at Defendants' theory that the MFA allows Defendants to impose service areas on providers, since none is articulated in their brief. On their face, Defendants' arguments relate to the imposition of service areas on subscribers only. [*See, e.g.*, Dkt. 120 at 55 ("[P]laintiffs' attack here is an attack on premiums."); *id.* at 56 ("[S]ervice areas are integral to the relationship between the insurer and the insured."); *id.* 57 ("[S]ervice areas relate to the transfer and spread of risk. Single-hospital plans placed the risk of non-coverage on the patient."); *id.* ("Insurers offering deep, broad coverage can insure high-risk consumers at a reasonable rate only if they can include low- and medium-risk individuals in the same pool.")]. If Defendants choose to develop their argument for the first time in their reply brief, Provider Plaintiffs respectfully request leave to file a surreply.

[30] The case Defendants cite for the three factors for determining whether conduct constitutes the business of insurance, *Pireno*, 458 U.S. 119, notes that *Royal Drug* is the controlling case on this issue and employs *Royal Drug*'s three-prong test. *See id.* at 126 ("In *Royal Drug, supra*, this Court had occasion to reexamine the scope of the express antitrust exemption provided for the 'business of insurance' by § 2(b) of the McCarran-Ferguson Act. We hold that decision of the question before us is controlled by *Royal Drug*.").

dispositive alone. *Pireno*, 458 U.S. at 129. Defendants' extraordinary agreements to divvy up interstate markets among themselves satisfy *none* of these criteria.

a. Defendants' Conspiracy to Limit Each Blue Plan's Activity to a Designated Service Area Does Not Relate to the Transfer and Spread of Risk to the Insureds.

The anticompetitive practices at issue in the Complaints do not constitute the business of insurance because they do not have the effect of transferring or spreading a policyholder's risk. Contrary to Defendants' arguments, their market allocation does not spread risks among insureds.

Establishing an exclusive "service area"—meaning a limited geographic area in which the insurer will offer to sell its insurance—concentrates rather than spreads risk. In allocating service areas, the insurer has, through an agreement with competitors, arbitrarily prevented *itself* from engaging in the true spreading of risk that would be possible if it could sell insurance to customers in other states.

Moreover, by precluding other insurers from entering into other Blues' markets, Defendants are concentrating and increasing, rather than spreading and reducing, policyholder risk. Defendants are impeding policyholders from making an informed choice among competing insurers, limiting the number of people among whom policyholder risk can be spread, and hindering regulators from promoting free and competitive markets. If Defendants would permit themselves (or if this court would require them, consistent with federal antitrust law) to compete with each other, it would promote healthy competition, and result in improved underwriting and wider risk spreading.

The horizontal market allocation agreements alleged in this case do not resemble the insurance practices complained of in *Feinstein v. Nettleship Co. of Los Angeles*, 714 F. 2d 928, 930-32 (9th Cir. 1983), cited by Defendants. In *Feinstein*, a group of physicians filed suit

against their medical association and its chosen insurer, which "sought to provide a single insurance broker for all of its members in order to assure coverage for certain high-risk specialties, thereby distributing risk across the membership." *Id.* at 932. The general concerns raised by the plaintiff thus related to the insurer-insured relationship and to risk-spreading and underwriting. Because the market allocation agreements at issue in this case serve to *increase* underwriting risk rather than to spread the risk, Defendants' anticompetitive practices do not constitute the business of insurance and are not protected by the MFA.

Defendants argue that Plaintiffs' claims boil down to a complaint about premiums. Obviously, Provider Plaintiffs have not focused their complaint on the premiums paid by subscribers. As for Subscriber Plaintiffs, Defendants' actions are not immune from the antitrust laws just because they resulted in excluded competition and inflated premiums. The Supreme Court has explicitly explained that "every business decision made by an insurance company has some impact on . . . its ratemaking"; but counting every activity of an insurance company—regardless of the role of such conduct in underwriting and spreading of policyholder risks—as the business of insurance "would be plainly contrary to the statutory language, which exempts the 'business of insurance' and not the 'business of insurance companies.'" *Royal Drug,* 440 U.S. at 216-17; *Pireno*, 458 U.S. at 128-29.

The Third Circuit rejected similar MFA arguments in *Insurance Brokerage Litigation*, 618 F.3d at 311-14, 356. There, the court considered a similar horizontal agreement among insurers not to compete against one another for policy renewals. The court held that "a horizontal agreement not to compete for renewal business, at least as alleged here, is not within the scope of activity exempted by the McCarran-Ferguson Act." *Id.* at 358.

Defendants' anticompetitive agreements here are even more pernicious than the one in *Insurance Brokerage Litigation.* Defendants here do not merely refrain from competing for renewal business, they refrain from competing for *any* business. And while the Third Circuit recognized the setting of premiums has some relation to risk allocation, it found that under *Royal Drug*, "more than a mere impact on the price of premiums must be demonstrated in order to establish that a particular practice has a substantial connection to the spreading and the underwriting of risk." *Insurance Brokerage Litig.*, 618 F.3d at 358 (internal citations omitted); *see also Royal Drug*, 440 U.S. at 214 n.12 ("unless there is some element of spreading risk more widely, there is no underwriting of risk").[31]

With regard to the Provider Plaintiffs' claims, Defendants' agreements to allocate geographic market share and fix prices for healthcare provider reimbursement involve cost savings for the Blues and result in supra-competitive profits, but they do not involve spreading, sharing, or underwriting of risk. Indeed, far from benefitting their insureds, "[t]he only beneficiaries of Defendants' antitrust violations are Defendants themselves." [Prov. Compl. ¶ 8]. Rejecting this same argument in *Maryland v. BCBSA,* the court stated: "It is difficult to reconcile the Blues' argument [that territorial allocation is related to the marketing and sale of insurance], however, with the admonition in *Pireno* and *Royal Drug* that contractual arrangements with health care providers designed solely to reduce costs are not sufficient to meet the business of insurance requirement." *Maryland v. BCBSA*, 620 F. Supp. 2d at 917 (to constitute the "business

[31] *Royal Drug* found that the agreements between Blue Shield and the pharmacies did not provide for the underwriting or spreading of risk, but instead provided for the reduction of risk through decreasing the amount of benefits Blue Shield paid to its insureds. 440 U.S. at 213. Because the agreements provided for risk reduction but not risk spreading, they did not fall under the definition of the "business of insurance." *Id.* at 214. *Royal Drug* explained the "important distinction between risk underwriting," which is potentially exempted by McCarran-Ferguson, and "risk reduction," which is not. *Id.* at 214 n.12. According to the Supreme Court, "[b]y reducing the total amount [an insurer] must pay to policyholders, an insurer reduces its liability and therefore its risk. But unless there is some element of spreading risk more widely, there is no underwriting of risk." *Id.*

of insurance," the defendants' market allocation scheme must "directly facilitate risk spreading and transfer through the provision of insurance"). Here, Defendants have not even attempted to explain how their use of market allocation and price fixing, in the context of their contracts with providers, spreads risk among insureds. And even if they had, such an explanation would involve assertions of fact that cannot be resolved on a motion to dismiss. *See id.* (denying summary judgment on the issue of risk spreading because "[t]he parties have submitted affidavits which raise material factual issues").

Rather than spreading risk among insureds, Defendants' decision to divide the market was made to promote Defendants' economic interests in protecting their dominant regional market shares from competition. [Sub. Compl. ¶¶ 4, 6, 320, 325, 331, 350-67]. Those agreements did not involve a decision to spread the health risks of Blue insureds among ever larger groups of persons, but a decision to *refrain* from spreading those risks beyond arbitrary state borders and to *confine* Defendants' risk spreading activities along state (or smaller) boundaries. [*Id.*]. As evidence of the arbitrary and unsuitable nature of Defendants' immutable territorial fiefdoms, the court need look no further than the recent retaliation dispute in the litigation involving Dr. Cain and the indefensible border-between-fiefdoms separating BCBS-Kansas and BCBS-Kansas City. That border did not develop to prevent "cream skimming" or manage risks; it exists to protect the respective turfs of these two competitors.

b. The Market Allocation Conspiracy and the Price Fixing Conspiracy Are Not Integral Parts of the Policy Relationship Between the Insurer and the Insured.

As a simple matter, the conduct alleged in the Provider Plaintiffs' complaint is not directly related to the relationship between an insurer and an insured. *Royal Drug* noted that in passing the MFA, Congress was concerned with "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these

were the core of the 'business of insurance.'" *Royal Drug*, 440 U.S. at 215-16 (Congress's focus "was on the relationship between the insurance company and the policy holder" (quoting *Nat'l Sec.*, 393 U.S. at 460)). The Court held that agreements between a Blue Plan and pharmacies "are not 'between insurer and insured.' They are separate contractual arrangements between [a Blue Plan] and pharmacies engaged in the sale and distribution of goods and services other than insurance." *Royal Drug*, 440 U.S. at 216. The Court rejected BCBSA's argument that the pharmacy agreements "so closely affect the 'reliability, interpretation, and enforcement' of the insurance contract and 'relate so closely to their status as reliable insurers' as to fall within the exempted area." *Id.* "This argument, however, proves too much[,]" the Court held, because under such a broad interpretation, "almost every business decision of an insurance company could be included in the 'business of insurance.' Such a result would be plainly contrary to the statutory language, which exempts the 'business of insurance' and not the 'business of insurance companies.'" *Id.* at 216-17; *see also In re Insurance Brokerage Antitrust Litig.*, 2006 WL 2850607, at *10 (D.N.J. Oct. 3, 2006) (holding that bid-rigging and steering arrangements between brokers and insurers "constitute independent agreements between entities operating within the insurance industry, but outside the sphere of the insurer/insured relationship"). Likewise, Defendants' use of market allocation and price fixing to reduce the amount it pays providers does not affect the relationship between the Blues and their subscribers.

As for Subscriber Plaintiffs' Complaint, Defendants' market allocation agreements cannot be integral to their relationship with insureds for the simple fact that they are intended to prevent, and have succeeded in preventing, Subscriber Plaintiffs from even forming policy relationships. No individual subscriber in Alabama, for instance, can purchase health insurance from BCBS of Mississippi or BCBS of Georgia.

In any event, Defendants' market allocation agreements are contracts among themselves, not between insurer and insured. [Sub. Compl. ¶ 4; Prov. Compl. ¶ 4]. Plus, they are confidential; a confidential agreement that Defendants do not even contend is incorporated by reference into their policies with their insureds can hardly be deemed *integral* to that relationship. [Sub. Compl. ¶ 360].

The court in *Maryland v. BCBSA* rejected the contention also made by Defendants here that their territorial allocation scheme "goes to the core of the relationship between the insured and the insurer because it determines to whom the insurer will offer a policy." *Maryland v. BCBSA*, 620 F. Supp. at 918. The court found that the relevant question is whether the challenged conduct determines "the *type of policy* which could be issued, *its reliability*, *interpretation*, and *enforcement*." *Id.* (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 744 (1985)) (emphasis added). The *Maryland* court also concluded "the decision not to market at all in a particular geographic area is one step removed from the aspects of the insured/insurer relationship mentioned above" and fails to satisfy the second *Pireno* factor. *Maryland v. BCBSA*, 620 F. Supp. at 918.[32]

Defendants make a convoluted argument that their agreements not to compete (which they euphemistically refer to as "service areas") are "integral" to their relationship with their insured because: 1) the "service area" delimits *where* an insured can go to seek treatment; 2) where the insured is treated affects the "scope of his coverage"; and 3) scope of coverage is recognized as integral to the insured-insurer relationship. This pretzel logic is unavailing because the "scope of coverage" does not mean the geographic limitations on where an insured

[32] *See also Garot Anderson Mktg., Inc. v. Blue Cross & Blue Shield United of Wis.*, 772 F. Supp. 1054, 1063 (N.D. Ill. 1990) (insurers' agreement to end farmers' insurance program was not an "integral part" of the subscribers' policy relationship; the "key relationship" was between the insurers, whereas the relationship between the insurers and policyholders was "secondary").

can go to be treated; it refers to what illnesses or medical conditions, *i.e.*, risks, he is insured against or "covered for." *See, e.g.*, *Slagle v. ITT Hartford*, 102 F.3d 494, 498 (11th Cir. 1996) (whether "windstorm damage" would be covered was question of "scope of coverage") [cited in Dkt. 120 at 68].

Similarly unavailing is Defendants' assertion that service areas are "integral" because they address a defect in old policies of insurance that limited insureds to a single hospital. But even assuming *arguendo* that "integral" can be equated with "fixes a problem that used to exist," refusing to compete and artificially delimiting geographic service areas to the boundaries of a single state or city are not what cured the single hospital problem. Insurers can easily allow insureds to use more hospitals without agreeing with competitors to allocate their markets.

Defendants rely on *Gilchrist v. State Farm Mut. Auto. Ins. Co.*, 390 F.3d 1327 (11th Cir. 2004) to make an analogy suggesting that their service areas are an integral part of their insurance business. However, the plaintiffs' claim in *Gilchrist* was that the defendant auto collision insurers used cheap or inferior parts when repairing policyholders' vehicles and then failed to pass along the savings. *Id.* at 1333. That challenged conduct, involving how the defendants repaired insureds' damaged autos, went straight to the heart of the collision insurance "relationship between insurer and insured" and constituted a naked attack on the "reliability, interpretation, and enforcement" of the insurance policy itself. *Id.* Plaintiffs here make no similar attack on Defendants' services to their policyholders.

Defendants' other cited authorities stand, at most, for the proposition that conduct affecting what *risks an insurance policy covers* may be integral to the insurer-insured relationship.[33] But Subscriber Plaintiffs do not attack the scope of health risks covered by their

[33] While the *Slagle*, 102 F.3d 494, and *UNR Indus., Inc. v. Cont'l Ins., Co.*, 607 F. Supp 855 (N.D. Ill. 1984), decisions did address joint conduct by insurers affecting the scope of insurance coverage, the *Smith* court addressed

policies. Rather, they contend that Defendants' illegal market allocation arrangements prevent them from even *having* an insurer-insured relationship with an out-of-state insurer of their choice.

c. Defendants' Anticompetitive Behavior Is Not Limited to Entities Within the Insurance Industry.

Finally, Defendants' market allocation and price fixing fails the third prong of the *Royal Drug* test because it is not "limited to entities within the insurance industry." *Pireno*, 458 U.S. at 129. Nothing in the law or common practice suggests, let alone requires, that market allocation agreements among competitors can, do or should exist within the insurance industry, as shown most fundamentally by the simple fact that, once again, non-Blue insurers manage to operate successfully without them. As the court concluded in *Insurance Brokerage Litigation*,

> "there is nothing about the alleged agreement [not to compete for renewal business] that is particular to the business of insurance; it is simply an agreement not to compete to sell a particular product to a particular customer, which would be expected—in any industry . . . –to yield a higher price than would prevail in a competitive market. The mere fact that the product here happens to be insurance is not enough to trigger the McCarran-Ferguson Act's exemptions."

Insurance Brokerage Litig., 618 F.3d at 359.

Defendants' "uniqueness" argument as to Subscriber Plaintiffs is largely unintelligible, but seems to say that assembling a group of hospitals where insureds can go to seek "free" or reduced cost treatment if they are ill is unique to the insurance industry. Subscriber Plaintiffs do not complain that Defendants are offering health insurance, but rather that Defendants' concerted and unlawful decision to engage in horizontal market allocation artificially *limits* the health care providers they can use and *restricts* their choice of health insurance providers.

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whether a Georgia statute requiring notice to insureds concerned an integral part of the insurer- insured relationship and concluded it did not. *Smith v. Jefferson Pilot Life Ins. Co.*, 14 F.3d 562, 570 (11th Cir. 1994).

Defendants' similarly confusing and equally irrelevant "cream skimming" argument seems to be that in the insurance business, one needs to have territorial restrictions like those Defendants have implemented because otherwise insurers will be vulnerable to their competitors' "picking off" the most desirable, in this instance the most healthy, subscribers. Reminiscent of the justification offered by price fixers and market allocators from time immemorial—"if we don't fix prices [or allocate markets], we will be ruined by unscrupulous competitors"— this argument falls of its own weight. Not only is it belied by, yet again, the fact that other insurers manage to thrive *without* any such market allocations, but it is predicated on unproven factual assertions.

Although providers contract with insurers, they are not "entities within the insurance industry" under *Royal Drug*, which recognized that defendants' agreements with pharmacies "involve the mass purchase of goods and services from entities outside the insurance industry." *Royal Drug*, 440 U.S. at 224. In *Pireno*, the same was true of the defendant insurers' use of a committee of chiropractors in determining how much to reimburse providers who performed chiropractic services for the insurers' subscribers. *Pireno*, 458 U.S. at 132. "[I]t is plain that the challenged peer review practices are not limited to entities within the insurance industry[,]" the Court held, because the committee "inevitably involves third parties wholly outside the insurance industry – namely, practicing chiropractors." *Id.* Therefore, Defendants' anticompetitive behavior fails all three prongs of the *Royal Drug* test, and does not qualify as the "business of insurance." Thus, the MFA presents no bar to Plaintiffs' claims.

B. Enforcing Federal Antitrust Law Here Does Not "Invalidate, Impair or Supersede" State Interests; Defendants' Market Allocation Agreements Are Not "Regulated by State Law."

Even if Defendants' horizontal market allocation agreements ***did*** constitute the "business of insurance," these agreements are not regulated by state law, and thus are not protected by the

MFA. In the MFA, Congress balanced the competing regulatory interests of the federal antitrust laws versus state regulation of insurance and determined that federal antitrust regulation would continue to govern interstate practices of insurance companies of the sort alleged here that are beyond the reach of state regulators. 15 U.S.C. § 1012(b) (federal regulations remain applicable to insurance practices where the federal regulations do not "invalidate, impair or supersede" state interests); *Royal Drug*, 440 U.S. at 220 ("Congress clearly provided that the antitrust laws would be applicable to the business of insurance 'to the extent that such business is not regulated by State law'"). As the Supreme Court has made clear, "[w]hen federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." *Humana*, 525 U.S. at 310.

Here, enforcing the Sherman Act's proscription against ***interstate*** territorial market allocation agreements that are beyond the reach of state regulators as *per se* violations of federal law *complements*, rather than *interferes with*, state insurance regulation and is required by the MFA. This complementary nature of federal regulation is demonstrated by the fact that no state can regulate an insurer that has agreed with its competitors not to operate within its borders. Alabama cannot regulate BCBS-Montana, for instance, nor can Alabama sanction BCBS-Montana for *not* doing business or competing in Alabama. Allowing the federal antitrust laws to police these *interstate*, indeed out-of-state, conspiracies that are beyond the reach of state regulators properly complements, and does not undermine, state insurance regulation.

In addition, state health insurance regulatory schemes are premised upon competition among different insurers to reduce costs and improve benefits. *See, e.g.*, Mont. Code Ann. § 33-16-201(b) (providing that a rate may only be deemed "excessive" if "a reasonable degree of

competition does not exist in the area with respect to the classification to which the rate is applicable”); Va. Code Ann. § 38.2-1904(A)(1) (same); *id.* at § 38.2-1906. Promoting competition in a state regulatory scheme that contemplates competition in no way “interferes” with state regulation; it facilitates it. Similarly, in *Negrete v. Allianz Life Ins. Co. of No. Am.*, 926 F. Supp. 2d 1143 (C.D. Cal. Feb. 25, 2013), the district court rejected the MFA defense in an analogous context, finding that imposing liability on an insurance company and its co-conspirators for fraudulently selling deferred annuities would frustrate no declared state policy. Without providing any specifics, Defendants make a broad-brush argument that insurance regulators from unidentified states “have jurisdiction over” their market allocation agreements because “bod[ies] of state law” exist “throughout the country” regulating “unfair insurance practices,” thus satisfying the MFA’s “state regulation requirement.” [Dkt. 120 at 58]. Apart from the total lack of support for these factbound assertions, Defendants do not and cannot argue that any state supervises, approves, or otherwise regulates the inherently *national and interstate* horizontal market allocation agreements reflected in the BCBSA’s market allocation agreements.

Defendants’ position is even more ironic in that the essence of their entire scheme has been *avoidance* of state regulation and supervision. Defendants’ market allocation agreements prevent the states from ever reviewing competing policies offered by multiple Blue insurers operating in a state; by illegal agreement, such policies are never created, never exist, and no rates for such policies are filed with any state regulator.

CONCLUSION

For the reasons stated above, Defendants’ motions to dismiss should be denied.

Respectfully submitted the 15th of January, 2014,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Provider and Subscriber Plaintiffs' Joint Response to Defendants' Motions to Dismiss was served by ECF, this 15th day of January, 2014, upon counsel of record.

/s/ Barry A. Ragsdale
Barry A. Ragsdale