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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' MEMORANDUM OF LAW IN JOINT OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND IMPROPER VENUE

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Provider and Subscriber Plaintiffs submit this Memorandum of Law in Opposition to various Defendants' Motions to Dismiss for Lack of Personal Jurisdiction and Improper Venue. These Defendants[1] filed six separate motions to dismiss, and nearly all of them adopted the legal analysis and arguments set forth in the "Memorandum of Certain Defendants in Support of Motion to Dismiss for Lack of Personal Jurisdiction and Improper Venue" ("Certain Defendants' Br.," Dkt. 125-1). The only substantive differences in the individual motions are certain factual arguments that purportedly negate personal jurisdiction as to that individual Defendant. Since the motions raise identical legal arguments, Plaintiffs submit this single opposition.

INTRODUCTION

All Plaintiffs have alleged, in detail, that all members of the Blue Cross and Blue Shield Association have conspired to restrain trade by agreeing to carve up the United States into exclusive territories. Provider Plaintiffs allege that Defendants agreed to fix the prices they pay to providers who treat a Blue plan's subscribers outside of that plan's exclusive territory. Subscriber Plaintiffs allege that Defendants' agreements to divide the market denied them the opportunity to purchase competitively priced policies.

A minority of the Blues, just ten of the thirty-eight Blue plans in the main action, challenge this Court's personal jurisdiction over them and claim that venue is inappropriate in this district. This Court has personal jurisdiction, and venue is appropriate, for a number of independent reasons. First, Plaintiffs' allegations meet the requirements for venue and personal jurisdiction under Section 12 of the Clayton Act. In the alternative, Plaintiffs may combine the

[1] The moving Defendants are Blue Cross Blue Shield of Arizona (BCBS-AZ), Blue Cross and Blue Shield of Kansas, Inc. (BCBS-KS), Blue Cross Blue Shield of North Dakota (BCBS-ND), Blue Cross Blue Shield of Wyoming (BCBS-WY), HealthNow New York Inc. (HealthNow) (Dkt. 125); Blue Cross Blue Shield of Mississippi (BCBS-MS) (Dkt. 122, 123); Blue Cross of Northeastern Pennsylvania (BC-NEPA) (Dkt. 121); Excellus Health Plan, Inc., d/b/a Excellus BlueCross BlueShield (Excellus) (Dkt. 113); Capital Blue Cross (Dkt. 112, 119, 135, 136); and Triple S Salud, Inc. (Dkt. 107).

Clayton Act's provision for nationwide personal jurisdiction with the general venue statute to create nationwide jurisdiction and venue. Second, jurisdiction is appropriate under Alabama's long-arm statutes because Defendants entered into a conspiracy in which at least one conspirator committed an overt act in Alabama, and whose effects have been felt in Alabama.[2] Third, Alabama's long-arm statute provides for personal jurisdiction over Defendants because they have availed themselves of the privilege of doing business in Alabama, both because they each have a substantial number of members in Alabama, and because of their participation in the BlueCard program. BlueCard allows subscribers of any Blue plan to seek treatment from Alabama providers, who are then paid by Blue Cross and Blue Shield of Alabama (BCBS-AL) for treating those subscribers. The number of members that Defendants have in North Carolina also makes jurisdiction in the Subscriber-only case appropriate in North Carolina, under its long-arm statute.[3] Regardless of the theory on which it is based, the exercise of personal jurisdiction over Defendants comports with the constitutional requirements of due process.

LEGAL STANDARD

"In the context of a motion to dismiss in which no evidentiary hearing is held, a plaintiff need establish only a prima-facie case of jurisdiction. The court, in considering the motion, must take all allegations of the complaint that the defendant does not contest as true, and, where the parties' affidavits conflict, the court must construe all reasonable inferences in favor of the

[2] For the same reasons, jurisdiction against the Defendants who contested jurisdiction in the Western District of North Carolina in the Subscriber case *Kelli R. Cerven et al. v. BCBS of North Carolina, et al.*, Case No. 5:12-cv-0017-RLV-DC is appropriate. (This case was transferred to the Northern District of Alabama and is now styled as *Cerven, et al., v. Blue Cross Blue Shield of North Carolina, et. al.*, Case No. 2:12-cv-04169-RDP.) The Cervens filed suit against all the current Defendants in North Carolina, but only certain Defendants moved to dismiss their suit for lack of jurisdiction or venue.

[3] Defendants Triple S Salud, Inc. and Excellus Health Plan, Inc. also contested the exercise of jurisdiction in Florida, Minnesota, South Carolina, and Texas (Dkt. 107, 113). The cases they request to be dismissed were all brought by provider plaintiffs not named in the consolidated amended complaint.

plaintiff." *Huey v. Am. Truetzschler Corp*., 47 F. Supp. 2d 1342, 1344 (M.D. Ala. 1999) (citing *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990)). A motion to dismiss "should be denied if plaintiff alleges sufficient facts to support a reasonable inference that defendant can be subjected to jurisdiction of the court." *Jackam v. Hosp. Corp. of Am. Mideast, Ltd*., 800 F.2d 1577, 1579 (11th Cir. 1986) (citing *Bracewell v. Nicholson Air Servs., Inc.,* 680 F.2d 103 (11th Cir. 1982)). Thus, if any reasonable inference can be drawn from the complaint that would support personal jurisdiction, Defendants' motions to dismiss must be denied.

ARGUMENT

I. THE CLAYTON ACT GRANTS PERSONAL JURISDICTION AND VENUE

Section 12 of the Clayton Act, 15 U.S.C. § 22, and the general venue statute, 28 U.S.C. § 1391, provide a statutory basis for both proper venue and personal jurisdiction over Defendants in the Northern District of Alabama (and the Western District of North Carolina). This case satisfies the requirements for venue and personal jurisdiction under Section 12 of the Clayton Act, 15 U.S.C. § 22. In the alternative, venue and jurisdiction are appropriate because nationwide service of process under Section 12 works in concert with the general venue statute, 28 U.S.C. § 1391, to provide nationwide venue and personal jurisdiction over Defendants. Moreover, personal jurisdiction over Defendants comports with Fifth Amendment due process.

A. Under the Clayton Act, Personal Jurisdiction and Venue Are Proper in Alabama (and North Carolina) Because Defendants Transact Business There

Section 12 of the Clayton Act provides for venue and personal jurisdiction in cases involving a corporate defendant:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22. Simply put, if Defendants "transact [] business" in this district, then venue is appropriate here, and Defendants will be subject to nationwide personal jurisdiction because they may be served with process anywhere in the nation. Fed. R. Civ. P. 4(k)(1)(C); *Rep. of Pan. v. BCCI Holdings (Luxembourg) S.A. (BCCI Holdings)*, 119 F.3d 935, 942 (11th Cir. 1997) ("[W]hen a federal statute provides for nationwide service of process, it becomes the statutory basis for personal jurisdiction.").

Defendants do not dispute that Section 12 provides for venue and personal jurisdiction in this district if they transact business here, but they claim that they do not transact business in Alabama because they maintain no offices here, do not advertise here, and so forth. (Certain Defendants' Br. 10.) Defendants neglect to mention, however, that none of these are requirements for a corporation to "transact business" under the Clayton Act.[4] "The term 'transacts business' was added by Congress in 1914 with the clear intention to broaden venue in antitrust cases so as to enlarge the jurisdiction of the various federal district courts and to broaden the choices of forums available to plaintiffs in antitrust cases." *In re Chicken Antitrust Litig.*, 407 F. Supp. 1285, 1291 (N.D. Ga. 1975). The Supreme Court has held that to transact business in a district, a corporation need not have an agent in the district, as long as its business is "of any substantial character." *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359, 372–73 (1927); *see also United States v. Scophony Corp. of Am.*, 333 U.S. 795, 807 (1948) ("The practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character' became the test of venue."). Even if a corporation's agents never set

[4] Defendants' assertions about their business activities (or lack thereof) in Alabama seem more suited to an analysis of whether they have "minimum contacts" with those states under the Fourteenth Amendment. This analysis is inapposite when evaluating venue under the Clayton Act. *United States v. Microsemi Corp.*, No 1:08cv1311, 2009 U.S. Dist. LEXIS 18700, at *14–15 (E.D. Va. Mar. 4, 2009). As Plaintiffs explain below, Defendants do have "minimum contacts" with Alabama.

foot in a district, its purchases and sales in the district "constitute the transaction of business" there. *Black v. Acme Mkts., Inc.*, 564 F.2d 681, 687 (5th Cir. 1977). Whether these purchases and sales are "substantial" is "to be judged from the point of view of the average businessman and *not in proportion to the sales or revenues of the defendant*." *Id.* (emphasis added). To hold otherwise would allow a large corporation to "engage in the same acts which would subject a smaller corporation to jurisdiction and venue." *Green v. U.S. Chewing Gum Mfg. Co.*, 224 F.2d 369, 372 (5th Cir. 1955).[5] In fact, a single transaction in the district may confer venue if it is related to the cause of action. *In re Chicken Antitrust Litig.*, 407 F. Supp. at 1291. But in general, "purchases and/or sales which constitute the transaction of business need not be connected to the subject matter of [the] suit," as long as they are substantial. *Black*, 564 F.2d at 687.

1. Alabama

With these standards in mind, it is beyond question that Defendants' business activity in Alabama is "substantial." No Defendant presents evidence that they do not have members residing in Alabama and do not have members who were treated in Alabama through the BlueCard program. More specifically, of the ten Defendants who challenge venue in this action, eight affirmatively admit that they have members who reside in Alabama and/or were treated in Alabama through the BlueCard program.[6] In fact, six disclosed the number of their members who reside in Alabama, as well as the number of their members treated in Alabama through the

[5] Although their business activity in Alabama as a percentage of their total business is irrelevant, BCBS-KS and BCBS-WY might want to double-check their calculations of these percentages. BCBS-KS's figures imply that it has more than 13 million members, and that more than 17 million of its members submitted claims through the BlueCard program. (*See* Dkt. 125-3 ¶¶ 16–17.) The population of Kansas is fewer than 3 million. BCBS-WY's figures imply that it has more than 7 million members. (*See* Dkt. 125-5 ¶ 16.) The population of Wyoming is fewer than 600,000.

[6] Dkt. 107-1 ¶13; Dkt. 119-1 ¶ 13; Dkt. 121-1 ¶ 8; Dkt. 125-2 ¶¶ 16–17; Dkt. 125-3 ¶¶ 16–17; Dkt. 125-4 ¶¶ 15–16; Dkt. 125-5 ¶¶ 16–17; Dkt. 125-6 ¶¶ 16–17.

BlueCard program.[7] The additional two Defendants, including BCBS-MS, do not dispute that they have members who reside in Alabama or were treated in Alabama. These admissions, and the figures cited by Defendants in their motions to dismiss prove that these Defendants' business activity in Alabama is substantial.

As Defendants concede, they use the BlueCard program to compete against national insurers for the business of the federal government, as well as national and multi-state employers with employees scattered around the country. (Dkt. 120 at 30.) In other words, if an Alabama resident is employed by an Arizona corporation, which has obtained health insurance for its employees from BCBS-AZ, then BCBS-AZ counts that Alabama employee as one of its members. That Alabama employee then has his medical care *in Alabama* covered by BCBS-AZ, and BCBS-AZ will compensate *Alabama* providers for that medical care. As shown in Defendants' motions to dismiss, each Defendant has a substantial number of members who live in Alabama:

Defendant	**Members in Alabama**
BCBS-AZ	305
BCBS-KS	134
BCBS-ND	226
BCBS-WY	22
Capital Blue Cross	(Sealed)[8]
HealthNow	1,377

And, each Defendant has purchased substantial amounts of healthcare services from providers in Alabama by paying for services provided to subscribers in Alabama through the BlueCard program:

[7] Dkt. 125-2, ¶¶ 16-17; Dkt. 125-3, ¶¶ 16-17; Dkt. 125-4, ¶¶ 15-16; Dkt. 125-5, ¶¶ 16-17; Dkt. 125-6, ¶¶ 16-17.

[8] The figures for Capital Blue Cross can be found in the sealed exhibit filed at Dkt. 119-1. Capital Blue Cross did not state how many of its members received services through the BlueCard program, but it did state the dollar value of those services.

Defendant	Members with BlueCard Claims in Alabama
BCBS-AZ	1,371
BCBS-KS[9]	1,719
BCBS-ND	55
BCBS-WY	401
Capital Blue Cross	Not given
HealthNow	1,866

Even with conservative assumptions about the premiums that Defendants charge their members, and the cost of providers' services, it is clear that these Defendants' business activities in Alabama total in the hundreds of thousands or millions of dollars each year.[10] Defendants have not argued, nor could they plausibly argue, that an "average businessman," *Black*, 564 F.2d at 687, would find these figures insubstantial. *See Green*, 224 F.2d at 371 (reversing the district court's decision that annual sales of $25,000 were not "substantial" under the Clayton Act). Moreover, these payments—premiums collected from subscribers and reimbursements paid to providers—are the basis of this litigation, so even a single transaction in Alabama could confer venue. *In re Chicken Antitrust Litig.*, 407 F. Supp. at 1291. Here, Defendants engage in as many as 1,866 transactions in Alabama annually. In short, Defendants' activities in Alabama are more than enough to confer jurisdiction and venue under the Clayton Act.[11]

2. North Carolina

The same analysis applies with regard to the exercise of jurisdiction in the Subscriber-only case in North Carolina: personal jurisdiction and venue are proper in North Carolina

[9] In addition to its participation in the BlueCard program, BCBS-KS contracts with an independent laboratory in Alabama.

[10] Defendants ignore the other element of their business with Alabama, the amount of money they receive from BCBS-AL through their treatment of Alabama subscribers.

[11] Four Defendants provided no information about the extent of their business in Alabama: Excellus, BCBS-MS, BC-NEPA, and Triple S Salud. (BC-NEPA did admit that it has members in Alabama, but it did not say how many.) Plaintiffs believe that these Defendants' business activities in Alabama are similar to those of the other six Defendants, and they request that they be permitted to take limited discovery regarding these activities.

because Defendants transact business there.[12] As shown in Defendants' motions to dismiss, the Defendants who provided information about their contacts with North Carolina have a substantial number of members who live in the state:

Defendant	Members in North Carolina
BCBS-AZ	788
BCBS-ND	439
BCBS-WY	75
Capital Blue Cross	(Sealed)[13]

No Defendant presents evidence that it does not have any members residing in North Carolina. And, each Defendant has purchased substantial amounts of healthcare services from providers in North Carolina by paying for services provided to subscribers in North Carolina through the BlueCard program:

Defendant	Members with BlueCard Claims in North Carolina
BCBS-AZ	1,071
BCBS-ND	349
BCBS-WY	2,990
Capital Blue Cross	Not given[14]

The evidence that Defendants provided in their motions to dismiss demonstrate that they transact business in North Carolina, far beyond the extent necessary to confer jurisdiction and venue for Subscriber Plaintiffs under the Clayton Act.[15]

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[12] Only certain Defendants contested the exercise of jurisdiction in North Carolina, where Subscriber plaintiffs Keith and Terri Cerven filed a complaint against each Defendant in the Subscriber case. Provider Plaintiffs have not filed suit in North Carolina.

[13] The figures for Capital Blue Cross can be found in the sealed exhibit filed at Dkt. 136-1.

[14] The figures for Capital Blue Cross can be found in the sealed exhibit filed at Dkt. 136-1. Capital Blue Cross did not state how many of its members received services through the BlueCard program, but it described in substantial detail the dollar value of its services to these members, as well as other business it does in North Carolina, at pp. 3-4 of its memorandum.

[15] The remaining Defendants provided no information about the extent of their business in North Carolina: BCBS-KS, HealthNow, Excellus, BCBS-MS, BC-NEPA, and Triple S Salud. (BC-NEPA did admit that it has members in North Carolina, but it did not say how many.) Plaintiffs believe that these Defendants' business activities in North

B. In the Alternative, Section 12 of the Clayton Act Provides Nationwide Personal Jurisdiction, and the General Venue Statute Provides Nationwide Venue

Even if Defendants did not meet the standard for "transact[ing] business" under Section 12 of the Clayton Act, personal jurisdiction is still appropriate because a plaintiff may rely on Section 12 and the general venue statute together for nationwide venue and personal jurisdiction. To review, Section 12 has two clauses, one for venue and one for nationwide personal jurisdiction:

> [Venue:] Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; [Nationwide Personal Jurisdiction:] and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22. The general venue statute provides for venue in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located," 28 U.S.C. § 1391(b)(1), and a corporate defendant resides "in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question." *Id.* § 1391(c)(2). Therefore, if a corporate defendant is subject to personal jurisdiction nationwide, then it resides nationwide, and venue is appropriate nationwide. Defendants urge this Court to recognize a reading of Section 12 that places a drastic limit on the nationwide service of process clause and curbs the intent behind the antitrust statutes, allowing a plaintiff to invoke nationwide personal jurisdiction under Section 12 only after filing suit in a venue provided by Section 12. (Certain Defendants' Br. at 7–10.) Such a narrow reading is inappropriate; the Eleventh Circuit has stated that where Congress has provided for nationwide

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Carolina are similar to those of the other four Defendants, and they request that they be permitted to take limited discovery regarding these activities.

service of process, "courts should presume that nationwide personal jurisdiction is necessary to further congressional objectives." *BCCI Holdings*, 119 F.3d at 948.

The courts of appeals are divided on whether a plaintiff can use Section 12 to justify personal jurisdiction over a corporate defendant while using the general venue statute to obtain venue. The Third and Ninth Circuits allow plaintiffs to do so under the "independent" reading of Section 12, which views the venue and jurisdiction clauses of Section 12 as independent of each other.[16] The Second, Seventh, and District of Columbia Circuits have taken the opposite view under the "integrated" reading of Section 12, which views the venue and jurisdiction clauses of section 12 as inseparable.[17] The Circuits adopting the integrated reading of Section 12 provide no legislative history or authority to support the idea that Congress ever intended Section 12's venue clause to limit personal jurisdiction. To the contrary, it has long been recognized that the general venue statute was meant to *supplement* special venue statutes such as Section 12. *See Delong*, 840 F.2d at 855; *Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n of Kan.*, 891 F.2d 1473, 1477 (10th Cir. 1989). But the general venue statute is not a true supplement if it disqualifies plaintiffs from invoking nationwide personal jurisdiction under Section 12—an option to which they would otherwise be entitled. Instead, the special venue provision of the Clayton Act was deliberately intended as a means to provide antitrust plaintiffs with more expansive venue options, in addition to those granted by general venue statutes, to facilitate the resolution of antitrust actions. *See Lipp v. Nat'l Screen Serv. Corp.*, 95 F. Supp. 66, 69–70 (E.D. Pa. 1950) (citing *United States v. Nat'l City Lines*, 334 U.S. 573 (1948)). The

[16] *Action Embroidery Corp. v. Atl. Embroidery, Inc*., 368 F.3d 1174, 1177–80 (9th Cir. 2004); *Go-Video, Inc. v. Akai Elec. Co*., 885 F.2d 1406, 1408–13 (9th Cir. 1989); *In re Auto Refinishing Paint Antitrust Litig*., 358 F.3d 288, 292–97 (3d Cir. 2004).

[17] *KM Enters., Inc. v. Global Traffic Techs., Inc*., 725 F.3d 718, 723–30 (7th Cir. 2013); *Daniel v. Am. Bd. Of Emergency Med.*, 428 F.3d 408, 422–27 (2d Cir. 2005); *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350–51 (D.C. Cir. 2000).

integrated reading of Section 12, which Defendants advocate, unduly restricts plaintiffs' ability to enforce the antitrust laws.

Although the Eleventh Circuit has not discussed this issue at length, it has adopted the independent reading of Section 12. In *Delong Equip. Co. v. Washington Mills Abrasive Co.*, the Eleventh Circuit affirmed the district court's holding that a corporate defendant "was subject to the nationwide service of process provision of the Clayton Act." 840 F.2d 843, 848 (11th Cir. 1988) (citing Section 12). The Eleventh Circuit then held that "venue is appropriate . . . under the general federal venue statute." *Id*. at 855. Specifically, the court concluded that "[i]n a federal antitrust case, venue may be established under § 4 of the Clayton Act, § 12 of the Clayton Act, or the general federal venue statute." *Id*. (citations omitted). The court's decision to invoke Section 12 for personal jurisdiction and the general venue statute for venue was carefully considered:

> Because we conclude that venue is established under the general federal venue statute, we do not reach the appropriateness of venue under § 12 of the Clayton Act.
>
> *It is appropriate for us to decide the venue question from the general venue statute alone, without also considering the applicability of the special antitrust venue statute.* As this court noted in *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 417 n.3 (11th Cir.1984), "[t]he majority of courts considering the joint operation of the venue provisions of the Clayton Act and § 1391(b) have held that the Clayton Act's specific venue provisions do not 'abolish or supersede the available districts mentioned in the general venue provisions of § 1391(b).'" *See also Vest v. Waring*, 565 F. Supp. 674 (N.D. Ga. 1983), in which the district court applied the general venue provision to establish venue over an individual defendant after the parties conceded that venue could not lie under the special antitrust venue statute, 15 U.S.C. § 15.

Id. at 855 n.16 (emphasis added). In other words, the Eleventh Circuit explicitly decided that Section 12's venue and personal jurisdiction clauses can be separated, and that a plaintiff can

establish personal jurisdiction under Section 12 and venue under the general venue statute. This Court should follow the Eleventh Circuit's binding precedent.

Indeed, the Ninth Circuit cited and relied on the Eleventh Circuit's decision in *Delong* when it issued *Go-Video*, the first opinion to thoroughly analyze and specifically articulate the independent view of Section 12. 885 F.2d at 1409. In *Go-Video*, the Ninth Circuit stated:

> Cases dealing with claims under the antitrust laws have likewise taken the view that the general federal venue statutes coexist (although not necessarily coextensively) with the specific venue provisions contained in the various antitrust laws. . . . [S]uch cases have examined whether the facts a plaintiff has pleaded satisfy *either* a general, or a specific antitrust, venue statute. *Delong Equipment Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 855 (11th Cir. 1988) ("In a federal antitrust case, venue may be established under § 4 of the Clayton Act, 15 U.S.C. § 15, § 12 of the Clayton Act, 15 U.S.C. § 22, or the general federal venue statute, 28 U.S.C. § 1391(b)."). . . .

Id.; *see also Action Embroidery*, 368 F.3d at 1177–78 (citing *Delong* in support of the independent view of Section 12 and its "holding that the special venue provision of Section 12 is supplemented by the general venue provisions of § 1391"). After reviewing the legislative history of the Clayton Act, the Ninth Circuit found "no evidence that Congress intended section 12's venue provisions to be exclusive, or that antitrust venue be narrowly conceived in scope," *Go-Video*, 885 F.2d at 1413, and instead recognized that the legislative history indicated that Congress intended to expand the venue provisions and broaden the range of forums available to antitrust plaintiffs and corporate defendants. *Id*. at 1410. That principle—that considerations of jurisdiction and venue should not pose obstacles to the vindication of the antitrust laws—supports the independent view of Section 12.

The Defendants' claim that "[t]he Eleventh Circuit has not squarely addressed this issue, but its case law is in line with an integrated approach" (Certain Defendants' Br. 8) is wrong. Defendants' argument is that because *Delong* "performed an extensive analysis under the forum state's long-arm statute to determine whether the defendant had minimum contacts such that

service was proper and the exercise of personal jurisdiction comported with due process requirements," (*id.* at 8–9), this Court should ignore *Delong*'s explicit holding and instead require Plaintiffs to satisfy the venue requirements of Section 12. However, *Delong* never said that the independence of Section 12's venue and personal jurisdiction clauses depends on whether the defendant has minimum contacts with the forum.[18] Rather, the court based its finding of personal jurisdiction primarily on Section 12, not the corporate defendant's contacts with the forum: "Service of process on [the individual defendant] was authorized under [Georgia's long-arm statute]; service of process on [the corporate defendant] was authorized under the nationwide service of process provision of the Clayton Act, 15 U.S.C. § 22." 840 F.2d at 857–58. There is no reason to disregard *Delong*'s clear holding: a plaintiff can establish personal jurisdiction under Section 12 and venue under the general venue statute.

Courts that apply the "integrated" reading focus on the argument that decoupling the two clauses leaves the venue language irrelevant, deducing that Congress would not put words into the statute that have no meaning. *See GTE New Media Servs.*, 199 F.3d at 1351 (adopting an "integrated" reading because Congress would not craft a statute with a "superfluous" first clause). When Congress passed Section 12, however, the specific venue clause was not irrelevant because, at the time, the general venue statute was much narrower than the provisions of the Clayton Act.[19] Because Section 12 expanded the venues available to antitrust plaintiffs,

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[18] Such a requirement would have been inappropriate because when a federal statute provides for personal jurisdiction, the defendant must have "minimum contacts" with the United States as a whole, not the forum state. *BCCI Holdings*, 119 F.3d at 946–47. (*See infra* pp. 16-17.) Obviously, Defendants here have extensive contacts with the United States as a whole.

[19] *See Monument Builders*, 891 F.2d at 1473, 1478:

> Prior to 1966, the general venue provisions for federal question cases permitted a plaintiff to bring suit only in the district where the defendant resided. The venue provisions in the Clayton Act [enacted Oct. 15, 1914] were 'designed to aid plaintiffs by giving them a wider choice of venues, and thereby to secure a more effective, because more convenient, enforcement of antitrust

Monument Builders, 891 F.2d at 1477, it would be a mistake to adopt the integrated reading of Section 12 on the grounds that Section 12's venue clause would otherwise be irrelevant. Therefore, Defendants' reliance on the narrow and "integrated" reading of Section 12 is fundamentally flawed because it ignores the history and purpose of both the antitrust and general venue statutes.

Defendants do not argue that they are beyond this Court's jurisdiction, or that venue is improper here, if the independent reading of Section 12 is correct. Because the Eleventh Circuit has adopted the independent reading, and because the independent reading effectuates Congress's desire to expand the venues available to antitrust plaintiffs, this Court should deny the motions to dismiss.[20]

C. Jurisdiction Under The Clayton Act Comports with Fifth Amendment Due Process

Once the Court determines that the federal statute confers jurisdiction over Defendants, it must then determine whether the exercise of jurisdiction comports with due process. *BCCI Holdings*, 119 F.3d at 942. When a federal statute provides the basis for personal jurisdiction, the Fifth Amendment's due process clause, rather than the Fourteenth Amendment, supplies the appropriate standard. *Id.* Under the Fifth Amendment, "[t]he burden is on the defendant to demonstrate that the assertion of jurisdiction in the forum will 'make litigation so gravely

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> prohibition.' . . . In 1966, Congress amended the general venue statute, expanding the available forums in all federal question cases.

(internal citations omitted). Today, the general venue statute provides for venue in "any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." 28 U.S.C. § 1391(b)(3); *see supra* pp. 9-10.

[20] Defendants argue in Part III.A of their brief that venue is improper under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. (Certain Defendants' Br. 18–19.) Provider Plaintiffs need not respond to this argument because they have not relied on these sections of the Clayton Act to establish venue. Subscriber Plaintiffs rely on *Delong*, which squarely addresses this issue. Specifically, the court concluded that "[i]n a federal antitrust case, venue may be established under § 4 of the Clayton Act, § 12 of the Clayton Act, or the general federal venue statute." 840 F.2d at 857–58 (citations omitted).

difficult and inconvenient that [he] unfairly is at a severe disadvantage in comparison to his opponent.'" *Id.* at 948 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985)). Only in "highly unusual cases" will the inconvenience to a defendant "rise to a level of constitutional concern." *Id.* at 947.

1. Defendants Have Presented No Evidence That Their Ability to Defend This Suit Will Be Significantly Compromised, Gravely Difficult Or Inconvenient

Here, jurisdiction comports with due process because Defendants have not attempted to "demonstrate that the assertion of jurisdiction in the forum will 'make litigation so gravely difficult and inconvenient that [they] unfairly [are] at a severe disadvantage in comparison to [their] opponent.'" *Id.* at 948 (quoting *Burger King*, 471 U.S. at 478). Nor could they, because Defendants are all large companies represented by counsel who have no difficulty traveling to Alabama.[21] Under similar circumstances, the Eleventh Circuit found "no constitutional impediment to jurisdiction" because the large corporate defendants "presented no evidence that their ability to defend this lawsuit will be compromised significantly if they are required to litigate in Miami," even though those defendants "may not have had significant contacts with Florida." *Id; see also Grail Semiconductor, Inc. v. Stern,* 12-60976-CIV, 2012 WL 5903817, at *5 (S.D. Fla. Nov. 26, 2012) (unsupported statements that it would be "extremely difficult" for defendant to litigate a case in Florida because he lives in California fail to meet burden because "they do not furnish the Court with anything substantive that would show why or how the burden

[21] At the November 2013 hearing in Birmingham on Dr. Kathleen Cain's motions for injunctive relief, which involved just one plaintiff and two defendants, approximately twenty defense attorneys attended. Apparently, travel to Birmingham is not prohibitively difficult, and Defendants have not argued that travel to North Carolina in the Subscriber cases would be any more cumbersome. *See BCCI Holdings*, 119 F.3d at 947–48 (stating that modern modes of transportation and means of communication have lessened the burden of defending a suit).

on [Defendant] would be of constitutional concern").[22] Because Defendants have not even tried to meet their burden, jurisdiction under the Clayton Act is appropriate.

2. The Relevant Forum Under the Fifth Amendment Is The United States

Instead of making the required showing of grave difficulty and inconvenience, Defendants argue that the Court must balance their contacts with Alabama (or North Carolina) against the federal interest in litigating there. (Certain Defendants' Br. 11 (citing *Butler v. Beer Across Am.*, 83 F. Supp. 2d 1261, 1268 (N.D. Ala. 2000)).) This is simply the wrong standard. *Butler* was a case involving a minimum-contacts analysis under a state long-arm statute, not an analysis of due process under the Fifth Amendment. Defendants focus on whether they "injected themselves" in these jurisdictions, (*id.*), but the Eleventh Circuit has held that under the Fifth Amendment, the idea of "purposeful availment" "will have no application in the case of domestic defendants" because "the relevant forum under the Fifth Amendment is the United States." *BCCI Holdings*, 119 F.3d at 945 n.16. Instead, in determining whether litigation imposes an undue burden, the Court must "examine a defendant's aggregate contacts with the nation as a whole rather than his contacts with the forum state in conducting the Fifth Amendment analysis." *Id.* at 947. Moreover, the "federal interest in litigating the dispute in the chosen forum" is balanced against the "burden imposed on the defendant" only if the defendant first "makes a showing of constitutionally significant inconvenience." *Id*. at 948.

Here, Defendants undisputedly have extensive contacts with the United States as a whole, and they have not attempted to make a showing of constitutionally significant inconvenience. In any event, federal interests strongly support jurisdiction in this district. The Eleventh Circuit has

[22] Demonstrating any substantial burden on Defendants is particularly challenging where, as here, each Defendant has hundreds of members in each district in which it was sued. *See* p. 6, *supra*.

recognized that "[i]n complex antitrust litigation involving numerous defendants from diverse geographic locations, it would be onerous and cumbersome to require the plaintiff to proceed separately against each defendant in the defendant's home forum, particularly given the strong federal interest in allowing for efficient conduct of a complex lawsuit." *Delong*, 840 F.2d at 850–51. Therefore, personal jurisdiction over Defendants satisfies the due process requirements of the Fifth Amendment, and this Court should deny Defendants' motions to dismiss.

II. ALL OF THE DEFENDANTS ARE SUBJECT TO PERSONAL JURISDICTION BECAUSE THEY ARE PARTIES TO A CONSPIRACY

A. Alabama

Defendants acknowledge that Alabama law permits the exercise of personal jurisdiction over all parties to a conspiracy. (Certain Defendants' Br. 15); *see Ex parte McInnis*, 820 So. 2d 795, 806–07 (Ala. 2001) (*cited in J&M Assocs. v. Romero*, 488 F. App'x 373 (11th Cir. 2012)). "Under a conspiracy theory, a defendant who otherwise would not be subject to personal jurisdiction might be hailed (sic) into court if the plaintiff 'plead[s] its conspiracy allegations with sufficient particularity' and alleges 'overt acts taken within Alabama in furtherance of the conspiracy.'" *Giraldo v. Drummond Co.*, 2:09-CV-1041-RDP, 2012 U.S. Dist. LEXIS 85562, at *19–20 (N.D. Ala. June 20, 2012) (Proctor, J.) (quoting *J&M Assocs. v. Callahan*, No. 07-0883-CG-C, 2011 U.S. Dist. LEXIS 131752, at *11 (S.D. Ala. Nov. 15, 2011) (internal citations omitted)). To establish personal jurisdiction over a nonresident defendant under a conspiracy theory, the conspiracy averments in the complaint must exceed bald speculation and mere conclusory assertions; however, this burden is not heavy, especially when determination of the jurisdictional facts is intertwined with questions of ultimate liability. *Ex parte Reindel*, 963 So. 2d 614 (Ala. 2007).

Provider and Subscriber Plaintiffs have pleaded their conspiracy allegations with particularity, alleging the details of the agreements among the Blues not to compete with each other, the years when the Blues met to form those agreements, the details of the agreements underlying the BlueCard program, the continuing existence of all of these agreements, and the antitrust injury that has resulted from these agreements, including injury in Alabama. (Prov. Compl. ¶¶ 6, 15, 19–22, 29, 107, 115, 141–95; Sub. Compl. ¶¶ 2, 4, 7–10, 290, 324–25, 331–48, 350–66, 368–403, 414–20.) Much of this information was taken from information the Blues themselves make publicly available. Although Defendants refer to Plaintiffs' allegations as "vague" and "generalized," (Certain Defendants' Br. 17), they cannot seriously contend that Plaintiffs have failed to allege conspiracy-based jurisdiction with particularity.

Because none of Defendants' affidavits deny the existence of a conspiracy, or their participation in that conspiracy, the motions to dismiss must be denied. In *Ex Parte Reindel*, the Supreme Court of Alabama decided a case in a posture similar to this one: the plaintiffs had alleged a conspiracy, and the defendants moved to dismiss for lack of jurisdiction, submitting affidavits listing their lack of connections to Alabama, but not denying the existence of, or their participation in, the alleged conspiracy. 963 So. 2d at 622–23. The Court had no trouble disposing of the motion to dismiss: "[W]here the complaint alleges conspiracy-based jurisdiction with particularity, failure to deny by affidavit or deposition the existence of, or participation in, a conspiracy will result in a denial of a motion to dismiss for lack of jurisdiction." *Id.* at 624. Likewise, Defendants' total failure to deny that they have agreed with the other Blues to allocate markets and fix their prices through the BlueCard program requires that this Court deny their motions to dismiss.

Instead of meeting their burden to refute the allegations of a conspiracy, Defendants quibble over what qualifies as an overt act within the forum and whether the complaint states any such acts. Defendants argue that the complaint does not allege (1) that the "*Moving Defendants* directed any actions toward Alabama," (2) "how any such contacts relate to the purported conspiracy," or (3) "any overt act taken by *Moving Defendants* within Alabama in furtherance of the alleged conspiracy." (Certain Defendants' Br.17–18 (emphasis added).)

Defendants miss the mark by focusing on their own, individual acts in Alabama. Whether Defendants direct their actions toward Alabama is entirely irrelevant. Personal jurisdiction based on a conspiracy does not require a plaintiff to allege specific acts in the forum state by every defendant. All the plaintiff must allege is that *any* defendant committed an overt act in furtherance of the conspiracy in the forum state. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 252–54 (1940). A sale made by any defendant in the forum state qualifies as such an overt act. *Id.* at 253–54. ("[S]ales by any one of the respondents in the Mid-Western area bound all. For a conspiracy is a partnership in crime; and an overt act of one partner may be the act of all without any new agreement specifically directed to that act." (internal quotation marks omitted)). The same is true of a defendant's purchase in the forum state. *See Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948). Therefore, as long as the complaint alleges a single overt act in furtherance of the conspiracy, whether a purchase or sale, committed by any defendant within Alabama, then personal jurisdiction and venue are proper as to all defendants.[23]

[23] Defendants may attempt to rely on the opinion in *Giraldo* in which this Court mentioned in passing that "it is not enough, under any theory, to do 'some' act in the forum state." *Giraldo v. Drummond Co.*, No. 2:09-CV-1041-RDP, 2013 U.S. Dist. LEXIS 104139, at *10 (N.D. Ala. July 25, 2013). But the procedural history and posture of *Giraldo* is distinguishable from this case. In *Giraldo*, this Court had concluded in an earlier proceeding that "[t]here is a complete absence of any effects felt or intended to be felt in Alabama" and that the only facts supporting the

Plaintiffs have alleged that BCBS-AL has taken overt acts in furtherance of the conspiracy in Alabama. All Defendants have agreed not to compete with BCBS-AL in Alabama, in exchange for a commitment by BCBS-AL not to compete in their states. This arrangement helps BCBS-AL preserve its 93% market share, allowing it to purchase services from Alabama providers at below-market rates (Prov. Compl. ¶ 6) and denying subscribers' access to competitors' lower premiums (Sub. Compl. ¶¶ 415, 418–21.) While these allegations alone would suffice to establish personal jurisdiction over Defendants under a conspiracy theory, there is more: Defendants then take advantage of BCBS-AL's market power by reimbursing Alabama providers at BCBS-AL's low rates through the BlueCard program when those providers treat Defendants' subscribers. (Prov. Compl. ¶ 7.) Each of Defendants' payments to Alabama providers at below-market rates is an overt act, directed toward Alabama, in furtherance of the conspiracy. And even if the payment itself could be characterized as an act taken in another state, BCBS-AL processes that payment in Alabama, on behalf of its co-conspirators. Because Defendants have not denied these allegations in their affidavits, the motions to dismiss should be denied.[24]

B. North Carolina

Likewise, Defendants are also subject to personal jurisdiction in North Carolina because they are parties to this conspiracy. *See Hanes Co., Inc. v. Ronson*, 712 F. Supp. 1223, 1229 (M.D. N.C. 1988) (exercising conspiracy theory jurisdiction where plaintiff had made a

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conspiracy theory were inadmissible on summary judgment. *Id.* Here, Plaintiffs have alleged that the effects of the conspiracy have been felt in Alabama.

[24] Basing personal jurisdiction on a conspiracy theory comports with due process. *Ex parte Reindel*, 963 So. 2d at 624 ("[I]t is not unfair or unreasonable to require the petitioners 'to answer here for their roles in the alleged course of events.'") (quoting *Mandelkorn v. Patrick*, 359 F. Supp. 692, 696-97 (D.D.C. 1973) ("Assuming as true the *unchallenged allegations* of conspiracy, . . . [there is] *no injustice* in requiring … the New York and Florida Defendants to submit to suit [in the District of Columbia].")).

"threshold" showing of existence of conspiracy); *Gemini Enters., Inc. v. WFMY Television Corp.*, 470 F. Supp. 559 (M.D.N.C. 1979) (undisputed facts in the record permit conspiracy theory jurisdiction). The standard for obtaining conspiracy theory jurisdiction in North Carolina does not differ in substance from that in Alabama; a plaintiff must make a "factual showing of a conspiracy and also a connection between the acts of the conspirator who was present in the jurisdiction and the conspirator who was absent." *Hanes Companies*, 712 F. Supp. at 1229.

The subset of Defendants who contest jurisdiction in the Subscriber case in North Carolina mistakenly state that North Carolina does not recognize a conspiracy theory of jurisdiction, citing cases in which the courts declined to exercise a conspiracy theory of jurisdiction because the plaintiffs had failed to allege sufficient conspiracy allegations. *See Dailey v. Popma*, 662 S.E.2d 12 (N.C. Ct. App. 2008) (declining to exercise conspiracy theory jurisdiction because plaintiff demonstrated no evidence of a conspiracy); *Stetser v. Tap Pharm. Prods., Inc.*, 591 S.E.2d 572 (N.C. Ct. App. 2004) (plaintiffs' conclusory allegations of a conspiracy insufficient to exercise conspiracy jurisdiction). As described above, Plaintiffs' allegations of conspiracy in this case are far from conclusory. Defendants decline to mention that the Fourth Circuit has not questioned the application of conspiracy theory jurisdiction under appropriate circumstances. In its only case addressing this issue, the Court of Appeals upheld the district court's decision declining to exercise conspiracy theory jurisdiction only after it had carefully reviewed the documents submitted by the plaintiff, and found that they did "not tend to prove that a conspiracy existed." *McLaughlin v. McPhail*, 707 F.2d 800, 807 (4th Cir. 1983).

Conspiracy theory jurisdiction over this case is appropriate in North Carolina for the same reasons that it is appropriate in Alabama. Plaintiffs have alleged that Blue Cross and Blue Shield of North Carolina (BCBS-NC) has taken overt acts in furtherance of the conspiracy in

North Carolina. All Defendants have agreed not to compete with BCBS-NC in North Carolina, in exchange for a commitment by BCBS-NC not to compete in their states. This arrangement helps BCBS-NC preserve its 73.81% market share (and its 95.9% market share of the independent full-service commercial health insurance market), allowing it to charge non-competitive premiums for individuals and small groups purchasing BCBS-NC's full-service commercial health insurance (Sub. Compl. ¶¶ 495–501.) Defendants' agreement not to compete with BCBS-NC in North Carolina is an overt act, directed toward North Carolina, in furtherance of the conspiracy. Because Defendants have not denied these allegations in their affidavits, the motions to dismiss should be denied.

III. ALABAMA AND NORTH CAROLINA'S LONG-ARM STATUTES AUTHORIZE PERSONAL JURISDICTION OVER DEFENDANTS BECAUSE THEY HAVE ESTABLISHED MINIMUM CONTACTS WITH THESE STATES

A. Alabama

Defendants do not dispute that Alabama's long-arm statute permits Alabama courts to assert personal jurisdiction to the full extent permitted by the Due Process Clause of the Fourteenth Amendment. (Certain Defendants' Br. 14.) Because Defendants routinely pay Alabama providers for services provided to Defendants' subscribers, Defendants have subscriber members in Alabama, and these Alabama contacts are the subjects of the Provider and Subscriber cases, courts in Alabama may assert specific personal jurisdiction over Defendants without offending due process. Again, no Defendant disputes that it has members residing in Alabama or that it has members who were treated in Alabama through the BlueCard program. *See supra* pp. 5–7.

To determine that the exercise of personal jurisdiction comports with due process under the Fourteenth Amendment, a court must find that "the defendant ha[s] minimum contacts with the forum state and that the exercise of jurisdiction [does] not offend 'traditional notions of fair

play and substantial justice.'" *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 925 (11th Cir. 2007) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Specific jurisdiction exists when a defendant's acts within the forum are related to the cause of action, *id.*, and when the defendant "manifestly has availed himself of the privilege of conducting business" in the forum state, *Burger King*, 471 U.S. at 476. That said, a defendant will not be subject to personal jurisdiction "solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Id.* at 475 (citations omitted).

Here, Defendants have availed themselves of the privilege of conducting business in Alabama through their participation in the BlueCard program. As Provider Plaintiffs have alleged, (Prov. Compl. ¶¶ 173–79), when a provider who contracts with a Blue plan in his or her own state (the "Host Plan") treats a subscriber of an out-of-state Blue plan (the "Home Plan"), the Home Plan pays the provider at the rate that the provider has negotiated with the Host Plan. The Defendants who disclosed their membership numbers admitted that they all have subscriber members in Alabama, and admitted that they pay providers in Alabama to treat their subscribers there as many as 1,866 times per year. (Certain Defendants' Br. 4 n.12.) Subscriber Plaintiffs allege that Defendants have levied non-competitive premiums on their subscriber members as a result of the market allocation agreements they reached with each other, limiting competition that would otherwise drive premiums down or result in less expensive alternatives. (Sub. Compl. ¶¶ 418–21.) Provider Plaintiffs allege that Defendants' payments to providers are lower than they would be in a competitive market because Defendants have agreed not to compete with each other and to extend their monopoly pricing to each other through the BlueCard program. (Prov. Compl. ¶¶ 176–77.) Therefore, specific personal jurisdiction is appropriate here because

Defendants are conducting business in Alabama that relates directly to Plaintiffs' causes of action.

Defendants respond that while they pay providers in Alabama for services provided to subscribers in Alabama, their participation in the BlueCard program "does not indicate continuous and systematic contact sufficient to support personal jurisdiction," and "does not constitute purposeful availment of the laws of the state of every other BlueCard member."[25] (Certain Defendants' Br. 15.) The first argument is misplaced because it relies on cases invoking "continuous and systematic contact" as a requirement for *general* personal jurisdiction, not *specific* personal jurisdiction. *See Angel Jet Servs., L.L.C. v. Red Dot Bldg. Sys.' Emp. Benefit Plan*, No. CV-09-2123-PHX-GMS, 2010 U.S. Dist. LEXIS 16345, at *11 (D. Ariz. Feb. 8, 2010); *Bayada Nurses, Inc. v. Blue Cross Blue Shield of Mich.*, No. CIV. A. 08-1241, 2008 U.S. Dist. LEXIS 58128, at *6 (E.D. Pa. July 30, 2008). The second argument is based on a line of cases holding that an insurer does not necessarily avail itself of the privilege of conducting activities in another state when one of its insureds travels to that state for treatment. (Certain Defendants' Br. 15–16.) These cases are inapposite for three reasons.

First, Defendant BCBS-KS has filed a copy of its agreement with providers, which states that the agreement applies to services provided in Kansas to subscribers of out-of-state Blue plans, (Dkt. 238-3 at 20, ¶ XXXII.A), and that disputes under the agreement will be governed by Kansas law, (*id.* at 1). Plaintiffs intend to prove that all providers sign similar contracts with Blue plans. Therefore, Defendants explicitly "invok[e] the benefits and protections of [the] laws" of other states when they arrange for services through the BlueCard program. *See Burger*

[25] To be clear, the standard the Supreme Court has set for "purposeful availment" is not "purposeful availment of the laws of the [forum] state," (Certain Defendants' Br. 15), but whether "the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S. at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

King, 471 U.S. at 475. None of Defendants' cited opinions examine this aspect of the BlueCard program.

Second, Defendants' own motions to dismiss reveal that a primary use of the BlueCard program is not by subscribers who happen to need medical treatment while traveling in another state, but by subscribers who live outside the state where their Blue plan operates. (*See* p. 6, *supra* (citing Defendants' motions to dismiss at Dkt. 125-2, ¶¶16-17; Dkt. 125-3, ¶¶16-17; Dkt. 125-4, ¶¶15-16; Dkt. 125-5, ¶¶16-17; Dkt. 125-6, ¶¶16-17); (Prov. Compl. ¶ 174).) These subscribers use the BlueCard program as their primary means of obtaining medical care. In the cases cited in Defendants' brief, courts held that they could not exercise jurisdiction over defendant insurers whose insureds had merely traveled to another state and sought treatment there, a circumstance beyond the insurers' control, and sometimes without the insurers' prior knowledge.[26] Here, by contrast, Defendants' coverage of out-of-state subscribers is not

[26] *St. Luke's Episcopal Hosp. v. La. Health Serv. & Indem. Co.*, No. CIV.A. H-08-1870, 2009 U.S. Dist. LEXIS 388, at *12 (S.D. Tex. Jan. 6, 2009) (stating that there is no purposeful availment "because of the insured's travel to the forum state, rather than from any affirmative decision by the insurer"); *Angel Jet Servs., L.L.C. v. Red Dot Bldg. Sys.' Emp. Benefit Plan*, No. CV-09-2123-PHX-GMS, 2010 U.S. Dist. LEXIS 16345, at *14 (D. Ariz. Feb. 8, 2010) (holding that there was no personal jurisdiction "because the requirement that a BCBS corporation pay for out-of-state benefits was the result of the beneficiary's selection of a medical provider, not the insurer's choice to do business with [the provider] in [another state]" (internal quotation marks omitted)); *Bayada Nurses, Inc. v. Blue Cross Blue Shield of Mich.*, No. CIV. A. 08-1241, 2008 U.S. Dist. LEXIS 58128, at *21 (E.D. Pa. July 30, 2008) (holding that Pennsylvania courts lacked personal jurisdiction over Blue Cross Blue Shield of Michigan, whose only connection to Pennsylvania was that it sent checks to a Pennsylvania address for services provided in North Carolina); *Whittaker v. Med. Mut. of Ohio*, 96 F. Supp. 2d 1197, 1200–02 (D. Kan. 2000) (holding that personal jurisdiction was unavailable in Kansas because the plaintiff unilaterally moved to seek treatment there); *Willingway Hosp., Inc. v. Blue Cross & Blue Shield of Ohio*, 870 F. Supp. 1102, 1109–11 (S.D. Ga. 1994) (holding that an Ohio insurer was not subject to personal jurisdiction in Georgia when its insured, an Ohio resident, traveled to Georgia for care); *Choice Healthcare, Inc. v. Kaiser Found. Health Plan*, 615 F.3d 364, 369–74 (5th Cir. 2010) (holding that Louisiana courts did not have personal jurisdiction over an out-of-state insurer whose insureds occasionally needed urgent care while traveling in Louisiana); *Perez v. Pan Am Life Ins. Co.*, 96 F.3d 1442, 1996 WL 511748, at *2 (5th Cir. 1996) (holding that a Guatemalan insurance company's authorization of the insured's treatment in Texas was insufficient to establish personal jurisdiction in Texas); *Berg v. Blue Cross & Blue Shield of Utica-Watertown, Inc.*, No. C-93-2752-DLJ, 1993 U.S. Dist. LEXIS 16119, at *5-10 (N.D. Cal. Nov. 2, 1993) (holding that there was no personal jurisdiction in California when the insured moved from New York to California and sought treatment there); *Mem'l Hosp. Sys. v. Blue Cross & Blue Shield of Ark.*, 830 F. Supp. 968, 970–74 (S.D. Tex. 1993) (holding that a single unsolicited phone call from a Texas hospital to an Arkansas insurer did not confer personal jurisdiction over the insurer in Texas).

"random" or "fortuitous," but designed and intended. For example, Provider Plaintiffs have alleged that "Defendant Blue Cross of Tennessee administers the Nissan Employee Benefit Plan, which covers the many Nissan employees who reside in Mississippi and, accordingly, seek medical treatment there." (Prov. Compl. ¶ 178.) This is not by accident; Blue Cross of Tennessee knows that if it wants to win Nissan's business, it must offer a product that covers Nissan's numerous employees in Mississippi. Because of the BlueCard program, it can (and does) advertise to Nissan and other companies that it will pay for services provided to out-of-state employees.[27] BlueCross BlueShield of Tennessee, BlueCard PPO, http://www.bcbst.com/get-insurance/employer-group-plans/bluecard-ppo.page ("Members who live, travel or have children attending school beyond the borders of Tennessee have peace of mind in knowing that coverage goes with them as part of our BlueCard PPO program."); *see also* BlueCross BlueShield of Montana, http://pic.twitter.com/Rfwac1qpcD ("A strong network is a key part of a strong health care plan"; "Our unrivaled network means peace of mind wherever you live, work, travel or play"). The same is true of Defendants here: all of them insure Alabama residents, and all of them pay BlueCard claims submitted on behalf of Alabama residents. They intended to do so when they contracted to provide health insurance to employers with out-of-state employees.

In an analogous case, the Alabama Supreme Court held that a California funeral home was subject to personal jurisdiction in Alabama by virtue of providing services to an Alabama resident. *Knowles v. Modglin*, 553 So. 2d 563 (Ala. 1989). In *Knowles*, the Alabama resident plaintiff's husband died in California. Through an Alabama funeral home, the plaintiff

[27] That the BlueCard program is useful to Defendants in this way does not mean that it is legal. As Plaintiffs explain in their opposition to the Blues' motion to dismiss Plaintiffs' conspiracy claims, there are a number of ways, other than the BlueCard program, that an individual Blue plan could offer nationwide coverage without violating the antitrust laws.

contracted with the defendant California funeral home for it to prepare her husband's body for burial, to supply a casket, and to ship the body in the casket to Alabama. After the defendant did so, the plaintiff filed suit in Alabama against the defendant for failing to prepare the body properly. The California defendant's only contacts with Alabama were the one-time preparation of the body, sale of the casket, and shipment of body and casket, and the communications and billings entailed by this one contract. The Alabama Supreme Court held that the defendant "purposefully availed itself of the privilege of conducting business in Alabama in this instance. In doing so, [the defendant] should have reasonably anticipated being summoned to an Alabama court to answer any charges of misconduct in connection with the handling and shipment of Mr. Knowles's body." *Id.* at 567. The defendant, "by its contacts with Alabama, not only invoked the protections and benefits of Alabama's laws, which it could have taken advantage of had it found it necessary to enforce its right to payment for services rendered and goods sold, but it also subjected itself to the jurisdiction of an Alabama court to resolve the conflicts that arose out of its business dealings with the plaintiffs." *Id.* On this basis, the Court held that personal jurisdiction satisfied the requirements of due process. *Id.* The same is true here, where Defendants agree to enter into contracts that they know will require them to pay for medical services provided in Alabama.

Because Defendants knew from the beginning that some of their subscribers live out-of-state, this case is completely unlike those in which a plaintiff unilaterally travels to another state for treatment. The better comparison is to *Nieves v. Houston Industries, Inc.*, 771 F. Supp. 159 (M.D. La. 1991), in which the plaintiff had been employed by a Houston company and was covered by its employee medical plan. When she took a leave of absence and moved with her family to Louisiana, her company agreed to continue her coverage as long as she paid the

premiums, and the plan paid her claims for medical services provided in Louisiana. *Id.* at 160. The plaintiff later sued the company and the plan in Louisiana when the plan refused to pay for medical care for her husband. *Id.* The court held that personal jurisdiction over the defendants was proper in Louisiana, stating that the defendants could have anticipated that they might have to defend an action there. *Id.* Here, the case for personal jurisdiction is even stronger, because Defendants' out-of-state subscribers did not all move away; many or most of them have always been out-of-state. Moreover, Defendants know and expect when writing their policies that BCBS-AL will process the claims of their out-of-state subscribers. (Prov. Compl. ¶ 175.) Therefore, personal jurisdiction comports with due process because Defendants' contacts with Alabama are not "random," "fortuitous," or "attenuated," but sustained and deliberate.

Third, Defendants have established minimum contacts with Alabama by taking advantage of the low rates that BCBS-AL has contracted to pay its providers. The court found this aspect of the BlueCard program significant in *St. Luke's Episcopal Hosp. v. La. Health Serv. & Indem. Co.*, No. CIV.A. H-08-1870, 2009 U.S. Dist. LEXIS 388 (S.D. Tex. Jan. 6, 2009), a case on which Defendants rely. In that case, a Texas hospital sued Blue Cross Blue Shield of Louisiana (BCBS-LA) in Texas for failing to pay the full amount due for the hospital's treatment of a BCBS-LA subscriber, who was a Louisiana resident. The court held that BCBS-LA's telephone conversations with the hospital and partial payment of its bills were not enough to support personal jurisdiction in Texas, but the BlueCard program gave the court pause. The court distinguished some of the cases that Defendants have cited here, noting that they did not examine the feature of the BlueCard program that allows the Home Plan to pay providers at the Host Plan's rates. *Id.* at *21–24. In *St. Luke's*, BCBS-LA "received a substantial discount on [the patient's] treatment under the Blue Card program, which entitled BCBS[-]LA to the discounted

rates under the managed-care agreement between St. Luke's and Blue Cross and Blue Shield of Texas." *Id.* at *23. Based in part on this distinction, the court deferred judgment on BCBS-LA's motion to dismiss for lack of personal jurisdiction. *Id.* at *24–28. Here too, every Defendant has entered into an arrangement that allows it to take advantage of the low reimbursement rates that the monopoly power of BCBS-AL provides. Defendants cannot agree to cover Alabama residents with their insurance policies, and agree with BCBS-AL to pay Alabama providers the low rates that BCBS-AL has negotiated in Alabama, and then cry "due process!" when those subscribers and providers challenge this practice in an Alabama court. By participating in the BlueCard program, Defendants have "minimum contacts" with Alabama, have directed their activities toward Alabama, and thus are subject to personal jurisdiction in Alabama.

B. North Carolina

Defendants acknowledge that North Carolina's long-arm statute, like Alabama's, provides for jurisdiction over nonresident defendants to the extent permitted by the United States Constitution. (Certain Defendants' Br. at 14.) They do not distinguish between the two state's statutes; instead, they assert that they have not established the "minimum contacts" to exercise jurisdiction in either state. For the same reasons that exercising personal jurisdiction is appropriate under Alabama's long-arm statute, jurisdiction under North Carolina's long-arm statute is also appropriate. Rather than repeat these arguments, Subscriber Plaintiffs incorporate them herein, and emphasize the specific facts that Defendants revealed with regard to their contacts in North Carolina.

As described in section II above, Defendants who disclosed their membership numbers or aspects of their business in North Carolina revealed more than "minimum contacts." (Dkt. 125-2: BCBS-AZ has 788 members in North Carolina; Dkt. 125-4: BCBS-ND has 439 members in North Carolina.)

And as described in section III(A) above, Defendants' purposeful availment of the state of North Carolina, subscribing these members—*who live and receive treatment in North Carolina*—to their insurance plans, does not constitute a "random" contact, as if these members sought medical treatment on a fluke visit through the state. *See Nieves v. Houston Indus., Inc.*, 771 F. Supp. 159 (M.D. La. 1991) (jurisdiction over insurance company appropriate in Louisiana when subscriber moved to Louisiana and retained her coverage). By subscribing these members, and by entering into an agreement not to compete with BCBS-NC, Defendants have more than sufficient contacts with North Carolina for the exercise of jurisdiction there to comport with the Due Process Clause of the Fourteenth Amendment.

IV. ALTERNATIVELY, PLAINTIFFS REQUEST JURISDICTIONAL DISCOVERY TO ESTABLISH PERSONAL JURISDICTION

Because Defendants have failed to include in their affidavits any allegations that would shift the burden of proof onto Plaintiffs, their motions to dismiss must be denied. But if the Court determines that Plaintiffs' allegations do not support personal jurisdiction over any particular Defendant, or that the Defendant has presented sufficient evidence to shift the burden of proof, Plaintiffs request jurisdictional discovery from that Defendant. While jurisdictional discovery is within the trial court's discretion, it is "not entirely discretionary." *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727 (11th Cir. 1982). A "[p]laintiff must be given an opportunity to develop facts sufficient to support a determination on the issue of jurisdiction." *Id.* at 731. "[T]he rules entitle a plaintiff to elicit material facts regarding jurisdiction through discovery before a claim may be dismissed for lack of jurisdiction." *Blanco v. Carigulf Lines*, 632 F.2d 656, 658 (5th Cir. 1980).

Here, the Defendants who deny that they do business in Alabama have failed to allege that they do not have any subscribers who live in Alabama, or that they never pay for their

subscribers' treatment in Alabama. For instance, defendant Blue Cross Blue Shield of Mississippi (BCBS-MS) alleges that it has no offices, employees, agents, telephone listing, real property or bank account in Alabama, nor pays taxes, solicits business or markets in Alabama. It is, however, inconceivable, given that Mississippi borders Alabama, that BCBS-MS does not regularly pay Alabama providers for healthcare received by BCBS-MS enrollees either visiting or residing in Alabama, or contract with Alabama vendors for other business-related services. Even fewer of the Defendants provided information about their business activities in North Carolina, and Plaintiffs have every reason to believe that if Blue Cross Blue Shield of Arizona has hundreds of members across the country, even in North Carolina, the other Defendants do as well. In the event the Court contemplates dismissal of any defendant, Plaintiffs respectfully request the opportunity to conduct limited jurisdictional discovery for the purpose of ascertaining material facts regarding jurisdiction.[28]

CONCLUSION

The motions to dismiss based on personal jurisdiction and venue should be seen for what they are: desperate attempts by Defendants to avoid this Court. Indeed, they are in effect arguing that they can conspire together but that they cannot be sued together by the victims of the illegal conspiracy.

Personal jurisdiction and venue are appropriate in Alabama (and North Carolina) for the reasons established above. Therefore, Defendants' motions to dismiss must be denied.

[28] If the Court ultimately determines that one or more of the Defendants is not subject to personal jurisdiction in Alabama (or North Carolina), Plaintiffs request that instead of dismissing the case against those Defendants, the Court transfer the case, with respect to those Defendants only, to the districts where those Defendants reside. *See* 28 U.S.C. § 1631 (requiring transfer "if it is in the interest of justice"). Plaintiffs would then request a transfer back to this district through the multidistrict litigation process.

Respectfully submitted the 15th of January, 2014,

Provider Track

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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.

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