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 Provider Track Cases**

PROVIDER PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING THE STANDARD OF REVIEW IN LIGHT OF *AMEX*

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Pursuant to Qualified Protecitve Order (Dkt. 550) and the Order Regarding Revised Sealing Procedures (Dkt. 758)

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INTRODUCTION

In *Ohio v. American Express Co.*, the Supreme Court confirmed the longstanding rule that horizontal restraints "imposed by agreement between competitors" are among the "small group of restraints" that "qualify as unreasonable *per se*." 138 S. Ct. 2274, 2283–84 (2018) ("*Amex*"). The Supreme Court explained that its decision applied only to vertical restraints and did not disturb the holding in *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972), which "concluded that a horizontal agreement between competitors was unreasonable *per se*." *Id.* at 2290 n.10. Put simply, *Amex* confirmed the propriety of this Court's ruling that some of the Blues' agreements must be judged under the *per se* rule. Moreover, the Supreme Court announced that, as a matter of law, "[o]nly other two-sided platforms can compete with a two-sided platform." *Amex*, 138 S. Ct. at 2287. And the Blues' own expert on two-sided platforms admitted that Kaiser Permanente, one of the Blues' major competitors, is not a two-sided platform. Consistent with that testimony and *Amex*, neither are the Blues. In the end, *Amex* did not disturb this Court's prior ruling on the standard of review and the matter should proceed to trial to assess the Defendants' unlawful practices under the *per se* standard.

In its previous opinion on the standard of review, this Court said that "it will be worth seeing what the Supreme Court has to say in its *American Express* decision." Doc. No. 2063 at 54 n.20. The Supreme Court has spoken, and *Amex* was a bust for the Blues.

STATEMENT OF UNDISPUTED FACTS

The following facts are undisputed, relevant, and material:

1. The Blues' market allocations and National Best Efforts rule are horizontal agreements. Doc. No. 2063 at 38, 46.

2. Kaiser Permanente comprises three separate entities that collaborate closely with each other: Kaiser Foundation Health Plan, Inc.; Kaiser Foundation Hospitals and its subsidiaries; and the Permanente Medical Groups. Ex. 1 (Fast Facts, https://about.kaiserpermanente.org/who-we-are/fast-facts).

3. In the regions where Kaiser Permanente operates, Kaiser Foundation Health Plan or one of its subordinate entities offers medical, surgical, and hospital coverage, and healthcare providers employed by one of the Permanente Medical Groups provide coverage exclusively to Kaiser Permanente members. Ex. 2 (Jesse Pines et al., Kaiser Permanente – California: A Model for Integrated Care for the Ill and Injured, Center for Health Policy at Brookings, https://www.brookings.edu/wp-content/uploads/2016/07/KaiserFormatted_150504RH-with-image.pdf).

4. In some regions, Kaiser Foundation Hospitals operates hospitals for the exclusive use of Kaiser Permanente members. Exs. 3–5 (Fast Facts, https://about.kaiserpermanente.org/who-we-are/fast-facts (select Northern California, Southern California, and Northwest regions)).

5. Kaiser Permanente is a single-sided business. Ex. 6 (Evans Tr.) at 68:12–19.

6. In 1983, Blue Plans established a "Colorado Assistance Project" to come to the aid of Blue Cross and Blue Shield of Colorado, which had lost more than half its contracts since 1976. Ex. 7 (BCBSA00124930, 931–32).

7. In connection with the Colorado Assistance Project, the Blue Plans noted,

> The Colorado market is intensely competitive, including one of the highest levels of HMO penetration in the country. In a recent survey of consumers conducted for the Plan, Blue Cross and Blue Shield of Colorado was estimated to have a 13 percent market share compared to an eight percent market share for Kaiser. The Plan estimates Kaiser enrollment at 100,000 contracts, which is roughly comparable to the Plan's group business.

Ex. 7 (BCBSA00124930, 934).

8. In 1994, the President of the Blue Cross Blue Shield Association wrote in his annual report,

> A highlight of [the Blues'] enrollment growth was that it enabled "the Blues to overtake managed care giant Kaiser Permanente," as Modern Healthcare magazine reported. At mid-year, the Plans' combined HMO enrollment reached 7.6 million, exceeding Kaiser Permanente's HMO enrollment by nearly one million subscribers.

Ex. 8 (BCBSA00022942, 954).

9. In 1995, an Association newsletter noted,

> Four major managed care competitors (PacifiCare, FHP, Kaiser and Humana) control 57 percent (1.3 million) of the 2.3 million total Medicare risk enrollees. Competitors dominate eight of the eleven markets where Blue Plans have a Medicare risk presence. The major competitor in each of these eight markets has, on average, 58 percent market share.

Ex. 9 (BCBSA00033416, 420).

10. All Blue Plans agree to adhere to the Guidelines to Administer Membership Standards Applicable to Regular Members. Ex. 10 (BCBSA03879143) (Nov. 18, 2016 version).

11. Standard 12 of the Guidelines provides, "No provider network, or portion thereof, shall be rented or otherwise made available to a National Competitor if the Licensed Marks or Names are used in any way with such network." Ex. 10 (BCBSA03879143, 188).

12. With some qualifications not relevant here, a "National Competitor" is defined as a non-Blue entity that "competes against the Blue System for Core Products and Services (as defined in Brand Regulation 5.7)," "has a presence in more than one state," and would have at least $2 billion (adjusted for inflation) in revenue for Core Products and Services, not counting hospital and healthcare system revenues. Ex. 10 (BCBSA03879143, 188).

13. "Core Products and Services" is defined in Brand Regulation 7.8 (not Brand Regulation 5.7) as "health care plans and related services as defined in Paragraph 1 of the

License Agreements and shall include, but not be limited to the sale, marketing or administration of: (a) medical surgical coverage, (b) hospital coverage, (c) major medical coverage, (d) Medicare or Medicaid risk coverage, (e) Medicare supplemental coverage, (f) dental, drug, mental health, vision or hearing coverage, (g) any HMO, PPO or other managed care plan, and (h) the delivery of health care services." Ex. 11 (TSS00143251, 347) (Brand Book, June 2016). There is also a list of items excluded from the definition of Core Products and Services, which are not relevant here. *Id.*

14. The Blues maintain a list of their National Competitors along with each one's "Health and Health-Related Premium" revenue; Kaiser Permanente has been on the list since at least 2004 and has often been the largest or second largest by revenue. Ex. 12 (BCBSA02912119, BCBSA02920995, BCBSA02915085, BCBSA01938447, BCBSA02911675, BCBSA02915262, BCBSA2699842, BCBSA00357803, BCBSA02697397, BCBSA02271659, BCBSA-CID-026754, BCBSA-CID-026741, BCBSA-CID-027806).

15. In Alabama, Viva Health, Inc. ("Viva") provides healthcare coverage to [redacted] Ex 13 (Yates Tr.) at 29:16–21. Viva's network includes [redacted] *See id.* at 154:11–91, 162:17–20.

16. Viva is owned by [redacted] Ex. 13 (Yates Tr.) at 31:9–24. Viva is [redacted] *id.* at 161:8–10.

17. The UAB Health System, the UAB School of Medicine, and the University of Alabama Health Services Foundation (which employs and/or appoints UAB's physicians) collaborate closely through an executive management structure called the Joint Operating Leadership, in an operating model called UAB Medicine. Ex. 14 (UAB Patient Care),

https://www.uab.edu/medicine/home/patient-care. UAB Medicine is one of the four institutions of The University of Alabama System. Ex. 15 (University of Alabama System: Institutions), https://uasystem.edu/institutions.

18. In a 2016 document titled "Market Information," BCBS-AL stated, "Our top small group competitors have been defined as UnitedHealthcare and VIVA Health." Ex. 16 (BCBSAL_0001961458, 463).

19. Blue Cross and Blue Shield of Alabama (BCBS-AL) has examined Viva's strengths and weaknesses as part of a "Competitor Biography." Ex. 17 (BCBSAL_0000226399, 405).

20. BCBS-AL CEO Terry Kellogg testified that Viva is a "pretty effective" competitor to BCBS-AL in the small group market in Birmingham. Ex. 18 (Kellogg Tr. 7/19/17) at 142:50–10.

21. In 2010, David Platt of BCBS-AL emailed Tim Sexton of BCBS-AL about Viva's efforts to hire new sales representatives in the Birmingham area: "What I do not like is having a bunch of new, eager, hungry Viva reps running around the area trying to drum up business when we are injecting so much change and price increase into the market! They clearly are not content with the status quo and plan to push for a larger share of the market." Ex. 19 (BCBSAL_0002037788).

22. The Blue Cross Blue Shield Association conducted a "Brand Strength Measure Survey" for BCBS-AL in 2011. The survey identified Viva as second on the list of BCBS-AL's "Top 3 Competitors" for each year from 2009 to 2011. Ex. 20 (BCBSAL_0000732441) at 11.

23. Viva views [redacted] Ex. 21 (VIVA02304) ([redacted]); Ex. 13 (Yates Tr.) at 325:13–327:10 (discussing [redacted]).

24. The University of Pittsburgh Medical Center (UPMC) owns forty hospitals and employs 4,900 doctors. Ex. 22 (UPMC Facts and Stats), https://www.upmc.com/about/facts. The UPMC Health Plan insures 3.9 million people. Ex. 23 (Our Company), https://www.upmchealthplan.com/about/who-we-are/about-our-company.aspx. Highmark Blue Cross Blue Shield, which operates in Pennsylvania, views UPMC Heath Plan as a competitor. Ex. 24 (BCBSA01156038, 053) ("UPMC Health Plan, a regional competitor of Highmark, opened up a retail store on 8/4/11 in Erie PA"); Ex. 25 (Deposition of former Highmark CEO Kenneth Melani) at 177:6–16 (stating that UPMC and other physician- and hospital-owned networks were Highmark's competitors).

25. In Pennsylvania, Geisinger Health System, which operates nine hospital campuses and employs 1,600 doctors, is affiliated with Geisinger Health Plan, which covers 550,000 people. Ex. 26 (Who We Are), https://jobs.geisinger.org/who-we-are. Highmark views Geisinger as a competitor as well. Ex. 27 (Presentation of a Liaison Committee, the majority of whose members were from Blue Cross of Northeastern Pennsylvania (now part of Highmark)) (HMK07387654, 658) ("BCNEPA has lost 15% market share over last 18 months in the Lycoming region, totaling 12,000 members[.] The decline has, in part, been driven by SH's decision to enter into a full service contract with Geisinger Health Plan (GHP) and GHP's aggressive pricing[;] Competition is intense and heating up").

26. According to AIS Health, in 2016 there were 270 provider-sponsored health plans, representing a majority of the health plans in the country. Ex. 28 (Preliminary Results of

AIS's Health Plan Survey Show Continued Growth Among Provider-Sponsored Plans), http://www.prweb.com/releases/2016/04/prweb13332414.htm.

ARGUMENT

I. *Amex* Did Not Change the Standard of Review for Horizontal Agreements.

Any horizontal agreement to restrain trade judged by the *per se* standard before *Amex* is judged by the *per se* standard after *Amex*. In *Amex*, which involved only a vertical restraint, 1238 S. Ct. at 2284, the Supreme Court explained that vertical and horizontal restraints must be handled differently:

> The plaintiffs argue that *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972), forbids any restraint that would restrict competition in part of the market—here, for example, merchant steering. *Topco* does not stand for such a broad proposition. *Topco* concluded that a horizontal agreement between competitors was unreasonable *per se*, even though the agreement did not extend to every competitor in the market. A horizontal agreement between competitors is markedly different from a vertical agreement that incidentally affects one particular method of competition. *See Leegin*, 551 U.S., at 888; *Maricopa County Medical Soc.*, 457 U.S., at 348, n. 18.

Id. at 2290 n.10 (citations omitted). Here, the Supreme Court could not have been clearer that *Amex* was not meant to abrogate *Topco* and other decisions that found horizontal agreements unlawful *per se*. In distinguishing between vertical and horizontal restraints, the Supreme Court validated this Court's approach to the standard of review, reaffirming that *Topco* has not been overruled, *see* Doc. 2063 at 29 ("The holdings in both *Sealy* and *Topco* have remained viable."), and that vertical and horizontal agreements are "markedly different."

Here, the Blues are parties to a horizontal market allocation agreement among competitors. Fact 1. Any attempt by the Blues to conflate horizontal and vertical restraints would contravene the Supreme Court's clear pronouncements in *Amex* and provide no basis for upsetting this Court's prior ruling on the appropriate standard of review.

Moreover, the thrust of *Amex*—establishing how a relevant product market must be defined when that market is a two-sided platform—does not apply to those horizontal restraints that are unlawful *per se*:

> The plaintiffs argue that we need not define the relevant market in this case because they have offered actual evidence of adverse effects on competition—namely, increased merchant fees. We disagree. The cases that the plaintiffs cite for this proposition evaluated whether horizontal restraints had an adverse effect on competition. Given that horizontal restraints involve agreements between competitors not to compete in some way, this Court concluded that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive. Vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market.

1238 S. Ct. at 2285 n.7 (citations omitted). Again, the Supreme Court validated this Court's approach, which applied the *per se* rule to the Blues' territorial allocation and output restrictions without needing to precisely define the relevant product market. *See* Doc. No. 2063 at 37 ("Plaintiffs have presented evidence of an aggregation of competitive restraints -- namely, the adoption of ESAs and, among other things, best efforts rules -- which, considered together, constitute a *per se* violation of the Sherman Act."). Thus, even if the Blues could prove that they operate a two-sided platform like the one described in *Amex* (and they cannot, for reasons explained below), nothing in *Amex* would alter the analysis of their horizontal restraints under the *per se* standard.

The Supreme Court's distinction between horizontal and vertical constraints was also consistent with the arguments made by American Express, represented by the same counsel who represent the Blues here. On behalf of American Express, the Blues' counsel asked the Court not to apply the rules that govern horizontal agreements, pointing out that "[t]his Court's cases draw a sharp distinction between horizontal restraints – agreements among competitors – and vertical restraints – agreements among actors at different levels of a supply or distribution chain." *Amex*,

Brief for Respondents, 2018 WL 481636, at *24. While vertical restraints "channel distributor behavior toward more effective competition," the Blues' counsel stated, "[a]greement among horizontal competitors blunts the rivalry that brings innovation and lower prices" and is "the 'supreme evil of antitrust.'" *Id.* at 24–25 (quoting *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004)). The Blues' counsel was right; it would be a mistake to take a case in which both the Supreme Court and the prevailing party explicitly did not rely on the law governing horizontal restraints, and use it to weaken the protections that the law has always afforded against horizontal collusion.

In the end, the plaintiffs' antitrust claims in *Amex* failed because they could not meet their burden under the rule of reason to put forth "evidence that the price of credit-card transactions was higher than the price one would expect to find in a competitive market." 138 S. Ct. at 2288. The Provider Plaintiffs here, as this Court previously held, have no such hurdle to clear in order to establish a violation of the antitrust laws. Horizontal constraints that have been found unlawful *per se*, including the ones at issue here, require no evidence of an effect on prices; they are entitled to a "conclusive presumption" that they are "unreasonable, and therefore illegal, without further investigation." *Nat'l Bancard Corp. (NaBanco) v. VISA U.S.A., Inc.*, 779 F.2d 592, 597–98 (11th Cir. 1986). *Amex* did not disturb this presumption.

The courts' sharp distinction between vertical and horizontal restraints is not just settled doctrine; it is sensible economics as well. Credit-card transactions were the product at issue in *Amex*, and the plaintiffs had not shown that the price of those transactions was anticompetitive. 138 S. Ct. at 2288. American Express's decision to allocate more of that price to merchants (instead of cardholders) than its competitors did was not viewed as evidence of anticompetitive activity. *Id.* Here, the Provider Plaintiffs do not complain that the Blues have unfairly allocated a

competitively set price for healthcare transactions. Rather, they complain that the price itself is anticompetitive due to the Blues' horizontal restraints. For an example of the distinction, suppose that Uber, a two-sided transaction platform, increases the commission it charges drivers, and uses the additional revenue to improve its rewards program for riders. *Amex* says that such a decision, by itself, is not anticompetitive. Then suppose instead that Uber agreed with its competitor Lyft that only Uber would contract with drivers and offer its services to riders in Alabama, and only Lyft would do the same in Georgia. Drivers and riders in both states would suffer from the lack of competition. *See Palmer v. BRG of Ga., Inc.*, 498 U.S. 46 (1990) (holding that it was *per se* unlawful for providers of bar review courses, HBJ and BRG, to agree "that HBJ would not compete with BRG in Georgia and that BRG would not compete with HBJ outside of Georgia."). Under the latter scenario, the complaint would not be that Uber or Lyft had misallocated the price of transactions between drivers and riders, but that the price itself was artificially inflated by the agreement to allocate markets. *Amex*'s emphasis on the continuing vitality of the *per se* rule shows that the Supreme Court would not have treated a horizontal market allocation agreement between Uber and Lyft any differently just because those two companies operate two-sided platforms.

In a case remarkably similar to this one, a court recently held that *Amex* does not affect the standard of review for horizontal restraints. *In re Delta Dental Antitrust Litigation*, 484 F. Supp. 3d 627 (N.D. Ill. 2020), is to dentistry what this case is to medical services. Like the Blues, the defendants in *Delta Dental* control an association from which they license their names, and through which they allocate exclusive control over geographic markets and limit the amount of revenue they can earn without using the licensed marks. *Id.* at 631. Like the Provider Plaintiffs, dental service providers challenged these restraints of trade as unlawful *per se*. *Id.* at

633–34. And like this Court, the *Delta Dental* court agreed. *Id.* at 635. But *Delta Dental* was decided after *Amex*, and the defendants strove to convince the court that their business is a two-sided platform that must be analyzed under the rubric of *Amex*. *Id.* at 634, 636. The court noted that *Amex* "did not discuss the per se mode of analysis at all, except to acknowledge that horizontal restraints, i.e., 'restraints imposed by agreement between competitors' are '[t]ypically' the kind that qualify as unreasonable per se." *Id.* at 637. The court went on: "Specifically, the Court did not address the availability or contours of a per se challenge to a horizontal restraint in a two-sided market. So even assuming that dental insurers operate in a two-sided market, *AmEx* does not necessarily foreclose plaintiffs' claim that defendants' agreement to eliminate intrabrand competition through territorial divisions is anticompetitive per se." *Id. Delta Dental* is correct—*Amex* simply cannot support an argument that horizontal market allocations must be judged under a different standard if they involve two-sided transaction platforms. They must be reviewed under the *per se* standard.

Although *Delta Dental* is the case most closely on point, it is just one of a growing number of cases that have distinguished *Amex* based on the difference between horizontal and vertical restraints. In a case involving markets for the services of college athletes, the court excluded an expert's testimony that the market was multi-sided, in part because the restraint at issue was horizontal and the restraint in *Amex* was vertical. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 2018 WL 4241981, at *4 (N.D. Cal. Sept. 3, 2018) ("In light of these material and obvious differences, it is clear that *American Express* does not require altering the Court's rulings as to market definition or the admissibility of Dr. Elzinga's opinions on that issue."). After remand in *Amex* itself, the district court dismissed claims by one class of plaintiffs partly because American Express did not "enter into a horizontal price-fixing agreement with

[its] competitors." *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 433 F. Supp. 3d 395, 410 (E.D.N.Y. 2020). The Federal Trade Commission, which co-authored the Horizontal Merger Guidelines, has rejected the application of *Amex* to a horizontal agreement that delayed generic competition for a branded drug. *In re Impax Labs., Inc.*, 2018 WL 4488325, at *2 (F.T.C. Sept. 12, 2018) ("This case involves a horizontal restraint between a patentee and its generic challenger to avoid competing in exchange for a sharing of the resulting monopoly profits. While *American Express* was careful to distinguish horizontal agreements from vertical restraints, Impax obscures this distinction …." (citation omitted)). The Provider Plaintiffs are aware of no case in which a horizontal restraint was evaluated under the rule of reason instead of the *per se* rule because of *Amex*. Given *Amex*'s clear reaffirmance of *Topco* and its progeny, and its explicit distinction between horizontal and vertical restraints, this case should not be the first.

Finally, the Court should not countenance any argument by Defendants that even if *Amex* does not control the standard of review in this case, it supports a change from the *per se* rule to the rule of reason because it shows that an operator of a two-sided transaction platform can benefit consumers by driving down the prices of service providers. This idea is antithetical to the purposes of the *per se* rule as well. Horizontal restraints do not escape the *per se* rule just because they might benefit consumers. *Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332 (1982) (holding that a price-fixing agreement was unlawful *per se* even though it fixed *maximum* prices). In *Knevelbaard Dairies v. Kraft Foods, Inc.*, the Ninth Circuit explained that cheese makers were not entitled to conspire to depress the price of milk just because it might allow them to sell cheese at a lower price:

> The fallacy of this argument becomes clear when we recall that the central purpose of the antitrust laws, state and federal, is to preserve competition. It is competition – not the collusive fixing of prices at levels either low or high – that these statutes recognize as vital to the public interest. … Every precedent in the

> field makes clear that the interaction of competitive forces, not price-rigging, is what will benefit consumers.

232 F.3d 979 (9th Cir. 2000). The Ninth Circuit's opinion aligns with the Supreme Court's holding in *Topco* that a business "has no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy." 405 U.S. at 610–11. Neither do the Blues. They may not use procompetitive justifications to excuse an agreement that is unlawful *per se*.

II. The Blues Do Not Operate a Two-Sided Platform Because They Compete with a One-Sided Business.

Because the Provider Plaintiffs challenge horizontal restraints, any inquiry into whether the Blues operate a two-sided platform is unnecessary. In any event, the Blues do not fit the Supreme Court's definition of a two-sided platform. In *Amex*, the Supreme Court explained, "Only other two-sided platforms can compete with a two-sided platform for transactions." *Id.* at 2287. Therefore, if the Blues want to claim that they operate a two-sided platform, their competitors must all be two-sided platforms as well. *United States v. Sabre Corp.*, 452 F. Supp. 3d 97, 138 (D. Del. 2000) (holding, in reliance on *Amex*, that a one-sided business and a two-sided platform could not be competitors as a matter of law), *vacated as moot*, 2020 WL 4915824 (3d Cir. July 20, 2020).

The Blues' expert on two-sided platforms, Dr. Evans, has defined the "transaction" at issue as follows:

> The ultimate transaction that is being facilitated by the – by the Blue Plans is the – is obtaining – is obtaining medical services by enrollees and the provision of those services by providers. So it's – it's, in effect, the provision of medical services. That is – and just to be clear there, that is the transaction that is being – that is being facilitated.

Ex. 6 (Evans Tr.) at 68:12–19. It follows from the Supreme Court's description of two-sided platforms that the Blues cannot operate a two-sided platform if they compete against a one-sided business to facilitate the provision of medical services.

Kaiser Permanente is a prime example of a one-sided business in the healthcare industry. It comprises three separate entities that collaborate closely with each other: Kaiser Foundation Health Plan, Inc.; Kaiser Foundation Hospitals; and the Permanente Medical Groups. Fact 2. Where Kaiser Permanente operates,[1] the Kaiser Foundation Health Plan or one of its subordinate entities offers medical, surgical, and hospital coverage, while healthcare providers employed by one of the Permanente Medical Groups provide coverage exclusively to Kaiser Permanente members. Fact 3. In some regions, Kaiser Foundation Hospitals operates hospitals for the exclusive use of Kaiser Permanente members.[2] Fact 4. Because Kaiser Permanente offers healthcare coverage and employs the healthcare providers who deliver care, it is a one-sided business, as Dr. Evans explained:

> So, a medical insurer that is fully vertically integrated into the provision of medical service, like a – like a Kaiser, as I understand it, that would be a single-sided business because they're integrated into – into the – into the medical provision side. And that makes – that makes that business single-sided. But based on – based on my, you know, general understanding of Kaiser. I haven't done a full, detailed analysis of Kaiser. But as I understand it, it's essentially entirely Kaiser that's providing – providing medical services.

Fact 5. Dr. Evans's general understanding of Kaiser Permanente is correct, and so is his conclusion that it is a one-sided business.

[1] Kaiser Permanente describes its operating regions as Northern California, Southern California, Colorado, Georgia, Hawaii, Mid-Atlantic States (essentially the Baltimore–Washington metropolitan area), Northwest (Oregon and two markets in southern Washington State), and Washington (the rest of Washington State). Ex. 1.

[2] Kaiser Permanente has twenty-one hospitals in Northern California and fifteen in Southern California. It also has two in the Northwest region and one in Hawaii.

The record demonstrates that Blues have long considered Kaiser Permanente to be an important competitor. In 1983, Blue Plans established a "Colorado Assistance Project" to come to the aid of Blue Cross and Blue Shield of Colorado, which had lost more than half its contracts since 1976. Fact 6. Ex. 7 BCBSA00124930, at 931–32. The Blue Plans noted,

> The Colorado market is intensely competitive, including one of the highest levels of HMO penetration in the country. In a recent survey of consumers conducted for the Plan, Blue Cross and Blue Shield of Colorado was estimated to have a 13 percent market share compared to an eight percent market share for Kaiser. The Plan estimates Kaiser enrollment at 100,000 contracts, which is roughly comparable to the Plan's group business.

Fact 7. In 1994, the President of the Blue Cross and Blue Shield Association wrote in his annual report,

> A highlight of [the Blues'] enrollment growth was that it enabled "the Blues to overtake managed care giant Kaiser Permanente," as *Modern Healthcare* magazine reported. At mid-year, the Plans' combined HMO enrollment reached 7.6 million, exceeding Kaiser Permanente's HMO enrollment by nearly one million subscribers.

Fact 8. In 1995, an Association newsletter noted,

> Four *major managed care competitors* (PacifiCare, FHP, Kaiser and Humana) control 57 percent (1.3 million) of the 2.3 million total Medicare risk enrollees. Competitors dominate eight of the eleven markets where Blue Plans have a Medicare risk presence. The *major competitor* in each of these eight markets has, on average, 58 percent market share.

Fact 9 (emphasis added).

The Blues' recognition of Kaiser Permanente as a competitor goes beyond business strategy; it is deeply embedded into the Blues' own rules. All the Blues have agreed to abide by a set of standards, including "Standard 12," which prohibits the Blues from renting their networks, using the Blue names and marks, to a "National Competitor." Facts 10–11. A National Competitor is an entity that "competes against the Blue System for Core Products and Services" and derives a certain amount of revenue from those "Core Products and Services," which include

"medical/surgical coverage," "hospital coverage," and "the delivery of health care services." Facts 12–13. The Blues actively maintain a list of their National Competitors along with each one's "Health and Health-Related Premium" revenue; Kaiser Permanente has been on the list since at least 2004, and is often the largest or second largest by revenue. Fact 14. Therefore, the Blues have consistently acknowledged for decades that they compete with Kaiser Permanente for the same "transactions" that their own expert says are at issue here.

Kaiser Permanente is not the only insurer that is integrated with healthcare providers. In Alabama, Viva Health, Inc. (Viva) provides healthcare coverage to approximately [redacted] Fact 15. Viva's network includes [redacted] *Id.* [redacted] Facts 16–17. In addition, the UAB Health System, [redacted] collaborates closely with the University of Alabama Health Services Foundation, which employs and/or appoints UAB's physicians. Fact 17. The UAB Health System's ultimate parent is The University of Alabama System. *Id.* [redacted] This degree of integration and collaboration is similar to Kaiser Permanente's.

The record also makes clear that Blue Cross and Blue Shield of Alabama (BCBS-AL) views Viva as a competitor. In a 2016 document titled "Market Information," BCBS-AL stated, "Our top small group competitors have been defined as UnitedHealthcare and VIVA Health." Fact 18. BCBS-AL has examined Viva's strengths and weaknesses as part of a "Competitor Biography." Fact 19. BCBS-AL CEO Terry Kellogg testified that Viva is a "pretty effective" competitor to BCBS-AL in the small group market in Birmingham. Fact 20. In 2010, David Platt of BCBS-AL emailed Tim Sexton of BCBS-AL about Viva's efforts to hire new sales

representatives in the Birmingham area: "What I do not like is having a bunch of new, eager, hungry Viva reps running around the area trying to drum up business when we are injecting so much change and price increase into the market! They clearly are not content with the status quo and plan to push for a larger share of the market." Fact 21. Moreover, when the Blue Cross Blue Shield Association conducted a "Brand Strength Measure Survey" for BCBS-AL, it identified Viva as second on the list of BCBS-AL's "Top 3 Competitors" for each year from 2009 to 2011. Fact 22. [redacted]

Fact 23.

[redacted] The University of Pittsburgh Medical Center, which owns forty hospitals and employs 4,900 doctors, offers its own health plan that insures 3.9 million people and competes with Highmark Blue Cross Blue Shield. Fact 24. Also in Pennsylvania, Geisinger Health System, which operates nine hospital campuses and employs 1,600 doctors, is affiliated with Geisinger Health Plan, which covers 550,000 people. Fact. 25. Highmark views Geisinger as a competitor as well. *Id.* So-called provider-sponsored health plans have increased in prominence: according to AIS Health, in 2016 there were 270 such plans, representing a majority of the health plans in the country. Fact 26.

In short, the Blues admittedly compete with Kaiser Permanente. The Blues' own expert on two-sided platforms acknowledges that Kaiser Permanente is a one-sided business. Other acknowledged competitors of the Blues, [redacted] are one-sided businesses as well because they have an integrated relationship between providers and a health plan. Thus, under *Amex*, the Blues cannot be a two-sided platform as a matter of law. 138 S. Ct. at 2287 ("Only other two-sided platforms can compete with a two-sided platform for transactions.").

CONCLUSION

Amex reaffirmed what this Court and others have long recognized: some horizontal restraints of trade are unlawful *per se*, regardless of how the market is defined. Following *Amex*, numerous courts have recognized the distinction between vertical and horizontal restraints that *Amex* made explicit, even when the market at issue was allegedly two-sided, and no court has relied on *Amex* to apply the rule of reason to a restraint that otherwise would have been *per se* unlawful. *Amex* thus offers no reason to revisit this Court's opinion that certain of the Blues' agreements must be judged by the *per se* rule. Even if *Amex* somehow changed the standard of review in cases involving two-sided platforms, the Blues admittedly compete with one-sided businesses, meaning that they are not two-sided platforms as a matter of law. Plaintiffs respectfully request that this Court leave its previous order undisturbed and proceed to a resolution of the merits under the *per se* standard.

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Respectfully submitted,

/s/ Edith M. Kallas
Edith M. Kallas – ***Co-Lead Counsel***
WHATLEY KALLAS, LLP
152 West 57th Street
41st Floor
New York, NY 10019
Tel: (212) 447-7060
Fax: (800) 922-4851
Email: ekallas@whatleykallas.com

/s/ Joe R. Whatley, Jr.
Joe R. Whatley, Jr. – ***Co-Lead Counsel***
W. Tucker Brown
WHATLEY KALLAS, LLP
2001 Park Place North
1000 Park Place Tower
Birmingham, AL 35203
Tel: (205) 488-1200
Fax: (800) 922-4851
Email: jwhatley@whatleykallas.com
tbrown@whatleykallas.com

Patrick J. Sheehan
WHATLEY KALLAS, LLP
101 Federal Street, 19th Floor
Boston, MA 02110
Tel: (617) 573-5118
Fax: (617) 371-2950
Email: psheehan@whatleykallas.com

Deborah J. Winegard
WHATLEY KALLAS, LLP
1068 Virginia Avenue, NE
Atlanta, GA 30306
Tel: (404) 607-8222
Fax: (404) 607-8451
Email: dwinegard@whatleykallas.com

Henry C. Quillen
WHATLEY KALLAS, LLP
159 Middle Street, Suite 2C
Portsmouth, NH 03801
Tel: (603) 294-1591
Fax: (800) 922-4851
Email: hquillen@whatleykallas.com

E. Kirk Wood, Jr. – ***Local Facilitating Counsel***
WOOD LAW FIRM LLC
P. O. Box 382434
Birmingham, AL 35238
Tel: (205) 612-0243
Fax: (205) 705-1223
Email: ekirkwood1@bellsouth.net

Charles Clinton Hunter
HAYES HUNTER PC
4265 San Felipe, Suite 1000
Houston, TX 77027
Tel: (281) 768-4731
Fax: (713) 583-7047
Email: chunter@hayeshunterlaw.com

Aaron S. Podhurst – ***Plaintiffs' Steering Committee***
Peter Prieto – ***Chair, Expert Committee***
PODHURST ORSECK, P.A.
One S.E. 3rd Avenue
Suite 2300
Miami, FL 33131
Tel: (305) 358-2800
Fax: (305) 358-2382
Email: apodhurst@podhurst.com
pprieto@podhurst.com

Dennis Pantazis – ***Plaintiffs' Steering Committee***
Brian Clark – ***Discovery Committee***
WIGGINS CHILDS PANTAZIS FISHER GOLDFARB
The Kress Building
301 Nineteenth Street North
Birmingham, AL 35203
Tel: (205) 314-0500
Fax: (205) 254-1500
Email: dgp@wcqp.com
bclark@wcqp.com

U.W. Clemon – ***Plaintiffs' Steering Committee***
U. W. Clemon, LLC
5202 Mountain Ridge Parkway
Birmingham, AL 35222
Tel: (205) 837-2898
Email: uwclemon1@gmail.com

Dennis C. Reich – ***Chair, Damages Committee***
REICH & BINSTOCK, LLP
4265 San Felipe, Suite 1000
Houston, TX 77027
Tel: (713) 622-7271
Fax: (713) 623-8724
Email: dreich@rbfirm.net

J. Mark White – ***Litigation Committee***
Augusta S. Dowd – ***Chair, Litigation Committee***
Linda G. Flippo – ***Discovery Committee***
WHITE ARNOLD & DOWD, P.C.
The Massey Building
2025 Third Avenue North, Suite 500
Birmingham, AL 35203
Tel: (205) 323-1888
Fax: (205) 323-8907
Email: mwhite@whitearnolddowd.com
adowd@whitearnolddowd.com
lflippo@whitearnolddowd.com

Nicholas B. Roth – ***Chair, Discovery Committee***
Julia Smeds Roth – ***Discovery Committee***
EYSTER KEY TUBB ROTH MIDDLETON & ADAMS, LLP
402 East Moulton Street, SE
Decatur, AL 35602
Tel: (256) 353-6761
Fax: (256) 353-6767
Email: nbroth@eysterkey.com
jroth@eysterkey.com

Van Bunch – ***Chair, Class Certification Committee***
BONNETT FAIRBOURN FRIEDMAN & BALINT, P.C.
2325 E. Camelback Road, Suite 300
Phoenix, AZ 85016
Tel: (602) 274-1100
Fax: (602) 274-1199
Email: vbunch@bffb.com

David A. Balto – ***Expert Committee***
THE LAW OFFICES OF DAVID A. BALTO
1350 I Street, N.W., Suite 850
Washington, DC 20005
Tel: (202) 789-5424
Fax: (202) 589-1819
Email: david.balto@dcantitrustlaw.com

Robert J. Axelrod – ***Chair, Written Submissions Committee***
AXELROD LLP
800 Third Avenue, Suite 2800
New York, NY 10022
Tel: (646) 448-5263
Fax: (212) 840-8560
Email: rjaxelrod@axelrodllp.com

Joey K. James – ***Litigation Committee***
BUNCH & JAMES
P. O. Box 878
Florence, AL 35631
Tel: (256) 764-0095
Fax: (256) 767-5705
Email: joey@bunchandjames.com

W. Daniel Miles, III – ***Written Submissions Committee***
BEASLEY ALLEN CROW METHVIN PORTIS & MILES, P.C.
218 Commerce Street
Montgomery, AL 36104
Tel: (800) 898-2034
Fax: (334) 954-7555
Email: dee.miles@beasleyallen.com

Richard S. Frankowski – ***Discovery Committee***
THE FRANKOWSKI FIRM, LLC
231 22nd Street South, Suite 203
Birmingham, AL 35233
Tel: (205) 390-0399
Fax: (205) 390-1001
Email: richard@frankowskifirm.com

Michael C. Dodge – ***Expert Committee***
GLAST PHILLIPS & MURRAY, P.C.
14801 Quorum Drive, Suite 500
Dallas, TX 75254
Tel: (972) 419-7172
Email: mdodge@gpm-law.com

John C. Davis – ***Written Submissions Committee***
LAW OFFICE OF JOHN C. DAVIS
623 Beard Street
Tallahassee, FL 32303
Tel: (850) 222-4770
Email: john@johndavislaw.net

Michael E. Gurley, Jr. – ***Discovery Committee***
Attorney at Law
24108 Portobello Road
Birmingham, AL 35242
Tel: (205) 908-6512
Email: mgurleyjr@yahoo.com

Mark K. Gray – ***Discovery Committee***
GRAY & WHITE
713 E. Market Street, Suite 200
Louisville, KY 40202
Tel: (502) 805-1800
Fax: (502) 618-4059
Email: mgray@grayandwhitelaw.com

Lynn W. Jinks, III – ***Expert Committee***
Christina D. Crow – ***Discovery Committee***
JINKS CROW & DICKSON, P.C.
219 North Prairie Street
Union Springs, AL 36089
Tel: (334) 738-4225
Fax: (334) 738-4229
Email: ljinks@jinkslaw.com
ccrow@jinkslaw.com

Stephen M. Hansen – ***Class Certification Committee***
LAW OFFICE OF STEPHEN M. HANSEN
1821 Dock Street
Tacoma, WA 98402
Tel: (253) 302-5955
Fax: (253) 301-1147
Email: steve@stephenmhansenlaw.com

Myron C. Penn – ***Discovery Committee***
PENN & SEABORN, LLC
53 Highway 110
Post Office Box 5335
Union Springs, AL 36089
Tel: (334) 738-4486
Fax: (334) 738-4432
Email: myronpenn28@hotmail.com

Harley S. Tropin – ***Damages Committee***
Javier A. Lopez – ***Discovery Committee***
KOZYAK TROPIN &
THROCKMORTON, P.A.
2525 Ponce De Leon Boulevard, 9th Floor
Miami, FL 33134
Tel: (305) 372-1800
Fax: (305) 372-3508
Email: hst@kttlaw.com
jal@kttlaw.com

J. Preston Strom, Jr. – ***Litigation Committee***
STROM LAW FIRM, LLC
2110 N. Beltline Boulevard, Suite A
Columbia, SC 29204-3905
Tel: (803) 252-4800
Fax: (803) 252-4801
Email: petestrom@stromlaw.com

C. Wes Pittman – ***Settlement Committee***
THE PITTMAN FIRM, P.A.
432 McKenzie Avenue
Panama City, FL 32401
Tel: (850) 784-9000
Fax: (850) 763-6787
Email: wes@pittmanfirm.com

Thomas V. Bender – ***Discovery Committee***
Dirk L. Hubbard
HORN AYLWARD & BANDY, LLC
2600 Grand Blvd., Suite 1100
Kansas City, MO 64108
Tel: (816) 421-0700
Email: tbender@hab-law.com
dhubbard@hab-law.com

Robert B. Roden – ***Litigation Committee***
SHELBY RODEN, LLC
2956 Rhodes Circle
Birmingham, AL 35205
Tel: (205) 933-8383
Fax: (205) 933-8386
Email: rroden@shelbyroden.com

Gregory S. Cusimano – ***Litigation Committee***
CUSIMANO, ROBERTS & MILLS, LLC
153 South 9th Street
Gadsden, AL 35901
Phone: (256) 543-0400
Fax: (256) 543-0488
Email: greg@alalawyers.net

Gary E. Mason – ***Class Certification Committee***
WHITFIELD BRYSON & MASON, LLP
1625 Massachusetts Ave. NW, Suite 605
Washington, DC 20036
Tel: (202) 429-2290
Fax: (202) 640-1160
Email: gmason@wbmllp.com

Brian E. Wojtalewicz
WOJTALEWICZ LAW FIRM, LTD.
139 N. Miles Street
Appleton, MN 56208
Tel: (320) 289-2363
Fax: (320) 289-2369
Email: brian@wojtalewiczlawfirm.com

Michael L. Murphy – ***Discovery Committee***
BAILEY GLASSER LLP
910 17th Street, NW, Suite 800
Washington, DC 20006
Tel: (202) 463-2101
Fax: (202) 463-2103
Email: mmurphy@baileyglasser.com

Archie C. Lamb, Jr.
ARCHIE LAMB & ASSOCIATES, LLC
301 19th Street North, Suite 585
The Kress Bldg.
Birmingham, AL 35203-3145
(205) 458-1210
Email: alamb@archielamb.com

Lance Michael Sears
SEARS & SWANSON, P.C.
First Bank Building
2 North Cascade Avenue, Suite 1250
Colorado Springs, CO 80903
Tel: (719) 471-1984
Fax: (719) 577-4356
Email: lance@searsassociates.com

Paul Lundberg
LUNDBERG LAW, PLC
600 4TH Street, Suite 906
Sioux City, IA 51101
Tel: (712) 234-3030
Fax: (712) 234-3034
Email: paul@lundberglawfirm.com

Jessica Dillon
Ray R. Brown
Molly Brown
DILLON & FINDLEY, P.C.
1049 W. 5th Avenue, Suite 200
Anchorage, AK 99501
Tel: (907) 277-5400
Fax: (907) 277-9896
Email: Jessica@dillonfindley.com
Ray@dillonfindley.com
Molly@dillonfindley.com

Cynthia C. Moser
HEIDMAN LAW FIRM
1128 Historic 4th Street
P. O. Box 3086
Sioux City, IA 51101
Tel: (712) 255-8838
Fax (712) 258-6714
Email: Cynthia.Moser@heidmanlaw.com

Gwen Simons
Simons & Associates Law, P.A.
P.O. Box 1238
Scarborough, ME 04070-1238
Tel: (207) 205-2045
Fax: (207) 883-7225
Email: gwen@simonsassociateslaw.com