UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA and STATE OF MICHIGAN, *Plaintiffs*, v. HILLSDALE COMMUNITY HEALTH CENTER, W.A. FOOTE MEMORIAL HOSPITAL d/b/a ALLEGIANCE HEALTH, COMMUNITY HEALTH CENTER OF BRANCH COUNTY, and PROMEDICA HEALTH SYSTEM, INC., *Defendants*.	Case No.: 5:15-cv-12311 District Judge Judith E. Levy **ORAL ARGUMENT REQUESTED**

ALLEGIANCE HEALTH'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM OF LAW

REDACTED VERSION

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**** The controlling or most appropriate authority for relief sought. L.R. 7.1(d)(2).***

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STATEMENT OF THE ISSUES PRESENTED

First Issue:

Whether *per se* antitrust principles, which are reserved for "naked restraints" of trade that unquestionably cause *substantial adverse effects* on competition and have no plausible consumer benefits, should be applied to Allegiance's allegedly anticompetitive conduct, given that Allegiance's experts opine that Allegiance's conduct caused no harm to competition at all and Plaintiffs' experts opine only that the alleged conduct "more likely than not" caused *some* unspecified amount of competitive harm?

Second Issue:

Whether the "quick look" test, which applies only where "an observer with even a rudimentary understanding of economics" would readily conclude that the alleged conduct has substantial anticompetitive effects on competition and no plausible procompetitive justifications, is the proper mode of analysis for Allegiance's alleged conduct (rather than the full rule of reason), given that Allegiance's expert, a Ph.D. economist, opines that Allegiance's conduct caused *no harm to competition at all*, *had plausible procompetitive justifications*, and delivered *significant procompetitive benefits to the citizens of South-Central Michigan*?

I. INTRODUCTION

W.A. Foote Memorial Hospital d/b/a Henry Ford Allegiance Health ("Allegiance"), respectfully moves this Court to grant it summary judgment as to the parts of Plaintiffs' antitrust claims (Counts I and II) seeking to apply *per se* or "quick look" theories of liability to Allegiance's alleged conduct. As demonstrated herein, *per se* and "quick look" principles are the exception, not the norm, in antitrust analysis, and are reserved for conduct that past judicial experience has clearly shown causes *obvious* and *substantial* harm to competition and consumers. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 887, 894-95, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007). The evidence in this case makes clear that it is *not* a case in which these "judicial shortcuts" are even remotely appropriate. Instead, the rule of reason, the presumptive mode of analysis, which considers all of the facts and circumstances associated with the alleged conduct in determining whether it caused substantial harm to competition, is proper.

As discovery has demonstrated, Allegiance's marketing strategy, which Plaintiffs contend was the product of an unlawful agreement with Hillsdale Community Health Center ("HCHC") not to compete with each other for patients, was in fact a rational and effective strategy designed by Allegiance to gain much-needed referrals from Hillsdale County.[1] Most significantly to this motion, the

[1] Allegiance strongly disputes any contention that it had an unlawful agreement

undisputed evidence confirms that (1) Allegiance marketed its services, both those that competed with HCHC and those that did not, in Hillsdale County; (2) Allegiance successfully increased its share of Hillsdale County residents for both competing and non-competing services; and (3) no Hillsdale County residents were ever allocated in any way to either Allegiance or HCHC. This evidence, together with the opinions expressed by experts *on both sides,* unquestionably demonstrates the inappropriateness of Plaintiffs' *per se* and "quick look" theories.

Specifically, *none* of the experts have opined that there has been *substantial* competitive harm as a result of Allegiance's alleged conduct. Allegiance's experts opine that there have been no identifiable anticompetitive effects at all, while Plaintiffs' economic expert goes only so far as to say, based on economic theory rather than empirical evidence, that *some* harm—unspecified in degree or probability—has "*likely*" occurred.[2] Also, while Plaintiffs' experts quibble with the degree of *success* Allegiance achieved as a result of its marketing strategies, they do not dispute the *plausibility* of Allegiance's procompetitive justifications for

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with HCHC, but the Court *need not* make any finding on this issue to grant summary judgment to Allegiance on Plaintiffs' *per se* and "quick look" theories.

[2] Deposition of Dr. Tasneem Chipty, 12/12/16 (excerpted in Exhibit A), 160:22-161:6 ("[redacted]"); *see also* Expert Report of Dr. Tasneem Chipty, 12/5/16 ("Chipty Reb.") (excerpted in Exhibit B), ¶ 4, 8.

those strategies. Allegiance submits that these two undisputed facts, standing alone, *require* the abandonment of the *per se* and "quick look" modes of analysis in favor of the "full" rule of reason.[3]

II. STATEMENT OF UNDISPUTED FACTS

Allegiance operates the only hospital in Jackson, Michigan, serving the healthcare needs of the Jackson County community. DOJ-DOCS-002410 (excerpted in Exhibit C), at 1-2.[4] [redacted] *Id.* at 2. The first such service was Allegiance's flagship open heart surgery program, which began providing life-saving services to the local community in 2008. *Id.* at 2.

[redacted][5] Deposition of Georgia

[3] Allegiance believes that Counts I and II fail under the full rule of reason as well, but does not seek judgment on Plaintiffs' rule of reason theory in this motion.

[4] In 2010, the American Hospital Association awarded Allegiance the Foster G. McGaw Prize, given annually to the hospital in the country best partnering with community organizations to address the needs of the underserved. *Id.* at 1.

[5] Notably, as tertiary care is provided upon referral of a patient to a specialist provider, referrals from physicians is the best way to grow volume for higher

Fojtasek, 9/20/16 (excerpted in Exhibit E), 101:17-102; 162:14-18 ([redacted]); *see also id.* at 102:1-2 ([redacted]). [redacted] *Id.* at 73:23-25, 98:10-102:5. [redacted] DOJ-DOCS-002410, at 2.[6]

The importance of referrals from Hillsdale County is best demonstrated by Allegiance's open heart program. [redacted][7] Expert Report of Susan Henley Manning,

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acuity services; moreover, as is widely recognized, [redacted] *See*, *e.g.*, Expert Report of Lawton M. Burns, 10/26/16 ("Burns Rpt.") (excerpted in Exhibit D), at ¶¶ 13-16.

[6] Competing providers include UMHS and Trinity St. Joseph Mercy in Ann Arbor; Borgess in Kalamazoo; and Sparrow in Lansing. *Id.*

[7] In support of Allegiance's CON application, HCHC submitted data showing the expected number of open heart patients in Hillsdale. Pursuant to Michigan

Ph.D., 11/14/16 ("Manning Rpt.") (excerpted in Exhibit F), ¶ 166; DOJ-DOCS-002410, at 2. And, because Allegiance is required to show that it performs a minimum number of procedures each year or face CON revocation or civil fines, continuing to obtain referrals from Hillsdale remains critical. MCL § 333.22247(2). As Ms. Fojtasek attested, [redacted] Deposition of Georgia Fojtasek, 11/14/14 (excerpted in Exhibit G), 92:17-19; Manning Rpt., ¶ 167.

Recognizing that the key to gaining referrals was maintaining good relations in Hillsdale, particularly with referring physicians, [redacted] Fojtasek Dep., 12/20/16, at 73:9-75:12.[8] [redacted] *See* Amended Expert Report of Lawrence W. Margolis ("Margolis Rpt.") (excerpted in Exhibit H), ¶¶ 17, 28.[9] [redacted]

Department of Health guidelines, this so-called "pledge" of patients to Allegiance is an acknowledgment by HCHC that its patients may consider Allegiance for the procedure (without any binding obligation on HCHC to refer patients). Because the number of expected procedures in Jackson County alone did not meet the regulatory threshold, obtaining these "pledged lives" from Hillsdale was critical to Allegiance's CON. DOJ-DOCS-002410, at 2-3.

[8] Due to anti-kickback laws, Allegiance is prohibited from offering any incentive for such referrals. *See* 42 U.S.C. § 1320a-7b (2015); Burns Rpt., ¶ 16 [redacted]

[redacted]

(Margolis Rpt. at ¶¶ 57-64, 90-93, 100-104); [redacted] (*id.* at ¶¶ 74-85); [redacted] (*id.* at ¶¶ 80-81); [redacted] (*id.* at ¶¶ 119-122).[10]

Allegiance's marketing also included free vascular screenings in Hillsdale County, and Allegiance even co-sponsored and jointly promoted one such screening with HCHC in 2010. Allegiance's Verified Answers to Plaintiffs' Second Set of Interrogatories ("Alleg. Ans. to 2d Int.") (excerpted in Exhibit I), 13, 17-18.[11] Allegiance also sent its vascular surgeon, Dr. Paul Corcoran, to treat Hillsdale County residents *in Hillsdale,* and encouraged him to market his skills directly to the local Hillsdale physicians. *Id.* at 11, 21. Allegiance likewise directed its neurologist and urologist to hold "office hours" to treat patients *in Hillsdale*. *See id.* The evidence supports that Allegiance physicians treating patients in Hillsdale benefitted Hillsdale County residents. *See* Deposition of Duke Anderson, 7/1/16 (excerpted in Exhibit K), at 341:2-342:2, 348:24-349:25.

[redacted] *Id.* at ¶ 126; DOJ-DOCS-002410, at 5; *see also* Chipty Dep. at 271:6-23 ([redacted]).

[10] Plaintiffs' and Allegiance's healthcare marketing experts agree [redacted] Burns Rpt., ¶ 23; Margolis Rpt., ¶ 17.

[11] Plaintiffs' expert, Dr. Lawton Burns, acknowledges that [redacted]. Deposition of Lawton M. Burns, 12/19/16 ("Burns Dep.") (excerpted in Exhibit J), at 82:9-83:2; 93:8-17.

Allegiance also did outreach specifically targeted to Hillsdale County primary care physicians. Allegiance sent "physician liaisons" to "round on" Hillsdale County primary care physicians, [redacted] Alleg. Ans. to 2d Int., at 10[12]; *see also* Anderson Dep., 7/1/16, at 313:19-25. In fact, as HCHC CEO Duke Anderson observed, Allegiance was the *only* hospital to employ this effective relationship building strategy in Hillsdale County. Anderson Dep., 7/1/16, at 313:19-314:25, 325:18-326:24, 329:15-331:4.

To gain more referrals, Allegiance also understood [redacted] *See* Burns Dep. at 308:21-316:3.[13] This concern was particularly acute for an insular community like Hillsdale County. Anderson Dep., 7/1/16, at 287:2-289:1. In fact, during a 2009

[12] In 2010, a full-time Hillsdale County physician liaison position was created. *Id.*

[13] Dr. Burns acknowledges that [redacted] ' Burns Dep. at 310:9-16. *See also* Margolis Rpt., ¶ 21 ([redacted] "). Hillsdale cardiologist Dr. Owusu recounted an example where he believes a referral source perceived he "stole" a patient and now no longer sends him referrals. Deposition of Victor Owusu, M.D., 6/14/16 (excerpted in Exhibit L), at 117:18-118:6.

physician liaison visit to Dr. Barry Collins, a Hillsdale orthopedist, [redacted] Deposition of Duke Anderson, 6/30/16 (excerpted in Exhibit M), at 91:14-92:23; Fojtasek Dep., 9/20/16, at 145:7-148:5. [redacted] Fojtasek Dep., 9/20/16, at 147:3-148:5.[14]

To this end, at times Allegiance [redacted] Fojtasek Dep., 9/20/16, at 74:19-76:18.[15] [redacted] Allegiance never stopped marketing in Hillsdale County via television, radio, and newsprint, and beginning in 2012, digital marketing, and [redacted] Fojtasek Dep., 9/20/16, at 76:17-18 ("[redacted]"); *see also* Anderson Dep., 7/1/16, at 313:19-314:25.

Moreover, it is indisputable that Allegiance's strategy was *successful*

[14] *See, e.g., id.* at 74:13-17 ([redacted]").

[15] The soundness of this approach is confirmed by Dr. Owusu, who explained that his decisions on where to refer patients was based on relationships and *not at all* influenced by billboards and other traditional media. Owusu Dep. at 27:11-28:14.

because, during the period of time that Plaintiffs allege Allegiance "conspired" "not to compete" with HCHC, Allegiance [redacted] (Manning Report, ¶¶ 109-110, 114, 121, 127, 169) *and* [redacted] (Burns Rpt., ¶ 37; Chipty Reb., ¶ 35; Manning Rpt., ¶ 77). By these efforts, Allegiance established itself as an additional source for higher acuity services in the region, [redacted] *See* Manning Rpt., ¶¶ 105-110, 140, 162, 165-170, 173 ([redacted]); Margolis Rpt., ¶¶ 20-22 ([redacted]).[16]

On this record, Allegiance submits that summary judgment as to Plaintiffs' *per se* and "quick look" legal theories is unquestionably required.

III. SUMMARY JUDGMENT LEGAL STANDARDS

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Rule 56 expressly provides that a court may grant summary judgment not only on a claim, but as to a *part* of a claim. *Id.* This

[16] [redacted] Burns Rpt., ¶ 34; Chipty Reb., ¶ 4, 8; Chipty Dep. at 99:10-17, 160:22-161:8.

motion seeks summary judgment as to the parts of Plaintiffs' antitrust claims that seek to impose liability under either the *per se* or "quick look" principles rather than the rule of reason standard, the presumptively proper method of analysis.

Because the selection of the proper mode of antitrust analysis is "a question of law," *Cal. ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1124 (9th Cir. 2011), federal courts have frequently granted summary judgment as to the inapplicability of *per se* and "quick look" theories. *See*, *e.g.*, *Hyland v. HomeServices of Am., Inc.*, 771 F.3d 310 (6th Cir. 2014) (affirming summary judgment on *per se* Section 1 claims); *Deborah Heart & Lung Ctr. v. Virtua Health Inc.*, No. 11-1290, 2015 WL 1321674 (D.N.J. Mar. 24, 2015) (granting defendants summary judgment on Section 1 claims after assessing "quick look" and rule of reason theories); *Gen. Aviation, Inc. v. Garrett Corp.*, 743 F. Supp. 515 (W.D. Mich. 1990) (issuing summary judgment against Section 1 and MCL § 445.772 *per se* theories).

IV. PLAINTIFFS' *PER SE* THEORY FAILS AS A MATTER OF LAW.

A. *Per Se* Applies Only To "Naked Restraints" Recognized To Cause *Substantial Anticompetitive Harm* To Competition.

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits *agreements* that *unreasonably* restrain trade.[17] *Leegin Creative Leather Prods.*, 551 U.S. at 885 (citations omitted). The prevailing mode of analysis for Section 1 claims is the rule

[17] Federal courts' interpretation of the Sherman Act is persuasive authority as to the meaning of its Michigan analog, MCL 445.772, the basis for Count II. *Gen. Aviation*, 743 F. Supp. at 523.

of reason, which considers the totality of the circumstances in determining both the existence of an agreement and its impact on competition.[18] The favored use of the rule of reason reflects the understanding that the antitrust laws are not intended to chill or condemn behavior that may be procompetitive or benign. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citation omitted). For this reason, the Supreme Court has voiced a strong presumption for applying the rule of reason in all cases except those few where prior judicial experience confirms that a restraint has "manifestly anticompetitive" effects and lacks "any redeeming [procompetitive] virtue." *Leegin Creative Leather Prods.*, 551 U.S. at 886 (citations omitted).

Over time, the Court has identified a handful of categories of "naked," "garden variety" restraints of trade that, "because of their pernicious effect on competition and lack of any redeeming virtue, are presumed to be unreasonable and, therefore, are deemed illegal *per se* without elaborate inquiry as to the harm they have caused or the reason for their use." *N. Pac. Ry. v. U.S.*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). However, the courts have cautioned that *per se* principles should be utilized only in those limited circumstances, because, unlike the rule of reason, *per se* analysis typically gives "no consideration … to the intent

[18] For purposes of this motion only, Allegiance submits that, *even assuming* that the alleged "agreement" existed between Allegiance and HCHC, the nature of the restraint and the competitive impact (or lack thereof) of such an agreement compel summary judgment against the *per se* and "quick look" theories as a matter of law.

behind the restraint, to any claimed pro-competitive justifications, or to the restraint's actual effect on competition." *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 906 (6th Cir. 2003) (citations omitted).

B. Neither the Alleged Agreement nor Allegiance's Conduct is the Type to Which the *Per Se* Rule Has Traditionally Been Applied.

Throughout this litigation, Plaintiffs have claimed that, pursuant to an agreement with HCHC, Allegiance "restricted" its marketing activities in Hillsdale County. (Complaint, ECF No. 1, 1, ¶¶ 4, 17, 35.) Even if true—which Allegiance denies—any such "agreement" does not warrant *per se* condemnation.

First, the Supreme Court has expressly held that not all marketing restrictions warrant *per se* condemnation. *Cal. Dental Ass'n v. FTC,* 526 U.S. 756, 778, 119 S. Ct. 1604, 1613, 143 L. Ed. 2d 935 (1999). The Court cautioned that *per se* treatment is not proper because not all marketing restrictions give rise to "intuitively obvious" anticompetitive effects. *Id.* at 771, 777 n.13, 781 (observing that "advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition" and that, absent further analysis of the specific marketing restriction, its likely anticompetitive effects, any offsetting procompetitive justifications, and the parties' market power, "it is not possible to conclude that the net effect of this particular restriction is anticompetitive"). Thus, even *assuming* that Allegiance's marketing strategy was a "marketing restriction" agreed upon with HCHC (an issue reserved for trial), *per se*

condemnation of Allegiance's conduct is clearly *not* appropriate.

Second, the Supreme Court has also made clear that *per se* condemnation is limited to situations where the parties are horizontal competitors. *Leegin Creative Leather Prods.*, 551 U.S. at 898-99. Here, however, the relationship between Allegiance and HCHC is not easily, or properly, classified solely in that manner. [redacted] Manning Rpt., ¶ 18; Margolis Rpt., ¶ 36; Burns Rpt,, ¶ 37; Expert Report of Dr. Tasneem Chipty, 10/27/16 ("Chipty Rpt.") (excerpted as Exhibit N), ¶ 10. [redacted] (Manning Rpt., ¶¶ 17-18, 165-170).[19] In short, the facts certainly do not reflect a "garden variety" horizontal agreement among competitors, and where a "hybrid" relationship exists, the courts have recognized that *per se* condemnation is not justified; instead, the rule of reason is required. *See*, *e.g.*, *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480-81, n.6 (9th Cir. 1986).

Finally, perhaps recognizing that the "marketing restriction" alleged by Plaintiffs is *not* the type of conduct to which the courts have applied *per se* principles, Plaintiffs' expert, Dr. Chipty, attempts to [redacted]

[19] Plaintiffs' own theory of the alleged restraint—that Allegiance limited its marketing because it "[redacted]" (Chipty Rpt., ¶ 18 (emphasis added))—implicitly recognizes the vertical component of the relationship.

[redacted] *E.g.*, Chipty Rpt., ¶ 6. However, merely characterizing Allegiance's conduct as a type of "market allocation" agreement does not make it so, particularly where the undisputed facts do not support this characterization. *See Safeway*, 651 F.3d at 1137.[20]

On this issue, the *Safeway* case is quite instructive. There, the Ninth Circuit rejected a claim by the State of California that a revenue-sharing agreement among grocers should be viewed as a "market allocation" arrangement, recognizing that "the conduct at issue is not a garden-variety horizontal division of a market." *Id.* The court emphasized how the agreement was *atypical*: it did not apply to all grocers within the market, it did not prevent any grocer from selling to particular consumers or selling particular products, it did not restrict customers from patronizing certain grocers, and it did not limit the grocers to a particular set of customers or geographic regions. *Id.* As such, "[a] restraint of this nature has not undergone the kind of careful judicial scrutiny that would support the application of a *per se* rule," and the court held that *per se* treatment was not appropriate. *Id.*;

[20] Classic "market allocation" agreements are ones in which "competitors at the same level agree to divide up the market for a given product," and typically bars a defendant from making actual sales to certain consumers or bars certain consumers from buying from the defendant. *Id.* (citation omitted). Notably, while Dr. Chipty asserts [redacted] *See* Chipty Reb., ¶ 35 ([redacted]).

see also In re Online DVD Rental Antitrust Litig., No. M 09-2029, 2011 WL 5883772, *9 (N.D. Cal. Nov. 23, 2011) (finding alleged agreement did not fit so "squarely within the category of agreements exhibiting the traditional hallmark of a 'naked' market allocation agreement effecting such an obvious restraint on a given market that *per se* treatment is appropriate.").

Here, like in *Safeway*, Allegiance's conduct cannot properly be viewed or condemned as a *per se* market allocation; instead, the rule of reason applies.

C. No Evidence Or Expert Testimony Suggests Allegiance's Conduct Had "Substantial Adverse Effects" On Competition.

Perhaps even more importantly, [redacted] *E.g.*, Chipty Dep. at 160:22-161:6; Burns Dep. at 164:1-3.[21]

Specifically, Allegiance's experts unequivocally opine, backed by empirical evidence, [redacted]

[21] Notably, this does *not* create a factual dispute that precludes summary judgment here; to the contrary, unless this Court rejects *all* of Allegiance's evidence as to the absence of competitive harm and *all* of Allegiance's evidence of plausible procompetitive justifications, the judicial shortcuts of *per se* and "quick look" principles must be rejected in favor of the full rule of reason.

[redacted] Manning Rpt., ¶¶ 107-162; Margolis Rpt., ¶¶ 17, 20, 22. Dr. Manning states: "[redacted] wide dampening or reduction in competition resulting from the alleged agreement. [redacted]" Manning Rpt., ¶ 20. Her analysis further indicates:

- [redacted]
- [redacted]
- [redacted]; and
- No economic evidence of a market-wide substantial reduction in access to inpatient or outpatient care.

Id. at ¶ 19; *see id.* at ¶¶ 107-162 ([redacted]). Similarly, Allegiance's healthcare marketing expert, Mr. Margolis, sees "[redacted]" Margolis Rpt., ¶ 22.

In addition, Plaintiffs' economist, Dr. Chipty, *never* opines that [redacted]

[redacted] *E.g.*, Chipty Rpt., ¶ 12. And even when challenged, she never goes further—not in her rebuttal report or deposition—than to reiterate her view that the alleged agreement [redacted] *E.g.*, Chipty Dep. at 77:21-78:2 ("[redacted]"); *see also* Chipty Dep. at 160:22-161:6 ([redacted]); Chipty Dep. 161:17-22 ([redacted]").[22]

Moreover, Plaintiffs' experts' reasons for opining that [redacted] is tenuous, at best. They repeatedly claim that [redacted] in Hillsdale, [redacted] Burns Dep. at 154:25-155:15 ([redacted]); Chipty Reb., ¶ 75 ("[redacted]

[22] The opinion of Dr. Burns, [redacted] is also far from an opinion that the conduct unequivocally caused substantial anticompetitive harm. Burns Rpt., ¶ 39 (emphasis added). He goes no further than to say that [redacted] *Id.* at ¶¶ 12(b) (emphasis added); *id.* at ¶ 34.

[redacted]

[redacted]

[redacted]’).

For example, both [redacted] Chipty Reb., ¶ 14; Burns Dep. at 143:23-144:8, 178:14-21. However, the evidence simply does not support the basis for their opinions. First, Dr. Chipty clearly failed to account for [redacted] Chipty Reb., ¶¶ 60-61; Chipty Dep. at 257:13-261:15. Dr. Chipty also admits that [redacted] Chipty Dep. at 263:1-16. Similarly, in his report, Dr. Burns attempts to minimize Allegiance’s marketing in Hillsdale [redacted] Burns Dep. at 176:7-182:10, 272:16-275:19. Finally, neither expert opines as to how many screenings would be “enough” in Hillsdale County for them to give Allegiance any “credit” for such screenings. *E.g.*, Burns Dep. at 168:5-11, 276:22-277:8 ([redacted]

[redacted]).[23]

Accordingly, simply based upon what Plaintiffs' experts ***do*** say and ***don't*** say, Plaintiffs clearly cannot "demonstrate that the [alleged agreement] was so lacking in procompetitive virtues that [it] should be deemed as a matter of law to lack 'any redeeming virtue'—a necessary finding for *per se* condemnation." *In re Online DVD Rental*, 2011 WL 5883772, at *9; *Safeway*, 651 F.3d at 1137.[24]

D. <u>The Plausibility Of Allegiance's Procompetitive Justifications For Its Conduct Is Uncontroverted</u>.

Finally, even if Plaintiffs could show that the alleged conduct resulted in "manifestly anticompetitive effects" (and they cannot), *per se* treatment would *still* be improper because it is undisputed that Allegiance has advanced *plausible* procompetitive justifications for its conduct. As the Supreme Court has explained, where plausible procompetitive benefits are asserted, the *per se* rule is rejected in favor of the rule of reason. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Print. Co.*, 472 U.S. 284, 294, 105 S. Ct. 2613, 2619–20, 86 L. Ed. 2d 202 (1985).

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[23] The Court need not making a finding as to how many screenings were conducted, or whether they were sufficient to provide Hillsdale residents with the greatest possible benefit, to conclude that at least *some* benefit was bestowed and reject Plaintiffs' request for *per se* condemnation of Allegiance's conduct.

[24] It is even clearer once Allegiance's experts' opinions of the absence of any harm and plausible procompetitive benefits in this case are taken into account. *See infra* Section VI.D. The lack of evidence of any unquestionably anticompetitive effect is unsurprising given that the alleged "marketing restriction" does not fit into any category of restraints deemed *per se* illegal. *See supra* Section VI.B.

Clearly, challenging the actual *success* of Allegiance's marketing strategy (which is, at most, what Plaintiffs' experts do) is not the same as disputing that Allegiance's procompetitive justifications for its conduct were *plausible*. To the contrary, Allegiance' experts unambiguously opine that Allegiance's procompetitive justifications were *plausible*, *legitimate*, and, ultimately, *effective*.

The facts relating to Allegiance's open heart program clearly demonstrate that this is so. Dr. Manning explains that Allegiance's marketing strategy [redacted] Manning Rpt., ¶¶ 100, 163-167 ("[redacted]").[25] Similarly, Mr. Margolis opines that Allegiance's strategy in Hillsdale County was [redacted] and that the strategy had [redacted]" Margolis Rpt., ¶ 21. Even Dr. Chipty, [redacted]

[25] The Court may consider factually-supported expert opinions concerning the procompetitive justifications and effects of Allegiance's conduct for purposes of deciding on summary judgment whether *per se* principles apply. *See Major League Baseball Props., Inc. v. Salvino*, *Inc.*, 542 F.3d 290, 311 (2d Cir. 2008) (upholding refusal to apply *per se* rule where defendant's expert opined as to procompetitive justifications and plaintiff's experts disagreed without factual basis).

[redacted] fails to dispute that it was reasonable for Allegiance to believe that *every single referral* directly and necessarily contributed to Allegiance's ability to try to meet its required minimum procedure requirements that were necessary to avoid the possible closure of its open heart surgery program.[26]

Finally, the cynical view of the evidence advanced by Plaintiffs' experts ignores the real world benefits to patients in Jackson County and Hillsdale County created by Allegiance's ability to offer open heart surgery locally. Allegiance's open heart program significantly reduces the time necessary for Jackson and Hillsdale residents to reach a surgeon (by avoiding a transfer to Ann Arbor or Kalamazoo), permitting better outcomes and, in some cases, preventing permanent or fatal heart damage.[27] Thus, neither Plaintiffs nor their experts can legitimately dispute that Allegiance's provision of open heart services has provided benefits to the residents of both counties.[28]

For all of these reasons, Allegiance submits that the application of *per se* principles in this case would be unquestionably inappropriate.

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[26] The threat of sanctions was not illusory: [redacted] Manning Rpt., ¶ 167 n.175. Allegiance records reflect that [redacted] Manning Rpt., ¶ 86.

[28] Due to Allegiance's program, open heart surgery is available within 36 miles (43 minutes driving time) of Hillsdale, much closer than Toledo, 65 miles; Ann Arbor, 70 miles; and Kalamazoo, over 70 miles. *See* Margolis Rpt. ¶ 25 and Ex. 2.

V. PLAINTIFFS' "QUICK LOOK" THEORY IS ALSO MISPLACED AS A MATTER OF LAW.

A. "Quick Look" Has Similarly Limited Applicability.

The "quick look" standard, which Plaintiffs advocate in the alternative (ECF No. 1, ¶ 37), is an intermediate shortcut applied "*only when an observer with even a rudimentary understanding of economics* could conclude that the arrangement in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n*, 526 U.S. at 777 n.13; *U.S. v. Brown Univ. in Providence in State of R.I.*, 5 F.3d 658, 669 (3d Cir. 1993) (applying "quick look" "where *per se* condemnation is inappropriate, but where no elaborate industry analysis is required to demonstrate the anticompetitive character of an inherently suspect restraint").

In applying a "quick look," the court first determines whether the defendant offers evidence of "plausible" procompetitive effects. *Cal. Dental Ass'n*, 526 U.S. at 778. If so, then the *full* rule of reason analysis, and not the "quick look," is required. *See id.* As with *per se* treatment, the Supreme Court has advised that the "quick look" form of analysis is improper if conduct "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition." *Id.* at 771.

B. Expert Testimony Confirms That Allegiance's Conduct *Increased* Competition for Tertiary Services.

The evidence of plausible procompetitive effects in this case, as in

California Dental, clearly renders "quick look" inappropriate. *See Cal. Dental Ass'n*, 526 U.S. at 770, 777 n.13. Indeed, Allegiance submits that it would be clear error to apply this shortcut—intended only for "*when an observer with even a rudimentary understanding of economics*" could see the alleged conduct's clear anticompetitive effects—given that a ***Ph.D economist*** has expressly opined that [redacted] *E.g.*, Manning Rpt., ¶¶ 163-173. Where, as here, the courts have been presented with expert reports opining as to plausible procompetitive justifications and effects, those courts have not hesitated to conclude that "quick look" analysis is not appropriate. *See Deborah Heart*, 2015 WL 1321674, at *9; *Major League Baseball Props.*, 542 F.3d at 319; *Brown Univ.*, 5 F.3d at 669.

In addition, as explained above, Plaintiffs provide no basis for rejecting Allegiance's proffered justifications. Plaintiffs' experts merely question the [redacted][29] For example, Dr. Chipty finds it [redacted]

[29] The existence and scope of *actual* (not just plausible) net procompetitive benefits is properly addressed by a full rule of reason analysis.

[redacted]

Chipty Dep. at 114:17-115:8 (objections omitted).[30]

Dr. Burns likewise [redacted] (Burns Rpt., ¶ 39) (emphasis added), and that [redacted] (*id.* at ¶¶ 9-10). Such opinions fail to refute the *plausible* procompetitive justifications for Allegiance's conduct, thus rendering the use of "quick look" inappropriate. As the Supreme Court explained in *California Dental*:

> The point is not that the CDA's restrictions necessarily have the procompetitive effect claimed by the CDA; it is possible that banning quality claims might have no effect at all on competitiveness . . . . The point, rather, is that ***the plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review*** to which the Commission's order was treated. ***The obvious anticompetitive effect that triggers abbreviated analysis has not been shown***.

526 U.S. at 778 (emphasis added) (rejecting "quick look" and *per se* tests because

[30] Significantly, Dr. Chipty acknowledges that [redacted] " Chipty Reb. ¶ 32 and Figure 1. She offers no basis, however, for [redacted] *Id.* at ¶33.

advertising restraints' anticompetitive effects were "far from intuitively obvious").

In sum, the evidence in this case, including the expert testimony, similarly demonstrates that, *at the very least*, it is *plausible* that Allegiance's conduct had a net procompetitive effect or no effect at all on competition. For this reason, a full rule of reason analysis is required.

VI. CONCLUSION

The law is clear that *per se* and "quick look" standards are suitable only for "garden-variety," "naked restraints" that clearly have *substantial* adverse effects on competition. Here, the record makes clear that this is no such case. Accordingly, Allegiance should be granted an opportunity to present evidence at trial on all of the facts and circumstances surrounding its alleged conduct, an opportunity that it would be denied if the Court were to summarily condemn Allegiance's conduct under either *per se* or "quick look" principles. For these reasons, Allegiance respectfully submits that summary judgment in its favor on Plaintiffs' *per se* and "quick look" theories is appropriate at this time.

CERTIFICATE OF CONFERENCE

I hereby certify that I have conferred with Plaintiffs' counsel and confirmed that they do not consent to any of the relief requested herein.

Dated December 30, 2016.

Respectfully submitted,

/s/

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
James M. Burns
D.C. Bar No.: 412318
901 K Street, N.W., Ste. 900
Washington, D.C. 20001
Telephone: (202) 508-3430
jmburns@bakerdonelson.com

DICKINSON WRIGHT
Doron Yitzchaki
P72044
350 South Main Street, Ste. 300
Ann Arbor, MI 48104-2131
Telephone: (734) 623-1947
DYitzchaki@dickinsonwright.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 30, 2016, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a Notice of Electronic Filing to all counsel or parties of record on the Service List below.

/s/
James M. Burns

SERVICE LIST

FOR PLAINTIFF UNITED STATES OF AMERICA:

Katrina Rouse, Esq.
Jennifer Hane, Esq.
Barry Joyce, Esq.
Jill McGuire, Esq.
U.S. Department of Justice
Antitrust Division
Litigation I Section
450 Fifth Street, N.W., Ste. 4100
Washington, D.C. 20530
(202) 305-7498
katrina.rouse@usdoj.gov

FOR PLAINTIFF STATE OF MICHIGAN:

Mark Gabrielse, Esq.
D.J. Pascoe, Esq.
Michigan Department of Attorney General
Corporate Oversight Division
G. Mennen Williams Bldg., 6th Floor
525 W. Ottawa Street
Lansing, MI 48933
(517) 335-6477
gabrielsem@michigan.gov
pascoedj@michigan.gov

LOCAL COUNSEL FOR PLAINTIFF UNITED STATES OF AMERICA:

Peter Caplan, Esq.
Assistant United States Attorney
211 W. Fort Street, Ste. 2001
Detroit, MI 48226
(313) 226-9784
peter.caplan@usdoj.gov