UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

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-JEL-DRG Judge Judith E. Levy Magistrate Judge David R. Grand ORAL ARGUMENT REQUESTED

PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO ALLEGIANCE HEALTH'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The United States and the State of Michigan ("Plaintiffs") respectfully move the Court, pursuant to Federal Rule of Civil Procedure 56, for summary judgment for the reasons stated in Plaintiffs' accompanying memorandum. Pursuant to Local Rule 7.1(a), attorneys for the United States and the State of Michigan conferred with counsel for W.A. Foote Memorial Hospital, d/b/a Henry Ford Allegiance Health ("Allegiance"), who stated that Allegiance does not consent to any of the requested relief.

Respectfully Submitted,

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January 19, 2017

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

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-JEL-DRG Judge Judith E. Levy Magistrate Judge David R. Grand ORAL ARGUMENT REQUESTED

PLAINTIFFS' REDACTED MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO ALLEGIANCE HEALTH'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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STATEMENT OF ISSUES

I. Whether Plaintiffs established an agreement between Allegiance and HCHC restricting Allegiance's marketing of competing services in Hillsdale County, where [redacted] and direct communications with HCHC explicitly reference such an agreement?

II. Whether this agreement amounts to a horizontal market allocation that is per se unlawful under Section 1 of the Sherman Act?

III. Whether this agreement is illegal under a "quick look" rule of reason analysis given the nature of the restraint and given Allegiance's failure to offer any procompetitive justifications cognizable under the Sherman Act?

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* Denotes controlling or most appropriate authority for the relief sought. LR 7.1(d)(2).

I. INTRODUCTION

Defendant W.A. Foote Memorial Hospital d/b/a Henry Ford Allegiance Health ("Allegiance") and Hillsdale Community Health Center ("HCHC") agreed that Allegiance would restrict its marketing of certain services in Hillsdale County. The existence of the agreement is clear. Allegiance's formal marketing plan [redacted]; Allegiance's CEO told HCHC's CEO that Allegiance "[redacted]; and Allegiance's Vice President of Marketing [redacted] and apologized directly to HCHC for "not honor[ing] our agreement" in another. This agreement let HCHC attract consumers in Hillsdale County without constraint from certain forms of critical competition from Allegiance, and amounts to a horizontal market allocation that is per se unlawful under Section 1 of the Sherman Act. Alternatively, the agreement may be held unlawful after a "quick look" rule of reason inquiry.[1] Thus, the Court should grant Plaintiffs' Cross-Motion for Summary Judgment and find Allegiance liable for violating the Sherman Act.

[1] Faced with parallel allegations, former defendants HCHC, Community Health Center of Branch County, and ProMedica Health System, Inc. have settled Plaintiffs' claims and have agreed to stop such behavior. *See* ECF No. 36.

II. STATEMENT OF FACTS

Allegiance and HCHC operate the only general acute-care hospitals in their respective adjacent counties[2] and are horizontal competitors for patients seeking healthcare services.[3] Marketing is a key component of this competition: it is an important way in which the hospitals seek more patients and a larger market share.[4] Allegiance markets to inform patients, physicians, and employers about the hospital, including its quality and scope of services.[5] Allegiance's marketing efforts in areas outside of Hillsdale County include media advertisements (print, billboards, television, radio, and digital), mailings, health fairs, health screenings, outreach to physicians and employers, and establishing clinics.[6] Allegiance's

[2] *See, e.g.*, Allegiance Health's Answer and Defenses to Plaintiffs' Complaint at ¶ 1 (ECF No. 24) ("Answer to Complaint"); Defendant Allegiance Health's Objections and Answers to First Set of Requests for Admission at 2 (RFA 1) ("Allegiance's RFA Answers") (excerpted in Exhibit A).

[3] Answer to Complaint at ¶ 14; *see* Allegiance's Objections and Answers to Plaintiffs' First Set of Interrogatories at 8 ("Allegiance's First Interrogatory Answers") (excerpted in Exhibit B) ("[redacted]").

[4] *See* Allegiance's RFA Answers at 4 (RFA 7) (excerpted in Exhibit A); Investigative Testimony of Georgia Fojtasek, Dec. 12, 2014, at 274:6-8 (excerpted in Exhibit C-2).

[5] *See* Answer to Complaint at ¶ 14; Allegiance's RFA Answers at 5 (RFA 9) (excerpted in Exhibit A).

[6] *See* Allegiance's RFA Answers at 5-6 (RFA 10-13) (excerpted in Exhibit A); Investigative Testimony of Georgia Fojtasek, Nov. 14, 2014, at 109:20-110:3 (excerpted in Exhibit C-1); Allegiance's First Interrogatory Answers at 4-11 (excerpted in Exhibit B); AH000334966 at 968 (excerpted in Exhibit O-1).

CEO, Georgia Fojtasek, conceded at her deposition, however, that Allegiance [redacted].[7]

Since at least 2009, Allegiance agreed with HCHC to restrict its marketing of services in which it competes with HCHC in Hillsdale County. In general, the two hospitals compete for so-called "lower acuity" services, while Allegiance also provides "higher acuity" services that Hillsdale does not.[8] So, for example, both hospitals provide basic cardiovascular services, but only Allegiance provides more advanced catheterization laboratory services, heart surgery, and vascular surgery.[9]

Written communications show that HCHC policed Allegiance's compliance with the agreement and brought violations to Allegiance's attention. Allegiance apologized in writing to HCHC for violating the agreement twice in 2009. Allegiance assured HCHC's CEO: "It isn't our style to purposely not honor our agreement,"[10] [redacted].[11] Additionally, several Allegiance documents refer

[7] Deposition of Georgia Fojtasek, Sept. 20, 2016 ("Fojtasek Dep."), at 76:20-25 (excerpted in Exhibit C-3); *see also* Statement of Allegiance Health In Further Response to The DOJ and MIAG Civil Investigative Demands at 4 ("Allegiance White Paper") (excerpted in Exhibit D).
[8] Expert Report of Susan Henley Manning, Ph.D. at ¶¶17-18 (excerpted in Exhibit E).
[9] *Id.* at ¶¶ 17, 76.
[10] *See* HIL-DOJ-003916 at 920 (excerpted in Exhibit F-1).
[11] *See* AH000980691 (Exhibit O-2).

explicitly to [redacted].[12] Allegiance does not dispute that its employees have referred repeatedly to [redacted].[13]

Moreover, Allegiance's documents show that the Allegiance-HCHC agreement caused Allegiance to [redacted].[14] Accordingly, Allegiance's Vice President of Physician Integration, Gerald Grannan, described Allegiance's [redacted][15]

[12] *See, e.g.*, AH000635931-33 at 931 (Exhibit O-3); AH000551704 (Exhibit O-4) [redacted]").

[13] Allegiance's RFA Answers at 10 (RFA 30) (excerpted in Exhibit A).

[14] For example, Allegiance's ordinary-course business documents show that Allegiance [redacted]. *See, e.g.*, AH000563848 (Exhibit O-5); AH000981696-97 (Exhibit O-6); AH001684494-97 at 497 (Column J, at J27, J28, J46, J47, J55) (Exhibit O-7); AH000416895 (Exhibit O-8). Similarly, other documents show that Allegiance [redacted]. *See, e.g.*, ALLDOJMIAG-ST-00005338-43 at 538-39 (Exhibit O-9); ALLDOJMIAG-GG-0000132 (Exhibit O-10); *see also* AH000572696 (Exhibit O-11). Further, please see Section IV.A, *infra*, for a detailed overview of internal and external communications that establish the Allegiance-HCHC agreement.

[15] AH000413603-04 (Exhibit O-12).

Allegiance competes with more distant hospitals to attract high-acuity patient referrals from Hillsdale County.[16] [redacted].[18] In addition, Allegiance [redacted]."[19]

III. SUMMARY OF APPLICABLE LAW

Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[20] "A dispute of material fact is genuine so long as 'the evidence is such that a reasonable

[16] *See* Allegiance White Paper at 1 (excerpted in Exhibit D).
[17] Fojtasek Dep. at 74:23-75:12 (Exhibit C-3) ("[redacted]").
[18] *Id.* at 126:22-127:20 (Allegiance planned to [redacted]).
[19] *See id.* at 125:16-21.
[20] Fed. R. Civ. P. 56(a).

jury could return a verdict for the non-moving party.'"[21] "[T]he court must view the evidence and draw all reasonable inferences in favor of the nonmoving party."[22] Where both parties have moved pursuant to Rule 56, "the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration."[23]

To establish a violation of Section 1 of the Sherman Act,[24] Plaintiffs must prove three elements: "1) a contract, combination or conspiracy; 2) affecting interstate commerce;[25] 3) which imposes an 'unreasonable' restraint of trade."[26] To decide whether a restraint of trade is "unreasonable," courts examine the

[21] *Tyson v. Sterling Rental, Inc.*, 836 F.3d 571, 576 (6th Cir. 2016) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).
[22] *Sec'y of U.S. Dept. of Labor v. Gilley*, 290 F.3d 827, 829 (6th Cir. 2002) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).
[23] *McKay v. Federspiel*, 823 F.3d 862, 866 (6th Cir. 2016).
[24] 15 U.S.C. § 1. It is not disputed that Michigan antitrust law follows federal precedent. *See* MCL 445.784(2). Therefore, the analysis in this brief applies equally to Counts I and II of Plaintiffs' Complaint. *See Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 619 n.4 (6th Cir. 1999).
[25] In its Answer, Allegiance admits that it engages in interstate commerce and in activities substantially affecting interstate commerce. *See* Answer to Complaint at ¶ 9.
[26] *White & White, Inc. v. Am. Hosp. Supply Corp.*, 723 F.2d 495, 504 (6th Cir. 1983).

restraint under a per se and/or a "quick look" rule of reason, or a full rule of reason analysis.[27]

Per se unlawful restraints are "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."[28] Where it applies, the per se rule provides "a 'conclusive presumption' of illegality to certain types of agreements" and "no consideration is given to the intent behind the restraint, to any claimed pro-competitive justifications, or to the restraint's actual effect on competition."[29]

The quick look rule of reason is an "abbreviated form of the rule of reason analysis" that is "used for situations in which 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'"[30] Under quick look analysis, once the plaintiff identifies "anticompetitive behavior," the burden of proof shifts to the defendant to "provid[e] some 'competitive justification' for the restraint."[31] Such procompetitive justifications, moreover, must not be achievable through less restrictive means.[32]

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[27] *See In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 274 (6th Cir. 2014).
[28] *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).
[29] *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 906 (6th Cir. 2003).
[30] *In re Se. Milk*, 739 F.3d at 274 (quoting *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999)).
[31] *Id.* at 275.
[32] *Id.* at 272.

IV. ARGUMENT

Section 1 requires concerted action by the defendants. A defendant rarely admits in writing the existence of an illegal anticompetitive agreement. But that is what happened here. As detailed in Section IV.A below, the evidence of the Allegiance-HCHC agreement entitles Plaintiffs to summary judgment on the first element of their claims.

Plaintiffs likewise are entitled to summary judgment based on the unreasonable nature of Allegiance's agreement with HCHC. The agreement at issue is a horizontal customer allocation agreement—a type of agreement that courts have long considered to be per se illegal. Alternatively, the agreement should be deemed illegal under a quick look analysis because of its obvious anticompetitive effects and absence of any legally cognizable procompetitive justification.

A. Plaintiffs' Direct Evidence Establishes Concerted Action Between Allegiance and HCHC

The evidence is compelling that, since at least 2009, Allegiance and HCHC have agreed to limit Allegiance's marketing for competing services in Hillsdale County. It is undisputed that Allegiance: [redacted]; apologized to HCHC for mistakenly marketing to Hillsdale County residents and committed to preventing future infractions; sought approval from HCHC before marketing certain services in

Hillsdale County; and [redacted].

1. Contemporaneous, Ordinary-Course Communications Between Allegiance and HCHC Show an Agreement

In February 2009, Allegiance sent a letter to Hillsdale County residents advertising a "free Seminar" to be held in Jackson County in March 2009 by "Orthopedic Surgeons, Charles Medlar, MD and Allan Tompkins, MD."[33] These types of seminars are offered to educate consumers about health issues and treatment options. [redacted]:

[33] HIL-DOJ-003916 at 917 (excerpted in Exhibit F-1). The letter is directed to an address in Reading, Michigan, which is located in Hillsdale County.
[34] AH000980691-92 (Exhibit O-2).
[35] *Id.*
[36] *Id.*

[redacted][37]

[redacted] Anthony Gardner, Allegiance's then-Vice President of Marketing, sent a letter of apology to HCHC's Dr. Collins, with a copy to Mr. Anderson.[38] In it, Mr. Gardner "apologize[d] for a letter that was sent to Hillsdale-area residents regarding an Allegiance Health orthopedic community event."[39] He explained that Allegiance "routinely exclude[s] residents from the Hillsdale community from our promotional mailings" and that an "error" caused Allegiance to send the letter "unintentionally."[40] Mr. Gardner concluded his apology by assuring Dr. Collins that Allegiance had "reviewed our internal processes . . . to ensure that future orthopedic mailings are not sent to Hillsdale residents."[41]

Then, in October 2009, Allegiance mailed a "welcome" letter to a Hillsdale County address in which its CEO offered a free first-aid kit as a housewarming gift

[37] *Id.*
[38] HIL-DOJ-003916 (excerpted in Exhibit F-1). In his apology to Dr. Collins, Mr. Gardner noted that "I have spoken with Duke Anderson directly regarding our mistake and have apologized to him as well." *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*

and provided Allegiance's website address.[42] After learning of the mailing, Allegiance's Mr. Gardner sent a handwritten apology to HCHC's Mr. Anderson "for the packets that were mailed to Hillsdale."[43] Mr. Gardner explained that "[a]s with the earlier ortho[pedics] error," the marketing "was certainly not intentional."[44] Mr. Gardner assured Mr. Anderson: "It isn't our style to purposely not honor our agreement."[45] He also reported that Allegiance would address the cause of the error "immediately" and thanked Mr. Anderson for making Allegiance aware of the mailing.[46]

2. [redacted]

[42] HIL-DOJ-003916 at 921 (excerpted in Exhibit F-1).
[43] *Id.* at 919-20 (excerpted in Exhibit F-1). In her testimony, Ms. Fojtasek confirmed that in 2009 Allegiance [redacted]. Fojtasek Dep. at 144:12-18 (excerpted in Exhibit C-3); *see also* Allegiance's RFA Answers at 9-10 (RFA 27-28) (excerpted in Exhibit A) ([redacted]).
[44] HIL-DOJ-003916 at 920 (excerpted in Exhibit F-1).
[45] *Id.*
[46] *Id.*

[redacted]

[47] AH000437523 (Exhibit O-13).

[48] AH000442389 at 391 (excerpted in Exhibit O-14); *see also* ALLDOJMIAG-AG-00028714 at 715 (excerpted in Exhibit O-15) [redacted]).

[49] AH000345985 at 987 (excerpted in Exhibit O-16).

[redacted]

3. Allegiance Sought HCHC's Advance Approval to Market in Hillsdale County

The course of conduct provides further evidence of the agreement and the manner in which it was executed. For example, several documents make clear that Allegiance sought HCHC's advance approval to market certain services in Hillsdale County. For example, in December 2008, Allegiance's Mr. Houttekier wrote to HCHC's Mr. Anderson: [53]

[50] AH000635931-32 at 931 (Exhibit O-3).
[51] AH000551704 (Exhibit O-4).
[52] AH000396819-20 (excerpted in Exhibit O-17). In another part of the email chain, [redacted]
[53] HILL-SUBPOENA-DOJ-000003 (Exhibit F-3).

> I am wondering if you would oppose me letting your primary care physicians know that this technique [minimally invasive parathyroid surgery] is available to their patients. Grant it [sic], if your physicians are performing this type of surgery I understand that you do not want me to market within the Hillsdale market, which we respect your wishes.[54]

Mr. Anderson responded by thanking Mr. Houttekier and "respectfully ask[ing] that you not market the aforementioned procedure to Hillsdale docs."[55] Mr. Houttekier then replied and confirmed that he would "continue to seek your approval prior to meeting with any of your physicians."[56]

[redacted]

[54] *Id.*
[55] *Id.*
[56] *Id.*; *see also* AH000314775-76 at 775 (Exhibit O-18) ([redacted]).
[57] AH000249623-25 at 924 (Exhibit O-19).
[58] *Id.*

[redacted]

Further, Allegiance curtailed its marketing efforts in response to HCHC objections. For example, around December 2013, an Allegiance thoracic surgeon wanted to meet with an ear-nose-throat physician in Hillsdale County. Allegiance's Mr. Houttekier relayed to a physician recruiter for HCHC that he wanted to introduce the surgeon to the Hillsdale physician. The recruiter responded: "I needed to let you know that [HCHC doctors] do this same work [as the Allegiance thoracic surgeon] so we wouldn't want to interfere with that. . . . I received some concern from Hillsdale and wanted to let you know."[61] Mr. Houttekier replied: "Ah, that is good to know and will [sic] not push the introduction because we do not want to steer business from Hillsdale that can be

[59] *Id.* at 625

[60] AH000413603-04 at 604 (Exhibit O-12) (noting also that "[redacted]"); *see also* AH000445379-82 at 380 (Exhibit O-20) (Regional Marketing Guidelines stating [redacted]); AH0000916369 at 372 (excerpted in Exhibit O-21) [redacted]).

[61] HILL-ANDE-00017933-35 at 934 (Exhibit F-2).

performed in Hillsdale by your docs."[62] HCHC's CEO congratulated the recruiter on her handling of the situation, writing to her, "Good job Diane!"[63]

Select documentary evidence of the Allegiance-HCHC agreement implemented over time, discussed above, is also summarized in Exhibit N.

4. This Undisputed Evidence Supports the Existence of an Agreement

Though often hard to detect, "[t]he most straightforward indication of a traditional conspiracy is a participant's direct acknowledgment that an agreement exists."[64] The "unity of purpose" or "common understanding" reflecting an unlawful agreement may be grounded in conduct, and does not require any formal instrument, like a written contract.[65]

This is the very rare case in which the evidence establishing the agreement between Allegiance and HCHC is both direct and overwhelming. As detailed

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[62] *Id.* at 933.
[63] *Id.*
[64] Areeda & Hovenkamp, *Antitrust Law* ¶ 1418a (3d ed.) (excerpted in Exhibit M); *see also Hyland v. HomeServices of Am., Inc.*, 771 F.3d 310, 318 (6th Cir. 2014) (Direct evidence "is explicit and requires no inferences to establish the proposition or conclusion being asserted . . . . [It] is 'tantamount to an acknowledgment of guilt." (internal punctuation and citations omitted)); *Tunica Web Advert. v. Tunica Casino Operators Ass'n, Inc.*, 496 F.3d 403, 409 (5th Cir. 2007) ("Direct evidence of concerted action is that which explicitly refers to an understanding between the alleged conspirators." (internal punctuation omitted)).
[65] *Hyland*, 771 F.3d at 318 (punctuation and citations omitted); *United States v. Gen. Motors Corp.*, 384 U.S. 127, 142-43 (1966) ("[An] explicit agreement is not a necessary part of a Sherman Act conspiracy—certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan.").

above, Allegiance employees explicitly referred to an agreement with HCHC [redacted] and in direct communications with HCHC. [redacted], and Allegiance apologized when it mistakenly engaged in prohibited marketing. Allegiance routinely sought advance approval from HCHC to market in Hillsdale County, [redacted]. [redacted]. This evidence shows that Allegiance acted in concert with HCHC to restrict the marketing of competing services in Hillsdale County.[66]

The deposition testimony of Allegiance's CEO [redacted] is not an obstacle to summary judgment. Ms. Fojtasek did not contradict or dispute the evidence of Allegiance's conduct described above. In fact, she acknowledged that [redacted]

[66] *See United States v. Apple Inc.*, 952 F. Supp. 2d 638, 693-95 (S.D.N.Y. 2013) (contemporaneous statements from CEO and ordinary course documents constitute direct evidence of agreement); *see also Tunica Web Advert.*, 496 F.3d at 410 (statements referring to a gentlemen's agreement and emails showing implementation of that agreement constitute direct evidence of concerted action); *In re Urethane Antitrust Litig.*, 913 F. Supp. 2d 1145, 1153-54 (D. Kan. 2012) (testimony that defendant's executive said on multiple occasions that he had met with competitors and reached agreements to set prices constitutes direct evidence of agreement).

[redacted]

Merely characterizing Allegiance's conduct as [redacted]. No matter the label on Allegiance's conduct, the legal question for the Court is whether Allegiance's admitted conduct, along with the undisputed contemporaneous business documents detailed above, constitute concerted action. The compelling evidence of an agreement demonstrates precisely the kind of concerted action between competitors that "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands."[71]

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[67] Fojtasek Dep. at 143:24-144:18 ([redacted]);145:7-146:3 (excerpted in Exhibit C-3); *see also* Deposition of Duke Anderson, June 30, 2016, at 252:6-9 (admitting that he complained to Allegiance about its marketing in Hillsdale County) (excerpted in Exhibit G-1).

[68] Fojtasek Dep. at 134:24-135:5; 167:20-168:22; 179:5-14; 215:14-216:1 (excerpted in Exhibit C-3).

[69] *Id.* at 130:2-15; 132:6-19; 135:6-136:16 (referencing AH000314775-76; *see* Exhibit O-18); 178:18-179:14 (excerpted in Exhibit C-3); *see also* Deposition of Duke Anderson, July 1, 2016, at 290:25-293:18 (admitting that he asked Allegiance not to market a procedure to Hillsdale County physicians because the Hillsdale County physicians provided the same service; referencing HILL-SUBPOENA-DOJ-000003; *see* Exhibit F-3) (excerpted in Exhibit G-2).

[70] *See* Fojtasek Dep. at 87:8-88:19; 92:14-20 (excerpted in Exhibit C-3); *see also id.* at 141:1-11; 225:14-226:5.

[71] *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768–69 (1984).

Moreover, Ms. Fojtasek's deposition testimony does not create a factual dispute as to the existence of an agreement. At the summary judgment stage, this Court may disregard testimony when it is blatantly contradicted by the objective record; such evidence fails to create a genuine issue of fact for trial.[72] Here, Allegiance's undisputed and repeated admissions in its contemporaneous, ordinary-course documents and its admitted conduct blatantly contradict Ms. Fojtasek's post-hoc, self-serving testimony.

B. The Allegiance-HCHC Agreement Was a Customer Allocation Agreement That Is Illegal Per Se under Section 1 of the Sherman Act

The horizontal agreement between Allegiance and HCHC is a type of market allocation known as customer allocation that almost always has the effects of raising price and reducing output.[73] The agreement here restricts a broad swath of

[72] *See* 11 *Moore's Federal Practice* § 56.22[3] (Matthew Bender 3d ed.) ("To create a genuine dispute of fact, evidence must be believable. There is no genuine dispute as to a fact when the opposing parties tell two different stories, one of which is blatantly contradicted by uncontested parts of the record, so no reasonable jury could believe it. If the nonmovant's version of the facts is unbelievable, the court should not adopt that version for purposes of ruling on a summary judgment motion.") (discussing *Scott v. Harris*, 550 U.S. 372, 380 (2007)); *see also Booher ex rel. T.W. v. Montavon*, 555 F. App'x 479, 484 (6th Cir. 2014) (affirming district court's holding that plaintiff's testimony could not create a genuine issue of material fact where medical evidence blatantly contradicted it).

[73] *See United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1372-73 (6th Cir. 1988) (per se illegal criminal customer allocation); *Blackburn v. Sweeney*, 53 F.3d 825, 827 (7th Cir. 1995) (per se illegal territorial division for marketing); *see also United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607-08 (1972) (describing why market allocation is per se illegal); *United States v. Consol. Laundries Corp.*,

hospital outreach of the type that unambiguously benefits consumers.[74] Allegiance undisputedly limited certain types of marketing in Hillsdale County, [redacted].[75] Courts have recognized the important role that marketing plays in competition. In *Bates v. State Bar of Arizona*, the Supreme Court explained that advertising "serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system."[76] Judicial experience and economic learning establish that a horizontal agreement (like Allegiance's) to allocate territories for marketing is a form of customer allocation likely to harm competition and consumers.[77]

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291 F.2d 563, 574-75 (2d Cir. 1961) ("We fail to see any significant difference between an allocation of customers and an allocation of territory.").

[74] As detailed in Section IV.A, the Court can grant summary judgment on the issue of an agreement. Even if the Court is unable to grant summary judgment at this time, the Court may still grant summary judgment on Plaintiffs' claims that the agreement—as alleged in the Complaint—is subject to per se liability, or alternatively, to quick look review. *See, e.g.*, *Coop. Theatres of Ohio*, 845 F.2d at 1373 (affirming the district court's ruling as a matter of law that the per se standard should apply to customer allocations).

[75] Fojtasek Dep. at 76:20-25; 137:6-12 (excerpted in Exhibit C-3).

[76] 433 U.S. 350, 364 (1977).

[77] *See Blackburn*, 53 F.3d at 827.

Courts treat this sort of restraint as per se illegal.[78] In *United States v. Cooperative Theatres of Ohio, Inc.*,[79] the Sixth Circuit held as a matter of law that an agreement between competitors to refrain from soliciting each other's customers was a per se illegal criminal customer allocation. In that case, two movie theater booking agents agreed to refrain from soliciting by making "cold calls" to each other's existing customers. Despite the defendants' arguments that they "remained free to accept *unsolicited* business from their competitors' customers," through referrals and general advertisements, and even though the agents were free to compete for new customers, the Sixth Circuit ruled that their agreement was per se illegal.[80] It explained that "the so-called 'no-solicitation' agreement alleged in this case is undeniably a type of customer allocation scheme which courts have often condemned in the past as a per se violation of the Sherman Act."[81]

In *Blackburn v. Sweeney*, a case on all fours with this one, the Seventh Circuit addressed a restraint allocating territories for marketing by county and

[78] Areeda & Hovenkamp, *Antitrust Law* ¶ 2030 (3d ed.), "Properly Defined Naked Market Divisions Unlawful Per Se" (excerpted in Exhibit M) (collecting cases and explaining "a naked agreement among rivals restraining advertising is valuable to the promisee precisely because advertising threatens to steal sales").
[79] 845 F.2d 1367 (6th Cir. 1988).
[80] *Id.* at 1373.
[81] *Id.*

deemed it to be per se illegal market allocation.[82] The *Blackburn* court reviewed a non-compete agreement between former partners of a law firm dividing the markets where they could advertise.[83] The court concluded that the agreement to limit advertising to different geographic regions "sufficiently approximates an agreement to allocate markets so that the *per se* rule of illegality applies."[84] The *Blackburn* court also observed: "[t]o fit under the per se rule an agreement need not foreclose all possible avenues of competition."[85]

Similarly, here, the fact that Allegiance can still use select forms of marketing and compete through means other than marketing in Hillsdale County does not change the per se illegality of the restraint.[86] The Court should find that the Allegiance-HCHC agreement was per se illegal even though some of Allegiance's digital, television, and radio marketing may have reached Hillsdale County residents. The agreement's clear purpose was to stifle the competition HCHC faced for lower-acuity services, while easing the competition Allegiance faced for higher-acuity services in the form of referrals; given the courts'

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[82] 53 F.3d at 827.
[83] *See id.* (agreement restricting "any advertising, including but not limited to, television, radio, newspapers, billboards, direct mail or yellow pages").
[84] *Id.*
[85] *Id.*; *see also Coop. Theatres of Ohio*, 845 F.2d at 1373 (agents were free to attract customers through advertisements and referrals).
[86] *See* Allegiance Health's Mot. For Partial Summ. J. (ECF No. 64) at 6 ("Def.'s Br.).

familiarity with this type of customer allocation agreement, this Court should condemn the agreement as per se illegal.

C. Allegiance's Arguments Against the Per Se Standard Must Be Rejected

Allegiance offers several arguments for why the per se standard is inappropriate in this case. None is persuasive.

1. This Court Is Not Required To Weigh Any Purported Anticompetitive and Procompetitive Effects Before Applying the Per Se Standard

Allegiance attempts to avoid per se liability by claiming that Plaintiffs failed to offer evidence of a substantial effect on or anticompetitive harm to competition.[87] But the case that Allegiance itself relies on makes clear that a plaintiff need not offer any such evidence in a per se case.[88] Similarly unsound is Allegiance's claim that the Court must reject "*all* of Allegiance's evidence of plausible procompetitive justifications" before using the per se standard.[89] The per se standard demands "facial invalidation" of per se illegal agreements even where a defendant proffers "procompetitive justifications."[90] Because Plaintiffs have proven a per se unlawful agreement, there is "a 'conclusive presumption' of

[87] *See id.* at 10-12, 15-19.
[88] *See id*. at 11-12 (quoting *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 906 (6th Cir. 2003), for the proposition that per se analysis "gives 'no consideration . . . to the restraint's actual effect on competition'").
[89] *Id.* at 15 n.21.
[90] *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 351 (1982).

illegality,"[91] and Plaintiffs have no further evidentiary burden to show anticompetitive effects.

Allegiance's reliance on *Northwest Wholesale Stationers* is misplaced.[92] That case addressed the unique issues surrounding a group boycott claim, which the Court recognized at the outset causes "more confusion . . . than . . . any other aspect of the *per se* doctrine," and therefore required "[s]ome care . . . in defining the category of concerted refusals to deal that mandate *per se* condemnation."[93]

Allegiance's reliance on *Online DVD Rental*—an out of circuit, unpublished case—is also unavailing.[94] In that case, the district court concluded that the agreement was not a "'naked' market allocation agreement" deserving per se treatment before considering anticompetitive effects or procompetitive justifications.[95] And in *Safeway*, the court considered justifications only after it concluded that the challenged conduct could not be considered a per se violation.[96] Our case, by contrast, involves the kind of horizontal customer allocation that is a well-established per se violation of the antitrust laws.

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[91] *In re Cardizem Antitrust Litig.*, 332 F.3d at 906.
[92] *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985).
[93] *Id.* at 294.
[94] Def.'s Br. at 19.
[95] *See In re Online DVD Rental*, No. M 09-2029 PJH, 2011 WL 5883772, at *9 (N.D. Cal. Nov. 23, 2011).
[96] *California ex rel. Harris v. Safeway Inc.*, 651 F.3d 1118, 1135-37 (9th Cir. 2011).

Finally, *Major League Baseball Properties* addresses the "operation[] of [a] sports league[]," which requires a certain level of cooperation that makes the industry as a whole generally subject to rule of reason analysis.[97] It in no way suggests that an expert's opinion on procompetitive effects can convert an otherwise per se case into one requiring a rule of reason analysis.

Also irrelevant for the same reason is Allegiance's claim that its experts say that the agreement—which, as Plaintiffs show, is per se illegal—did not produce anticompetitive effects.[98] And even if it were relevant, Allegiance misconstrues the record. Allegiance's economic expert, Dr. Manning, conceded that her analysis does not allow her to rule out the possibility that Allegiance could have gained even more share in Hillsdale County absent the agreement, which severs any causal link between the agreement and changes in market share.[99]

2. Allegiance Fails to Portray Its Agreement as Anything Other than a Per Se Unlawful Market Allocation

Allegiance's motion leaves the impression that the per se standard is rarely applied. But neither *Leegin* nor common practice support this mischaracterization.

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[97] *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 332-34 (2d Cir. 2008).
[98] Def.'s Br. at 15.
[99] Deposition of Dr. Susan Manning, Dec. 14, 2016 ("Manning Dep.") at 164:13-165:1 (excerpted in Exhibit H).

Leegin addressed a vertical agreement.[100] And *Leegin* made clear that horizontal agreements "to divide markets" were the type of restraint that would justify per se treatment.[101]

Since the Court is presented in our case with a type of restraint that is per se illegal, *California Dental Association v. FTC*,[102] is cold comfort to Allegiance. In that case, the Supreme Court addressed a challenge to the defendant trade association's ethics rules designed to prevent false and misleading advertisements.[103] The rules applied equally to all dentists advertising in all parts of California, and did not purport to prevent a dentist in one location from advertising in a competitor's region. Further, the advertising that the trade association's rules were intended to limit was harmful to consumers; no such argument has been advanced here.[104] Thus, the opinion neither limits nor overturns the well-established per se treatment of agreements between horizontal competitors to divide territories.

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[100] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 887-99 (2007).
[101] *Id.* at 886.
[102] 526 U.S. 756, 760 (1999).
[103] *Id.* at 759-60.
[104] *Id.* at 778 (expressing view that these particular advertising restrictions could "prevent[] misleading or false claims that distort the market").

To the extent Allegiance contends that the present case cannot be governed by the per se standard because it does not bar any actual sales,[105] such an argument is directly foreclosed by *Cooperative Theatres*, as discussed above. In *Cooperative Theatres*, the Sixth Circuit held that an agreement preventing parties from actively soliciting each other's customers was per se illegal customer allocation, even where the agreement still allowed competition for customers through other means.[106]

3. The Purported "Hybrid" Nature of the Allegiance-HCHC Relationship is Irrelevant

Allegiance also claims that the per se framework is inappropriate in this case because Allegiance and HCHC have a "hybrid" relationship that includes both horizontal and vertical elements and therefore is inappropriate for per se analysis.[107] Allegiance is mistaken.

The Sherman Act outlaws *agreements* that unreasonably restrain trade.[108] Accordingly, the Supreme Court focuses on the nature of the agreements in

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[105] *See* Def.'s Br. at 14 n.20.
[106] *Coop. Theatres of Ohio*, 845 F.2d at 1371, 1373.
[107] *See* Def.'s Br. at 13.
[108] *See, e.g., United States v. Apple, Inc.*, 791 F.3d 290, 297 (2d Cir. 2015) (cert. denied 136 S. Ct. 1376 (Mar. 7, 2016)) ("The dissent fails to apprehend that the Sherman Act outlaws *agreements* that unreasonably restrain trade and therefore requires evaluating the nature of the restraint, rather than the identity of each party who joins in to impose it, in determining whether the *per se* rule is properly invoked.").

question, rather than the nature of the relationships between parties.[109] The agreement here restricts marketing of healthcare services in which Allegiance and HCHC are horizontal competitors. That there could be other agreements concerning services where the two hospitals do not compete is irrelevant. In *Palmer*, for example, two horizontal competitors in the market for bar review courses, BRG of Georgia and Harcourt Brace Jovanovich ("HBJ"), entered into an agreement in which HBJ agreed not to compete with BRG in Georgia and BRG agreed not to compete with HBJ in any other state.[110] As part of the agreement, BRG of Georgia became the exclusive licensee and marketer of HBJ's "Bar/Bri" materials in Georgia, thereby adding a vertical element to their relationship.[111] The Supreme Court nonetheless found the agreement to be per se illegal market allocation, explaining that it resulted in "horizontal territorial limitations."[112]

Accordingly, whether a vertical element was part of the overall relationship between two entities is irrelevant to the Court's Section 1 analysis of a horizontal restraint. Even in cases where entities had a multifaceted relationship that could be described as "hybrid," courts have based their analyses on the nature of the

[109] *See Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990).
[110] *See id.* at 46-47.
[111] *Id.* at 47.
[112] *Id.* at 49-50.

agreements in question.[113] In particular, where the relationship between parties had both horizontal and vertical elements, courts have focused on whether the alleged restraint of trade in question was "essentially horizontal."[114]

Furthermore, in cases where hospitals generally compete against each other but have referral relationships in a limited number of areas, as Allegiance argues is the case here, courts have focused on services in which they were in competition and analyzed the hospitals as horizontal competitors.[115] Regardless of the other aspects of the Allegiance-HCHC relationship, the agreement to have Allegiance

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[113] *See, e.g., Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1481 n.6 (9th Cir. 1986) (noting that "a 'hybrid' arrangement only justifies the application of the rule of reason where the market in which the conspirators are in a vertical relationship is in some way interdependent with the market in which they have a horizontal relationship" and that the per se standard is appropriate otherwise); *Arnold Pontiac-GMC, Inc. v. Gen. Motors Corp.*, 700 F. Supp. 838, 840-41 (W.D. Pa. 1988) (per se standard applied because the agreement in question "constitute[d] a horizontal agreement," despite "hybrid" relationship).

[114] *See, e.g., Apple, Inc.*, 791 F.3d at 297; *In re Mushroom Direct Purchaser Antitrust Litig.*, No. 06-0260, 2015 WL 6322383, at *16 (E.D. Pa. May 26, 2015) (agreement among members of a mushroom marketing cooperative that were in a "hybrid" relationship was per se illegal because the agreement itself lacked a vertical element).

[115] *See, e.g., Saint Alphonsus Med. Ctr. – Nampa, Inc. v. St. Luke's Health Sys. Ltd.*, 1:12–CV–00560–BLW, 1:13–CV–00116–BLW, 2014 WL 407446, at *1-2 (D. Idaho Jan. 24, 2014) (enjoining a merger between competing healthcare provider networks that also had selective referral relationships by effectively analyzing it as a horizontal merger); *New York v. Saint Francis Hosp.*, 94 F. Supp. 2d 399 (S.D.N.Y. 2000) (agreement between two competing hospitals that attempted to "redirect patients" from one to the other was a per se illegal horizontal restraint).

limit marketing in services where it competes with HCHC was entirely horizontal and should be deemed per se illegal.

D. Alternatively, the Allegiance-HCHC Agreement is Condemnable Under a "Quick Look" Rule of Reason Analysis

Even if the Court does not rule that the agreement is a per se illegal customer allocation, a "quick look" rule of reason analysis will show its illegality because the restraint is inherently suspect, and Allegiance has not produced evidence of a plausible or valid procompetitive justification for the agreement.[116]

1. The Agreement Is Inherently Suspect

This agreement, even if found not to be per se unlawful, is so close to classic market allocation that there is a high likelihood that it harms competition.[117] It is undisputed that hospitals use marketing to attract patients, and that marketing is a productive method of competition.[118] Hospitals rely on it to inform patients, physicians, and employers about the products and services—and their quality—available at the hospital. In turn, hospitals facing marketing from rivals have an incentive to respond competitively, such as by improving services, quality, and

[116] *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) ("Absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services,—such an agreement limiting consumer choice . . . cannot be sustained under the Rule of Reason." (internal citations omitted)).
[117] *Blackburn*, 53 F.3d at 827.
[118] *See* Deposition of Larry Margolis, Dec. 8, 2016 ("Margolis Dep.") at 26:22-27:11; 27:22-28:5 (excerpted in Exhibit I); Expert Report of Dr. Tasneem Chipty at ¶ 17 ("Chipty Report") (excerpted in Exhibit K).

reputation. Marketing benefits the individual with information, education, and free goods and services. It also spurs investments in services, quality, and community education. Consumers respond to and rely on marketing, and hospital executives consider marketing essential to their ability to compete effectively.[119] Both sides' experts have opined that hospital marketing is a form of hospital competition;[120] and competition benefits all consumers.

Moreover, the agreement here caused obvious harm to consumers. It is undisputed that [redacted].[121] And deprived of the health education and awareness of their treatment options that unfettered marketing provides, Hillsdale County residents were left without the full array of tools that competition offers to make choices about their health.

2. Allegiance Has Not Asserted a Plausible, Procompetitive Justification for Its Agreement with HCHC

As an initial matter it is important that Allegiance's description of its conduct blinks the fact of the agreement. As Plaintiffs have demonstrated, Allegiance did not simply "resolve[] to avoid steps that could damage its

[119] Deposition of Anthony Gardner, July 19, 2016, at 40:23-41:14 (excerpted in Exhibit J).
[120] Margolis Dep. at 27:22-28:5 (excerpted in Exhibit I); Chipty Report at ¶¶ 14-15 (excerpted in Exhibit K).
[121] Fojtasek Dep. at 137:6-12 (excerpted in Exhibit C-3).

relationship with Hillsdale County physicians."[122] It agreed with a competitor that it would protect such physicians from competition. Allegiance did not "[choose] to focus more on 'relationship building' marketing;"[123] it agreed with a competitor on exactly how to restrict its marketing to limit the competitive pressures on that competitor. That is the lens through which Allegiance's asserted procompetitive justifications must be viewed.

Allegiance does not claim that the agreement was ancillary to any efficiency. And nothing in the record arguably supports the assertion that any Allegiance service line could not have been offered absent the agreement.[124]

Instead, the justifications that Allegiance claims for its restraint seem to boil down to obtaining referrals from HCHC for its open heart center.[125] Steering referrals away from rivals through an anticompetitive agreement, however, is not procompetitive. It is anticompetitive because Allegiance competed less against HCHC for services HCHC performs; and because Allegiance relied on this lessening of low-acuity service competition with HCHC, rather than legitimate quality competition with high-acuity rivals, to motivate Hillsdale County physicians to redirect referrals. Also, Hillsdale County residents likely enjoyed

[122] Def.'s Br. at 8.
[123] *Id.*
[124] *See Saint Francis Hosp.*, 94 F. Supp. 2d at 422 (restraint was not generally necessary for hospital provision of new tertiary service).
[125] Def.'s Br. at 20.

less competition for higher-acuity services. A restraint designed to displace market-based outcomes is antithetical to the antitrust laws.[126] The Sherman Act leaves it up to the marketplace, rather than individual defendants, to decide where competition is appropriate.[127] As the Supreme Court explained in *Professional Engineers*, rejecting the engineering society's safety justification for its ban on competitive bidding, "[t]he Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."[128]

Finally, Allegiance claims, without proof, that "Allegiance's ability to offer open heart surgery locally" benefits Hillsdale County patients due to shorter travel time to Allegiance.[129] But there is no triable issue of material fact as to whether the open heart center is related to the agreement in any way. The only evidence Allegiance cites for this proposition is an irrelevant statement by Dr. Manning about the role of HCHC's pledge and referrals—not the role of the agreement—in enabling Allegiance's approval for its open heart center.[130] And this claim is

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[126] *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695.
[127] *Id.*; *see also Apple, Inc.*, 791 F.3d at 332 ("Because of the long-term threat to competition, the Sherman Act does not authorize horizontal price conspiracies as a form of marketplace vigilantism to eliminate perceived ruinous competition or other competitive evils." (internal citations and quotation marks omitted)).
[128] *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 694-95.
[129] Def.'s Br. at 21.
[130] *Id.* at 20 (citing Dr. Manning's Report at ¶¶ 100, 163-167). For consideration in the context of a summary judgment motion, an expert's opinion "must be more

legally irrelevant. The Sherman Act does not consider the societal value of an action as a defense to a horizontal restraint, because the Court cannot consider "whether competition is good or bad."[131] Nor can Allegiance justify its anticompetitive agreement by claiming it used the profits from the agreement to, for example, invest in services.[132] Thus, HCHC's pledge and referral of open heart patients is not a plausible procompetitive justification for the agreement.

There are, of course, perfectly legitimate ways that Allegiance may attract the referrals necessary to maintain its open heart surgery certificate of need and increase the use of its open heart center. Indeed, Allegiance's expert admits that Allegiance has used many other less restrictive alternatives to obtain referrals from Hillsdale and other counties,[133] [redacted],[134] and the government's industry expert explained that [redacted]

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than a conclusory assertion about ultimate legal issues." *Brainard v. Am. Skandia Life Assur. Corp*., 423 F.3d 655, 663-64 (6th Cir. 2005) (internal citation omitted); *see also Major League Baseball Props.*, 542 F.3d at 311 ("An expert's opinions that are without factual basis and are based on speculation or conjecture are similarly inappropriate material for consideration on a motion for summary judgment .").

[131] *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 694-95; *accord FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 414, 421-23 (1990) (condemning attorneys' boycott, noting potential social benefits of the boycott was not part of the Court's consideration under the Sherman Act).

[132] *See Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998).

[133] Manning Dep. at 274:1-277:22 (excerpted in Exhibit H).

[134] ALLDOJMIAG-AG-00006283 at 299 (excerpted in Exhibit O-22).

[redacted].[135] Agreeing to restrict competition is not among these legitimate options for attracting referrals.

3. A Quick Look Analysis Is Appropriate If the Court Does Not Treat the Agreement as Per Se Unlawful

In its motion, Allegiance argues that an abbreviated or "quick look" rule of reason analysis should not be used,[136] asserting that "[w]here, 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."[137] As Plaintiffs detailed above, the arguments offered by Allegiance do not satisfy the well-established conditions necessary for a procompetitive justification to be plausible and valid under the law. Further, none of the three cases cited by Allegiance applies here. In two of the cases, the court's decision to use a rule of reason standard was industry-specific.[138] In the third case,

[135] Rebuttal Expert Report of Lawton R. Burns at ¶ 8 (excerpted in Exhibit L).
[136] Def.'s Br. at 22-25.
[137] *Id.* at 23.
[138] *See Major League Baseball Props.*, 542 F.3d at 332-34 (applying rule of reason analysis because restraints are generally necessary to create sports leagues); *United States v. Brown Univ.*, 5 F.3d 658, 678 (3d Cir. 1993) (applying rule of reason analysis because "institutions of higher education 'require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently'" (internal citation omitted)).

the restraint at issue was not obviously anticompetitive and the plaintiff did not seek per se condemnation.[139]

V. CONCLUSION

For these reasons, the United States and the State of Michigan respectfully request that the Court grant Plaintiffs' Cross-Motion for Summary Judgment, and deny Allegiance's Motion for Partial Summary Judgment.

Respectfully Submitted,

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[139] *See Deborah Heart & Lung Ctr. v. Virtua Health Inc.*, No. 11-1290, 2015 WL 1321674, at *8 (D.N.J. Mar. 24, 2015).

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2017, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of the filing to the counsel of record for all parties for civil action 5:15-cv-12311-JEL-DRG, and I hereby certify that there are no individuals entitled to notice who are non-ECF participants. I hereby further certify that I caused an unredacted version of the foregoing to be served on Defense counsel of record via email.

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