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 REPLY TO ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

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

TABLE OF AUTHORITIES

CASES **PAGE**

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

TABLE OF EXHIBITS

I. INTRODUCTION

In its opening brief ("Df. Opening Br.") (ECF No. 64 and 68), Allegiance demonstrated that summary judgment in its favor with respect to Plaintiffs' *per se* and "quick look" legal theories is unquestionably warranted. As Allegiance explained, the Sixth Circuit employs an "automatic presumption in favor of the rule of reason standard," *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 273 (6th Cir. 2014) (citations and quotation marks omitted), and the "judicial shortcuts" of *per se* or "quick look" condemnation are appropriate only for "garden-variety," "naked" restraints that cause substantial harm to competition and lack plausible procompetitive benefits, *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). Because Allegiance's alleged conduct unquestionably fails to fit within these narrow requirements, applying either shortcut in this case would be clearly erroneous as a matter of law.

Despite some colorful rhetoric, nothing in Plaintiffs' response to Allegiance's opening brief (which they style a "Combined Cross-Motion and Response" ("Plaintiffs' Brief" or "Pls. Br.")) (ECF No. 73 and 74) refutes the correctness of the positions advanced by Allegiance. Specifically, Plaintiffs respond with three arguments, none of which is correct on either the facts or the law:

First, Plaintiffs contend that the issue of whether an "agreement" to restrain trade existed between Allegiance and Hillsdale Community Health Center ("HCHC") can be decided on summary judgment. (Pls. Br. at 8.) Plaintiffs, however, are clearly mistaken. The issue of "agreement" is a *highly* disputed issue of material fact; indeed, ***every*** Allegiance and HCHC witness deposed in this case has disputed the existence of any agreement between them to restrain trade.[1] This testimony cannot simply be "disregarded," as Plaintiffs' suggest (*cf.* Pls. Br. at 18); summary judgment on this issue in light of this conflicting evidence is erroneous as a matter of law. *See, e.g., Moran v. Al Basit LLC*, 788 F.3d 201, 204, 205 (6th Cir. 2015) (reversing summary judgment based upon a party's conflicting deposition testimony, which was sufficient, by itself, to create a genuine dispute of fact).

However, the disputed evidence on the issue of "agreement" among

[1] *See infra* at n. 5 and attached as Composite Exhibit P: Transcript of Deposition of Georgia Fojtasek, 11/14/14, at 175:7-9 (A: I can tell you that we don't have an agreement and didn't have an agreement with Hillsdale.); Transcript of Deposition of Duke Anderson, 6/30/16, at 38:3-8 (Q: During the time you have been the CEO of Hillsdale Community Health Center, has Hillsdale ever orchestrate an agreement to limit marketing of competing healthcare services with Allegiance Health? A: No.); Transcript of Deposition of Gerald Grannan, 6/15/16, at 42:8-25 (Q: Did you believe that Allegiance had to get Hillsdale Community Health Center's permission to market services in Hillsdale County? A: No. . . . Q: Have you ever heard anyone reference a gentlemen's agreement between Hillsdale Community Health Center and Allegiance Health? … A: Typically around lower level staff who don't understand the process of what -- how we make decisions.); Transcript of Deposition of Jeremiah Hodshire, 5/31/16, at 53:3-7 (Q: Has anyone at Hillsdale Community Health Center ever told you that Hillsdale and Allegiance have had an agreement that limits Allegiance's marketing for competing services in Hillsdale County? A: No.).

Allegiance and HCHC is not limited solely to the parties' denials. Also undisclosed by Plaintiffs (but critical to the ultimate resolution of this fact dispute) is the testimony by the Allegiance employees who authored the documents Plaintiffs rely upon, in which they explain that their characterizations of the hospitals' interactions were, in fact, *inaccurate and/or unreliable*. *E.g.*, Transcript of Deposition of Michael Houttekier, 6/13/16 (excerpted as Comp. Ex. P-11 hereto), at 226:1-227:23 ("gentleman's agreement" reference was a misnomer he created on his own, absent knowledge of any unlawful agreement); Transcript of Deposition of Suzette Turpel, 10/13/16 (excerpted as Comp. Ex. P-13 hereto) at 301:20-305:7 (indicating that her statements about the Allegiance/HCHC relationship were based upon misinformation provided by a former colleague, and were not consistent with Allegiance's actual strategy). Plaintiffs also ignore the *undisputed* fact that Allegiance *increased its market share* in Hillsdale County for the very services that Plaintiffs allege were the focus of the purported restrictive "agreement," evidence that further refutes any suggestion that any such "agreement" ever existed. (Df. Opening Br. at 8-9.) In addition, testimonial and documentary evidence further shows that Allegiance began an extensive digital advertising campaign promoting its cardiology, orthopedics, and oncology services, including online health screenings, that reached Hillsdale County residents during the very time that Plaintiffs contend an agreement not to market

those services in Hillsdale was in effect. (Df. Opening Br. at 5-6, 8); *see also* Transcript of Deposition of Kevin Minnelli, as Corporate Representative of Eruptr, LLC, 9/16/16 (excerpted as Exhibit Q hereto), at 75:18-77:14, 225:4-226:6, 229:6-230:3, 260:14-21. In sum, in light of this evidence, summary judgment on the issue of "agreement" would be clearly improper as a matter of law.

Second, Plaintiffs contend that the alleged "agreement"—*assuming it even exists*—can be condemned under *per se* principles as a matter of law. (Pls. Br. at 19-23.) This contention is equally erroneous. Tacitly acknowledging that only "garden variety" "naked" restraints can be declared *per se* unlawful, Plaintiffs strain to fit Allegiance's conduct within that tiny box, now characterizing the alleged conduct as a "customer allocation agreement." (*Id.* at 8.) However, that label is clearly inapt, as it ignores the simple, undeniable fact that *no* patient in Hillsdale County was ever "allocated" to Allegiance or to HCHC, as Plaintiffs' expert witness acknowledged. *See* Transcript of Deposition of Lawton M. Burns, Ph.D., 12/19/16 (excerpted as Exhibit R hereto), at 308:11-13 ("It's not clear to me that any patients were allocated to Allegiance.").[2]

Additionally, while Allegiance admittedly chose to limit *some* forms of

[2] Because the alleged conduct is *not* properly characterized as a "customer allocation" agreement, Plaintiffs' cases suggesting that "customer allocation" agreements may be *per se* unlawful, *Blackburn v. Sweeney*, 53 F.3d 825, 827 (7th Cir. 1995), and *United States v. Cooperative Theatres of Ohio, Inc.*, 845 F.2d 1367, 1372 (6th Cir. 1988), are (in addition to being distinguishable) clearly not controlling in this case.

marketing in Hillsdale County (which, in itself, does not run afoul of antitrust laws, *see Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188 (7th Cir. 1985) ("Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment."), the undisputed facts reflect that at all times Allegiance continued to compete for patients in Hillsdale County across all service lines, and that it was increasingly successful in doing so. (Df. Opening Br. at 8-9.) Moreover, perhaps most tellingly, Plaintiffs ignore the fact that there is no evidence that the alleged agreement caused substantial harm to competition, even though a clear, substantial anticompetitive effect is the sine qua non of a "garden variety" *per se* restraint. *See Leegin Creative Leather Prods.*, 551 U.S. at 886-87. For all of these reasons, application of the *per se* rule in these circumstances is clearly improper. *In re Se. Milk*, 739 F.3d at 271 (the *per se* test should be used "only when the rule of reason would likely justify the same result").

Third, Plaintiffs' "fall back" contention—that upon this Court's finding that the *per se* rule is inapplicable, the "quick look" analysis should be employed—is also unsound. (Pls. Br. at 30-36.) As Allegiance demonstrated in its opening brief, there is ample evidence in the record that Allegiance's marketing strategy and conduct in Hillsdale County was undertaken for legitimate, lawful and procompetitive reasons (namely, to increase referrals for higher acuity services,

thus enabling Allegiance to become an additional provider competing to offer those services to Hillsdale residents). (Df. Opening Br. at 3-5, 7-8, 19-21.) Where a defendant has advanced procompetitive justifications for its conduct, as Allegiance has done, the law is clear that the application of "quick look" principles is inappropriate. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770, 773 n.13, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999); *Deborah Heart & Lung Ctr. v. Virtua Health Inc.*, No. 11-1290, 2015 WL 1321674, *9 (D.N.J. Mar. 24, 2015).[3]

II. GENUINE DISPUTES OF MATERIAL FACT PRECLUDE THE RESOLUTION OF THE ISSUE OF "AGREEMENT" BY SUMMARY JUDGMENT AS A MATTER OF LAW.

A. Sixth Circuit Law Precludes Summary Judgment Where Material Facts Are In Dispute.

Allegiance's opening brief demonstrated that, even *assuming* the alleged "agreement" between Allegiance and HCHC existed, the ambiguous scope and unilateral nature of the restraint, the absence of competitive harm, and the plausible

[3] Finally, Plaintiffs' effort to support their arguments against Allegiance by seeking to draw a parallel between Allegiance's conduct and that of Allegiance's former co-defendants, (*see* Pls. Br. at 1 n.1), is both inappropriate and unfounded. Not only does the Settling Defendants' Consent Judgment expressly provide that it does not constitute evidence against or an admission by Settling Defendants regarding any issue of fact or law in the case (ECF No. 36 at 2), but, as Plaintiffs well know, Allegiance's conduct is materially *different* from the Settling Defendants' in many ways, including (1) the undisputed fact that both Allegiance and HCHC unequivocally denied the existence of any agreement amongst them, (2) that Allegiance engaged in *significant* marketing at all times in Hillsdale County, unlike its former co-defendants, and (3) that Allegiance *grew* its market share in Hillsdale County throughout the relevant period, something that the Settling Defendants could not demonstrate.

competitive benefits of such an "agreement" require that this Court enter summary judgment against Plaintiffs' *per se* and "quick look" theories as a matter of law. However, Allegiance intentionally chose *not* to seek summary judgment on the issue of "agreement," and filed only a partial motion for summary judgment, because it recognized that the issue of "agreement" was in no way "*undisputed*." Plaintiffs, in contrast, ignore the substantial evidence disputing the existence of the alleged agreement, seeking summary judgment in circumstances where controlling Sixth Circuit precedent makes clear that summary judgment cannot be entered. *See*, *e.g.*, *Moran*, 788 F.3d at 204.

Indeed, the Sixth Circuit has expressly held that a party's testimony *alone* is sufficient to create a genuine issue of material fact, as "'credibility judgments and weighing of the evidence are prohibited'" in determining whether summary judgment is proper. *Id.* at 204-205 (quoting *Schreiber v. Moe*, 596 F.3d 323, 333 (6th Cir. 2010)). In reaching that decision, the Sixth Circuit rejected the argument that testimony could be disregarded because it was inconsistent with contemporaneous business records, finding that the records did not constitute "objective incontrovertible evidence" and that, in fact, the testimony challenging its accuracy had to be creedited. *Id.* at 205 (reversing summary judgment because, "[d]espite the lack of corroborating evidence, Plaintiff's testimony is sufficient to create a genuine dispute of material fact that forecloses summary judgment"); *see*

also O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 595 (6th Cir. 2009) (reversing summary judgment where "plaintiff's at times contradictory testimony," even without corroborating evidence, created a genuine issue of fact).[4] Plaintiffs ignore this well-settled legal principle, but it is fatal to their request for summary judgment.

B. Materials Facts Concerning The Alleged "Agreement" Are Genuinely In Dispute and Prevent Summary Judgment As A Matter Of Law.

Here, as in *Moran*, the record demonstrates that whether the issue of the alleged "agreement" in fact existed is rife with disputed facts, making summary judgment on this issue improper as a matter of law. *Moran*, 788 F.3d at 205. As previously noted, (1) every one of the Allegiance and HCHC employees deposed denies knowledge of the existence of any such "agreement"; (2) the authors of the documents that refer to an "agreement" have specifically explained how those references are inaccurate, misleading and/or without foundation; (3) the parties' conduct, particularly Allegiance's marketing efforts in Hillsdale County, is inconsistent with the alleged "agreement"; and (4) the undisputed growth of

[4] Plaintiffs rely upon cases in which a witness' testimony is "blatantly contradicted" by unambiguous objective evidence, like an clear videotape or uncontested medical reports, so that no reasonable jury could believe the testimony. (Pls. Br. at 19 n. 72.) These cases are plainly inapplicable here. *See Carter v. City of Wyoming,* 294 F. App'x 990, 992 (6th Cir. 2008) (reversing summary judgment where a videotape did not "blatantly contradict" plaintiff's factual allegations).

Allegiance's market share also runs counter to the existence of any "agreement" to restrain Allegiance's efforts to compete in Hillsdale County.

1. *The Witnesses' Testimony Overwhelming Controverts the Existence of the Alleged "Agreement."*

Undisclosed by Plaintiffs, but critical to the Court's consideration of this issue, the record reveals that the testimony of ***every single current or former employee of Allegiance or HCHC*** deposed in this case conflicts with the purported "agreement" alleged by Plaintiffs in their Complaint. *See* Composite Exhibit P.[5] Thus, while Plaintiffs suggest that this Court need only ignore the conflicting testimony of Allegiance CEO, Georgia Fojtasek, (*see* Pls. Br. at 17-19), this Court would need to "disregard" the testimony of *all* of these witnesses, creating an error

[5] Composite Exhibit P is comprised of excerpts of the following: Transcript of Deposition of Duke Anderson, 6/30/16 ("P-1"), at 38:3-40:3, 47:7-20; Transcript of Deposition of Charles Bianchi, 8/23/16 ("P-2"), at 241:7-14, 249:15-21; Transcript of Deposition of Theresa Draper, 7/20/16 ("P-3"), at 46:9-47:5; 52:25-53:7; Transcript of Deposition of Dr. Timothy Ekpo, 8/25/16 ("P-4"), at 206:3-12; Transcript of Deposition of Georgia Fojtasek, as 30(b)(6) Corporate Representative of Allegiance, 11/14/14 ("P-5"), at 175:7-9; Transcript of Deposition of Georgia Fojtasek, 12/12/14 ("P-6"), at 278:6-14; Transcript of Deposition of Judy Gabriele, 6/01/16 ("P-7"), at 197:4-16, 257:23-258:2; Transcript of Deposition of Anthony Gardner, 11/13/14 ("P-8"), at 177:16-25; Transcript of Deposition of Gerald Grannan, 6/15/16 ("P-9"), at 42:2-45:24; 87:13-20; Transcript of Deposition of Jeremiah Hodshire, 5/31/16 ("P-10"), at 8:8-16, 116:10-117:5; Transcript of Deposition of Michael Houttekier, 6/13/16 ("P-11"), at 56:7-57:17; 228:6-10; Transcript of Deposition of Timothy Keener, 7/12/16 ("P-12"), at 66:2-18; Transcript of Deposition of Suzette Turpel, 10/13/16 ("P-13"), at 301:20-304:8; Transcript of Deposition of Dawn Van Aken, 6/2/16 ("P-14"), at 37:19-38:4; 71:12-17; and Transcript of Deposition of Karen Yacobucci, 7/14/16 ("P-15"), at 91:15-92:24.

over ten times as great as that in *Moran*. In addition, Plaintiffs would have this Court ignore the testimony of Allegiance's third party marketing vendors, who also denied any knowledge of the alleged "agreement." *See*, *e.g.*, Transcript of Deposition of Linda Grigg, as Corporate Representative of Grigg Media, LLC, 9/8/16 (excerpted as Exhibit S hereto), at 221:22-224:22. *Moran* permits no such thing at summary judgment, and rightly so. *See Moran*, 788 F.3d at 205.

2. *The Authors Of The Documents Cited In Plaintiffs' Brief Have Explained Their References To "Agreement" Were Inaccurate, Misleading and/or Uninformed.*

In addition, just like in *Moran*, the record here reflects that "the facts differ[] from what was recorded" in the documents on which Plaintiffs rely. *See id.* Here, the witness testimony indicates several reasons why the references to an "agreement" or "gentleman's agreement" in certain Allegiance documents should be discounted or ignored. Specifically, Ms. Suzy Turpel testified that, while a non-executive level member of Allegiance's marketing department, she believed—***incorrectly***—that Allegiance had agreed with HCHC to restrict certain forms of advertising in exchange for HCHC's pledge to support Allegiance's open heart CON, and that, for a time, she both abided by this mistaken instruction and relayed this false understanding of Allegiance's marketing restrictions to her co-workers, all the while failing to determine whether her erroneous understanding was correct. Turpel Dep., 10/13/16 (excerpted as Comp. Ex. P-13 hereto) at 301:20-305:7. It

was only much later, as she testified, that she learned her belief about an "understanding" was completely incorrect. *See id.*

Similarly, Mr. Michael Houttekier, another non-executive level Allegiance employee, testified that he started using the term "gentleman's agreement" as shorthand for an Allegiance's marketing approach that he did not fully understand, and not based upon any Allegiance leader indicating to him that such an arrangement existed. *See* Houttekier Dep., 6/13/16 (excerpted as Comp. Ex. P-11 hereto), at 226:1-227:23; *see also* Grannan Dep., 6/15/16 (excerpted as Comp. Ex. P-9 hereto), at 71:6-74:15, 243:1-20, 263:3-265:14 (explaining that Mr. Houttekier was not privy to Allegiance's larger strategy and his use of the phrase "gentleman's agreement" just "oversimplified" the marketing strategies in an inaccurate and incomplete manner).[6] In sum, when one examines the complete record—as required by Sixth Circuit law—and not merely the snippets that Plaintiffs prefer, it is quite evident that the dispute over whether an unlawful

[6] Similarly, Ms. Fojtasek explained that her statement that "*we agreed* to screen out Hillsdale zip codes," cited by Plaintiffs at page 10 of their Brief, was a reference to Allegiance employees agreeing, amongst themselves, to screen out the zip codes, and ***not*** intended to suggest that Allegiance and HCHC had agreed to do so. *See* Fojtasek Dep., 9/20/16 (attached to Plaintiffs' Brief as Composite Exhibit C-3), at 143:7-145:1 (explaining that phrase "we agreed" referred to a consensus among Allegiance employees and *not* an agreement between Allegiance and HCHC). Plaintiffs use of this exhibit, without providing this Court with Ms. Fojtasek explanation of her use of that term, is both disappointing and disturbing, as it further highlights the fact that Plaintiffs' "evidence" of "agreement" is fraught with ambiguity and disputed issues of fact.

"agreement" ever existed between Allegiance and HCHC goes far beyond mere affirmative denials, it is reflected throughout virtually every significant piece of evidence in this case.[7] In such circumstances, summary judgment on the issue of "agreement" is clearly impossible.

3. *The Undisputed Evidence Reflects That Neither Allegiance Nor HCHC Acted In Conformity With The Alleged "Agreement," Further Calling Into Question Its Very Existence.*

Although a party's testimony need not be corroborated by other evidence in order to create a genuine dispute of fact, *see Moran*, 788 F.3d at 205, this record is replete with additional evidence that corroborates the witnesses' testimony disputing the existence of any "agreement" between Allegiance and HCHC. Specifically, there is ample evidence that Allegiance acted *inconsistently* with any purported "agreement" not to compete with HCHC by limiting its marketing in Hillsdale County.

There is also abundant undisputed evidence that Allegiance competed for patients in Hillsdale County through a variety of marketing efforts, including

[7] Allegiance further notes that several of the documents upon which Plaintiffs rely are inconsistent *on their face,* making any reliance upon them all the more suspect and inappropriate. For example, Plaintiffs cite an internal Allegiance document indicating that "the only service marketing has a green light to promote in Hillsdale is open-heart," (Pls. Br. at 13 n. 52), and only one page later they cite another Allegiance document indicating that HCHC was "okay with [Allegiance] promoting vascular but *not* heart," (Pls. Br. at 14)(emphasis in original). Plaintiffs ignore the clear inconsistency in these two statements, but this Court should not—indeed, it must not when considering Plaintiffs' request for summary judgment on this issue. *See* Fed. R. Civ. P. 56.

advertisements on traditional media and through social media, as well as through community events, digital health screenings, physician liaisons and visiting specialists. (*See* Df. Opening Br. at 6.) Plaintiffs have not, and cannot, challenge these facts. In addition, Plaintiffs completely ignore the fact that Allegiance engaged in significant *digital* marketing in Hillsdale County that was targeted towards competing service lines (cardiology, oncology, and orthopedics). And, as Allegiance's opening brief notes—and Plaintiffs have not disputed—this advertising not only reached Hillsdale County, it successfully engaged Hillsdale County residents. (*See* Df. Opening Br. at 6; Amended Expert Report of Lawrence Margolis, 11/17/16 (Df. Opening Br. Ex. H) at ¶¶ 74-85.) The significance of Allegiance's digital marketing of its oncology services in Hillsdale County cannot be ignored, given that Plaintiffs rely heavily upon an internal Allegiance "MarCom" (Marketing and Communications) plan—which is clearly inaccurate—that indicates that oncology services would not be marketed in Hillsdale pursuant to the alleged agreement with HCHC. (*See* Pls. Br. at 12.) In short, Allegiance's digital marketing in Hillsdale County expressly confirms that the internal Allegiance marketing documents on which Plaintiffs rely to support their claim of "agreement" are often incorrect and inconsistent with what Allegiance *actually did* in Hillsdale. This "conduct" evidence further reflects the factual dispute about whether any "agreement" ever existed, thus preventing summary judgment from

being granted on this issue for either side at this time.[8]

4. *The Uncontroverted Growth Of Allegiance's Market Share In Hillsdale County Also Disputes The Existence Of Any "Agreement" To Restrain Competition.*

Finally, Plaintiffs' overarching contention that Allegiance's conduct was intended to, and in fact did, diminish competition in Hillsdale County is refuted by the *undisputed, independent data* showing that Allegiance's market share of Hillsdale County patients, for both competing and non-competing services, actually *grew* during the same time that this alleged "agreement" was purportedly in place. This increase in market share is the most direct evidence of *competition* between Allegiance and HCHC imaginable, yet Plaintiffs offer no explanation for how this increase in share could possibly be consistent with their theory of unlawful anticompetitive "agreement." This fact alone should be fatal to their claim, and at a minimum it eliminates any basis for applying *per se* treatment to their claim, as discussed in greater detail below.[9]

---

[8] To be clear, Allegiance believes, and intends to prove at trial, that the evidence of "agreement" points decidedly in Allegiance's favor, and that no such agreement ever actually existed.

[9] In short, while Plaintiffs seek to chastise Allegiance by asserting that "merely characterizing Allegiance's conduct as a 'strategy' does not make it one," (Pls. Br. at 18), Allegiance's marketing strategy is supported by *evidence* of Allegiance's marketing *success* in Hillsdale, and thus is more than "mere words." In contrast, Plaintiffs' characterization of the facts related to the issue of "agreement" as being *undisputed*—when clearly, as demonstrated herein, it is not—*is* an accurate example of hollow rhetoric, unsupported by the evidence, that this Court should ignore.

III. PLAINTIFFS' *PER SE* THEORY IS NOT APPLICABLE, AS A MATTER OF LAW, TO THE FACTS OF THIS CASE.

A. *Per Se* Standards Do Not Apply Because The Undisputed Evidence Shows The "Agreement"—If It Ever Even Existed—Is Not A "Garden-Variety" "Naked" Horizontal Market Allocation Agreement.

In its opening brief, Allegiance demonstrated that the alleged "agreement" in this case, if it ever even existed, is so unusual and uncommon that it is clearly not one that the antitrust laws permit to be judged under the *per se* rule. (Df. Opening Br. at 10-21); *see generally Leegin Creative Leather Prods.*, 551 U.S. at 885-89. Plaintiffs now contend Allegiance's conduct should be characterized as a "horizontal customer allocation agreement," a characterization that appears *nowhere* in their Complaint and does not accord with the facts. This Court should reject Plaintiffs' eleventh hour attempt to recast their claim to try to suit their needs. *See In re Se. Milk*, 739 F.3d at 272-73 ("Plaintiffs should not be able to change their characterization of the conspiracy midstream in order to gain a more favorable outcome.").

More importantly, Plaintiffs' characterization of Allegiance's conduct as a "customer allocation" scheme is belied by the simple, undeniable fact that Plaintiffs have not established (nor can they) that *any* customer was ever allocated to either Allegiance or HCHC. To the contrary, as previously noted, the undisputed facts show that Allegiance continued to *gain share* in Hillsdale for the

very patients that Plaintiffs contend would have been "allocated" to HCHC; as such, it simply makes no sense to suggest that a "customer allocation" arrangement existed as between Allegiance and HCHC.[10]

In addition, even taking as true Plaintiffs' contention that the parties entered into *some* form of unlawful "agreement," (which Allegiance unqualifiedly denies) the "agreement" that Plaintiffs contend existed in this case differs in so many ways from the "garden variety" allocation agreements described in the cases Plaintiffs cite as to make Plaintiffs' reliance on those cases pointless. (*See* Pls. Br. at 19 n.73.) Indeed, in each of the cases Plaintiffs cite, unlike here, the conduct involved (1) ***reciprocal*** agreements (2) under which each party undertook the ***same restraint*** with respect to the other party's customers or territory. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607-08, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972) (finding a *per se* illegal allocation where all members of the association "sign[] an agreement with Topco designating the territory in which that member may sell Topco-brand products" and "[n]o member may sell these products outside the territory in which it is licensed"); *Coop. Theatres of* Ohio, 845 F.2d at 1372

[10] It is also undisputed, and indisputable, that at all times Hillsdale residents had the option to utilize UMHS, Borgess, and other hospitals whenever and wherever they desired, further refuting any suggestion that *any* patient could even *potentially* be "allocated" to Allegiance or HCHC. Expert Report of Susan Henley Manning, Ph.D., 11/14/16 (excerpted as Exhibit T hereto), at ¶ 98 ("[A]ny agreement between Allegiance and Hillsdale will not dampen the competitive pressure being exerted on these hospitals from the many other hospitals participating in the market.")

("[T]he instant case involves a horizontal agreement between two competitors to refrain from seeking business from each other's existing accounts. This is plainly a form of customer allocation…."); *Blackburn*, 53 F.3d at 827 (finding an unlawful customer allocation where the parties' written agreement explicitly prohibited plaintiffs from doing any advertising directly or indirectly in defendants' territory *and vice versa*); *United States v. Consol. Laundries Corp.*, 291 F.2d 563, 574-75 (2d Cir. 1961) (involving a conspiracy in which defendants agreed, *inter alia*, "to allocate customers among themselves, to refrain from competing with each other for customers so allocated"). *See also Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990) ("[U]nder their allocation agreement, BRG received [the Georgia] market, while HBJ received the remainder of the United States. Each agreed not to compete in the other's territories."); *Mid-West Underground Storage, Inc. v. Porter*, 717 F.2d 493, 496-98 n.2 (10th Cir. 1983) ("The essence of a market allocation violation ... is that competitors apportion the market among themselves and cease competing in another's territory or for another's customers.").[11]

[11] Plaintiffs' contention that *Blackburn* is "on all fours" with the facts here is also plainly erroneous, and may be based, at least in part, on their failure to recognize (or at least include in their brief for this Court's benefit) the *Blackburn* court's reference to "the reciprocal Agreement to limit advertising" in the first portion of the quote Plaintiffs provide when stating that the *per se* rule applies to "an agreement to allocate markets." *Compare* Pls. Br. at 20-21, *with Blackburn*, 53 F.3d at 827.

Here, there is no evidence of any ***reciprocal*** restraint undertaken by HCHC. Plaintiffs did *not* allege any such restraint in their Complaint, nor do they even suggest in their Brief that HCHC agreed to restrain its own conduct in any way in return for Allegiance supposedly agreeing not to market Allegiance's competing services in Hillsdale County.[12] Such an "agreement" would also make absolutely no sense for Allegiance, providing even more reason for this Court *not* to accept at face value Plaintiffs' contention that any such "agreement" existed.

Most important for this Court's analysis, however, at least at this juncture, the absence of any "reciprocity" in the alleged "agreement" clearly takes the conduct outside of the "garden variety" customer allocation agreements that prior judicial experience has shown should be declared *per se* unlawful. As such, it would be a clear error of law for this Court to condemn Allegiance's alleged conduct as *per se* unlawful based upon any of the cases Plaintiffs cite. *See In re Se. Milk*, 739 F.3d at 271 (the *per se* test should be used "reluctantly and infrequently, informed by other courts' review of the same type of restraint, and

[12] While Plaintiffs' expert witness, Dr. Tasneem Chipty, *labels* the alleged agreement a "customer allocation," her description is far from stereotypical: she states that Allegiance agreed "not to solicit certain customers residing in Hillsdale County" and "[i]n return, Allegiance hoped to receive patient volume for certain types of care not offered by HCHC." *See* Initial Report of Dr. Tasneem Chipty, Ph.D., 10/27/16 (attached to Df. Opening Br. as Exhibit N), ¶ 18. Moreover, Plaintiffs' other expert witness, Dr. Lawton Burns, ultimately admitted that "[i]t's not clear to me that any patients were allocated to Allegiance." Burns Dep., 12/19/16 (excerpted in Exhibit R), at 308:11-13.

only when the rule of reason would likely justify the same result"); *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 344, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982) (application of *per se* principles are appropriate only where prior cases "enable the Court to predict with confidence that the rule of reason [would] condemn it.").

Quite to the contrary, prior judicial experience illustrates that Allegiance's alleged conduct is of the sort where the courts have concluded that the alleged restraint cannot properly be assessed under *per se* principles. *See, e.g., Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 778, 119 S. Ct. 1604, 1613, 143 L. Ed. 2d 935 (1999); *Cal. ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118 (9th Cir. 2011); *Mid-West Underground Storage*, 717 F.2d at 503; *see also In re Wholesale Grocery Prod. Antitrust Litig.*, No. 09-MD-2090, 2013 WL 140285, at *10 (D. Minn. Jan. 11, 2013), *aff'd in relevant part*, 752 F.3d 728 (8th Cir. 2014) ("the [agreement] does not prohibit SuperValu and C & S from competing for customers not covered by the [agreement], SuperValu and C & S did not make an exclusive market allocation. Therefore, the [agreement] does not fall into an established '*per se*' category.").

As Allegiance explained in its opening brief, the *Safeway* decision is instructive here (certainly more so than *Blackburn*). *See Safeway*, 651 F.3d at 1137 ("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, as the *Safeway* court explained, where "'the conduct at issue is not a garden-variety horizontal division of a market, we have eschewed a *per se* rule and instead have utilized rule of reason analysis.'" *Id.* at 1134 (citation omitted). As in *Safeway,* this Court should find that *per se* treatment is improper as a matter of law and direct that the rule of reason be applied in assessing Allegiance's conduct.[13]

B. *Per Se* Analysis Is Also Improper Where, As Here, The Parties Continued To Compete With Each Other.

Although Plaintiffs broadly characterize Allegiance's conduct as an agreement "not to compete" with HCHC for certain Hillsdale County patients, the unrebutted evidence shows the contrary to be true. This is significant, because continued competition between the parties, when alleged to have engaged in market allocation agreement, has been viewed by courts as another fact that

[13] As Allegiance also explained in its opening brief, the "hybrid" nature of the Allegiance/HCHC relationship provides further justification for rejecting *per se* analysis of Plaintiffs' claims. (*See* Df. Opening Br. at 13.) In response, Plaintiffs seek to distinguish *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986), by stating that the market in which the parties are in a vertical relationship must be "interdependent" with the allegedly restrained market for rule of reason treatment to apply, (Pls. Br. at 29 n. 113), but that is precisely the situation here: the lower level services as to which Allegiance and HCHC compete *are* interdependent with the higher level services as to which Allegiance seeks referrals from Hillsdale County doctors. Indeed, all of the services, lower and higher level services, are part of the "continuum of care" that all witnesses have testified is critical to serve patient needs. In addition, Plaintiffs' other contention—that a "hybrid" relationship is not sufficient to compel rule of reason treatment where the agreement itself had no "vertical element" (Pls. Br. at 29 n. 114)—is also off point, as the referral relationship is clearly "vertical" in nature.

cautions against the use of *per se* principles. *See Safeway*, 651 F.3d at 1137; *Mid-West Underground Storage*, 717 F.2d at 503; *Anesthesia Advantage, Inc. v. Metz Group*, 759 F. Supp. 638, 646 (D. Col. 1991).

Anesthesia Advantage is instructive on this point. There, the district court found that, "[a]lthough characterized as an allocation of the market" by the plaintiffs, the alleged "agreement" (a call schedule designating which physicians was available on certain nights) "does not provide that competition will cease." 759 F. Supp. at 646. For that reason, the "agreement" was not a "naked restraint of trade with no purpose except stifling competition," and the fact that plaintiffs' *portrayed* the conduct as an "allocation" agreement was not determinative to the analysis; and ultimately, *per se* treatment was rejected in favor of the rule of reason. *Id.*

Here, Plaintiffs admit that Allegiance continued to market its services in Hillsdale County through a variety of marketing tactics, including advertisements on traditional media and through social media, as well as through community events, digital health screenings, physician liaisons and visiting specialists. (*See* Df. Opening Br. at 6.) There is also no dispute that Allegiance engaged in digital marketing on key *competing* service lines (cardiology, oncology, and orthopedics) in Hillsdale, and that Allegiance's digital advertising reached and impacted Hillsdale County residents. Minnelli Dep., 9/16/16 (excerpted as Exhibit Q

hereto), at 234:19-238:3. Indeed, even the HCHC CEO, Duke Anderson, recalled seeing Allegiance ads in newsprint, on television, and online while in Hillsdale County. Anderson Dep., 6/30/16 (excerpted as Exhibit U hereto), at 67:17-69:4.

Plaintiffs also did not refute that Allegiance's strategy to increase referrals on competing service lines included the "halo effect," by which the promotion of higher acuity services increases consumer awareness of the overall brand, and thus the demand for lower acuity as well. (*See* Df. Opening Br. at 5 n.9); *see also* Transcript of Deposition of Tasneem Chipty, Ph.D., 12/12/2016 (excerpted as Exhibit V hereto) at 274:5-6 ("I don't dispute the legitimacy of [the halo effect] as an independent strategy."). This *undisputed* evidence of Allegiance's continued competition with HCHC on both competing and non-competing service lines, both through marketing efforts and otherwise, should provide this Court with further assurance that the *per se* standard is simply not appropriate for this case.[14]

[14] Importantly, when stripped of its colorful rhetoric, Plaintiffs' position appears to be that their *per se* market allocation theory can be supported based solely on Allegiance's failure to market all of its services in Hillsdale via *billboards, print, and direct mail*, (Pls. Br. at 20), since Plaintiffs *cannot* dispute that Allegiance marketed all of it services via other methods, including television, digital marketing and physician liaisons (*see, e.g.,* Pls. Br. at 22). Allegiance's decision not to engage in these limited forms of marketing in Hillsdale County cannot provide the necessary support for Plaintiffs' claims, particularly given the undisputed evidence that other competitors, UMHS nor Borgess, have not engaged in print, billboard, or direct mail advertising in Hillsdale County, *see* Anderson Dep., 6/30/16 (excerpted in Exhibit U hereto) at 161:2-164:9, and Plaintiffs' evidence does not even include a complete ban on all such advertising. Indeed, Plaintiffs cannot dispute that Allegiance engaged in significant print marketing in

C. Plaintiffs' Attempt to Apply *Per Se* Standards Here, Where There Is No Evidence of Any Harm and Evidence of Plausible Procompetitive Benefits, Distorts The Purposes Of Antitrust Law's *Per Se* "Shortcut."

As Plaintiffs are quick to argue in their Response Brief, if they can persuade this Court that Allegiance's conduct *is* a "garden-variety" "horizontal customer allocation agreement" (and, as Allegiance has now demonstrated, it is not), then Plaintiffs could potentially be relieved from the obligation to prove that Allegiance's conduct had any competitive effects. However, the *per se* rule was developed to be a judicial shortcut "only in clear cut cases," *In re Se. Milk*, 739 F.3d at 271 (citation omitted); it is *not* intended to serve as a litigation "tactic" to override actual record evidence showing a lack of competitive harm and plausible procompetitive benefits. *Id.* (application of *per se* principles should be reserved for when "the rule of reason would likely justify the same result").

Accordingly, Allegiance respectfully submits that the Court is not required to, nor should it, ignore the fact that there is no evidence in this record of substantial competitive harm as a result of Allegiance's alleged conduct. As Allegiance explained in its opening brief, Allegiance's experts opine that there have been *no identifiable anticompetitive effects at all*, and all that Plaintiffs' economic expert has said, in response, is that *some* harm, unidentified in character

---

Hillsdale County through the Jackson Citizen Patriot newspaper, which has a "robust" circulation in Hillsdale County. *See* Transcript of Deposition of Judy Gabriele, 6/1/16 (excerpted as Exhibit W hereto), at 101:16-21.

and magnitude, "likely" occurred if an allocation agreement existed. (*See* Df. Opening Br. at 15-18.) The application of *per se* principles on these facts would be, Allegiance submits, improper as a matter of law.

IV. PLAINTIFFS' "QUICK LOOK" THEORY FAILS AS A MATTER OF LAW.

Finally, as Plaintiffs acknowledge, a "quick look" analysis 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.'" (Pls. Br. at 7.) As Allegiance has established, the "quick look" test cannot properly be applied here.

A. Plaintiffs Have Not Established A "High Likelihood" Of Harm.

In response to Allegiance's opening brief, Plaintiffs assert that the "quick look" is appropriate because the alleged "agreement" is "inherently suspect" and "so close to [a] classic market allocation that there is a high likelihood that it harms competition." (Pls. Br. at 30-31.) However, Allegiance has already thoroughly refuted the contention that the alleged agreement is "close to a classic market allocation" arrangement, and also demonstrated that Plaintiffs have no evidence that Allegiance's conduct creates a "*high likelihood*" of harm. As previously noted, neither of Plaintiffs' experts has opined that there is a "high likelihood" of harm to competition; accordingly, Plaintiffs' first argument in support of applying

"quick look" is simply is baseless.

B. "Quick Look" Analysis Is Not Permitted Because Allegiance Has Indeed Proffered *Plausible* Procompetitive Justifications.

Plaintiffs' second argument in support of quick look also lacks merit. As Allegiance demonstrated in its opening brief, Plaintiffs' experts did not contest the *plausibility* of Allegiance's procompetitive justifications. (Df. Opening Br. at 23-24.) This fact, standing alone, requires the rejection of the "quick look" in this case. *See Cal. Dental Ass'n*, 526 U.S. at 778 (emphasis added) (explaining that "the plausibility of competing claims about the effects of the [advertising restriction] rules out" the abbreviated "quick look" analysis); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Print. Co.*, 472 U.S. 284, 294, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985) (where plausible procompetitive benefits are asserted, the *per se* rule is rejected in favor of the rule of reason).

Equally fatal to Plaintiffs' position, their experts did not even taken a position as to the plausibility of procompetitive *benefits* of Allegiance's conduct While Allegiance's experts opined, based on record evidence and independent data, not only that Allegiance's procompetitive justifications for its marketing strategies were *plausible*, they further opined that Allegiance's conduct enabled Allegiance to achieve its goal of offering open heart surgery and other tertiary

services in competition with larger regional health systems.[15] (*See* Df. Opening Br. at 18-19); Manning Rpt., 11/14/16 (attached as Df. Opening Br., Exhibit F), at ¶¶166-167.

As Allegiance explained, Plaintiffs have not, and cannot, refute the fact that, absent the relationship Allegiance cultivated with HCHC (whether as a result of its independent strategy or the alleged "agreement"), Allegiance would not have been granted the opportunity to offer open heart services, a development that provided an *additional* competitive option for such services for the citizens of both Jackson and Hillsdale County. [16] *See* Manning Rpt. (attached as Df. Opening Br., Exhibit F), ¶ 167 ("But for the pledge from Hillsdale Hospital and subsequent referrals, Allegiance's open heart center would not have gained approval and there would be one less competitor providing such services in the market."). Increasing the open heart options for the citizens of Jackson and Hillsdale falls squarely within the spectrum of procompetitive benefits that require the rejection of the "quick look."

[15] The necessity of HCHC's pledge and referrals to Allegiance's open heart Certificate of Need, in light of state regulations and demand for the service in Jackson County, is well-documented on the record. (Df. Opening Br. at 4-6.) The fact that Allegiance's need for open-heart referrals was driving its marketing strategy in Hillsdale County is also well-established. *See* Fojtasek Dep., 11/14/14 (attached to Df. Opening Br. as Exhibit G), at 92:17-19 (according to Ms. Fojtasek, obtaining referrals from Hillsdale County is "job 1" for Allegiance).

[16] It is further undisputed that Allegiance was, for many Hillsdale residents, a geographically closer option than other open heart providers like University of Michigan Health System and Trinity St. Joseph in Ann Arbor. (Df. Opening Br. at 21 n. 28); *see also* Fojtasek Dep., 9/20/16 (attached to Df. Opening Br. as Exhibit E), at 99:9-19, 101:4-9.

See Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1157 (6th Cir. 2003) ("Improving customer choice is procompetitive. "); *United States v. Brown Univ. in Providence in State of R.I.*, 5 F.3d 658, 664 (3d Cir. 1993) (finding district court erred in applying "quick look" and remanding for rule of reason analysis where defendant's plausible procompetitive defenses were erroneously discredited by the court).

Finally, Plaintiffs' suggestion that the opinions of Allegiance's economics expert, Dr. Manning, on procompetitive benefits can be discounted because they are not tied to the record is demonstrably incorrect. *See* Manning Rpt. (attached as Df. Opening Br., Exhibit F), at ¶¶ 163-73 and Tables 6-10 and 15 (citing the case evidence upon which her opinions rely). Accordingly, it would be clearly erroneous to ignore, as Plaintiffs have, the substantial evidence that Allegiance's marketing efforts were independently-crafted and designed to achieve the procompetitive benefits that Allegiance's witnesses have testified to, including 'the desire to increase open-heart referrals from Hillsdale County physicians.

C. If The "Agreement" Is Found To Exist, Record Evidence Shows It Is An Ancillary Restraint.

Plaintiffs also assert, in a conclusory fashion, that the alleged agreement (if it even exists) was *not* an ancillary restraint reasonably tied to any procompetitive benefit. (Pls. Br. at 32.) Plaintiffs are mistaken: "[a] restraint is ancillary when it may contribute to the success of a cooperative venture that promises greater

productivity and output." *Polk Bros., Inc.*, 776 F.2d at 189; *accord Woman's Clinic, Inc. v. St. John's Health Sys., Inc.*, 252 F. Supp. 2d 857, 869 (W.D. Mo. 2002) (describing ancillary agreements as "agreements that, while horizontal, have the potential to promote competition"). As Allegiance has explained, conduct designed to avoid "antagonizing" Hillsdale doctors from sending referrals to Allegiance was critical to the goal of achieving those necessary referrals, easily satisfying the test of *Polk Brothers*. *See Polk Bros*., 776 F.2d at 189 ("If the restraint, viewed at the time it was adopted, may promote the success of this more extensive cooperation, then the court must scrutinize things carefully under the Rule of Reason.").

In sum, Plaintiffs cannot show that the "quick look" analysis is appropriate in this case and, like the application of *per se* principles, would deny Allegiance the opportunity to present critical evidence at trial. Allegiance therefore urges this Court to grant it summary judgment as to this legal theory at this time as well.

VI. CONCLUSION

The law is undisputed that *per se* and "quick look" standards are suitable only for "garden-variety," "naked" restraints that clearly have substantial adverse effects on competition. The record is also clear that the alleged conduct in this case, as a matter of law, is not a "garden-variety" restraint that prior judicial experience confirms will ultimately prove unlawful after the application of the full

rule of reason analysis.

For all of these reasons, Allegiance respectfully requests that the Court grant summary judgment in its favor as to Plaintiffs' *per se* and "quick look" theories, ensuring that Allegiance will be permitted the opportunity to present *all* of its evidence at trial. Allegiance has patiently awaited that day for over two years, and believes that once this Court has heard all of the evidence, it will agree that Allegiance's conduct was lawful in all respects.

Dated February 9, 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 February 9, 2017, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which sent 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