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

PLAINTIFFS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Allegiance does not dispute that it limited marketing in Hillsdale County to receive more referrals from HCHC. Allegiance does not dispute that it communicated with HCHC about these limitations and apologized when it inadvertently solicited patients in Hillsdale County. And Allegiance does not dispute that its employees reference an agreement with HCHC in multiple, contemporaneous documents. Instead, Allegiance attempts to construct a genuine issue of material fact merely by having its executives re-label their conduct as a strategy rather than an agreement. And it relies on legally irrelevant and unsupported claims about the competitive effects of this agreement in an effort to prevent judgment as a matter of law. Both of these arguments lack merit, and the Court should grant summary judgment in Plaintiffs' favor.

II. ARGUMENT

A. Allegiance Has Failed to Identify a Genuine Issue of Material Fact Regarding the Existence of Concerted Action

Plaintiffs can prove concerted action through "1) an overall unlawful plan or common design, 2) knowledge that others are involved . . . , and 3) a showing of each alleged members' participation."[1] Plaintiffs' Cross-Motion for Summary Judgment set forth the undisputed material facts concerning each of these

[1] *In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 536 (D.N.J. 2004); *see also Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939) ("It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it.").

elements.[2] None of Allegiance's arguments in response creates a genuine dispute concerning the material facts of record.

First, Allegiance contends that summary judgment is inappropriate based purely on its executives' post-complaint efforts to re-label their earlier acknowledgments of an agreement as a strategy. But Allegiance overstates the so-called conflict between the deposition testimony and Plaintiffs' evidence.[3] The majority of this testimony disputes only the label that is applied to Allegiance's conduct, which is a legal conclusion.[4] The remainder of the testimony is too inconsistent with the objective evidence to be credited.[5] At bottom, the parties have no dispute over what Allegiance has done, only about whether that conduct constitutes an unlawful agreement under the antitrust laws, which distinguishes this case from *Moran*.[6] Semantics and post-hoc characterization of admitted conduct cannot raise a genuine dispute of material fact.

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[2] *See* Pls.' Br. at 8-16 (ECF No. 73).
[3] *See, e.g.*, Def.'s Ex. P at 10-11 (Bianchi) (addressing a different agreement); *id.* at 20 (Dr. Ekpo), 82-83 (Yacobucci) (not aware of agreement); *id.* at 29 (Gabriele), 67 (Turpel) (heard of agreement).
[4] *Cf. Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 564-65 (2007) (describing allegations of "contract, combination, or conspiracy" as "legal conclusions" that must be supported by facts before they satisfy the pleading standard).
[5] *See* Pls.' Br. at 19 n.72.
[6] *Moran v. Al Basit LLC*, 788 F.3d 201 (6th Cir. 2015) (finding summary judgment inappropriate where there was a dispute about the number of hours that plaintiff worked and where there was a plausible claim that defendant fabricated documents to contradict the plaintiff's testimony).

Further, Allegiance's increasing market share and its limited advertising in Hillsdale County do not bar summary judgment. Allegiance's expert concedes that her market share analysis neither proves nor disproves the existence of an agreement.[7] And the fact that Allegiance competed for some services and customers in Hillsdale County does not refute Allegiance's agreement with HCHC to limit competition in other, important ways.

B. Allegiance's Agreement with HCHC Is Either Per Se Unlawful or Subject to Quick Look Analysis as a Matter of Law

Under Sixth Circuit precedent, an agreement not to solicit a rival's existing customers is a per se unlawful customer allocation, even where it does not foreclose all competition or identify particular customers whom each party will or will not serve.[8] Allegiance first incorrectly suggests that Plaintiffs changed their theory of the case.[9] But Plaintiffs alleged in their Complaint that Defendants "allocate[d] territories,"[10] and there is no "significant difference between an allocation of customers and an allocation of territory."[11] Both parties' experts

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[7] *See* Deposition of Susan Manning, Dec. 14, 2016 ("Manning Dep."), at 33:5-35:8 (excerpted in Exhibit P).

[8] *See United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367 (6th Cir. 1988); *see also Blackburn v. Sweeney*, 53 F.3d 825, 827 (7th Cir. 1995) ("To fit under the per se rule an agreement need not foreclose all possible avenues of competition."); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980) (finding agreement per se unlawful because it "extinguish[ed] one form of competition").

[9] Def.'s Reply Br. at 15 (ECF No. 83).

[10] Compl. ¶ 35.

[11] *United States v. Consol. Laundries Corp.*, 291 F.2d 563, 574-75 (2d Cir. 1961).

agree.[12] Allegiance next argues that *Cooperative Theatres* does not apply because that case involved reciprocal agreements to allocate both parties' customers, and the agreement at issue here allocates customers only to HCHC.[13] But the lack of symmetry does not matter.[14] Symmetry was irrelevant to the Sixth Circuit's holding in *Cooperative Theatres*. And Hillsdale County residents did not suffer any less harm because Jackson County residents did not also suffer harm. What matters "is that the agreements at issue are arrangements among competitors that give one firm the right to restrict" how its rival competes.[15] In any event, Allegiance did receive consideration for this agreement, albeit in different form.[16]

Allegiance fails to cite any law that prohibits the per se standard here. *California Dental* analyzed an ethics rule that did not limit advertising to particular consumers.[17] *Safeway* involved a short-term profit-sharing agreement that did not limit marketing.[18] The defendants in *Midwest Underground* were not horizontal

[12] *See* Manning Dep. at 312:20-22 (excerpted in Exhibit P); Expert Report of Dr. Tasneem Chipty at ¶¶ 18-19 (excerpted in Exhibit K).
[13] Def.'s Reply Br. at 16-19.
[14] *Cf. United States v. Reicher*, 983 F.2d 168, 169-70, 172 (10th Cir. 1992) (finding per se unlawful bid rigging where parties only allocated a single project to one conspirator without any mirrored allocation to the party that "lost" the first bid).
[15] *See* Areeda & Hovenkamp, *Antitrust Law* ¶ 2030c (excerpted in Exhibit Q).
[16] *See* Pls.' Br. at 5.
[17] *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 760 (1999); *see also* Pls.' Br. at 26.
[18] *Cal. ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1123-24 (9th Cir. 2011).

competitors, and the plaintiff did not even allege market or customer allocation.[19] And *In re Wholesale Grocery Products*[20] is an unreported district court decision that directly contradicts the Sixth Circuit's binding precedent in *Cooperative Theatres*. Finally, contrary to Allegiance's claim,[21] this Court should not consider supposed evidence of lack of competitive harm. For per se unlawful conduct, "no consideration is given . . . to the restraint's actual effect on competition."[22]

Even if this Court does not consider the restraint to be per se illegal—which it should—Plaintiffs are still entitled to summary judgment under the quick look test. The quick look standard applies when "an observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have an anticompetitive effect."[23] The agreement here fits that description.[24] As discussed above, the nature of the competitive effect here is indistinguishable from the effect of the agreements that courts found per se

[19] *Midwest Underground Storage, Inc. v. Porter*, 717 F.2d 493, 496-97 & n.2 (10th Cir. 1983).
[20] *In re Wholesale Grocery Prods. Antitrust Litig.*, 2013 WL 140285, at *10 (D. Minn. Jan. 11, 2013).
[21] Def.'s Reply Br. at 23-24.
[22] *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 906 (6th Cir. 2003); *see also* Pls.' Br. § IV.C.1.
[23] *See Cal. Dental*, 526 U.S. at 770.
[24] *See* Pls.' Br. § IV.D.1; *see also* Chipty Report at ¶ 12 (excerpted in Exhibit R); *id.* at ¶¶ 26-37; *see also* Rebuttal Expert Report of Tasneem Chipty at ¶¶ 38, 49, 62 (excerpted in Exhibit S).

unlawful in *Cooperative Theatres* and *Blackburn*.[25] This satisfies Plaintiffs' burden on likely competitive harm for purposes of the quick look analysis.[26]

Finally, Allegiance cannot survive a quick look analysis by claiming that its agreement with HCHC "enabled Allegiance to achieve its goal of offering open heart surgery and other tertiary services in competition with larger regional health systems."[27] Even if Allegiance's provision of tertiary services were a cognizable procompetitive benefit, which it is not,[28] Allegiance has failed to present any evidence that the restraint is necessary to achieve that claimed benefit.[29] Allegiance offers no evidence showing that, for example, it could not have achieved enough referrals by competing harder with HCHC and other providers.[30] All that Allegiance claims is that HCHC's pledge and referrals—not the

[25] *See* Areeda & Hovenkamp, *Antitrust Law* ¶ 1911a (excerpted in Exhibit Q) (quick look analysis used when "the restraint is sufficiently threatening to place it presumptively in the *per se* class, but lack of judicial experience requires at least some consideration of proffered defenses").
[26] *See N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 374 (4th Cir. 2013) (finding likelihood of anticompetitive effects when conduct "at its core" was a "practice[] like" conduct found per se unlawful by other courts).
[27] Def.'s Reply Br. at 25-26.
[28] *See* Pls.' Br. § IV.D.2.
[29] *See NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 114-15 (1984) (rejecting argument that restraint was justified by new service where defendant failed to show that "the agreement . . . is necessary to market the product at all"); *N.Y. ex rel. Spitzer v. St. Francis Hosp.*, 94 F. Supp. 2d 399, 418 (S.D.N.Y. 2000) (refusing to consider new hospital services a procompetitive effect where these services "could be offered independently of the challenged restraint").
[30] Allegiance's consultant presented it with such strategies. *See* Pls.' Ex. O-22.

agreement—were necessary for Allegiance's open heart surgery center.[31] This is insufficient to avoid liability under a quick look analysis.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Cross-Motion for Summary Judgment.

February 23, 2017 Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

s/Andrew Robinson
Andrew Robinson (D.C. Bar No. 1008003)
Katrina Rouse (D.C. Bar No. 1013035)
Garrett Liskey
Jill Maguire
Antitrust Division, Litigation I Section
U.S. Department of Justice
450 Fifth St. NW
Washington, DC 20530
(202) 598-2494
andrew.robinson2@usdoj.gov

Peter Caplan (P-30643)
Assistant United States Attorney
U.S. Attorney's Office
Eastern District of Michigan
211 W. Fort Street
Suite 2001
Detroit, Michigan 48226
(313) 226-9784
peter.caplan@usdoj.gov

FOR PLAINTIFF STATE OF MICHIGAN:

s/with the consent of Mark Gabrielse
Mark Gabrielse (P75163)
Assistant Attorney General
Michigan Department of Attorney General
Corporate Oversight Division
G. Mennen Williams Building, 6th Floor
525 W. Ottawa Street
Lansing, Michigan 48933
(517) 373-1160
gabrielsem@michigan.gov

[31] Def.'s Reply Br. at 26.

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2017, I electronically field the foregoing paper with the Clerk of 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 and all attachments to be served on Defense counsel of record via email.

s/Andrew Robinson
Andrew Robinson (DC Bar No. 1008003)
Antitrust Division, Litigation I Section
U.S. Department of Justice
450 Fifth St. NW
Washington, DC 20530
(202) 598-2494
andrew.robinson2@usdoj.gov