

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

VHS LIQUIDATING TRUST, et al.,

Plaintiffs,

v.

BLUE CROSS OF CALIFORNIA, et al.,

Defendants.

JCCP: 5398

Case No. RG21106600

ORDER RE STANDARD OF REVIEW

I. INTRODUCTION

The plaintiffs Verity Health Systems (“Verity”), Prime Healthcare (“Prime”), and Children’s Hospital Los Angeles (“CHLA”) (collectively “Hospitals”) assert antitrust and related claims against multiple Blue Cross and Blue Shield entities¹ (collectively the “Blues”) and their

¹ They are: Blue Cross of California d/b/a Anthem Blue Cross; Anthem Blue Cross Life and Health Insurance Company; California Physicians’ Service, d/b/a Blue Shield of California; Blue Cross and Blue Shield of Alabama; Blue Cross and Blue Shield of Arizona, Inc.; Elevance Health, Inc. f/k/a Anthem, Inc.; Anthem Health Plans, Inc., d/b/a Anthem Blue Cross and Blue Shield of Connecticut; Blue Cross Blue Shield Healthcare Plan of Georgia, Inc.; Rocky Mountain Hospital & Medical Service Inc., d/b/a Anthem Blue Cross and Blue Shield of Colorado in Colorado and d/b/a Anthem Blue Cross and Blue Shield of Nevada in Nevada; Anthem Insurance Companies, Inc., d/b/a Anthem Blue Cross and Blue Shield of Indiana; Anthem Health Plans of Kentucky, Inc., d/b/a Anthem Blue Cross and Blue Shield of Kentucky; Anthem Health Plans of Maine, Inc., d/b/a Anthem Blue Cross and Blue Shield of Maine; HMO Missouri, Inc., d/b/a Anthem Blue Cross and Blue Shield of Missouri; RightCHOICE Managed Care, Inc.; Healthy Alliance Life Insurance Company; Anthem Health Plans of New Hampshire, Inc., d/b/a Anthem Blue Cross and Blue Shield of New Hampshire; Empire HealthChoice

umbrella organization Blue Cross Blue Shield Association (“BCBSA”). This action is part of JCCP 5398, which includes eight subsequently filed actions by other health care providers. This JCCP is related to federal multidistrict litigation, MDL No. 2406, known as *In re Blue Cross Blue Shield Antitrust Litigation* No. 2:13-cv-20000-RDP (N.D. Ala.) (“*MDL Litigation*”). Each plaintiff in this JCCP opted out of a class in the *MDL Litigation* to pursue antitrust claims under California law and, in some cases, the laws of other states in the alternative.

In the operative Fourth Amended Complaint (“4AC”) filed on October 28, 2025, the Hospitals assert four causes of action (or counts) under the Cartwright Act: (1) the First Count for horizontal market allocation; (2) the Second Count for group boycott; (3) the Third Count for horizontal price fixing; and (4) the Fourth Count for horizontal unlawful exchange of

Assurance, Inc., d/b/a Empire BlueCross BlueShield; Community Insurance Company, d/b/a Anthem Blue Cross and Blue Shield of Ohio; Anthem Health Plans of Virginia, Inc., d/b/a Anthem Blue Cross and Blue Shield of Virginia, Inc.; Blue Cross Blue Shield of Wisconsin, d/b/a Anthem Blue Cross and Blue Shield of Wisconsin; CompCare Health Services Insurance Corporation; Highmark Inc., f/k/a Highmark Health Services; Highmark BCBSD Inc.; Highmark West Virginia Inc.; CareFirst, Inc.; CareFirst of Maryland, Inc.; CareFirst BlueChoice, Inc.; GuideWell Mutual Holding Corporation; Group Hospitalization and Medical Services, Inc.; Blue Cross and Blue Shield of Florida, Inc.; Hawaii Medical Service Association (Blue Cross and Blue Shield of Hawaii); Cambia Health Solutions, Inc.; Regence BlueCross BlueShield of Oregon; Regence BlueCross BlueShield of Utah; Regence BlueShield; Health Care Service Corporation, an Illinois Mutual Legal Reserve Company, including its divisions Blue Cross and Blue Shield of Illinois, Blue Cross and Blue Shield of Texas, Blue Cross and Blue Shield of New Mexico, Blue Cross and Blue Shield of Oklahoma, and Blue Cross and Blue Shield of Montana; Caring for Montanans, Inc., f/k/a Blue Cross and Blue Shield of Montana, Inc.; Wellmark, Inc. (Wellmark Blue Cross and Blue Shield of Iowa); Wellmark of South Dakota, Inc. (Wellmark Blue Cross and Blue Shield of South Dakota); Louisiana Health Service & Indemnity Company, d/b/a Blue Cross and Blue Shield of Louisiana; Blue Cross and Blue Shield of Massachusetts, Inc.; Aware Integrated, Inc.; BCBSM, Inc., d/b/a Blue Cross and Blue Shield of Minnesota; Horizon Healthcare Services, Inc., d/b/a Horizon Blue Cross Blue Shield of New Jersey; Blue Cross and Blue Shield of North Carolina; Triple-S Management Corporation; Triple-S Salud, Inc.; Blue Cross & Blue Shield of Rhode Island; Blue Cross Blue Shield of South Carolina; Blue Cross Blue Shield of Tennessee, Inc.; and Blue Cross and Blue Shield of Vermont. (See Case Management Statement Filed on January 31, 2025.)

competitively sensitive business information. They also assert related claims under the Unfair Competition Law. (Bus. & Prof. Code § 17200, et seq.)

Currently before the Court is the Hospitals’ “Motion to Apply the *Per Se* Standard of Review.” The central question is whether under the Cartwright Act the Court applies a per se rule, which the Hospitals advance, or a rule of reason, which the Blues advance, to review the following restraints: (1) Exclusive service area provisions (“ESA”) set forth in the Blues’ 1991 License Agreements that the Hospitals contend constitute illegal market allocation and group boycott; (2) the Blues’ BlueCard Program, which was initiated in 1992 and became mandatory in 1995, that the Hospitals contend constitutes illegal price fixing; and (3) the National Best Efforts (“NBE”) rule, which became effective in 2005 but was lifted in 2021, that the Hospitals contend constitutes an output restriction. The parties agree that the issue is a matter of law for the Court. (*See People v. Santa Clara Valley Bowling Proprietors’ Ass’n* (1965) 238 Cal.App.2d 225, 234.)

Similar issues were raised in the *MDL Litigation* under the Sherman Antitrust Act. The MDL court issued rulings in 2018 (*In re Blue Cross Blue Shield Antitrust Litigation* (N.D. Ala. 2018) 308 F.Supp.3d 1241) and in 2022 (*In re Blue Cross Blue Shield Antitrust Litigation* (N.D. Ala., Aug. 9, 2022) 2022 WL 3221887).

The Court has permitted multiple briefs and submissions on this issue—about 10 separate submissions—and held three hearings, including one after a detailed tentative ruling. After considering all the submissions and argument of counsel, the Court hereby rules as follows:

II. NATURE OF THIS MOTION

Both sides have submitted a substantial amount of evidence—documents, deposition testimony, and declarations. Material facts are disputed. A threshold question is how the Court should resolve, if at all, factual disputes. Federal courts addressing analogous motions under the

Sherman Act typically address the standard of review on summary judgment or class certification motions, where the rules regarding factual disputes are more crystallized. The Hospitals' description of this motion as an early motion *in limine* addressing jury instructions and seeking to exclude evidence relevant only to the rule of reason is apt. (5/14/26 Tx. at 21.) The Hospitals assert that they have made an evidentiary showing to warrant per se jury instructions. The Blues have essentially made a detailed proffer with evidence to argue they are entitled to present evidence on and to receive jury instructions on the rule of reason. While many of the facts regarding the restraints are not genuinely disputed, the Hospitals dispute much of the Blues' proffer.

The Court will apply a standard like what the Court would apply on a motion *in limine* to exclude evidence based on relevance given disputed jury instructions typically made immediately before trial. Thus, the Court does not resolve factual disputes here. If the Blues have proffered material facts based on evidence that, if believed by the jury, legally warrant a rule of reason analysis, then the Court credits those facts for purposes of this motion.

III. FACTUAL BACKGROUND²

A. The General Businesses

1. The Plaintiff Hospitals

Verity, Prime, and CHLA are hospitals that provide myriad health care services and products to patients. They regularly contract with health care plans or their designees to provide care for covered members at contract rates to be reimbursed by the plans.

² While the facts in this Section III might be disputed, the parties have either not contested them or have presented evidence to support them on this motion. The Court makes no rulings on the admissibility under Evidence Code for any evidence submitted by either side.

2. The Defendant Blues and BCBSA

The Blues are health care plans that provide health insurance and financing, health care administrative services, and other related services to their subscribers and covered individuals. The Blues contract with entities to provide health insurance to individuals or to administer a plan on behalf of a self-insured entity. The covered individuals are called members or patients. In the regular course of their business, the Blues—or their designees—contract with health care providers, such as the Hospitals, to provide health care services to their members in exchange for reimbursements at contract rates. The contract rates are typically discounted from full-billed rates. The series of contracts between the Blues and different health care providers form a provider network. The Blues describe the provider network as a product that the Blues sell and deliver to their subscribers and members. (5/20/26 Tx. at 16:18-19 and 22-24.) The Blues contend that they operate a two-sided transaction platform that joins together their members with their in-network providers in which the relevant product is “healthcare transactions.”

BCBSA is an umbrella organization in which each Blue is a member. BCBSA is controlled by the Blues collectively as each of the Blues’ CEOs staff BCBSA’s Board of Directors. BCBSA controls the terms and conditions for each Blue’s membership in BCBSA.

BCBSA is the owner of certain trademarks and trade names, including the Blue Shield and Blue Cross trade names and related marks (“marks” for short) that are registered federally under the Lanham Act. BCBSA has licensed certain marks to the Blues through License Agreements dated 1991. (“License Agreement” herein refers to the 1991 agreement, Exs. 309 and 310.) BCBSA or its predecessors in interest have also entered into prior license agreements in 1952, 1954, and 1972 with various plans that the Blues assert were with a Blue or its predecessor-in-interest. The Blues conduct their healthcare insurance and financing business under the blue brand by using these blue marks licensed by BCBSA. The Blues are also

permitted to conduct the same type of business under a non-blue brand and without using the blue marks, which is referred to as green-branded business.

Before the 1990s, there were over 100 plans that used the blue marks throughout the United States. As a result of mergers and acquisitions and general business evolution, as of the briefing, about 33 Blues exist. Each Blue is a separate corporate entity. Most states have only one Blue, a joint Blue Cross and Blue Shield plan, while a few states, including California, have two competing Blues.

B. The Blues' Proffered Origin Story

1. Early Development

The Blues trace their history to the 1930s depression era. Back then, hospitals and medical societies started to form local health care plans where individuals prepaid for hospital or medical services. (D. Ex 6.) Certain states passed enabling statutes that authorized plans to register and to sell services within the state. (D Ex. 2.) Over time beginning in the 1930s, different pre-paid plans for hospital or medical services began sprouting at different locations in the United States. These pre-paid plans were precursors to the current health insurance plans that pervade the contemporary health care industry. (D. Ex. 6.)

Some of these early plans began using the blue cross or blue shield name or mark. Some evidence suggests that the blue cross mark was first used in 1934 by a St. Paul, Minnesota, plan. (D Ex. 6.) Other evidence pointed out by the Hospitals suggests that the American Hospital Association (“AHA”) first used the blue cross mark. (Fernandez Decl., Ex. A at 1.) Some evidence suggests that the blue shield mark was first used for prepaid medical services in 1939 by the Buffalo, New York, plan. (D Ex. 6.) In any event, other local plans used the blue cross and the blue shield marks at different times in different locations in the United States. (D Ex. 6.)

The Blues have provided some evidence of early use by different plans at different locations.

(See D. Exs. 1 (and related cited Exhibits) and 252.) Focusing on California, for example:

- A Desert Sun article published on November 28, 1949, states that Palm Springs city employees signed up for “Blue Cross Hospital service of Southern California” and the “Blue Shield California Physician Service.” (D. Ex. 111.)
- The Oakland Tribune published on May 25, 1949, an advertisement for “California Physicians’ Service” using the “Blue Shield” name and the shield mark. (D Ex. 112)
- A 1939 publication shows a hospital service plan using the blue cross mark that was used in connection with Associated Hospital Service of Southern California to administer the plan. (D Ex. 113.)
- The San Jose Evening News published an advertisement for Hospital Service of California, which the Blues represent is related to Elevance (California), that used the Blue Cross name and mark in 1947 (D Ex. 248.)
- Similar ads using the Blue Cross mark and name were published in the Los Angeles Times in 1939 (DX 113) and in the Oakland Tribune in 1944 (DX 247), which the Blues represent was used by Elevance (California).

Typically, the blue cross mark was used by hospital plans that covered in-patient hospital services, and the blue shield mark was used by medical plans that covered medical care by physicians. (D Ex. 13.)

Since the 1930s, the Blues or their predecessors-in-interest have had relationships with national or umbrella organizations, beginning with the AHA and the American Medical Association (“AMA”). (D Exs. 2 and 6.) BCBSA traces its lineage back to these early umbrella organizations. The early umbrella organizations supported and, in some cases, promoted the pre-paid plans. There was usually some form of membership in the organization. And, standards for plan approval by and membership in the umbrella organizations emerged. (D Ex. 6.)

2. The Lanham Act and Centralized Registration

In 1946, Congress enacted the Lanham Act, which provided for national trademark protection through federal registration. In its wake, the umbrella organizations that existed at the time—AHA and Blue Shield Medical Care Plans (“BSMCP”)—contemplated how to protect the blue marks. The Blues state that the plans and the umbrella organizations faced a practical problem: “Because of each Blue Plan’s historical origins, different entities had different claims to the marks in different parts of the country.” (Opp. at 6:11-12.)³ The Blues claim that the Lanham Act required single ownership for mark registration.⁴ In 1947, the Blue Cross Commission voted that the AHA proceed with registering the blue cross name and mark under the Lanham Act. (Ex. 32.) Also in 1947, the AMCP (“Associated Medical Care Plans”) Commission voted to adopt the Blue Shield name and symbol and register it with the US Patent and Trademark Office (“US PTO”). (Ex. 29.) AHA and BSMCP applied for federal registration of the blue cross and blue shield marks in 1947 and 1948, respectively. (DX34, at BCBSA00135918; see DX35, at BCBSA01127147.) The US PTO issued the blue cross marks to the AHA on February 5, 1952 (Ex. 36) and the blue shield mark to BSMCP on April 1, 1952. (Ex. 37.)

In 1952, the Blue Cross Commission prepared a “Report of Special Committee on Licensing Agreement.” (Ex. 18.) The report recounts that at a 1951 meeting of the “Blue Cross

³ The Hospitals dispute the Blues’ claim that individual plans had common law rights at the time that the Lanham Act was passed.

⁴ The Court notes that the Lanham Act permits concurrent use registration of the same mark by multiple owners under certain circumstances, a provision included in the original. (See 15 U.S.C. § 1052(d); see Original citation Pub. L. 79-489, ch. 540, 60 Stat. 427 (July 5, 1946).) Concurrent use “will arise where two or more persons will independently adopt the same or a similar trademark and use it under the same or similar circumstances.” (*Application of Beatrice Foods Co.* (1970) 429 F.2d 466, 472.) The Blues do not explain why the plans in the 1940s and 1950s did not pursue concurrent use registration or why that option was unavailable.

Plans” the plans discussed protections for the blue marks and registration under the Lanham Act, which they believed “requires ownership of the mark by a single party as a prerequisite to registration.” The report describes concerns expressed by certain plans: Under local plan ownership of the marks, each plan asserted rights within its own territory regardless of plans in contiguous or overlapping territory; the plans were concerned that, because the marks were associated with multiple origins, the marks could dissipate, be destroyed, or become generic; and, while the plans contemplated common ownership of the marks in the umbrella organization (AHA), they were concerned whether the transfer of the marks would be revocable and about the standards for licensing to the plans by the common owner. The committee recommended that the transfer to AHA be revocable and there be automatic licensing to plans that meet the standards. (Ex. 18.) There is evidence that the blue shield plans underwent a similar process. (D Exs. 22-24.)⁵

Thereafter, local plans entered into license agreements with the umbrella organizations that included terms and conditions for the rights to use the blue shield and blue cross marks.⁶ The Blues presented evidence of license agreements entered in 1952 regarding blue shield marks (D Ex. 7) and in 1954 regarding blue cross marks (D Ex. 38).⁷

⁵ An apparent and unexplained discrepancy in the chronology appears. For the Blues’ theory that the plans initially owned the marks to be consistent, the plans must have already assigned rights to the umbrella organizations before 1952 for AHA and BSMCP to have applied for registration of those marks in the late 1940s. Again, these issues have not been fully litigated.

⁶ As a general matter, corporate lineage is murky on this motion—more so as we go further back in time. The Court lacks information at this time to conclude which Blue is descended, in whole or in part, from which plans, and thus which Blue can trace lineage to which, if any, licensee of the 1952, 1954, or 1972 license agreements.

⁷ The exhibits present exemplar license agreements, not particular ones for each plan. There is thus an evidentiary gap as to which plans entered the early license agreements. But the evidence here is sufficient to buoy the Blues’ proffer for purposes of this motion.

The 1952 blue shield license agreement, titled “Agreement Relating to the Collective Service Mark ‘Blue Shield,’” describes the blue shield name and mark and provides that they are the property of BSMCP. (D Ex. 7 at 2.) The agreement provides, “Each member plan that is a party hereto is entitled by virtue of its membership to use the words ‘Blue Shield’ in order to identify to the public its nonprofit medical care plan and its membership in [BSMCP].” (Id.) BSMCP granted each member the right to use the “service mark.” Any member of BSMCP automatically forfeits and surrenders permission to use the mark if it ceases to be a member of BSMCP. (Id.) A member’s rights to use the marks were subject to termination if the member used the marks contrary to the agreement. (Id. at 2-3.) Under paragraph 7, BSMCP members retained any legal right to use the marks that may have been acquired under the laws of the state or province in which it was incorporated, as long as such local rights are not asserted to limit BSMCP’s rights resulting from its use or federal registration, and if the member leaves BSMCP, the local rights cannot be asserted against BSMCP by way of a defense or a counterclaim in an action by BSMCP to enforce the license agreement. (Id. at 3.) The 1952 license agreement contained no express provision for exclusive service areas.

The AHA’s 1954 license agreement (D Ex. 38) regarding the blue cross marks begins with a series of recitals where the parties acknowledge that the blue cross marks designated plans for prepayment of hospital care and related services sponsored and approved by AHA; that individual plans developed certain territorial rights regarding the marks in their particular areas served by the plans; and that AHA and the plans agreed that there should be sole, exclusive ownership and control of rights in the blue cross marks. The plans assigned to AHA all right, title, and interest in the blue cross marks to hold in trust for specific purposes. Each individual plan was licensed by AHA to use the marks within the area served by the plan on the “date of

these presents”; that license was exclusive except for overlapping areas by multiple plans. (Id. at 3 [¶1 (b)].) The license and the trust established by the agreement could be revoked by majority of plans by vote. (Id. at 6.) Upon revocation, the plans would revert to their pre-agreement status. (Id. at 7 [¶ 7].)

The AHA transferred ownership of the blue cross marks to Blue Cross Association (“BCA”) in 1972. (BCA and BSA later merged in 1982 to form BCBSA. (D Ex. 45.)) BCA entered new license agreements with certain plans in 1972 regarding use of the blue cross marks. (The Blues did not present a corresponding license agreement for the blue shield marks dated in the 1970s.) The 1972 blue cross license agreement provides:

BCA hereby grants to Plan upon the terms and conditions of this License Agreement, the right and license to use the Licensed Marks as service marks, in the sale and advertising of programs for health care and related services . . . in a manner approved by BCA . . . [including] as part of the Plan’s corporate name.

(D Ex. 44.) The 1972 license agreement includes an exclusive service area provision: “The rights hereby granted are exclusive to Plan within the geographical area served by the Plan on the effective date of this License Agreement . . . except to the extent that said area may overlap the area or areas served by one or more other licensed Blue Cross Plans,” in which case the rights granted are “non-exclusive.” (Id. at 1 [¶ 1].) The plans agreed to maintain a license to operate, to use the marks as required, and to provide data to BCA as requested. (Id. at 2.) Upon termination of the license agreement (other than for termination of the Ownership Agreement),⁸ all rights to the blue cross marks revert to BCA, and the plan must cease using them. (Id. at 3.) No express reversion of rights to the plans appears to be memorialized in the 1972 license agreement.

⁸ The “Ownership Agreement” has not been called out to the Court in the briefs.

C. The Operative 1991 License Agreement

1. Business Challenges

In the 1960s, 70s, and 80s, blue plans, which might be predecessors to the Blues, faced business challenges in an evolving healthcare marketplace, including trends towards health insurance in the United States being provided through employment and the growth of national employers that had employees spread over multiple states.

The Blues undertook strategic planning efforts in the 1980s to address their business challenges through a process they term “Long Term Business Strategy.” As part of that process, the Blues held an “Assembly of Plans” over several years in the 1980s, a process the Blues describe as a “constitutional convention” for the Blues. During the Assembly of Plans, the Blues discussed the ESA provisions in the 1972 license agreement.

As cited by the Hospitals, some CEOs of the Blues acknowledged that the ESAs resulted in “larger market share because other Blues stay out and do not fragment the market” and provide “stronger provider agreements for the same reason”; that absent ESAs, “plans will be fighting among themselves” through “Blue on Blue competition” and that “competition from other Blue Cross plans is much more of a threat than that of commercial carriers”; that “Plans benefited from the exclusive service areas because it eliminated competition from other Blue Plans. Otherwise, there would be open warfare”; that absent ESAs, “all Plans will eventually compete against each other”; and “the major advantage of an exclusive franchise area was seen in lessening of competition” and “the only alternative would be all out competition and a ‘survival of the fittest.’” (P. Mot. at 6 [and related citations].)

During the Assembly of Plans, BCBSA prepared a White Paper in 1987 to “provide the basis for discussion and deliberation” on issues facing the Blues. (P. Mot. at 7.) The White Paper listed “Options Relating to Use and Enforcement of the Names and Marks,” setting forth:

Option 1. Seek to Maintain the Exclusive Service Areas.

This option, which the Association’s Board is following, could involve several tactical choices over the next several years. For example, it could involve litigating one case or another, or settling others. It also could include seeking legislative relief from Congress[.]

Option 2. Amend the License Agreements to Provide for “Primary service Areas” rather than the Traditional Exclusive Arrangement

“Primary service areas” means a Plan would remain obligated to provide adequate services within its “primary” service area, but could go outside that area in certain circumstances. By definition, this would involve competition among Plans in some instances. Primary service areas are accepted in antitrust case law. Such an approach could require more data to be submitted from Plans to the Association and could lead to disputes. A primary service area approach, premised on actual or potential competition among Plans for Blue Cross and Blue Shield products, would entail significant changes in the role of the Association and conduct among the Plans.

Option 3. Revise the Licenses so that the Service Marks Are Not Limited to Territorial Areas.

This option assumes the exclusive service areas may become unenforceable, either by reason of the Association’s failure to enforce the license conditions, an adverse antitrust decision, or a combination of the two. It further assumes the replacement of the exclusive service areas by at least limited competition among Plans. The system would need a trade symbol consistent with consumer protection in the competitive marketplace.

Option 4. Ignore the Existing Exclusivity Provisions in the Licenses, but Continue to Operate in Accordance with all Other Provisions.

This could result from failure to take effective enforcement action or as the consequence of an adverse court case. If the Plans were to become full competitors on a nationwide basis using the names and marks, significant changes would take place in the way Plans interact, and in the role of the Association [.]”

The Blues collectively elected for Option 1.

2. License Agreement Provisions

Ultimately, the Blues entered into new License Agreements with BCBSA in 1991—one for blue cross marks and one for blue shield marks. (Exs. 309 and 310.) The two different agreements are substantially similar for relevant purposes, and the parties do not call out material differences. All parties agree that the 1991 License Agreements, as amended over time, are currently operative. As to the Blue Cross License Agreement (Ex. 309):

The preamble acknowledges that the plans had local rights to use the marks, that they wanted nationwide protection and to maintain uniform quality control, that in 1972 they executed a license agreement and an “Ownership Agreement,” and that the 1991 License Agreement supersedes.

The License Agreement provides a grant of rights to use the marks. Paragraph 1 provides:

BCBSA hereby grants to the Plan, upon the terms and conditions of this License Agreement . . . the right to use [BLUE CROSS or BLUE SHIELD] in its trade and/or corporate name (the "Licensed Name"), and the right to use the Licensed Marks, in the sale, marketing and administration of health care plans and related services in the Service Area set forth and defined in paragraph 5 below.

It provides other terms and conditions for the use of the marks. Paragraph 4 requires the Blues to be in good standing with BCBSA and to comply with Membership Standards. It provides:

The Plan agrees (a) to maintain in good standing its membership in BCBSA; (b) promptly to pay its dues to BCBSA, said dues to represent the royalties for this License Agreement; (c) materially to comply with all applicable laws; (d) to comply with the Membership Standards Applicable to Regular Members of BCBSA, a current copy of which is attached as Exhibit 2 hereto; and (e) reasonably to permit BCBSA, upon a written, good faith request and during reasonable business hours, to inspect the Plan's books and records necessary to ascertain compliance herewith.

Paragraph 5 sets forth exclusive service area provisions:

The rights hereby granted are exclusive to the Plan within the geographical area(s) served by the Plan on June 30, 1972, and/or as to which the Plan has been granted

a subsequent license, which is hereby defined as the "Service Area," except that BCBSA reserves the right to use the Licensed Marks in said Service Area, and except to the extent that said Service Area may overlap areas served by one or more other licensed Blue Cross Plans as of said date or subsequent license, as to which overlapping areas the rights hereby granted are nonexclusive as to such other Plan or Plans only. ("ESA")

Paragraph 6 provides that a Blue may not use the blue marks outside of its ESA except for specifically permitted purposes and are subject to penalties for any violations:

Except as expressly provided by BCBSA with respect to National Accounts, Government Programs and certain other necessary and collateral uses, the current rules and regulations governing which are attached as Exhibit 3 and Exhibit 4 hereto, and are contained in other documents referenced herein, or as expressly provided herein, the Plan may not use the Licensed Marks and Name outside the Service Area or in connection with other goods and services, nor may the Plan use the Licensed Marks or Name in a manner which is intended to transfer in the Service Area the goodwill associated therewith to another mark or name. Nothing herein shall be construed to prevent the Plan from engaging in lawful activity anywhere under other marks and names not confusingly similar to the Licensed Marks and Name, provided that engaging in such activity does and will not dilute or tarnish the unique value of the Licensed Marks and Name. In addition to any and all remedies available hereunder, BCBSA may impose monetary fines on the Plan for the Plan's use of the Licensed Marks and Names outside the Service Area, and provided that the procedure used in imposing a fine is consistent with procedures specifically prescribed by BCBSA from time to time in regulations of general application.

Paragraph 9 sets forth certain dispute resolution terms between the Blues and BCBSA.

BCBSA has rights to terminate a Blue's license by special vote for specified reasons, including failure to comply with the Membership Standards.

Paragraph 11 provides that, upon termination of the Licensing Agreement for any reason (unless all the License Agreements are terminated) all rights to use the blue marks return to BCBSA and the Blue must discontinue all use of the marks and name, including changing its corporate name as necessary. It provides:

Except as otherwise provided in paragraph 15 below or by the affirmative vote of three fourths of the Plans and three-fourths of the total then current weighted vote of all the Plans, or unless this and all such other License Agreements are

simultaneously terminated by force of law, the termination of this License Agreement for any reason whatsoever shall cause the reversion to BCBSA of all rights in and to the Licensed Marks and Name, and the Plan agrees that it will promptly discontinue all use of the Licensed Marks and Name, will not use them thereafter, and will promptly, upon written notice from BCBSA, change its corporate name so as to eliminate the Licensed Name therefrom.

Paragraph 15 describes termination of the License Agreement under certain circumstances and preserves the idea of a reversion of rights to the Blues under specific circumstances. Paragraph 15 provides that if the License Agreement is terminated for reasons specified in Paragraph 15, “ownership of the Licensed Marks shall revert to each of the Plans as provided in the Ownership Agreement.”

The License Agreement expressly provides that it did not create partners, joint venturers, or any agency relationships. (Id., ¶ 20.)

The License Agreement includes several exhibits that contain material terms:

Exhibit 2 to the License Agreement includes Membership Standards that the Blues were required to follow. Standard 5 required the Blues to follow the BlueCard Program: “A Plan shall effectively and efficiently participate in Inter-Plan Programs, including, but not limited to the BlueCard Program and Inter-Plan Medicare Advantage Program, for the purposes of providing portability of membership between Plans and ease of claims processing for customers receiving benefits outside of Control/Home Plan's Service Area.”

Exhibit 3 sets forth certain Guidelines that the Blues were required to follow, including the policies and provisions governing National Accounts.

Exhibit 4 provides for circumstances where a Blue may use the licensed marks or “Brands” outside of its ESA, such as common business communications. Among other things, it regulates “Marketing Spillover”; provides specific limitations on the use of the Brand on

“Provider Contracting” (Exhibit 4, ¶ 2.3); and articulates use of the brand with regard to “Services to National Accounts.”

D. The Restraints

1. The ESA Restraint

The ESA provisions set forth above provide that each Blue is permitted to conduct business under the blue brand only in its ESA, subject to specific exceptions. With regard to the specific application of the ESA here, the Hospitals contend and the Blues agree that the License Agreement means that a Blue may not enter into contracts with hospitals or other health care providers outside of that Blue’s ESA under the licensed blue cross or blue shield marks. (5/14/26 Tx. at 167:16-168:12 and 169.) Several Blues have confirmed this understanding and interpretation of the License Agreement. (P. Mot. at 8-9, fns.21-24.)

The evidence shows that the License Agreements’ enforcement provisions regarding the ESA have force. Several Blues acknowledge that BCBSA through a vote of the Board of Directors may fine a Blue and modify or terminate its License Agreement if it does business outside its assigned ESA. (Dep. Ex. 632, p. BCBSA00302660-61; Exs. 309 & 310, ¶ 6.)

2. The BlueCard Program

Given the ESA provisions, the Blues had a practical business problem created by subscribers, such as national employers, that had employees or covered individuals who lived in disparate locations. If a Blue was precluded under the License Agreement from contracting with providers outside its ESA, how was a Blue to procure contracted health care providers for its blue-branded plan members who live in other ESAs? The Blues faced a tension between applying the ESAs to preclude a Blue from contracting with providers outside its ESA and the

business needs of each Blue to procure contracted services for members for whom it was responsible and who lived outside its ESA.

The Blues thus crafted the BlueCard Program, as memorialized in Membership Standard 5, which was adopted in 1992 and became mandatory in 1995.⁹ All the Blues are required to participate in the BlueCard Program as part of BCBSA National Programs as a condition of the License Agreement. (Opp. at fn. 4.) Under this program, each Blue agrees to reimburse providers outside of its ESA for services to its members at the rates that the local Blue has negotiated in its contracts with providers in its ESA. Essentially, Blues outside of an ESA in which a provider is located may piggyback on the contracted rates established by the Blue in that ESA with that provider. The program allows a Blue's members who live and/or receive care outside of the Blue's ESA to access care at rates contracted with the local Blue. By the same token, when a Blue contracts with a provider in its ESA, it brings the total volume of all the members of all the Blues as potential patients for that provider. BlueCard does not operate as between Blues in overlapping service areas, such as California, where multiple Blues may negotiate under the blue brand.

3. The National Best Efforts Rule

As noted above, the Blues had rights under the License Agreement to conduct business under different marks. In 2005, the Blues adopted the National Best Efforts ("NBE") standard or rule. (Opp. at 15.) The NBE rule provides, "At least 66-2/3% of the annual Combined National Net Revenue of a Plan and its Licensable Controlled Affiliates attributable to health care plans and related services (hereafter 'National Health Revenue') must be sold, marketed, administered

⁹ How the Blues paid for services to members outside their ESAs before the BlueCard program—other than by paying non-contracted full-billed rates—is an issue.

or underwritten under the Licensed Marks and Names.” (Ex. 152.) The Blues agree that, under this rule, each Blue was required to derive at least 66 2/3% of its national health revenue under the blue brand. (Opp. at 15.) The NBE rule was eliminated in April 2021 as part of a settlement in the *MDL Litigation*.

IV. DISCUSSION

A. Applicable Antitrust Standards

1. The Cartwright Act and the Sherman Act

The Cartwright Act was passed in 1907. It defines a “trust” as “a combination of capital, skill or acts by two or more persons for any” of several specified purposes, including the following: “To create or carry out restrictions in trade or commerce”; “To limit or reduce the production, or increase the price of merchandise or of any commodity”; and “To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.” (Bus. & Prof. Code § 16720.) Except as provided in the statute, “every trust is unlawful, against public policy and void.” (Bus. & Prof. Code § 16726.)

The parties dispute the extent of the applicability of federal law under the Sherman Act, which was passed in 1890, to the Cartwright Act. “The Sherman Act is the Cartwright Act’s federal counterpart.” (*Ahn v. Stewart Title Guaranty Co.* (2023) 93 Cal.App.5th 168, 179 fn.6.) They contain substantial similarities but notable differences. (*Id.* [summarizing notable differences: indirect purchasers have standing to sue under the Cartwright Act; mergers are not covered; and there is no analogue to the monopolization provision of Sherman Act § 2].)

The California Supreme Court has held, on the one hand, that “the Cartwright Act is patterned after the Sherman Act. Both have their roots in common law. Hence federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act.” (*Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 315; *Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 852 [same]; *Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 925 [“A long line of California cases has concluded that the Cartwright Act is patterned after the Sherman Act and both statutes have their roots in the common law. Consequently, federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act.”].) On the other hand, the California Supreme Court dived deeper into the Cartwright Act’s drafting history in *State of California ex rel. Van de Kamp v. Texaco, Inc.*, and concluded:

In the past, we have attributed various (and sometimes conflicting) roots to the Cartwright Act. We have (i) asserted that it was patterned after a proposed alternative bill to what became the Sherman Act (15 U.S.C. §§ 1–7) [citation]; (ii) suggested that it was modeled after the Sherman Act itself [citation]; and (iii) stated that it codified the common law [citation.] As discussed below, the first position—or at least a variation of it—is most historically correct, and it discloses most clearly the probable intent of the drafters.

((1988) 46 Cal.3d 1147, 1153-63 [providing a detailed analysis of the statutory history, principally to interpret the meaning of “combination”] and [superseded by statute on other grounds].) Based on *Texaco*, the court later stated, “Interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century.” (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1195 [addressing the Unfair Competition Law and accrual/discovery rule issues].)

The First District Court of Appeal has directed, “Because the Cartwright Act has objectives identical to the federal antitrust acts, the California courts look to cases construing the federal antitrust laws for guidance in interpreting the Cartwright Act.” (*Vinci v. Waste Management, Inc.* (1995) 36 Cal.App.4th 1811, 1814 n.1 [following standing analysis of *Associated General Contractors v. Carpenters* (1983) 459 U.S. 519, 535, under the Sherman Act].) As discussed below, the California Supreme Court regularly adopts principles articulated by the US Supreme Court under § 1 of the Sherman Act to be applicable under the Cartwright Act on issues directly relevant here—price fixing, market allocations, and group boycotts—including the standard for determining whether a matter should be determined under the rule of reason or per se rules.

2. Early Jurisprudence: The Rule of Reason and Per Se Doctrine Developments

Once upon a time, the common law set forth an absolute rule against the restraint of trade. (See *Wright v. Ryder* (1868) 36 Cal. 342, 357.) The rule was unworkable in a changing economy. (*Id.*) The courts developed the rule of reason under which only unreasonable restraints were prohibited but maintained a version of the old common law absolute prohibitions on certain restraints that were ruled to be prohibited per se. The two doctrines—per se and rule of reason—largely developed concurrently under both the Sherman Act and the Cartwright Act.

The rule of reason was announced principally by *Standard Oil Co. v. United States* (1911) 221 U.S. 1, 66 [“the construction which we have deduced from the history of the [Sherman] act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute, the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied”] and *United States v. American Tobacco Co.* (1911) 221 U.S. 106. The California Supreme Court similarly held that the broad

prohibitions of the Cartwright Act are subject to an implied exception similar to the one that validates reasonable restraints of trade under the Sherman Act. (*People v. Building Maintenance etc. Ass'n* (1953) 41 Cal.2d 719, 727.) In short, the rule of reason is a flexible analytical framework to determine whether a particular business practice or agreement unreasonably restrains trade that requires courts to weigh the anticompetitive effects of conduct against its procompetitive benefits to determine whether, on balance, the practice harms competition. (*Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.* (2020) 55 Cal. App. 5th 381, 400.)

Federal courts had also been applying the per se rule—or a version of it—under the Sherman Act since at the latest 1897. (*See U.S. v. Trans-Missouri Freight Ass'n* (1897) 166 U.S. 290 [price fixing among competing train lines].) While the language in *Standard Oil* was broad, *U.S. v. Trenton Potteries Co.* clarified that the per se rule remained applicable, at least for price fixing. ((1927) 273 U.S. 392, 396-98 [holding that “an agreement on the part of the members of a combination controlling a substantial part of an industry, upon the prices which the members are to charge for their commodity, is in itself an undue and unreasonable restraint of trade and commerce” and that the “aim and result of every price-fixing agreement” is to eliminate competition].) The Court explained that *Standard Oil* and the *Tobacco Cases* were not intended to apply to price fixing. (*Id.*; *see also U.S. v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150, 214 [“As clearly indicated in the *Trenton Potteries* case, the *American Tobacco* and *Standard Oil* cases have no application to combinations operating directly on prices or price structures.”].)

The logic of *Trenton Potteries* and *Socony-Vacuum Oil* was that all price fixing agreements are unreasonable and cannot be saved by an inquiry into their reasonableness. Over

time, courts applied the same logic to other categories of restraints. *Northern Pacific R. Co. v. United States* summarized:

‘(T)here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are *price fixing*, [citation]; *division of markets*, [citation]; *group boycotts*, [citation]; and *tying arrangements*, [citation].’

((1958) 356 U.S. 1, 5 [emphasis added].)

California too applied the per se rule along with the rule of reason under the Cartwright Act and followed the same logic. Beginning with dynamite, the California Supreme Court struck down under the common law an agreement dividing territorial markets by precluding “shipment of dynamite to any part of the United States lying east of the eastern boundaries of Montana, Wyoming, Colorado, and New Mexico.” (*Vulcan Powder Co. v. Hercules Powder Co.* (1892) 96 Cal. 510, 514.) The court later explained, “The Cartwright Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law. ... The public interest requires free competition so that prices be not dependent upon an understanding among suppliers of any given commodity, but upon the interplay of the economic forces of supply and demand.” (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 44.) California later directly adopted under the Cartwright Act the holding and language in *Northern Pac. Ry. Co.* set forth above. (*Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co.* (1971) 4 Cal.3d 354, 361 [applying per se rule to group boycott claim based on bid

rigging]; see also *Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 853 [quoting *Northern Pac. R. Co. v. United States* (1958) 356 U.S. 1, 5].) As the First District articulated early on:

The ‘per se’ doctrine means that a particular practice and the setting in which it occurs is sufficient to compel the conclusion that competition is unreasonably restrained and the practice is consequently illegal. In the ‘rule of reason’ category, however, the conclusion does not follow from the mere showing of the conduct and its setting but requires the complicated and prolonged economic investigation to produce evidence that warrants an inference that the purpose of the actor or the actual or probable consequences of the act was to hinder competition, as well as on probable competitive effects.

(*People v. Santa Clara Val. Bowling Proprietors' Ass'n* (1965) 238 Cal.App.2d 225, 234.)

3. Antitrust Jurisprudence Evolved

Antitrust law evolved. It turns out that not all agreements under the traditional four categories of agreements that have been historically reviewed under a per se standard—price fixing, group boycotts, market allocations, and tying—are always in all situations subject to a per se standard of review, even for horizontal restraints.

Whereas *Oakland-Alameda County Builders' Exchange* held, “We need not belabor the obvious in noting that group boycotts are illegal per se under traditional antitrust principles” (4 Cal. 3d at 365), *Marin County Bd. of Realtors v. Palsson* held that the claimed group boycott there was subject to the rule of reason. ((1976) 16 Cal.3d 920.) *Palsson* involved a trade association for realtors that enforced an “access rule” by which “the members of the board have agreed to withhold from nonmembers information on multiple listings, an agreement which could be interpreted as a concerted refusal to deal” and “an agreement by member brokers not to employ licensed part-time salesmen.” (*Id.* at 931.) The agreement was horizontal because the board members were realtors that competed with non-member realtors. The court, however, “hesitate[d] before mechanically applying a per se rule.” (*Id.* at 931.) The court distinguished

between “direct boycotts aimed at coercing parties to adopt noncompetitive practices and indirect boycotts which result in refusals to deal only as a byproduct of the agreement. ‘When the element of purpose to coerce the trade policy of third parties or to secure their removal from competition is absent, the policy question raised by agreements under which the parties mutually limit their own freedom to deal with outsiders becomes more difficult, and the courts have appropriately outlined wider limits before declaring such agreements illegal.’” (*Id.* at 932.) The court held, “This limitation on the per se rule is particularly applicable to trade association agreements not directly aimed at coercing third parties and eliminating competitors.” (*Id.* at 932.) The court explained that, post *Klor’s, Inc. v. Broadway-Hale Stores, Inc.* (1959) 359 U.S. 207, courts have applied the rule of reason to noncoercive agreements of voluntary associations, which indicates that trade associations may perform beneficial services for their members and society. “In the course of providing these benefits, the associations often exclude nonmembers. But such exclusion, unless directly aimed at eliminating competition, can rarely be said to be so inherently destructive or so devoid of any discernible benefit that the courts must condemn the policy without exploring its effects or the underlying rationale.” (*Id.* at 934.) The court then applied the rule of reason and found, nonetheless, that the rules violated the Cartwright Act as an unlawful restraint of trade.

The US Supreme Court also departed from categorically applying per se rules to group boycott restraints. The Court applied the rule of reason to a horizontal agreement among participating dentists in a dental association to withhold from their customers the service of forwarding x-rays to insurance companies along with claim forms. (*F.T.C. v. Indiana Federation of Dentists* (1986) 476 U.S. 447, 458 [“Although this Court has in the past stated that group boycotts are unlawful per se, [citations including *Klor’s*], we decline to resolve this case

by forcing the Federation's policy into the “boycott” pigeonhole and invoking the per se rule.”].) In its analysis, the Court noted that, for group boycotts, “per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor.” (*Id.* at 458.)

Similarly, despite the categorical emphasis in *Trenton Potteries*, the US Supreme Court held that not all price fixing agreements are per se. For example, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* held that ASCAP and BMI’s issuance to CBS of blanket licenses to copyrighted musical compositions at fees negotiated by them is not a per se price fixing violation even though blanket licenses involve the composers and publishing houses joining in an organization that sets its price. ((1979) 441 U.S. 1.) The Court pointed out that the blanket license is not a “naked restrain[t] of trade with no purpose except stifling of competition” but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use. (*Id.* at 20.) Although *Broadcast Music* involved an agreement among competitors (artists that compete), the Court noted that the restraint did not “wholly equate[] with a simple horizontal arrangement among competitors.” (*Id.* at 23.)

The US Supreme Court has given substantive guidance (aside from categories) to explain when per se rules apply as opposed to the rule of reason. *U.S. v. Topco Associates, Inc.* explained, “It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act.” ((1972) 405 U.S. 596, 607; *see also Arizona v. Maricopa County Medical Soc.* (1982) 457 U.S. 332, 344 [“Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.”].) In contrast, *Broadcast Music* noted, “We have never examined a practice like this one before,”

when applying the rule of reason to literal price fixing. (441 U.S. at 10.) *National Soc. of Professional Engineers v. U. S.* summarized: “agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality” are “illegal per se”; “agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed” are subject to rule of reason. ((1978) 435 U.S. 679, 692.) The inquiry focuses on “whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to increase economic efficiency and render markets more, rather than less, competitive.” (*Broadcast Music, Inc.*, 441 U.S. at 19–20.)

Along these lines, the US Supreme Court later applied the rule of reason to a horizontal price fixing and output limitations matter because it “involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.” (*National Collegiate Athletic Ass’n v. Board of Regents of University of Oklahoma* (1984) 468 U.S. 85, 101.) The Court explained, “Both per se rules and the Rule of Reason are employed ‘to form a judgment about the competitive significance of the restraint.’” (*Id.* at 103.) “[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition. Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition.” (*Id.* at 103–104.)¹⁰

¹⁰ Similarly, *Texaco Inc. v. Dagher* held that an agreement between Texaco and Shell in a joint venture to refine and sell gas under the original separate brands (Texaco) and (Shell) but setting a single price for both brands was not a per se price fixing violation. ((2006) 547 U.S. 1.) The logic was that Texaco and Shell did not compete but rather participated in the relevant market jointly—even though the gas was sold under separate brands. (*Id.* at 5–6.)

On the heels of *NCAA*, the US Supreme Court clarified, “The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like ‘per se,’ ‘quick look,’ and ‘rule of reason’ tend to make them appear.” (*California Dental Ass’n v. F.T.C.* (1999) 526 U.S. 756, 779 [holding “quick look” insufficient to justify finding that certain advertising restrictions adopted by the California Dental Association violated the antitrust laws and requiring rule of reason].) Justice Souter explained that “there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.” (*Id.* at 781.)

The US Supreme Court confirmed that it presumptively applies the rule of reason under the Sherman Act. (*Texaco Inc. v. Dagher* (2006) 547 U.S. 1, 5; *see also California ex rel. Harris v. Safeway, Inc.* (9th Cir. 2011) 651 F.3d 1118, 1133 [“The rule of reason is the presumptive or default standard”].)

The California Supreme Court expressly adopted Justice Souter’s language from *California Dental Assn.* as applicable to the Cartwright Act in *In re Cipro Cases I & II*. ((2015) 61 Cal.4th 116, 148.) In determining whether the rule of reason or per se applied to reverse payment patent settlements, the court set forth the governing principles California courts must apply to make that determination.

The court explained that, under the rule of reason, “inquiry is limited to whether the challenged conduct promotes or suppresses competition.” (*Id.* at 146.) To determine whether an

agreement harms competition more than it helps, a court may consider “the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption.” (*Id.*) “Rule of reason inquiry is not required in every case” and the courts “have partially simplified the analysis by identifying categories of agreements or practices that can be said to always lack redeeming value and thus qualify as per se illegal.” (*Id.*) ““The per se rule reflects an irrebuttable presumption that, if the court were to subject the conduct in question to a full-blown inquiry, a violation would be found under the traditional rule of reason.”” (*Id.*) More recently, a third category, quick look rule of reason analysis, has emerged, applicable to cases where “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,” and where a defendant may be asked to come forward with procompetitive justifications for a challenged restraint without the plaintiff having to introduce elaborate market analysis first. (*Id.* at 146-47.)

The court then articulated the shift in antitrust jurisprudence: “There was a time when this court and the United States Supreme Court treated the choice between per se and rule of reason analysis as a necessary threshold inquiry involving rigidly distinct analytic boxes. In more recent years, however, the Supreme Court has explained, ‘[t]he truth is that our categories of analysis of anticompetitive effect are less fixed than terms like ‘per se,’ ‘quick look,’ and ‘rule of reason’ tend to make them appear. . . . [T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.”” (*Id.* at 147 [quoting *California Dental Assn.*].)

The court further explained that the emergence of quick look rule of reason analysis did not signal the supplanting of the traditional per se/rule of reason dichotomy with a new trichotomy but rather a shift to “something of a sliding scale” in “antitrust analysis.” (*Id.*)

The court concluded, “This more nuanced approach makes equal sense for claims under the Cartwright Act.” (*Id.*) The per se and rule of reason approaches “are but useful tools the courts have developed over time to carry out the broad purposes and give meaning to the general phrases of the antitrust statutes.” (*Id.*) The “analytic approach” “involves a continuum, with the ‘circumstances, details, and logic’ of a particular restraint dictating how the courts that confront the restraint should analyze it.” (*Id.* at 147.)

The court then explained that courts may tailor the analysis for the particular needs of the case: “In lieu of an undifferentiated one-size-fits-all rule of reason, courts may ‘devise rules ... for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.’” (*Id.* [quoting *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (2007) 551 U.S. 877, 898-99].)

The First District recognized that *In re Cipro* requires a “modern” “more nuanced” approach. (*Ben-E-Lect v. Anthem Blue Cross Life & Health Ins. Co.* (2020) 51 Cal.App.5th 867, 872–873 [“Historically, some combinations, such as agreements to fix prices, divide markets, or tie the purchase of one product or service to another, as well as certain boycotts, have been considered unreasonable per se and, therefore, illegal. [citations.] But the modern approach is more nuanced.” (citing *In re Cipro*)].) The court explained, “Now, the per se approach is viewed side by side with traditional rule of reason analysis that considers whether a given combination promotes or harms competition.” (*Id.*)

Under the developed Sherman Act jurisprudence, some lower federal courts apply the rule of reason when the restraint poses plausible procompetitive effects. (*See, e.g., In re Delta Dental Antitrust Litigation* (N.D.Ill. 2025) 800 F.Supp.3d 898, 910 [holding that “In short, because the record suggests that the ESAs serve a plausible procompetitive purpose, they must be evaluated under the Rule of Reason”; *but compare with Aya Healthcare Services, Inc. v. AMN Healthcare, Inc.* (9th Cir. 2021) 9 F.4th 1102, 1109 [holding that “not all horizontal restraints are analyzed pursuant to the per se standard” and under the “ancillary restraints” doctrine a horizontal agreement is “exempt from the per se rule” and analyzed under the rule-of-reason if the restraint is (1) subordinate and collateral to a separate “legitimate transaction” and (2) “reasonably necessary” to achieving that transaction’s pro-competitive purpose]; and *U.S. v. Apple, Inc.* (2d Cir. 2015) 791 F.3d 290, 326 [“a participant in a price-fixing agreement may invoke only certain, limited kinds of ‘enterprise and productivity’ to receive the rule of reason’s advantages. As [*Broadcast Music* explained], the per se rule would lose all the benefits of being ‘per se’ if conspirators could seek to justify their conduct on the basis of its purported competitive benefits in every case.”]) *In re Cipro*, however, did not expressly adopt that rule. Nor has any other cited California decision.

B. The ESA Restraint: Whether Per Se or Rule of Reason Applies Will Depend on the Blues’ Further Pre-Trial Evidentiary Showing

The parties do not dispute the ESA restraint’s material terms at issue.¹¹ The Blues have divided geographic regions in the United States into exclusive service areas—ESAs—in which

¹¹ The Blues argue that agreements must be assessed as of the time they were made in determining the standard of review, citing *In re Cipro*. (61 Cal.4th at 158.) Here, there is a fundamental issue as to when the operative agreements were made that are relevant to the ESA restraint. (See P. Reply at 8-9.) (In contrast, the dates for the BlueCard Program and the NBE

one Blue (for most regions) has exclusive rights to use the blue marks and to conduct health care insurance and financing business under the blue brand. The specific dimension of the ESA restraint at issue here is that the Blues have agreed that they may not contract with a hospital outside of its ESA under the blue brand. Particularly as to the plaintiff Hospitals, the Blues have agreed that only the California Blues may contract with hospitals located in California under the blue brand and that the non-California Blues may not do so. The Blues have entered these agreements with each other through contracts with BCBSA, an umbrella organization that is controlled by the Blues collectively. The Hospitals argue that the ESA restraint constitutes both per se market allocation and per se group boycott violations under the Cartwright Act.¹²

1. Market Allocation

The First Count asserts a claim for market allocation under the Cartwright Act. As noted in *Oakland-Alameda*, market allocation is one of the types of agreements that have traditionally been categorized as a per se violation, and the principle goes back to *Vulcan*. Here, the Blues

rule are more definite.) The operative agreements are, undisputedly, the 1991 Licensing Agreements that superseded all prior license agreements. The roots of the Blue Cross ESAs can arguably be traced back to the 1954 license agreement. But the terms of the 1991 License Agreements are materially different and reference the Blues' service areas in 1972, when the Blues entered a different license agreement. The Blues agreed to the 1991 License Agreement after considering material matters regarding the ESAs' impact on competition raised during the Long Term Business Strategy and Assembly of Plans in the 1980s. The 1991 License Agreements arguably constitute new agreements. The roots of the Blue Shield ESAs in the 1991 Blue Shield License Agreements, however, do not appear to be traceable to the 1952 license agreement, which had no corresponding ESA provisions. Yet, all the ESAs are based on the initial assignment from the plans to BCBSA's predecessors in the 1940s, which is critical to the Blues' arguments. The ESAs are thus informed by multiple agreements made at different times, some in the 1940s, 1950s, 1970s, and ultimately in 1991. The Court takes a practical approach to consider all the relevant facts to implement *In re Cipro*'s mandate to carry out the broad purposes of the Cartwright Act.

¹² The Hospitals' counsel earlier represented that the market allocation and group boycott legal theories are based on the same material facts.

have divided up territorial markets by ESAs. The divisions are based on allocations of trademark rights, *i.e.*, territories where the Blues may conduct business under the blue brand, as there are no territorial restrictions on the Blues conducting green-branded business. This case thus involves the intersection of trademark and antitrust law. The Hospitals argue that the Blues' ESAs are per se violations under *U.S. v. Sealy, Inc.* (1967) 388 U.S. 350, *U.S. v. Topco Associates, Inc.*, and the related line of decisions. The Blues argue that the License Agreements have procompetitive benefits because they settle pre-existing common law trademark rights that the Blues or their predecessors-in-interest owned—a material factor absent in *Sealy* and *Topco*—justifying the application of the rule of reason. The Hospitals dispute the Blues' proffer at every material factual and legal juncture as well as the legal paradigm to analyze the question.

a) *Sealy* and *Topco*: Market Divisions Based on Allocation of Territorial Trademark Rights

Sealy involved a company—Sealy, Inc.—in the business of licensing manufacturers of mattresses and bedding products to make and to sell products under the Sealy name and trademarks, allocating exclusive territories to manufacturer-licensees. (388 U.S. at 351.) “Sealy agreed with each licensee not to license any other person to manufacture or sell in the designated area; and the licensee agreed not to manufacture or sell ‘Sealy products’ outside the designated area. A manufacturer could make and sell his private label products anywhere he might choose.” (*Id.*) The Court found that the restraint was horizontal because the licensees owned substantially all of Sealy's stock; Sealy's board of directors were all licensee-stockholders; and the licensees controlled Sealy's day-to-day business, “including the grant, assignment, reassignment, and termination of exclusive territorial licenses.” The Court explained, “The territorial arrangements must be regarded as the creature of horizontal action by the licensees. It would violate reality to treat them as equivalent to territorial limitations imposed by a manufacturer upon independent

dealers as incident to the sale of a trademarked product. Sealy, Inc., is an instrumentality of the licensees for purposes of the horizontal territorial allocation. It is not the principal.” (*Id.* at 354; see also *American Needle, Inc. v. National Football League* (2010) 560 U.S. 183, 191.)

Sealy also involved price fixing, which was not at issue on appeal. The Court explained, “The territorial restraints were a part of the unlawful price-fixing and policing,” as each licensee had an enclave to maintain resale prices free from the danger of outside incursion. (388 U.S. at 356.) The territorial restraint’s connection with price fixing, the Court held, was sufficient to find it an unlawful per se restraint under the Sherman Act. (*Id.* at 356-57.)

Topco involved a company—Topco, Inc.—that served as a purchasing agent and a cooperative association for 25 independent supermarket chains that procured and distributed items to its members. (405 U.S. at 598.) The members owned all Topco stock, and Topco’s board was composed of its members’ executive officers. (*Id.*) A group of small independent grocery chains founded Topco to compete with larger chains. (*Id.* at 599.) Topco’s members agreed with Topco to designate the territory in which that member obtained exclusive rights to sell Topco-brand products. The exclusivity provisions combined with veto power over new members insulated members from competition in Topco-brand goods. Topco had power to terminate membership for violation of the licenses. (*Id.* at 602.) The Court reiterated that one of the classic examples of a per se violation of § 1 of the Sherman Act is an agreement between competitors at the same level of the market structure [horizontal] to allocate territories in order to minimize competition. “This Court has reiterated time and time again that ‘(h)orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.’ [citation.] Such limitations are per se violations of the Sherman Act.” (*Id.* at

608.) Finding *Sealy* to be “on all fours,” the Court held that the restraint there was horizontal and a per se violation of the Sherman Act. (*Id.*)

The trial court in *Topco* applied the rule of reason and found that the restraint was reasonable, but the Court held that how the Court would rule under the rule of reason was irrelevant. “The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules.” (*Id.* at 609–610.) The Court added, “Implicit in [the] freedom [to compete enshrined in the Sherman Act] is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.” (*Id.* at 610.) The Court rejected the district courts’ argument that the limitation on Topco members to compete with each other was justified because it fostered competition between members and other large supermarket chains, principally because Topco had no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy. (*Id.* at 610-11.) That, the Court held, is a determination for Congress. (*Id.* at 611 “If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts.”)

Topco clarified *Sealy*’s discussion regarding the aggregation of restraints. “It is true that in *Sealy* the Court dealt with price fixing as well as territorial restrictions. To the extent that *Sealy* casts doubt on whether horizontal territorial limitations, unaccompanied by price fixing, are per se violations of the Sherman Act, we remove that doubt today.” (405 U.S. 596, 609 n.9.)

The Blues question whether *Sealy* and *Topco* remain good law.¹³ *Topco* has neither been overruled nor vitiated, and the US Supreme Court affirmed *Topco* in *Palmer v. BRG of Georgia, Inc.* in applying per se standards to an agreement between two bar review companies to divide markets. ((1990) 498 U.S. 46, 47, 49 [holding that an agreement that gave BRG an exclusive license to market HBJ's material in Georgia and to use its trade name “Bar/Bri,” that HBJ would not compete with BRG in Georgia, and that BRG would not compete with HBJ outside of Georgia was unlawful on its face].) As to California, *In re Cipro* adopted *Topco* in 2015 under the Cartwright Act for the proposition that:

[B]usinesses may not engage in a horizontal allocation of markets, with would-be competitors dividing up territories or customers. (*United States v. Topco Associates, Inc.*, supra, 405 U.S. at pp. 608, 612, 92 S.Ct. 1126; *Vulcan Powder Co. v. Hercules Powder Co.*, supra, 96 Cal. at pp. 514–515, 31 P. 581; *Guild Wineries & Distilleries v. J. Sosnick & Son* (1980) 102 Cal.App.3d 627, 633–635, 162 Cal.Rptr. 87.) Such allocations afford each participant an “enclave ..., free from the danger of outside incursions,” in which to exercise monopoly power and extract monopoly premiums.

(*In re Cipro*, 61 Cal.4th at 148.) Regardless of how *Sealy* and *Topco* have been treated by lower federal courts under the Sherman Act, *In re Cipro* adopted *Topco* under the Cartwright Act.¹⁴

Here, the ESA restraint constitutes a horizontal agreement similar to that in *Sealy* and *Topco*, as the MDL court held. (See 308 F.Supp.3d at 1261.) Similar to the facts in *Sealy* and *Topco*: the Blues sell the same products to subscribers, including provider networks, and they all contract with providers, such as the Hospitals; they all have entered License Agreements with an umbrella organization—BCBSA, which they collectively control because their CEOs sit on

¹³ (See *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.* (D.C.Cir. 1986) 792 F.2d 210, 226 [“[*Sealy* and *Topco*] must be regarded as effectively overruled.”].) The Supreme Court, however, has continued to cite *Topco* positively afterwards.

¹⁴ *In re Cipro* also affirmed *Vulcan* and *Guild Wineries*, which held it unlawful for a manufacturer/distributor to terminate an independent distributor because it refused to accept the manufacturer’s territorial or customer restrictions among distributors. (102 Cal. App. 3d at 630.)

BCBSA's board; and BCBSA has power to take action against a Blue for violation of the License Agreement and its Membership Standards and Guidelines, including revoking the Blues' trademark rights. BCBSA is an instrumentality of the Blues no less than the umbrella companies in *Sealy* and *Topco*. The agreements here are horizontal, as evidenced by, among other things, the testimony by certain Blue CEOs that the Hospitals cited. The Blues all engage in the same business at the same level. Each Blue has agreed to conduct blue-branded business only in its ESA and not to contract with providers under the blue-brand outside its ESA. Accordingly, the Blues have divided territorial markets through licensing arrangements in a manner facially like that in *Sealy* and *Topco*. The agreements restrict Blue-on-Blue competition. Territorial market divisions have long been held to violate California's antitrust laws, going as far back as *Vulcan*. As the small grocers in *Topco* could not escape per se violation by arguing that their territorial allocations allowed them to compete better with larger chain supermarkets, any argument by the Blues that the ESAs allow them to compete better with large national health insurance carriers faces the same conclusion. Unless these decisions can meaningfully be distinguished, they would warrant applying per se rules here—particularly in light of the evidence regarding the Blues' considerations of the limitations the ESAs impose on competition.

The Hospitals argue that, as a legal matter, once the Court finds that the Blues have designated ESAs (territorial divisions) based on licensing of the marks by BCBSA to each Blue, the Court should end the analysis and hold that the restraint is subject to a per se rule. The Court, they argue, should not consider additional facts or legal arguments under *Topco*. This argument, however, harkens back to “a time” when courts “treated the choice between per se and rule of

reason analysis as a necessary threshold inquiry involving rigidly distinct analytic boxes”¹⁵ and conflicts with the approach under the Cartwright Act required by *In re Cipro*. Although *In re Cipro* adopted *Topco*, to the extent the limits on the analysis set by *Topco*, which are subordinate legal points, conflict with the more detailed and nuanced analysis required by *In re Cipro*, the latter governs under the Cartwright Act. On this point, the Hospitals’ interpretation of *In re Cipro*—in the briefs and at hearing—is too narrow. *Ben-E-Lect* confirmed that the Court should take a “modern” “more nuanced” approach and consider per se and rule of reason side by side.

b) The Blues’ Trademark-Settlement Justification

The Blues for the most part do not devote much effort to addressing *Topco* and *Sealy* on a granular level. But unless they can be meaningfully distinguished, they control. The argument the Blues make, however, to distinguish *Sealy* and *Topco* that the Court finds potentially viable is that the exclusive territorial rights there were distributed “top down” by the umbrella organizations that owned and allocated licensed territories without regard to whether the licensees originally owned the marks. (5/20/26 Tx. at 32.) Here, by contrast, the Blues contend that the rights were first transferred “bottom up” from the plans to the umbrella organizations and only then licensed back to the plans. (Id.) The Blues argue that the rule of reason applies because the License Agreements with their ESAs were entered into for the presumptively procompetitive purpose of allowing the Blues to protect the marks through federal registration under the Lanham Act.

¹⁵ One federal court described the categorical approach as a “tyranny of labels” that federal courts no longer follow. (*See North Jackson Pharmacy, Inc. v. Caremark RX, Inc.* (N.D. Ill. 2005) 385 F.Supp.2d 740, 751.)

The logic behind the Blues’ position that the Court finds warrants further inquiry proceeds as follows: Each Blue or its predecessor acquired rights to the marks under the common law by usage (see, e.g., D. Opp. at 7 [“The License Agreements Codify Existing Common-Law Trademark Rights”]), transferred the rights to the marks to the umbrella organization for practical business and legal purposes, and retained the original common law rights to use the marks in the relevant territory, which the Blues contend corresponds to each Blues’ respective ESA (see, e.g., D. Opp. at 20 [“ESAs Memorialize Historic Trademark Rights”]). So, if BCBSA were to be disbanded and all the License Agreements eliminated, the original common law trademark rights would revert back to each Blue, which could then prevent other Blues from conducting business under infringing marks in the relevant territory. (See, e.g., D. Opp. at 9 [“If the License Agreements were to end, the respective rights they protect would revert to each Plan”].) The License Agreement contemplates this possibility in Paragraph 15. (Ex. 309, ¶ 15 [reversion of rights].) Thus, for example, the California Blues could theoretically use their common law trademark rights to exclude all the non-California Blues from contracting with the Hospitals’ California facilities under the same blue marks. Going one step beyond, the Blues could then, in an effort to avoid litigation, enter into agreements with other Blues to settle their trademark rights. That hypothetical agreement would arguably be simply another version of the License Agreement. Hence, the License Agreements’ ESAs should be viewed as a settlement of trademark rights among contemporary concurrent users of the same marks, justifying the rule of reason based on the procompetitive benefits of settling trademark rights. This dynamic was not present in *Sealy* and *Topco* and would be meaningful if the facts are borne out.

(1) The Blues' Principal Authorities

The Blues point out that courts have held that contracts, in general, to settle disputed trademark rights have a pro-competitive component, at least under certain circumstances, as described in *1-800 Contacts, Inc. v. FTC* (2d Cir. 2021) 1 F.4th 102, and *Clorox Co. v. Sterling Winthrop, Inc.* (2d Cir. 1997) 117 F.3d 50. In *Clorox*, Clorox acquired the PINE-SOL mark and challenged agreements between its predecessor-in-interest and Sterling Winthrop, the prior owner of the LYSOL mark. “Each of the agreements derives from a trademark dispute” between the owners of the two marks dating from the 1950s. (117 F.3d at 52.) The court held that because the agreement “limits only the way that one competing trademark may be used, and does not significantly affect any competitor’s ability to compete, it does not violate the antitrust laws.” (*Id.*) The court explained that trademark agreements are common and favored, and the rule of reason applied in that case.

Unlike trademark agreements that in reality serve to divide markets, *see, e.g., Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951), and thus have been condemned as illegal per se under the antitrust laws, the agreement at issue here merely regulates the way a competitor can use a competing mark. Contrary to Clorox's argument, the agreement does not effect any of the types of restraints that have historically been condemned as illegal per se, such as price fixing, market divisions, tying arrangements, or boycotts. Accordingly, we must examine the summary judgment evidence in accordance with “rule of reason” analysis.

(117 F.3d at 55–56.) In applying the rule of reason, the court explained:

We note, however, that the pro-competitive justifications of the agreement bolster our conclusion that the agreement does not violate the antitrust laws. As we stated previously, trademark agreements are favored in the law as a means by which parties agree to market products in a way that reduces the likelihood of consumer confusion and avoids time-consuming litigation. Parties such as Clorox, Sterling, and their predecessors, are in a position to structure such agreements in the way that the parties believe best accommodates their interests in light of trademark law. Accordingly, in the absence of any evidence that the provisions relating to trademark protection are auxiliary to an underlying illegal agreement between competitors—such as the territorial market division condemned in *Timken*—and absent exceptional circumstances, we believe the parties' determination of the

scope of needed trademark protections is entitled to substantial weight.

(*Id.* at 60.)

Timken, with which *Clorox* contrasted itself, preceded and supported the holdings in *Sealy* and *Topco*, both of which cited *Timken*. (See *Topco*, 405 U.S. 596 at 608 [citing *Timken* for the proposition that horizontal territorial limitations are naked restraints of trade that are per se violations of the Sherman Act]; *Sealy*, 388 U.S. at 354-55 [relying on *Timken* to conclude the aggregation of restraints in *Sealy* violated the Sherman Act].) *Timken* involved an agreement between US, British, and French companies, all using the “Timken” mark, to divide world markets for antifriction bearings. (*Timken Roller Bearing Co. v. U.S.* (1951) 341 U.S. 593, 595). The Court found that the parties “(1) allocated trade territories among themselves; (2) fixed prices on products of one sold in the territory of the others; (3) cooperated to protect each other's markets and to eliminate outside competition; and (4) participated in cartels to restrict imports to, and exports from, the United States.” (*Id.* at 596-97.) The Court rejected the claim that “the restraints of trade be justified as reasonable steps taken to implement a valid trademark licensing system” (*id.* at 598) and affirmed the trial court’s order finding a Sherman Act violation.

1-800 Contacts involved online advertisements for the sale of contact lenses. The petitioner sued and sent cease-and-desist letters to its competitors alleging trademark infringement regarding online ads and entered 13 settlement agreements to resolve most of the disputes. “Each of these agreements includes language that prohibits the parties from using each other's trademarks, URLs, and variations of trademarks as search advertising keywords. The agreements also require the parties to employ negative keywords so that a search including one party's trademarks will not trigger a display of the other party's ads. The agreements do not prohibit parties from bidding on generic keywords such as ‘contacts’ or ‘contact lenses.’” (1

F.4th at 111.) The FTC applied a standard of review akin to a “quick look,” but the court held that the rule of reason applied. In discussing the procompetitive justifications during a rule of reason analysis, the court followed *Clorox*’s holding that efforts to protect trademarks serve the competitive purpose of furthering trademark policies. The Court, however, cautioned:

That does not mean that every trademark agreement has a legitimate procompetitive justification. If the “provisions relating to trademark protection are auxiliary to an underlying illegal agreement between competitors,” or if there were other exceptional circumstances, we would think twice before concluding the challenged conduct has a procompetitive justification. [citation.] As in *Clorox*, however, there is a lack of evidence here that the Challenged Agreements are the “product of anything other than hard-nosed trademark negotiations.”

(*Id.* at 120.)

Assuming a factual basis for the Blues’ proffer that each Blue had preexisting common law trademark rights to the marks in its ESA, no cited decision under the Cartwright Act addresses the factual permutation at issue here. The closest cited decisions under the Sherman Act are *In re Delta Dental Antitrust Litigation* (N.D. Ill. 2025) 800 F.Supp.3d 898, and the MDL court’s orders.

In 2018, the MDL court applied *Sealy* and *Topco* to hold that the per se standard of review applied. (*In re Blue Cross Blue Shield Antitrust Litigation* (N.D. Ala. 2018) 308 F.Supp.3d 1241.) The MDL court’s first decision did not analyze this trademark-based justification for the ESAs in any detail. (See 308 F.Supp.3d at 1269-71 [addressing the Blues’ arguments to distinguish *Sealy* and *Topco* on “unique product” and “cooperative ventures” grounds but not the trademark-based justification]. About four years later the MDL court reconsidered the issue, found that there was “Daylight Between” this case and “*Topco* and *Sealy*,” and held that the ESA restraint should be reviewed under the rule of reason for the period after April 2021 when the NBE restraint was eliminated. That decision rested partially on the

de-aggregation of the NBE and ESA restraints and partially on the trademark-settlement-based justification. (*In re Blue Cross Blue Shield Antitrust Litigation* (N.D. Ala., Aug. 9, 2022, No. 2:13-CV-20000-RDP) 2022 WL 3221887, at *5-6.) The MDL court, however, continued to apply per se to the ESAs for the period before April 2021 when the NBE rule was in effect—regardless of the trademark-based justifications, which are the same ones the Blues advance here for the period before and after the NBE rule was lifted. (*Id.*)

Delta Dental described factual and legal issues under the Sherman Act involving exclusive service areas—also called “ESAs” in that context—to use the Delta Dental brand that resemble those here. The court distinguished the restraints there based on the history of the group dental plans and their relationship to the Delta Dental System as it exists today from the restraints that courts have previously held to be unlawful per se, although it did not contrast the facts of any prior decision. (800 F.Supp.3d at 906.) The court described an overview of the Delta Dental system’s history and then pointed out that the “ESA” there had some putatively procompetitive benefits: Encouraging “Member Companies” to recruit providers in less populated areas as well as urban areas; discouraging “free-riding off the network-building efforts”; and preventing marketplace confusion. (800 F.Supp.3d at 909.) Similar logic for procompetitive effects would apply here based on the Blues’ argument that the license agreements constitute a settlement of preexisting trademark rights.¹⁶

The only cited decision that addressed an agreement settling trademark infringement claims based on concurrent use in territorially divided areas is *VMG Enterprises, Inc. v. F. Quesada & Franco, Inc.* (D.P.R. 1992) 788 F.Supp. 648, 651, 657, which involved a challenge

¹⁶ As discussed below, *Delta Dental* is distinguishable and not persuasive on other issues, but its holding regarding the putative procompetitive benefits of the ESAs are informative here.

to a concurrent use agreement and subsequent registration under Section (d) of the Lanham Act.¹⁷ The court—in 1992—found the challenge to the concurrent use agreement as a horizontal division to be a novel issue and did not condemn the agreement as a per se violation of the antitrust laws. (*Id.* at 654.) That court explained that “the territorial division in question is legitimate under both common law and by statute, as intended to promote the underlying principles of the trademark laws in general and the Lanham Act, to wit: the avoidance of consumer confusion and protection of a party's investment in developing the goodwill of its products.” (*Id.* at. 657 [citing *Application of Beatrice Foods Co.*, 429 F.2d at 472].) It held that the “concurrent use agreement” and registration there did not “create” “trademark territorial division” but “merely recognized it.” (*Id.*) The Hospitals do not meaningfully distinguish *VMG*. (Reply at n.18.) The Blues’ argument—at its essence—is that they concurrently used the marks before the 1950s, and, instead of entering concurrent use agreements, they centralized their purported rights in BCBSA’s predecessors, which then redistributed them to the Blues. The corresponding point here is that, if the Blues have common law rights as they claim, they can enter similar concurrent use agreements—such as the License Agreements—that would be subject to a rule of reason analysis as in *VMG*. Remarkably, neither side cites a post-1992 decision on this precise issue.

(2) Analysis of the Blues’ Legal Arguments to Distinguish *Sealy* and *Topco*

The Court finds that, while *Sealy* and *Topco* are very close, the totality of these considerations is sufficient to distinguish them if the Blues can satisfy the foundational showing

¹⁷ *adidas-America, Inc. v. Payless Shoesource, Inc.* (D. Or. 2008) 546 F.Supp.2d 1029, 1080, cited by the Blues, considered a misuse-unclean hands defense under Section 1 of the Sherman Act and appears inapposite.

necessary to support their argument. If the Blues’ factual arguments bear out and the finder of fact concludes that the License Agreements constitute a legitimate settlement of previously-owned trademark rights, then the ESAs have some procompetitive justification as discussed in *Clorox*, *1-800 Contacts*, *Delta Dental*, and *VMG*. And, in that event the ESAs here would be sufficiently different from the “top-down” allocations in *Sealy* and *Topco*. Settlement of trademark rights helps strengthen the marks. Strengthening the marks helps the Blues avoid the likelihood of confusion and discourages free-riding, which have procompetitive benefits. In that event, the substantive grounds for applying per se rules—that the restraint only has anticompetitive effects—would not warrant applying per se rules to the ESAs, and the restraint here would be novel enough to warrant the rule of reason. If the purported settlement of previously-owned trademark rights, however, was without foundation, was illegitimate, a sham, or a pretext for the allocations of territorial markets that BCBSA distributed to the Blues in the 1991 License Agreement, then the Blues would be unable to meaningfully distinguish *Sealy* and *Topco*. To use the MDL court’s phrase, there would be no “daylight” between *Sealy* and *Topco*.

The Hospitals dispute whether any Blue had preexisting common law trademark rights, including whether the Blues satisfy necessary legal common law requirements, as well as material components of the Blues’ origin story. There are disputes, for example, as to where or in what geographic markets the marks were used first and by whom, how they were used, as service marks or collective marks or in some other manner, whether there was any secondary meaning, or whether the marks were legally protectable under the common law. The Blues, however, have presented significant evidence of early use. The Blues have also presented evidence to support the broad outlines of their origin story as set forth above. Some evidence specifically suggests that the plans that agreed to the first license agreements had disputed

trademark issues and that settling those disputes was one motivation in the initial assignment of rights to the umbrella organization and the related initial license agreement. The evidence also suggests that the original plans that assigned rights to AHA did so in “trust” while preserving certain reversion of rights. In sum, the Blues have presented sufficient evidence not to dismiss their proffer factually out-of-hand on this motion as the Hospitals suggest. This, however, does not end the inquiry as the Blues argue but warrants further analysis.

(3) Factual and Legal Gaps

At this point, gaps in both the evidence and the legal analysis are prominent. For example, factually, the evidence does not trace each Blue’s corporate lineage back to the plan that initially assigned rights to BCBSA’s predecessor in the 1940s. So, even if the Blues are correct about which plan used the marks where, the Blues have not yet necessarily tied themselves to those original plans. The Blues have not shown that their ESAs correspond to the territorial rights of their corresponding early plans. Further, the factual history here between the blue shield and blue cross marks is not identical and different conclusions might apply. The 1952 blue shield license agreement lacked any exclusive service area provisions, so the justification for the ESAs in the 1991 Blue Shield License Agreements cannot be traced back to the original license agreement; but they might be traceable back to the territorial common law rights of the predecessor plans. And, even assuming some early use of the marks before the first license agreements, whether that use was sufficient to attach common law rights that could be transferred to BCBSA’s predecessors is unclear.

To the last point, whether the facts legally warrant the attachment of common law rights to exclude other plans from using infringing marks in a relevant geographic location is contested. That analysis must be done under the applicable common law, whether California’s or foreign

state law for Prime’s non-California facilities. (See VHS Plaintiffs Statement of Claims.) For example, California has recognized common law trademark rights since 1865. (*See Derringer v. Plate*, 29 Cal. 292 (1865).) California later passed a statutory scheme but preserved certain rights established under the common law. (See Cal. Bus. & Prof. Code § 14259 [“Nothing herein shall adversely affect the rights or the enforcement of rights in marks acquired in good faith at any time within common law”]; *Weatherford v. Eytchison*, 90 Cal. App. 2d 379 (1949) [holding that the statutes constituted “but an affirmance of the common law”].) California’s common law had its specific requirements and limitations—including actual use and geographic limitations. (See, e.g., *Derringer*, 29 Cal. at 294-95 [“Any name, symbol, letter, figure or device adopted by the persons manufacturing or selling goods, and used and put upon such goods to distinguish them from those manufactured or sold by others, and employed so often and for such a length of time, as to raise the presumption that the public would know that it was used to indicate ownership of the goods in the person manufacturing or selling them, constitutes his trade mark:”]; *Weatherford v. Eytchison*, 90 Cal. App. 2d 379 (1949) [holding rights limited to geographic area of actual use, modifying a statewide injunction to cover only the “City of Los Angeles,” where the plaintiff had actually conducted business, and not to cover the “State of California”].)

The parties, however, should in the first instance identify the necessary legal elements and whether the evidence is sufficient to support them. For example, the Hospitals in a post-hearing brief argue that the common law did not afford trademark protections to marks used in connection with the sale of services, so the plans had no relevant common law rights—an issue that warrants more analysis. (P. Supp. Br. at 11.) In any event, the legal conclusion that

common law trademark rights attached and the scope of those rights will depend upon the particular factual showing under the applicable common law, an analysis not yet done.¹⁸

(4) The Parties' Positions on the Foundational Requirements to Support the Blues' Trademark-Settlement-Based Justification

The parties dispute the foundational factual showing that the Blues must make to justify a rule of reason analysis at trial given the Blues' proffered trademark-settlement-based justification. Each side presents diametrically opposed views. The Hospitals argue that, for the Blues' justification to be viable at all and to sufficiently distinguish *Sealy* and *Topco*, the Blues must establish that each Blue had preexisting common law trademark rights everywhere in the United States. (P. Reply at 18.) The Blues, on the other hand, argue that their trademark settlement justification does not require that they prove that they had any common law trademark rights at all—anywhere—before the first license agreements issued in 1952 and 1954. They argue that simply entering the licensing agreements to protect the marks through federal registration under the Lanham Act is sufficient to establish a procompetitive purpose to warrant the rule of reason. They rely principally on *Clorox*, *1-800 Contacts*, and *Delta Dental* to support that proposition. (See, e.g., 5/20/2026 Tx. at 159; D. Submission on Tentative Order at 2.)

The Court finds neither sides' position persuasive. *In re Cipro*'s direction that courts may devise rules for offering proof as well as presumptions where justified applies here. The circumstances, details, and logic of the ESAs and the specific issues here require a bespoke solution. (61 Cal.4th at 147.) The Court identifies a separate position to carry out the broad purpose of the Cartwright Act.

¹⁸ The Hospitals touch on this in their June 5, 2026, Supplemental Brief. (Supp. Br. at 11-12.) This analysis should be done systematically as discussed below.

As to the Blues' argument: The Blues' Opposition is permeated with the proposition that the plans in the 1940s had preexisting common law trademark rights and that they settled them by centralizing them and memorializing them in the first license agreements, which they argue is reflected in the operative 1991 License Agreements. (See, e.g., D. Opp. at 7 [“The License Agreements Codify Existing Common-Law Trademark Rights” and “[T]he initial 1950s License Agreements granted rights to the federal Blue Marks that *precisely tracked the rights each Plan was already exercising at common law.*” (emphasis in original)]; id. at 8 [“The Blue Shield Agreements . . . explicitly preserv[ed] local rights to the marks, which, at common law, included the right to exclude . . . while simultaneously protecting the mark against third-party infringement”]; id. at 9 [“[I]f the License Agreements were to end, the respective rights they protect would revert to each Plan.”]; id. at 27 [“ESAs Memorialize Historic Trademark Rights”]; and id. at 20 [“neither [*Sealy* nor *Topco*] involved the centralization and codification of *rights that were independently developed at common law*” (emphasis added)].) The Blues argue, however, that “the Court need not make any final determination that every Blue Plan acquired common law trademark rights. The law expressly permits parties to settle their trademark rights in order to protect them and minimize disputes.” (D. Opp. at 21.)

The Blues' argument hinges on the jury's finding that the License Agreements legitimately settled the early plans' common law trademark rights. Absent sufficient facts for a jury to find that the relevant plans that purportedly transferred common law trademark rights to BCBSA's predecessors in the 1940s and then entered the 1952 and 1954 license agreements had a reasonable factual and legal basis to believe that they had common law trademark rights in the

relevant geographical areas to settle,¹⁹ the jury would not be able to find that the License Agreements constitute a legitimate settlement of trademark rights as opposed to a trademark agreement that is auxiliary to an illegal agreement as in *Topco* and *Timken*. In that event, this case cannot be meaningfully distinguished from *Topco* and *Sealy*.

First, absent a showing of antecedent trademark rights, the Blues cannot show that any meaningful rights were transferred from the plans to AHA and BSMCP and cannot show any “bottom up” transfer. The evidence would only show a “top-down” transfer from the umbrella organizations. That would be materially no different than *Topco*—an allocation of geographic markets from a member-controlled umbrella organization to member organizations based on exclusive rights to sell products in geographic markets. The centralization or pooling of rights to register under the Lanham Act that the Blues argue warrants the rule of reason would be meaningless because the plans would not have had any antecedent rights to legitimately centralize. The centralization or “pooling” would be nothing more than legally insignificant events precipitating a *Topco*-like, unlawful allocation.

Second, the Blues’ argument that the Court finds persuasive is that, as in *VMG*, the License Agreements merely “recognize” territorial trademark rights among concurrent users that already existed and did not “create” them. In some ways, this might be the ultimate factual question on this issue: Did the License Agreements create the ESAs or recognize preexisting trademark rights? If the License Agreements created the trademark rights, this case is not meaningfully different than *Topco* (and *Sealy* and *Timken*). If they were recognized, then they are meaningfully different for the reasons set forth above. Absent a showing of antecedent

¹⁹ The Court uses “antecedent trademark rights” below as shorthand for “reasonable factual and legal basis to believe in the existence of antecedent common law trademark rights in the relevant geographical areas.”

trademark rights, the distinction that *VMG* made, that the Blues promote here, and that the Court accepts, would not apply as there would be no antecedent rights for BCBSA and the Blues to have observed in the License Agreements.

Third, *Clorox* and *1-800 Contacts* distinguished legitimate trademark settlement agreements from sham or pretextual agreements that contain trademark protections that are auxiliary to an underlying illegal agreement as in *Timken*. (*Topco* could substitute for the same proposition.) A showing of antecedent trademark rights is necessary under the facts of this case for the jury to find that the Licensing Agreements are not merely auxiliary to an illegal agreement to divide markets.

Clorox and *1-800 Contacts* cannot be adopted here wholesale but must be viewed in context because their facts are fundamentally different. Neither case involved facts that showed collusion between the settling parties, a sham or pretextual agreement, “or anything other than hard-nosed trademark negotiations.” (*Clorox*, 117 F.3d at 60-61; *1-800 Contacts*, 1 F.4th at 120.) The agreements there did “not effect any of the types of restraints that have historically been condemned as illegal per se, such as . . . market divisions,” as in *Timken*. (See 117 F.3d at 56.) And, as noted, *Clorox* found that the agreements there did not significantly affect any competitor’s ability to compete. As the Hospitals point out, the settlements there did not allocate territories. (P. Mot. at 28.) In contrast, the Hospitals cite evidence to support a finding that the Blues entered an illegal agreement to eliminate competition and allocate markets and that the ESAs restrict the Blues’ ability to compete. That includes the CEOs’ statements and the evidence of considerations during the Assembly of Plans, all at minimum permitting an inference that the Blues opted for the current ESAs to allocate markets for the purpose of eliminating competition. The evidence here does not show “hard-nosed bargaining” over trademark rights

like that in *Clorox* and *1-800 Contacts*, but, at the same time, some evidence reflects disputes between some early plans over trademark rights before the first license agreements. The point here is that applying *Clorox* and *1-800 Contacts* to this case must be measured.

The Blues agree that the upshot of this holding in *Clorox* and *1-800 Contacts* is that a party cannot use trademarks as a “pretext for violating the antitrust laws” and that it guards against “sham” trademark agreements. (Def. Supp. Br. at 1-2). The Blues argue, however, that the question of “pretext” or a “sham” agreement only arises when applying the rule of reason analysis and not at this stage. (Id.) While *Clorox* and *1-800 Contacts* articulated the principle while engaging in the second stage of a rule of reason analysis, the Court finds the same principle is informative at this stage, at least in this case. Even if the Court applies the Blues’ test that they need only show a plausible procompetitive benefit to warrant the rule of reason, the Blues do not credibly articulate why they would have a plausible procompetitive justification if the ESAs in the License Agreements were a “sham” or were “pretextual” agreements purporting to settle non-existing antecedent trademark rights. *Clorox*’s citation to *Timken* shows that the principle applies at this stage as *Timken* was a per se case; if the Court finds that there was an illegal underlying agreement similar to *Timken*, then the per se rule would apply and the second stage of the rule of reason analysis would not be reached. If the purported settlement of trademark rights was illegitimate, a “sham” or “pretextual,” it cannot support any procompetitive justification to warrant the rule of reason.

The Blues understand this point as they argue that “legitimate trademark agreements at least potentially serve the procompetitive purpose of advancing trademark policies.” (Def. Supp. Br. at 2.) The showing required by this Court only requires sufficient evidence necessary for the jury to find that the ESAs constitute “legitimate trademark agreements” and not shams or

pretexts. The Blues also understand this as they further argue that their evidence already establishes “legitimate trademark agreements.” (Id. at 5-7.) On this point, however, the Court requires evidence sufficient to find antecedent trademark rights before submitting the issue to the jury to determine the ultimate question of whether the License Agreements, in fact, constitute legitimate agreements to settle trademark rights.

The Blues argue that showing antecedent organic use of the marks is sufficient without showing the existence of any antecedent trademark rights. But organic antecedent use without the attachment of common law rights has no legal meaning. It would not justify distinguishing *Topco*. For its part, *Delta Dental* does not explain how it would. Only if some common law rights attached through the organic use would the initial transfer from the plans to BCBSA’s predecessors in the 1940s be meaningful for purposes of constituting some form of a legitimate settlement.

In short, if the Blues lack antecedent trademark rights, then the Blues cannot prove the existence of relevant substantive, common-law trademark rights that were supposedly transferred to BCBSA’s predecessors and settled in the first license agreements. In that event, insufficient evidence would exist to conclude that the relevant ESAs in the License Agreements are legitimate settlements of antecedent common law rights. And, the trademark-settlement justification for the ESA would fail. The Blues that cannot trace their ESAs back to antecedent common law rights have no justifiable procompetitive interest in excluding from their ESAs competitors using the same marks to avoid customer confusion, free riding, or any other interest based on trademark law. The Blues’ argument would be built on speculation and unsubstantiated abstractions. And, in that event, the territorial allocations under the License Agreements would be materially no different than the allocations in *Topco* and *Sealy*. Or, in the words of the

Second Circuit, the trademark protection in the License Agreements would be “auxiliary to an underlying illegal agreement between competitors.” Put yet another way, the common law trademark claim would be a pretext for carving up that particular market. And, in that event, the per se rules would apply to the market allocation claims by the particular Hospital against all the Blues who agreed to carve up and to boycott providers in that area.

There is a geographic component to this analysis because the early plans operated differently in disparate geographic locations under different legal jurisdictions that perhaps applied different legal principles. The Blues present a macro story, but the existence of antecedent trademark rights is not singular. The Blues agree that different plans had different claims to the marks in different parts of the United States. (Opp. at 6.) Currently, about 33 Blues exist whereas more than 100 plans existed before the 1990s. Each Blue and prior plan entered into a separate agreement with BCBSA or its predecessor. Each license agreement is a separate contract (although they would be interpreted together). And, the ESAs are not necessarily equal because the legitimacy of each ESA might differ. Some early plans might have had antecedent trademark rights to settle that would support a current ESA by the corresponding Blue, while others might not. One Blue’s ability to trace its ESA to antecedent rights would not justify the ESA of another Blue that cannot do so. For example, assuming only for argument, that the California Blues cannot establish any antecedent common law trademark rights, but the Minnesota Blue is able to do so based on the St. Paul plan’s early use of the marks and the applicable Minnesota common law, the Minnesota Blue’s tracing would not justify the allocation of the California market to the California Blues. An ESA so allocated by BCBSA would resemble the allocations *created* in *Sealy* and *Topco* as opposed to the *recognition* of an existing but disputed territorial right.

By the same token, even if antecedent trademark rights exist for some geographic areas, it might not necessarily support allocating an entire state under one ESA, particularly in California where trademark rights had geographic limitations under its common law, as noted above. For example, for argument's sake only, assuming the California Blues had antecedent trademark rights in the San Diego and Los Angeles areas, how a settlement of those rights supports allocating the territory around Arcata, California, near the Oregon border is unclear. The allocation of territories in the License Agreements that are not rationally related to the territory, i.e., the footprint, where antecedent trademark rights existed would be arbitrary. The Hospitals describe this point by arguing that the use of the marks by the early plans in "localized geographic market[s]" "does not correspond to the ESAs formalized . . . decades later in the 1991 [License Agreements]." (P. Reply at 17.) If the territories do not reasonably correspond, the Court would find the grants of exclusive territorial rights here no different than the unlawful exclusive territorial rights granted in *Sealy* and *Topco*.

The inquiry here must examine the fit between the geographic footprint of any antecedent common law rights and the ESAs allocated under the License Agreement. There must be some rational relationship between the original footprint and the ESA. The footprints that principally matter in this inquiry are ones that have some connection to the territory where a plaintiff Hospital is located. Absent a rational relationship, the License Agreements' allocation through the ESAs of a territory that covers a plaintiff Hospital would be arbitrary and not be reasonably tied to the settlement of any antecedent trademark rights.

The Blues argue that they have a single system-wide solution for all the Blues to enable federal registration and that there should be a single standard of review based on this restraint. The Court notes that accepting this view would make the Blues susceptible to the Hospitals'

argument that, if any part of that system-wide solution—i.e., any part of the group of settlements—is illegitimate, pretextual, or a sham, then the entire system is subject to per se. If the Blues’ 33 separate License Agreements, which are different contracts, and multiple ESAs, which have different histories based on 100 or more plans’ original use of the marks, cannot be segregated in any way and if part of the system is illegitimate, pretextual, or a sham, the entire system is tainted. The Hospitals’ arguments would be more persuasive than the Blues’ argument in that event. But the evidence shows that, although there is one system, it is composed of multiple components based on multiple contracts with multiple ESAs that emanate from different histories and different common law roots. As noted, some territorial allocations in the ESAs might be based on a legitimate trademark settlement, and others might not. (Or, possibly, all or none.) In any event, the Blues cannot justify the allocation of an ESA that is based on an illegitimate settlement by pointing to another one that is legitimate. At the same time, subjecting components of the system that are based on legitimate trademark settlements to per se because other components are not legitimate, *i.e.*, the Hospitals’ view, does not appear necessary. The Blues may object to this approach from a business perspective, but examining antecedent trademark rights on an ESA-by-ESA basis appears to be appropriate from a legal perspective.

As to the Hospitals’ argument: As noted, the Hospitals take a diametrically opposite position to that of the Blues. They argue that the Blues need to prove that the individual plans collectively had previously owned and enforced common law rights spanning the whole country for a settlement of common law trademark rights to justify the ESAs. (Reply at 18.) That argument overstates the matter, at least for purposes of this motion, and counsel’s argument at the hearing otherwise did not move the Court. (5/20/26 Tx. at 81:20-83:8.) While the Hospitals allege a nationwide conspiracy, what principally matters based on the Court’s analysis above is

whether a Blue can reasonably claim common law rights to a geographic footprint that is rationally related to an area where a Hospital is located and thus argue to the jury it has a legal basis outside the License Agreement to use the marks in that area and, by the same token, to preclude all other Blues from contracting with Hospitals in that area under the blue brand. Whether the Blues can claim the same for a location not directly connected with a plaintiff Hospital, for example, Sitka, Alaska, is more tangential. Whether the Blues allocated or boycotted providers in Sitka, Alaska, without a common-law-trademark basis might (or might not) have some relevance to liability or to the Hospitals' damages theory. But those issues are not addressed here. A specific showing as to a territory not connected with a Hospital is unnecessary here to establish whether *Sealy* and *Topco* are distinguishable, which is the issue. The Hospitals' argument based on conspiracy rules in their supplemental brief does not change the analysis; that question goes to which defendants "conspired" and might be liable, which the Court does not address here.

c) Conclusion as to Foundational Requirements for the Rule of Reason to Apply to the Market Allocation Count

This action involves specific hospitals and facilities in specific geographic markets that the Blues have divided up among themselves in the License Agreement. As discussed below, the market allocation and group boycott claims are flip sides of the same factual ESA restraint.

The Court clarifies its intent as to the meaning of the existence of antecedent trademark rights. What matters is whether the early plans that purportedly transferred their trademark rights to BCBSA's predecessor had a reasonable factual and legal basis to believe that they had common law trademark rights in the marks that they transferred. A reasonable factual and legal basis for the existence of such rights is necessary to enter a legitimate settlement regarding those rights. Only a legitimate settlement of antecedent trademark rights would warrant a protection of

interests based on trademark law—avoiding customer confusion, avoiding free riding, and strengthening the mark. Absent a reasonable factual and legal basis to believe that common law trademark rights existed, there was no legitimate basis to assign any such rights to BCBSA’s predecessors or to enter purported settlement agreements regarding those rights. And, the allocation of an ESA to a plan that is unsupported by such antecedent rights would constitute a territorial allocation created by the umbrella organization no different than in *Sealy* and *Topco* and would be subject to a per se standard of review.

The Court thus concludes: The Court will evaluate whether the per se rule or the rule of reason applies to the market allocation Count based on the ESA restraint on a plaintiff-by-plaintiff and ESA-by-ESA basis. *Topco* and the related line of cases are close to controlling but can be distinguished if the Blues make the necessary foundational showing. For the Court to distinguish *Topco* and apply the rule of reason to a Hospitals’ market allocation claim against all the Blues, the Blues must establish facts, supported by admissible evidence, sufficient to find that a plan had a reasonable factual and legal basis to believe that it had common law trademark rights to the marks at issue before the rights were assigned to BCBSA’s predecessors before the 1952 and 1954 license agreements covering a geographic area rationally related to a Hospitals’ location.²⁰ There must be both a reasonable factual basis for the belief and a reasonable legal basis for the belief. Absent that showing, the Court will apply a per se standard of review for that plaintiff Hospitals’ market allocation claim against all the Blues.

²⁰ To be clear, the Blues do not need to prove these facts by a preponderance of the evidence in a pretrial proceeding; they need to present evidence sufficient to make the findings. The Court appreciates the Blues’ argument that the ultimate issue is for trial. (5/20/26 Tx. at 9:20-13:1.) But to sufficiently distinguish *Topco* in order to get to trial under the rule of reason, the Court requires more than the broad showing made here. Further, whether discovery is closed does not affect whether the Blues possess and/or can marshal the evidence to make the necessary showing in response to this Order.

The Court will address in further CMCs the procedures for this presentation—whether by documentary submission or an evidentiary hearing under § 402 of the Evidence Code—as well as the relevant timing and related motion practice.

d) Additional Considerations

1. The analysis and conclusions above address most of the Hospitals’ myriad factual arguments against the Blues’ claim that they had common law trademark rights. (See Reply at 15-18.) This motion was not intended to be made on a full evidentiary record. An opportunity for a sufficient record should be permitted before trial, particularly now that the Court has clarified the issues informing the standard of review for the ESA restraint. If the Blues make the necessary foundational showing to warrant jury instructions on the rule of reason, the parties may litigate the full scope of the factual and legal issues raised by the Hospitals at trial.

2. While the Blues argue that they need not show the existence of any antecedent rights to warrant rule of reason instructions, they also argue that their evidence establishes antecedent trademark rights. The Blues presented some evidence of early use with their motion papers, submitted additional evidence after hearing, and proffer that they have even more evidence.²¹ Other than finding that there are some gaps in the evidence, the Court makes no final factual finding here and will examine the evidence afresh upon the Blues’ submission, particularly because the legal requirements have not been adequately or systematically addressed. The evidence has neither been presented nor challenged with the appropriate legal analysis by both sides under the relevant common law with an eye to the standard articulated by the Court. As noted, this should be done systematically in light of this Order.

²¹ The evidence was not all submitted in an admissible form.

3. The Blues argue that, in 2022, the MDL court did not require the Blues to prove the existence of antecedent common law trademark rights as a foundation for ruling that the rule of reason applied to the market allocation claim. The MDL court, however, ruled that the rule of reason applied only from April 2021 forward because of the elimination of the NBE rule and that the per se standard applied for the prior period, despite the same trademark-settlement-based argument the Blues make here. The MDL court held that the trademark-settlement-based justification was not sufficient to warrant the rule of reason. The Blues do not ask for the same order here.

The Court does not find the initial aggregation and later elimination of the NBE rule controlling. The MDL court's point was that the NBE rule restricted green branded business and thus restricted a Blue's ability to compete in each other's ESAs and that lifting the NBE rule allowed the Blues to compete freely in each other's ESAs through non-blue branded business. Neither *Sealy* nor *Topco* involved or required an aggregated restraint that limited the members' ability to sell non-Topco/Sealy branded products in competition with Topco/Sealy branded products for per se to apply. (See *Topco*, 405 U.S. at 602 [describing the agreement]; *Sealy*, 388 U.S. at 351 [no restriction on members selling their own branded mattresses].) While *Sealy* involved aggregation of a territorial allocation with price fixing (not an output restriction), *Topco* clarified that the aggregation referenced in *Sealy* was not required. What the Court finds controlling here to distinguish *Topco* based on a trademark-settlement-based justification is whether the Blues had antecedent common law trademark rights to actually settle.

As to whether antecedent trademark rights existed as a factual matter, the MDL court stated, "Prior to the introduction of the License Agreements with [BCBSA] and with its predecessors, the Blue Plans had been using the Blue Marks and had already acquired at least

some common law trademark rights in the Marks.” (2022 WL 3221887 at *5). But the MDL court cited no evidence for that finding; nor did the MDL court cite any common law legal principles—from any jurisdiction—that would warrant such a conclusion; and thus the court did not address the legal arguments the Hospitals make here based on common law trademark principles. Nor did the MDL court address the geographical issues set forth above, including differences among the early plans and related possible differences in the legitimacy of different ESAs. The MDL court, after stating that the providers disputed that the Blue Plans had any preexisting common law trademark rights, cited the 1952 and 1954 license agreements’ self-referential descriptions of preexisting rights. But the 1952 and 1954 license agreements themselves, including their recitals, do not prove the existence of antecedent rights. At most they show that the signatory plans believed and asserted they had such rights. Absent articulation of the common law legal principles necessary to find antecedent rights and the evidence that would satisfy those principles, the basis for the MDL’s conclusion is unclear.

The Blues point out that the MDL court held that it “need not define the exact nature or extent of the Blue Plans’ common law rights in the marks.” (*Id.*, *6.) But neither does this Court, which requires only sufficient evidence to submit the question to the jury. If the foundational showing is made, any additional showing the parties deem appropriate regarding the nature or extent of those rights can be litigated under the rule of reason. For similar reasons, the Court finds the Blues’ argument unpersuasive that the Court’s foundational requirements require the Blues to engage in a rule of reason analysis. Requiring sufficient evidence to support a finding of antecedent trademark rights is a far cry from requiring the Blues to address whether the ESAs unreasonably restrain trade or to weigh the anticompetitive effects of the ESAs against their procompetitive benefits.

4. The Blues argue that *Delta Dental* did not require the defendants there to show any antecedent trademark rights. Unlike the MDL court, *Delta Dental* made no findings at all as to whether the dental plans had or lacked pre-existing common law trademark rights before the umbrella organization there, “DDPA,” licensed the Delta Dental trademark to its members for use in their respective ESAs. The Blues argue that *Delta Dental* “found the Delta Dental service areas subject to the rule of reason without any common law trademark origins, simply based on the historic organic development alone.” (Opp. at 23 citing *Delta Dental*, 800 F.Supp.3d at 904-905.) More precisely, *Delta Dental* neither considered nor addressed the issue, and whether the plaintiffs challenged that issue the way the Hospitals do here is unclear. The Hospitals are correct that *Delta Dental* did not meaningfully distinguish the facts of *Topco* (or *Sealy* or *Timken* or any cases in the same line) to explain why the history of the dental plans was meaningfully different. As noted, while *Delta Dental* found that the ESAs “grew organically”—using the same language and idea the Blues advance here—it did not explain why the “organic” growth was meaningfully different than the facts in *Topco*. *Delta Dental* is not persuasive as to the foundational facts that must be established to meaningfully distinguish *the facts of this case* from *Topco* and related decisions, particularly given the arguments the Hospitals raise here.

Further, the Hospitals are correct that *Delta Dental* involved a joint venture. The court found that a “fundamental dispute that looms large over the case as a whole” is whether the defendants were ““competing economic actors”” or “should be viewed as joint venturers who lawfully associate,” a distinction the court found to be material to the standard of review (as well as to class certification). (*Id.* at 905.) The court found the latter, and a joint venture raises other concerns. While the Blues argue that this distinction is not meaningful, it loomed over the court’s analysis, which would explain the lack of need to distinguish *Topco* on a more granular

level or the need to make a finding regarding preexisting common law rights similar to the one that the MDL court made. For example, the court found that “a plausible interpretation of defendants’ account” that the plaintiffs “did not challenge as a factual matter” is that the defendants’ “association represents not a conspiracy among erstwhile competitors who combined to stifle competition and exercise monopsony power over dental service providers, but rather a legitimate collaboration among state-based dental services corporations.” (800 F.Supp.3d at 908.) In contrast, the Hospitals contend that the Blues conspired to stifle competition and exercise monopsony power over the Hospitals—a central component of their claims—and have marshalled evidence to support that contention. Similarly, the plaintiffs in *Delta Dental* did not identify evidence to suggest that the state-based dental service corporations were actual or potential competitors when they joined together. (*Id.*) Here, the Hospitals have marshalled evidence to show that the Blues were actual or potential competitors—at least in the run-up to the operative License Agreements, including during the Assembly of Plans.

2. Group Boycott

The Hospitals request that their Second Count for horizontal group boycott under the Cartwright Act be reviewed under a per se standard. As noted, while group boycotts were once categorically reviewed under a per se standard, *Palsson* applied the rule of reason to a group boycott even though it involved a horizontal restraint. *Palsson* distinguishes between direct boycotts whose primary purpose is to coerce third parties into adopting noncompetitive practices or to eliminate competitors—which are subject to the per se rule—and indirect boycotts where

any refusal to deal is merely an ancillary, incidental byproduct of the restraint—which are subject to the rule of reason. The parties, however, do not meaningfully address this principle.²²

The Hospitals’ group boycott claim is founded on the same factual basis as the market allocation claim. The division of markets into ESAs and the Blues’ collective agreement not to contract with hospitals outside of their ESAs are flip sides of the same factual coin. The Court’s conclusion that the market allocation claim has novel components applies to the group boycott claim as well.

The same logic for the market allocation claim applies here to the group boycott claim. If a Blue has antecedent trademark rights to use the blue marks in a relevant geographic market to the exclusion of other entities using an infringing mark, then asserting that mark to preclude infringement in that market—thus precluding an outside Blue from using the mark in that market—is an exercise in protecting the mark. And, an agreement that the outside Blue would not infringe would result in an indirect boycott that is not directly aimed at coercing anticompetitive behavior. It would be aimed at avoiding infringement and respecting trademark rights, which have procompetitive benefits. In that event, the rule of reason would apply. If, however, the Blues cannot establish those antecedent trademark rights, then the collective agreement not to contract with a Hospital in that geographic market would be a direct boycott with no purpose other than to coerce the Hospital into agreeing to lower rates with the in-ESA Blue, particularly when this restraint is aggregated with the BlueCard program. That would be a direct boycott that is coercive as contemplated by *Palsson*. The per se standard of review would apply in that event.

²² The parties focus on out-of-jurisdiction cases in addressing the group boycott Count without meaningfully addressing how the California Supreme Court’s direct pronouncements on group boycott claims under the Cartwright Act apply. The Court finds *Palsson* controlling.

Whether the Court applies per se rules or the rule of reason will depend on whether the Blues make the foundational showing as discussed above.

C. The BlueCard Program: The Rule of Reason Applies

The material components of the BlueCard Program are as follows: The Blues have all agreed that an out-of-ESA Blue obtains the benefit of contract rates negotiated by an in-ESA Blue when its members receive healthcare services from in-ESA providers that have contracted with an in-ESA Blue. Accordingly, all out-of-ESA Blues have agreed to reimburse providers at the same contract rates that the providers have negotiated with an in-ESA Blue. The Hospitals' theory is that this agreement constitutes price fixing under the Cartwright Act.

1. Literal Fixing of Prices

California has adopted the federal definition of price fixing: “[A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity ... is illegal per se. ...” “[T]he machinery employed ... is immaterial.” (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 666 [quoting *United States v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150].)

The Hospitals' theory is that the BlueCard Program constitutes price fixing because each out-of-ESA Blue has agreed to reimburse providers at the rate negotiated by the local Blue—thus pegging the prices they pay to out-of-ESA providers to the price established by the in-ESA Blue with that provider.²³ By the same token, each Blue has the ability to leverage the volume of all Blues nationwide while negotiating with hospitals in its ESA and thus exercises heightened bargaining power in the negotiations. And, the Blues are precluded from opting out of the

²³ Price fixing, of course, is equally violative of antitrust laws whether it is by buyers or sellers. (*Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* (1948) 334 U.S. 219, 233-37.)

BlueCard program and setting up their own networks outside their ESAs. The refusal to negotiate (part of the group boycott) while pegging reimbursement to the in-ESA Blues' rates, the Hospitals argue, interferes with the free market's ability to set prices—reimbursement rates for non-contracted Blues.

The Blues claim that the BlueCard Program is not “price fixing.” (Opp at 34-37.) Whether it is illegal price fixing under the Cartwright Act is a legal conclusion. The Hospitals, however, are correct that the BlueCard Program literally fixes prices by pegging the reimbursement rates paid by out-of-ESA Blues. The Blues' argument otherwise is unpersuasive. That the Hospitals bargain at arms' length with the in-ESA Blues does not mean that the out-of-ESA Blues have not agreed to peg the prices that they will pay to the providers for services to their members. (*See also Socony-Vacuum Oil* at 222-23 [“That price-fixing includes more than the mere establishment of uniform prices is clearly evident . . . Prices are fixed . . . If the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be a certain level or on ascending or descending scales, if they are to be uniform . . . They are fixed because they are agreed upon.”].)

But literal fixing of prices, even among horizontal competitors, does not necessarily mean that per se rules apply. (*See Broadcast Music*, 441 U.S. at 23 [blanket-license fee among individual copyright owners]; *NCAA*, 468 U.S. at 100-03 [rule of reason applied to horizontal price fixing and output limitations where restraints were essential if the product was to be available at all]; *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102 (9th Cir. 2021) [applying rule of reason to a horizontal non-solicitation agreement between competitors for travel nurses].) Contemporary antitrust jurisprudence requires further inquiry as discussed above.

2. Joint Purchasing Arrangement Justification

The Blues claim that the BlueCard Program is akin to a joint purchasing arrangement that courts have held are subject to the rule of reason. The MDL court accepted this argument and the underlying reasoning.

While prior courts have applied the joint purchasing arrangement theory in different contexts,²⁴ *North Jackson Pharmacy, Inc. v. Caremark RX, Inc.*, (N.D. Ill. 2005) 385 F.Supp.2d 740, applied it in an analogous situation. There, Caremark, a Pharmacy Benefits Manager, administered drug benefit plans on behalf of 1,200 "Plan Sponsors," which included employers, health insurers, and other third-party payors of prescription drug costs. The Plan Sponsors and Caremark agreed that the Plan Sponsors would pay drug costs at rates established by Caremark and any given pharmacy; Caremark negotiated rates with pharmacies on behalf of all of its Plan Sponsors, requiring pharmacies to accept reimbursement rates (a discount formula) for payments by the Plan Sponsors for covered patients. (*Id.* at 744.). The plaintiff, an independent pharmacy, objected under the Sherman Act. In assessing whether the rule of reason or per se standard of review applied, the court found that the relevant agreement was among the Plan Sponsors—firms that would normally compete with one another—and was thus horizontal. (*Id.* at 746.) The court found that by negotiating rates on behalf of the 1,200 Plan Sponsors, Caremark acted on behalf of a "cooperative purchasing group." It found that cooperative purchasing agreements might, but do not necessarily, stifle competition. "Cooperative buying" might be a collusive monopsony that drives prices below competitive levels, *id.* at 747, which is exactly the

²⁴ For example, *All Care Nursing Service, Inc. v. High Tech Staffing Services, Inc.* (11th Cir. 1998) 135 F.3d 740, applied the theory in an arrangement where a group of hospitals agreed to hire temporary nurses from preferred nursing agencies in the first instance. But *All Care* found factually that "there was no agreement to fix prices in [that] case" (*id.* at 748) and is thus less instructive.

Hospitals' argument here. But it can also be used by purchasers to "exploit[] the productive efficiencies that result from conducting business on a larger scale." (*Id.* at 747 [citing Blair & Jeffrey L. Harrison, *Monopsony: Antitrust Law and Economics* 93-94 (1993)]). The court then applied the ancillary restraint doctrine and found that the restraint was not "naked" because the restraint could have redeeming value and was thus subject to the rule of reason.²⁵ (*Id.* at 747; *see also Castro v. Sanofi Pasteur Inc.* (D.N.J. Dec. 20, 2012, No. 11-7178), 2012 WL 12516573, *5 [holding that rule of reason applied to a joint purchasing arrangement by physicians who purchased vaccines through Physicians Buying Groups from Sanofi and quoting Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* Para 20.05b (4th ed. 2011) ["In contrast to buyer collusion, joint purchasing is a form of economic integration that antitrust should generally encourage. Thus, properly defined joint purchasing arrangements are analyzed under the rule of reason."])).

The MDL court followed this logic to hold that the BlueCard Program plausibly has procompetitive benefits in that, principally, while it might constitute an abusive monopsony arrangement, it might also enable the Blues to benefit from the efficiencies of scale. (308 F.Supp.3d at 1276). Hence the MDL court ruled that the rule of reason applies "because of the plausible procompetitive benefits of the BlueCard program," while acknowledging that the Blues have "arguably" "pegged prices." (*Id.* at 1276.) The Supreme Court of Iowa reached the same result under Iowa law applying similar reasoning in part. (*See Mueller v. Wellmark, Inc.* (Iowa 2015) 861 N.W.2d 563, 570-75 [holding that BlueCard was subject to rule of reason under Iowa competition law that was harmonized with federal antitrust law, accepting "economies of scale"

²⁵ The Hospitals preemptively address the ancillary restraints doctrine in their motion (Mot. at 28), but the Blues do not expressly argue it.

justification, and following *North Jackson*].) No cited decision that has examined the BlueCard program has rejected this analysis or held that BlueCard is subject to a per se review under the Sherman Act or the antitrust laws of other states.

The principal question here is whether a similar analysis and conclusion should follow under the Cartwright Act. The analysis in *North Jackson* and by the MDL court under the Sherman Act is sound, and *Mueller*'s analysis under related Iowa law is persuasive. They have articulated a procompetitive benefit of BlueCard in the relevant market that would place the BlueCard Program on the rule of reason side of the continuum described by *In re Cipro*. As per se rules developed to condemn practices for which there were only anticompetitive effects and because these courts found a plausible procompetitive effect in the relevant market, they have applied the rule of reason—moving away from categorical assignments to a more detailed and nuanced analysis of the restraints in a manner required by *In re Cipro*.

The Hospitals neither meaningfully distinguish these cases nor articulate how California policy or the text of the Cartwright Act warrants a different conclusion. They argue that BlueCard is mandatory, not optional, and thus lacks safeguards or an “escape clause” evident in other cases, citing principally *All Care* and *Broadcast Music*. Neither decision holds that this element is necessary for a joint purchasing arrangement to be treated under the rule of reason. Substantively, the Hospitals do not explain how the lack of this element negates the procompetitive benefit of joint purchasing arrangements—economies of scale, including the volume of patients each Blue brings to each provider. The presence or absence of this type of “safeguard” is better analyzed as a factor under the rule of reason to determine whether the anticompetitive aspects outweigh any procompetitive benefits. For example, it might be relevant to the magnitude of any anticompetitive effects and less-restrictive alternatives. But it alone

does not transform the program into a per se violation. Similarly, the Hospitals' argument that the BlueCard Program solves the problem that the Blues created for themselves under the ESA restraints and is thus self-imposed also appears to be an argument that properly should be made under the rule of reason. The Hospitals cite to *Socony-Vacuum Oil, U.S. v. Masonite Corp.* (1942) 316 U.S. 265, and *U.S. v. New Wrinkle* (1952) 342 U.S. 371—none of which addressed a joint purchasing arrangement and all of which were decided before *California Dental Ass'n* and *In Re Cipro* directed courts to examine the circumstances, details, and logic of each restraint. (Reply at 21 n.25.)

The Hospitals question whether the joint purchasing arrangement the Blues advance is factually accurate given that the Licensing Agreement states that the Blues have not formed a joint venture. But that raises a factual dispute. The BlueCard Program resembles a joint purchasing arrangement sufficiently to be submitted to the fact finder, which can draw appropriate inferences. The Hospitals also argue that the procompetitive benefits of the BlueCard program are irrelevant. (Reply at 22:22-23.) This argument again harkens back to pre-*In re Cipro* decisions and is unpersuasive for the reasons discussed above.

The Hospitals' argument that the MDL court misapplied *Dagher* is not determinative. Whether the Blues formed a joint venture under the meaning of *Dagher* did not dictate the outcome. A joint venture under *Dagher* is not necessary to create a joint purchasing arrangement. The other grounds asserted at the hearing are not persuasive. The Hospitals' own allegations show that the Blues leverage the entire membership of all the Blues—which is simply another way to view the claim that the Blues negotiate with each provider on behalf of all the Blues. This again is a matter where inferences either way could be argued to the ultimate finder of fact.

Finally, the Hospitals do not present an argument that the Cartwright Act departs, based on text or policy, from the Sherman Act on the application of price fixing rules in joint purchasing arrangements. Given the case law, reviewing the BlueCard Program as a price fixing restraint under a pegging theory would be a novel application of either the Cartwright Act or the Sherman Act. The decisions the Hospitals cited when asked to identify the decisions that would render this application not novel—but one that courts have repeatedly addressed—are inapposite as discussed above. (5/20/26 Tx. at 87-88 and 105:4-13.)

The Court concludes that the rule of reason applies to the BlueCard program.

D. The NBE Restraint: Per Se Rule Applies

Through the NBE restraint, the Blues have entered a horizontal agreement to limit the amount of non-Blue-branded, *i.e.*, green-branded, business that each Blue may generate. The Hospitals argue that the NBE restraint is an output restriction that constitutes a per se violation of the Cartwright Act. At the hearing, the Hospitals stated that the NBE restraint is covered under Count One (Market Allocation) and Count Three (Price Fixing) in the 4AC. (5/14/26 Tx. at 14-15.) The Cartwright Act “makes a conspiracy among competitors to restrict output and/or raise prices unlawful per se without regard to any of its effects.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851.) The MDL court found that any health revenue a Blue may generate from services offered under a green brand is limited in relation to its Blue-branded revenue. Thus, the NBE restraint “operates as an output restriction on a [Blue’s] non-Blue brand business.” (308 F. Supp. 3d at 1272.) The MDL court held that the NBE restraint was a per se violation under the Sherman Act. (308 F.Supp.3d at 1273 [“Output restrictions have been called one of the “most important per se categories,” along with naked horizontal price-fixing and market allocation.” (citing *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.* (1st

Cir. 2004) 373 F.3d 57, 61, and *Xcaliber Int'l Ltd. LLC v. Atty. Gen. State of La.* (5th Cir. 2010) 612 F.3d 368, 375)].) In distinguishing *Broadcast Music* and *NCAA*, the MDL court pointed out that the NBE restraint is clearly not necessary for the product to be available at all. (*Id.* at 1273.) Indeed, as part of a settlement in the *MDL Litigation*, the Blues agreed in 2021 to lift the NBE restraint.

The Blues argue that the NBE restraint should be subject to the rule of reason because it “served an important brand-protection function.” They argue that it “ensured dedication to, investment in, and collaboration under the Blue brands.” (D. Opp. at 38.) This argument conflates brand-protection—in terms of protecting trademarks and the goodwill associated with them—with protecting and promoting a business. The Blues also argue that the “NBE promoted inter-brand competition [against United, Aetna, Cigna, etc.] in the market writ large by enabling the Blues to function as a single national competitor.” But as the Blues acknowledge in their Opposition, the NBE rule’s function was to promote the blue-branded business by encouraging the dedication of resources to the Blue-branded business, which was necessarily over green-branded business. The purpose was to generate more revenue through a larger provider network and otherwise under the blue brand. Brand investment or cohesion rationales that concern promoting the defendants’ own businesses do not constitute procompetitive justifications for the horizontal output restraint.

The Blues’ argument here differs markedly from the procompetitive trademark protection arguments addressed above. In the words of the MDL court, “Whether the [NBE restraint] benefitted the Plans’ Blue branded business ‘is irrelevant. ... [Defendants have] no authority under the Sherman Act to determine the respective values of competition in various sectors of the market.’” (308 F.Supp.3d at 1273 [citing *Garot Anderson Agencies, Inc. v. Blue Cross & Blue*

Shield United of Wis. (N.D. Ill. Feb. 26, 1993) 1993 WL 78756 at *12].) The Court sees no reason the same principle should not apply under the Cartwright Act.

The Blues argue that the NBE restraint did not harm the Hospitals. But that is a factual issue that could be raised on summary judgment or at trial and very well might be subject to expert testimony. The restriction on the output of green business—particularly when combined with the BlueCard program and the ESA restraints—is facially related to the rates that Hospitals were able to charge for services to the Blues’ members.²⁶ For example, the Hospitals’ services to a member under a Blue’s green-branded business would not be covered under the BlueCard program, and absent a contract between the Blue and the Hospital for the green business, the Blue would be required to pay non-contract rates for services to that member. So, the output restriction that limited the amount of green business a Blue could generate (and thus a cap on the number of green-branded members a Blue could contract for) appears to be directly related to the rates that Hospitals were able to charge for services to the Blues’ members. That the restriction on green business that the NBE restraint imposed was proportional and not absolute goes to the degree of the restraint, not to the kind or nature of the restraint.²⁷

The Blues have not provided an adequate procompetitive justification based on the circumstances, details, and logic of the NBE restraint. The NBE restraint falls on the per se end

²⁶ While aggregation is not necessary under *Topco* to apply per se to a market allocation claim in a *Topco*-like situation, aggregation of restraints can support applying per se where the restraints work together to reduce competition.

²⁷ At the hearing the Blues cited the following decision that the Court finds inapposite: *Joyce Beverages of New York, Inc. v. Royal Crown Cola Co.* (S.D.N.Y. 1983) 555 F.Supp. 271, 278-79 n4 [holding that exclusivity provision in franchise agreement does not violate Sherman Act]; *Haagen-Dazs Co., Inc. v. Double Rainbow Gourmet Ice Creams, Inc.* (9th Cir. 1990) 895 F.2d 1417 [UNPUBLISHED][dealer exclusivity policy, a nonprice vertical restraint, judged under rule of reason].)

of the *In re Cipro* spectrum. The Court finds that the Hospitals' claims based on the NBE restraint are subject to a per se standard of review.

V. ORDERS

Based on all the briefs and evidence submitted in connection with this motion and argument of counsel, as well as the foregoing, the Court hereby ORDERS as follows:

- 1. The standard of review applicable to the Market Allocation Count based on the ESA restraint will depend on whether the Blues make a sufficient foundational showing that the plans had antecedent trademark rights as discussed above.**
- 2. The standard of review applicable to the Group Boycott Count based on the ESA restraint will also depend on whether the Blues make a sufficient foundational showing that the plans had antecedent trademark rights as discussed above.**
- 3. The rule of reason standard of review applies to the Price Fixing Count based on the BlueCard Program.**
- 4. The per se standard of review applies to the Price Fixing and Market Allocation Counts based on the NBE restraint.**

IT IS HEREBY ORDERED.

Dated: October 6, 2026

By: 

S. Raj Chatterjee
Judge of the California Superior Court