

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

OSCAR INSURANCE COMPANY OF FLORIDA,
Plaintiff-Appellant,

v.

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida, No. 6:18-cv-01944 (Byron, J.)

APPELLANT'S CORRECTED APPENDIX

STEVEN C. SUNSHINE
TARA L. REINHART
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000

PAUL M. ECKLES
MICHAEL H. MENITOVE
MATTHEW LISAGAR
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
4 Times Square
New York, NY 10036
(212) 735-3000

SETH P. WAXMAN
LEON B. GREENFIELD
CATHERINE M.A. CARROLL
KEVIN M. LAMB
DREW VAN DENOVER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

FRANCIS M. McDONALD, JR.
SARAH A. LONG
MCDONALD TOOLE WIGGINS, P.A.
111 N. Magnolia Ave., Ste. 1200
Orlando, FL 32801
(407) 246-1800

December 30, 2019

INDEX

DESCRIPTION	TAB
District Court Docket Sheet	Docket
Doc. 1—Complaint (Nov. 13, 2018)	1
Doc. 75—Amended Complaint (Feb. 13, 2019)	75
Doc. 81—Motion to Dismiss (Feb. 27, 2019)	81
Doc. 81-1—Exhibit A: Florida Department of Financial Services Email Exchange	81-1
Doc. 113—Order Granting Motion to Dismiss (Sept. 20, 2019)	113
CERTIFICATE OF SERVICE	

Docket

APPEAL, CLOSED, MEDIATION

U.S. District Court
Middle District of Florida (Orlando)
CIVIL DOCKET FOR CASE #: 6:18-cv-01944-PGB-EJK

Oscar Insurance Company of Florida v. Blue Cross and Blue Shield of Florida Inc. et al
Assigned to: Judge Paul G. Byron
Referred to: Magistrate Judge Embry J. Kidd
Case in other court: 11th Circuit, 19-14096
Cause: 15:0001 Antitrust Litigation

Date Filed: 11/13/2018
Date Terminated: 09/20/2019
Jury Demand: Plaintiff
Nature of Suit: 410 Anti-Trust
Jurisdiction: Federal Question

Date Filed	#	Docket Text
11/13/2018	<u>1</u>	COMPLAINT (<i>Injunctive Relief Sought</i>) against All Defendants with Jury Demand (Filing fee \$ 400 receipt number 113A-14812638) filed by Oscar Insurance Company of Florida. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Proposed Summons Blue Cross, # <u>3</u> Proposed Summons Health Options, # <u>4</u> Proposed Summons Florida Health Care Plan)(McDonald, Francis) Modified on 11/13/2018 (SPM). (Entered: 11/13/2018)
11/13/2018	<u>2</u>	NEW CASE ASSIGNED to Judge John Antoon II and Magistrate Judge Thomas B. Smith. New case number: 6:18-cv-1944-Orl-28TBS. (NAS) (Entered: 11/13/2018)
11/13/2018	<u>3</u>	CORPORATE Disclosure Statement by Oscar Insurance Company of Florida identifying Corporate Parent Mulberry Health Inc. for Oscar Insurance Company of Florida.. (McDonald, Francis) (Entered: 11/13/2018)
11/13/2018	<u>4</u>	NOTICE to counsel, Steven C. Sunshine and Tara R. Reinhart, of Local Rule 2.02 (signed by deputy clerk). (SPM) (Entered: 11/13/2018)
11/13/2018	<u>5</u>	NOTICE to counsel, Paul M. Eckles, Michael H. Menitove, and Matthew Lisagar, of Local Rule 2.02 (signed by deputy clerk). (SPM) (Entered: 11/13/2018)
11/13/2018	<u>6</u>	SUMMONS issued as to Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc. (SPM) (Entered: 11/13/2018)
11/14/2018	<u>7</u>	RELATED CASE ORDER AND NOTICE of designation under Local Rule 3.05 – track 2. Notice of pendency of other actions due within 14 days from the date of this order. Signed by Judge John Antoon II on 11/14/2018. (copies mailed/emailed)(AKC) (Entered: 11/14/2018)
11/14/2018	<u>8</u>	INTERESTED PERSONS ORDER. Certificate of interested persons and corporate disclosure statement due within 14 days from the date of this order. Signed by Judge John Antoon II on 11/14/2018. (counsel emailed)(AKC) (Entered: 11/14/2018)
11/19/2018	<u>9</u>	CERTIFICATE of interested persons and corporate disclosure statement re <u>8</u> Interested persons order by Oscar Insurance Company of Florida identifying Corporate Parent Mulberry Health Inc. for Oscar Insurance Company of Florida.. (McDonald, Francis) (Entered: 11/19/2018)
11/19/2018	<u>10</u>	NOTICE of pendency of related cases re <u>7</u> Related case order and track 2 notice per Local Rule 1.04(d) by Oscar Insurance Company of Florida. Related case(s): no (McDonald, Francis) (Entered: 11/19/2018)
11/19/2018	<u>11</u>	MOTION for preliminary injunction by Oscar Insurance Company of Florida. (Attachments: # <u>1</u> Exhibit A – Declaration of Nicholas Gossen, # <u>2</u> Exhibit B – Declaration of Mark A. Israel, # <u>3</u> Exhibit C – Declaration of Will Johnson, # <u>4</u> Exhibit D – Declaration of William Sparks, # <u>5</u> Exhibit E – Proposed Preliminary Injunction Order)(McDonald, Francis) (Entered: 11/19/2018)
11/20/2018	<u>12</u>	MOTION for miscellaneous relief, specifically Motion for Expedited Scheduling Conference and Entry of Scheduling Order to Govern Preliminary Injunction Proceedings by Oscar Insurance Company of Florida. (Attachments: # <u>1</u> Exhibit A – Plaintiff's Proposed First Request for Production to Defendants)(McDonald, Francis)

		(Entered: 11/20/2018)
11/20/2018	<u>13</u>	MOTION for miscellaneous relief, specifically Motion for Expedited Briefing by Oscar Insurance Company of Florida. (McDonald, Francis) (Entered: 11/20/2018)
11/20/2018	<u>14</u>	ORDER directing the Clerk of Court to reassign this case to another United States District Judge for all further proceedings. Signed by Judge John Antoon II on 11/20/2018. (BRS) (Entered: 11/20/2018)
11/21/2018	15	Case Reassigned to Judge Paul G. Byron. New case number: 6:18-cv-01944-Orl-40-TBS. Judge John Antoon II no longer assigned to the case. (ALL) (Entered: 11/21/2018)
11/26/2018	<u>16</u>	ORDER granting in part and denying in part <u>13</u> Motion for Expedited Briefing. On or before Friday, November 30, 2018, Defendants shall file a response to <u>12</u> Motion for Expedited Scheduling Conference and Entry of Scheduling Order. See Order for details. Signed by Judge Paul G. Byron on 11/26/2018. (SCM) (Entered: 11/26/2018)
11/27/2018	<u>17</u>	Unopposed MOTION for Steven C. Sunshine to appear pro hac vice by Oscar Insurance Company of Florida. (Attachments: # <u>1</u> Exhibit)(McDonald, Francis) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 11/27/2018)
11/27/2018	<u>18</u>	Unopposed MOTION for Tara L. Reinhart to appear pro hac vice by Oscar Insurance Company of Florida. (Attachments: # <u>1</u> Exhibit)(McDonald, Francis) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 11/27/2018)
11/27/2018	<u>19</u>	Unopposed MOTION for Matthew Lisagar to appear pro hac vice by Oscar Insurance Company of Florida. (Attachments: # <u>1</u> Exhibit A – Attorney Certification)(McDonald, Francis) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 11/27/2018)
11/27/2018	<u>20</u>	Unopposed MOTION for Michael H. Menitove to appear pro hac vice by Oscar Insurance Company of Florida. (Attachments: # <u>1</u> Exhibit A – Attorney Certification)(McDonald, Francis) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 11/27/2018)
11/27/2018	<u>21</u>	Unopposed MOTION for Paul M. Eckles to appear pro hac vice by Oscar Insurance Company of Florida. (Attachments: # <u>1</u> Exhibit A – Attorney Certification)(McDonald, Francis) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 11/27/2018)
11/27/2018		***PRO HAC VICE FEES paid by attorney Steven C. Sunshine, appearing on behalf of Oscar Insurance Company of Florida (Filing fee \$150 receipt number ORL078765.) Related document: <u>17</u> Unopposed MOTION for Steven C. Sunshine to appear pro hac vice. (JP) (Entered: 11/27/2018)
11/27/2018		***PRO HAC VICE FEES paid by attorney Tara L. Reinhart, appearing on behalf of Oscar Insurance Company of Florida (Filing fee \$150 receipt number ORL078766.) Related document: <u>18</u> Unopposed MOTION for Tara L. Reinhart to appear pro hac vice. (JP) (Entered: 11/27/2018)
11/27/2018		***PRO HAC VICE FEES paid by attorney Michael H. Menitove, appearing on behalf of Oscar Insurance Company of Florida (Filing fee \$150 receipt number ORL078767.) Related document: <u>20</u> Unopposed MOTION for Michael H. Menitove to appear pro hac vice. (JP) (Entered: 11/27/2018)
11/27/2018		***PRO HAC VICE FEES paid by attorney Matthew Lisagar, appearing on behalf of Oscar Insurance Company of Florida (Filing fee \$150 receipt number ORL078768.) Related document: <u>19</u> Unopposed MOTION for Matthew Lisagar to appear pro hac vice. (JP) (Entered: 11/27/2018)
11/27/2018		***PRO HAC VICE FEES paid by attorney Paul M. Eckles, appearing on behalf of Oscar Insurance Company of Florida (Filing fee \$150 receipt number ORL078769.) Related document: <u>21</u> Unopposed MOTION for Paul M. Eckles to appear pro hac vice. (JP) (Entered: 11/27/2018)

11/27/2018	<u>22</u>	ORDER granting <u>17</u> motion to appear pro hac vice. Signed by Magistrate Judge Thomas B. Smith on 11/27/2018.(KWH) (Entered: 11/27/2018)
11/27/2018	<u>23</u>	ORDER granting <u>18</u> motion to appear pro hac vice. Signed by Magistrate Judge Thomas B. Smith on 11/27/2018.(KWH) (Entered: 11/27/2018)
11/27/2018	<u>24</u>	ORDER granting <u>20</u> motion to appear pro hac vice. Signed by Magistrate Judge Thomas B. Smith on 11/27/2018.(KWH) (Entered: 11/27/2018)
11/27/2018	<u>25</u>	ORDER granting <u>21</u> motion to appear pro hac vice. Signed by Magistrate Judge Thomas B. Smith on 11/27/2018.(KWH) (Entered: 11/27/2018)
11/27/2018	<u>26</u>	ORDER granting in part and denying in part <u>19</u> motion to appear pro hac vice. Signed by Magistrate Judge Thomas B. Smith on 11/27/2018.(KWH) (Entered: 11/27/2018)
11/28/2018	<u>27</u>	NOTICE by Oscar Insurance Company of Florida re <u>16</u> Order on Motion for Miscellaneous Relief <i>Notice of Filing Proof of Service</i> (Attachments: # <u>1</u> Exhibit A – Proof of Service Correspondence)(McDonald, Francis) (Entered: 11/28/2018)
11/30/2018	<u>28</u>	Unopposed MOTION for Evan R. Chesler to appear pro hac vice by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (Conner, Timothy) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 11/30/2018)
11/30/2018	<u>29</u>	Unopposed MOTION for Karin A. DeMasi to appear pro hac vice by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (Conner, Timothy) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 11/30/2018)
11/30/2018	<u>30</u>	Unopposed MOTION for Lauren Roberta Kennedy to appear pro hac vice by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (Conner, Timothy) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 11/30/2018)
11/30/2018	<u>31</u>	Unopposed MOTION for Christine A. Varney to appear pro hac vice by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (Conner, Timothy) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 11/30/2018)
11/30/2018	<u>32</u>	ORDER denying without prejudice <u>28</u> motion to appear pro hac vice; denying without prejudice <u>29</u> motion to appear pro hac vice; denying without prejudice <u>30</u> motion to appear pro hac vice; denying without prejudice <u>31</u> motion to appear pro hac vice. See Local Rule 2.02(a). Signed by Magistrate Judge Thomas B. Smith on 11/30/2018. (Smith, Thomas) (Entered: 11/30/2018)
11/30/2018	<u>33</u>	Unopposed MOTION for Evan R. Chesler to appear pro hac vice by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (Attachments: # <u>1</u> Exhibit A)(Conner, Timothy) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 11/30/2018)
11/30/2018	<u>34</u>	Unopposed MOTION for Lauren Roberta Kennedy to appear pro hac vice by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (Attachments: # <u>1</u> Exhibit A)(Conner, Timothy) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 11/30/2018)
11/30/2018	<u>35</u>	Unopposed MOTION for Karin A. DeMasi to appear pro hac vice by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (Attachments: # <u>1</u> Exhibit A)(Conner, Timothy) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 11/30/2018)
11/30/2018	<u>36</u>	Unopposed MOTION for Christine A. Varney to appear pro hac vice by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (Attachments: # <u>1</u> Exhibit A)(Conner, Timothy) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 11/30/2018)
11/30/2018	<u>37</u>	RESPONSE in Opposition re <u>12</u> MOTION for miscellaneous relief, specifically Motion for Expedited Scheduling Conference and Entry of Scheduling Order to Govern Preliminary Injunction Proceedings filed by Blue Cross and Blue Shield of

		Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (Conner, Timothy) (Entered: 11/30/2018)
12/03/2018	<u>38</u>	ORDER granting <u>33</u> motion to appear pro hac vice; granting <u>34</u> motion to appear pro hac vice; granting <u>35</u> motion to appear pro hac vice; granting <u>36</u> motion to appear pro hac vice. Signed by Magistrate Judge Thomas B. Smith on 12/3/2018. (Smith, Thomas) (Entered: 12/03/2018)
12/03/2018	<u>39</u>	MOTION for miscellaneous relief, specifically Motion for Leave to File Reply to <i>Defendants' Response to Plaintiff's Motion for Expedited Scheduling Conference</i> by Oscar Insurance Company of Florida. (McDonald, Francis) (Entered: 12/03/2018)
12/03/2018	40	ENDORSED ORDER granting <u>39</u> Motion for Leave to File a Reply. Defendants did not file a response, but the Court does not require one to resolve this motion. Plaintiff may file a reply not to exceed five (5) pages on or by December 4, 2018. Signed by Judge Paul G. Byron on 12/3/2018. (SCM) (Entered: 12/03/2018)
12/03/2018		***PRO HAC VICE FEES paid by attorney Evan R. Chesler, appearing on behalf of Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc. (Filing fee \$150 receipt number ORL078884.) Related document: <u>33</u> Unopposed MOTION for Evan R. Chesler to appear pro hac vice. (JP) (Entered: 12/03/2018)
12/03/2018		***PRO HAC VICE FEES paid by attorney Lauren Roberta Kennedy, appearing on behalf of Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc. (Filing fee \$150 receipt number ORL078884.) Related document: <u>34</u> Unopposed MOTION for Lauren Roberta Kennedy to appear pro hac vice. (JP) (Entered: 12/03/2018)
12/03/2018		***PRO HAC VICE FEES paid by attorney Karin A. DeMasi, appearing on behalf of Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc. (Filing fee \$150 receipt number ORL078884.) Related document: <u>35</u> Unopposed MOTION for Karin A. DeMasi to appear pro hac vice. (JP) (Entered: 12/03/2018)
12/03/2018		***PRO HAC VICE FEES paid by attorney Christine A. Varney, appearing on behalf of Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc. (Filing fee \$150 receipt number ORL078884.) Related document: <u>36</u> Unopposed MOTION for Christine A. Varney to appear pro hac vice. (JP) (Entered: 12/03/2018)
12/03/2018	41	NOTICE of hearing: Scheduling Conference set for 12/6/2018 at 3:30 PM in Orlando Courtroom 4B before Judge Paul G. Byron. The Court has set aside sixty (60) minutes for this hearing.(GNB) copies e-mailed (Entered: 12/03/2018)
12/03/2018	<u>42</u>	REPLY in support of <u>12</u> MOTION for miscellaneous relief, specifically Motion for Expedited Scheduling Conference and Entry of Scheduling Order to Govern Preliminary Injunction Proceedings filed by Oscar Insurance Company of Florida. (McDonald, Francis) Modified on 12/4/2018 (RDO). (Entered: 12/03/2018)
12/03/2018	<u>43</u>	RESPONSE to Motion re <u>39</u> MOTION for miscellaneous relief, specifically Motion for Leave to File Reply to <i>Defendants' Response to Plaintiff's Motion for Expedited Scheduling Conference</i> filed by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (Conner, Timothy) (Entered: 12/03/2018)
12/04/2018	<u>44</u>	Unopposed MOTION for Rebecca J. Schindel to appear pro hac vice by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (Attachments: # <u>1</u> Exhibit A)(Conner, Timothy) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 12/04/2018)
12/04/2018	<u>45</u>	ORDER granting <u>44</u> motion for Rebecca J. Schindel to appear pro hac vice. Signed by Magistrate Judge Thomas B. Smith on 12/4/2018. (Smith, Thomas) (Entered: 12/04/2018)
12/05/2018	<u>46</u>	(WRONG EVENT CODE USED. ATTORNEY CALLED AND WILL REFILE) CORPORATE Disclosure Statement by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc. identifying Corporate Parent GuideWell Mutual Holding Corporation for Blue Cross and Blue Shield of Florida,

		Inc., Florida Health Care Plan Inc., Health Options Inc... (Conner, Timothy) Modified on 12/6/2018 (RDO). (Entered: 12/05/2018)
12/06/2018		***PRO HAC VICE FEES paid by attorney Rebecca J. Schindel, appearing on behalf of Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc. (Filing fee \$150 receipt number ORL078989.) Related document: <u>44</u> Unopposed MOTION for Rebecca J. Schindel to appear pro hac vice. (RCN) (Entered: 12/06/2018)
12/06/2018	<u>47</u>	CERTIFICATE of interested persons and corporate disclosure statement re <u>8</u> Interested persons order by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc. identifying Corporate Parent GuideWell Mutual Holding Corporation for Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc... (Conner, Timothy) (Entered: 12/06/2018)
12/06/2018	<u>48</u>	Minute Entry. Proceedings held before Judge Paul G. Byron: SCHEDULING CONFERENCE held on 12/6/2018. Court Reporter: Koretta Stanford (GNB) (Entered: 12/07/2018)
12/11/2018	<u>49</u>	Unopposed MOTION for Extension of Time to File Response/Reply as to <u>1</u> Complaint by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (Conner, Timothy) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 12/11/2018)
12/11/2018	<u>50</u>	Unopposed MOTION for Matthew Lisagar to appear pro hac vice by Oscar Insurance Company of Florida. (Attachments: # <u>1</u> Exhibit A – Attorney Certification)(McDonald, Francis) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 12/11/2018)
12/11/2018	<u>51</u>	ORDER granting <u>50</u> motion for Matthew Lisagar to appear pro hac vice for Plaintiff. Signed by Magistrate Judge Thomas B. Smith on 12/11/2018. (Smith, Thomas) (Entered: 12/11/2018)
12/11/2018	<u>52</u>	ORDER granting in part and denying in part <u>49</u> Motion for Extension of Time to File Response to Plaintiff's Complaint. Responses due by 2/1/2019. Signed by Magistrate Judge Thomas B. Smith on 12/11/2018. (Smith, Thomas) (Entered: 12/11/2018)
12/12/2018		Set/reset deadlines/hearings: for All Defendants. Answer due by 2/1/2019. (RDO) (Entered: 12/12/2018)
12/17/2018	<u>53</u>	TRANSCRIPT of Scheduling Conference held on 12/06/18 before Judge Paul G. Byron. Court Reporter: Koretta Stanford, stanarm2014@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 1/7/2019; Redacted Transcript Deadline set for 1/17/2019; Release of Transcript Restriction set for 3/18/2019. (KS) (Entered: 12/17/2018)
12/17/2018	<u>54</u>	NOTICE to counsel of filing of OFFICIAL TRANSCRIPT, Doc. 53. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days. Any party needing a copy of the transcript to review for redaction purposes may purchase a copy from the court reporter or view the document at the Clerk's Office public terminal. Court Reporter: Koretta Stanford. (KS) (Entered: 12/17/2018)
12/19/2018	<u>55</u>	NOTICE of hearing: Telephone Conference set for 12/21/2018 at 10:30 AM in Orlando Courtroom 4B before Judge Paul G. Byron. The parties shall call 888-363-4735 five minutes before the hearing is scheduled to begin. Access Code: 3126210. Security Code: 122118.(GNB) copies e-mailed (Entered: 12/19/2018)
12/21/2018	<u>56</u>	Supplemental DECLARATION of Nicholas Gossen re <u>11</u> MOTION for preliminary injunction by Oscar Insurance Company of Florida. (Sunshine, Steven) Modified on 12/26/2018 (LMM). (Entered: 12/21/2018)
12/21/2018	<u>57</u>	Supplemental DECLARATION of Mark A. Israel, Ph. D. re <u>11</u> MOTION for preliminary injunction by Oscar Insurance Company of Florida. (Sunshine, Steven)

		Modified on 12/26/2018 (LMM). (Entered: 12/21/2018)
12/21/2018	<u>58</u>	Minute Entry. Proceedings held before Judge Paul G. Byron: TELEPHONE CONFERENCE held on 12/21/2018. Court Reporter: Koretta Stanford (GNB) copies e-mailed (GNB). (Entered: 12/26/2018)
01/03/2019	<u>59</u>	ORDER for Lauren Kennedy, Rebecca Schindel, and Christine Varney to comply with the administrative procedures regarding electronic filing within thirty (30) days from the date of this Order. Signed by Judge Paul G. Byron on 1/3/2019. (GNB) copies e-mailed/mailed (Entered: 01/03/2019)
01/10/2019	60	NOTICE of hearing on motion re <u>11</u> MOTION for preliminary injunction . Motion Hearing set for 1/23/2019 at 8:30 AM in Orlando Courtroom 4B before Judge Paul G. Byron, U.S. District Court, 401 West Central Blvd, Orlando, Florida. The Court has set aside five (5) hours for this hearing. (GNB) copies e-mailed (Entered: 01/10/2019)
01/14/2019	61	ENDORSED ORDER denying as moot <u>12</u> Motion for Expedited Briefing Schedule. The Court has held a hearing on this issue. Signed by Judge Paul G. Byron on 1/14/2019. (GNB) copies e-mailed (Entered: 01/14/2019)
01/18/2019	<u>62</u>	RESPONSE in Opposition re <u>11</u> MOTION for preliminary injunction filed by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (Attachments: # <u>1</u> Declaration of Nicholas Tant, # <u>2</u> Exhibit A to the Declaration of Nicholas Tant, # <u>3</u> Declaration of Laurence Baker, Ph.D.)(Demasi, Karin) Modified on 1/22/2019 (RDO). (Entered: 01/18/2019)
01/23/2019	<u>63</u>	Minute Entry. Proceedings held before Judge Paul G. Byron: MOTION HEARING held on 1/23/2019 re <u>11</u> MOTION for preliminary injunction filed by Oscar Insurance Company of Florida. Court Reporter: Koretta Stanford (GNB) (GNB). (Entered: 01/25/2019)
01/23/2019	<u>64</u>	Exhibit List (Preliminary Injunction Hearing) by Oscar Insurance Company of Florida. (GNB) copies e-mailed (Additional attachment(s) added on 2/8/2019: # <u>1</u> Exhibit 2, # <u>2</u> Exhibit 4, # <u>3</u> Exhibit 6, # <u>4</u> Exhibit 7, # <u>5</u> Exhibit 8, # <u>6</u> Exhibit 11, # <u>7</u> Exhibit 12, # <u>8</u> Exhibit 13) (GNB). (Entered: 01/30/2019)
01/23/2019	<u>65</u>	Exhibit List (Preliminary Injunction Hearing) by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., and Health Options Inc. (GNB) copies e-mailed (Additional attachment(s) added on 2/8/2019: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 7, # <u>3</u> Exhibit 8 Part 1, # <u>4</u> Exhibit 8 Part 2, # <u>5</u> Exhibit 8 Part 3, # <u>6</u> Exhibit 8 Part 4, # <u>7</u> Exhibit 10, # <u>8</u> Exhibit 13, # <u>9</u> Exhibit 14, # <u>10</u> Exhibit 21, # <u>11</u> Exhibit 29, # <u>12</u> Exhibit 33, # <u>13</u> Exhibit 34, # <u>14</u> Exhibit 42) (GNB). (Entered: 01/30/2019)
01/30/2019	<u>66</u>	ORDER regarding exhibit certification. Signed by Judge Paul G. Byron on 1/30/2019. (GNB) copies e-mailed (Entered: 01/30/2019)
02/01/2019	<u>67</u>	TRANSCRIPT of Preliminary Injunction Hearing held on 01/23/19 before Judge Paul G. Byron. Court Reporter/Transcriber Koretta Stanford, stanarm2014@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 2/22/2019; Redacted Transcript Deadline set for 3/4/2019; Release of Transcript Restriction set for 5/2/2019. (KS) (Entered: 02/01/2019)
02/01/2019	68	NOTICE to counsel of filing of OFFICIAL TRANSCRIPT, Doc. 67. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days. Any party needing a copy of the transcript to review for redaction purposes may purchase a copy from the court reporter or view the document at the clerk's office public terminal. Court Reporter: Koretta Stanford. (KS) (Entered: 02/01/2019)
02/01/2019	<u>69</u>	ORDER TO SHOW CAUSE as to Plaintiff Oscar Insurance Company of Florida. Plaintiff is hereby ORDERED TO SHOW CAUSE by a written response filed within fourteen (14) days from the date of this Order why this case should not be dismissed for lack of prosecution due to the non-filing of a Case Management Report. Failure to respond shall result in a dismissal of this action without further notice from the Court. Signed by Judge Paul G. Byron on 2/1/2019.

		(GNB) copies e-mailed (Entered: 02/01/2019)
02/01/2019	<u>70</u>	MOTION to dismiss for failure to state a claim by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (Demasi, Karin) Modified on 2/4/2019 (RDO). (Entered: 02/01/2019)
02/05/2019	<u>71</u>	NOTICE of Exhibit Certification by all parties. (GNB) copies e-mailed (Entered: 02/05/2019)
02/05/2019	<u>72</u>	ORDER denying <u>11</u> Motion for Preliminary Injunction. Signed by Judge Paul G. Byron on 2/5/2019. (SCM) (Entered: 02/05/2019)
02/06/2019	<u>73</u>	ORDER dismissing without prejudice <u>1</u> Complaint as a shotgun pleading; denying as moot <u>70</u> Motion to Dismiss. On or before February 13, 2019, Plaintiff may file an amended complaint. Plaintiff is cautioned that failure to file an amended complaint within the time provided will result in the Court dismissing this case and closing the file without further notice. Signed by Judge Paul G. Byron on 2/6/2019. (SCM) (GNB). (Entered: 02/06/2019)
02/07/2019		Set/reset deadlines/hearings: Amended Complaint due by 2/13/2019 (RDO) (Entered: 02/07/2019)
02/13/2019	<u>74</u>	RESPONSE TO ORDER TO SHOW CAUSE re <u>69</u> Order to show cause filed by Oscar Insurance Company of Florida. (Sunshine, Steven) (Entered: 02/13/2019)
02/13/2019	<u>75</u>	<i>AMENDED COMPLAINT and Demand for Jury Trial (Injunctive Relief Sought) against Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc. with Jury Demand. filed by Oscar Insurance Company of Florida.(Sunshine, Steven)</i> (Entered: 02/13/2019)
02/14/2019	<u>76</u>	ENDORSED ORDER discharging <u>69</u> Order to Show Cause. The parties are directed to file the Case Management Report on or by Thursday, February 28, 2019. Defense counsel is admonished for disregarding Court imposed deadlines by refusing to confer with Plaintiff in a timely manner. Future failure to comply will result in the imposition of sanctions. Signed by Judge Paul G. Byron on 2/14/2019. (SCM) Modified on 2/14/2019 (GNB). (Entered: 02/14/2019)
02/14/2019	<u>77</u>	RESPONSE TO ORDER TO SHOW CAUSE re <u>76</u> Order no pdf filed by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B)(DeMasi, Karin) (Entered: 02/14/2019)
02/25/2019	<u>78</u>	MOTION for miscellaneous relief, specifically to Redesignate the Case as Track Three Pursuant to Local Rule 3.05 by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (Attachments: # <u>1</u> Exhibit A)(DeMasi, Karin) Modified on 2/26/2019 (RDO). (Entered: 02/25/2019)
02/27/2019	<u>79</u>	RESPONSE in Opposition re <u>78</u> MOTION for miscellaneous relief, specifically to Redesignate the Case as Track Three Pursuant to Local Rule 3.05 filed by Oscar Insurance Company of Florida. (Reinhart, Tara) (Entered: 02/27/2019)
02/27/2019	<u>80</u>	ENDORSED ORDER denying <u>78</u> Motion to Redesignate Case as Track Three. As discovery unfolds, the parties may move to redesignate the case to Track Three upon finding a justified need for extended time. However, the Court finds no reason to do so at this point in the litigation. Furthermore, the Court advises the parties that as a Track Two case, the latest the Court will set this case is for the July 2020 term. Signed by Judge Paul G. Byron on 2/27/2019. (SCM) (Entered: 02/27/2019)
02/27/2019	<u>81</u>	MOTION to dismiss for failure to state a claim by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (Attachments: # <u>1</u> Exhibit A)(DeMasi, Karin) (Entered: 02/27/2019)
02/27/2019	<u>82</u>	REQUEST for oral argument re <u>81</u> MOTION to dismiss for failure to state a claim by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (DeMasi, Karin) (Entered: 02/27/2019)
02/28/2019	<u>83</u>	CASE MANAGEMENT REPORT. (Reinhart, Tara) (Entered: 02/28/2019)

03/01/2019	<u>84</u>	CASE MANAGEMENT AND SCHEDULING ORDER. Signed by Judge Paul G. Byron on 3/1/2019. (MMW) (Entered: 03/01/2019)
03/04/2019		Set/reset scheduling order deadlines: Amended Pleadings due by 4/5/2019, Discovery due by 12/23/2019, Dispositive motions due by 2/3/2020, Pretrial statement due by 5/1/2020, All other motions due by 5/8/2020, Final Pretrial Conference set for 6/16/2020 at 03:00 PM in Orlando Courtroom 4 B before Judge Paul G. Byron, Jury Trial set for trial term beginning on 7/6/2020 at 09:00 AM in Orlando Courtroom 4 B before Judge Paul G. Byron., Conduct mediation hearing by 1/15/2020. Lead counsel to coordinate dates., Defendant disclosure of expert report due by 10/16/2019, Plaintiff disclosure of expert report due by 9/4/2019 (RDO) (Entered: 03/04/2019)
03/04/2019	85	CASE REFERRED to Mediation. No mediator appointed at this time. (RDO) (Entered: 03/04/2019)
03/13/2019	<u>86</u>	RESPONSE in Opposition re <u>81</u> MOTION to dismiss for failure to state a claim filed by Oscar Insurance Company of Florida. (Sunshine, Steven) (Entered: 03/13/2019)
03/15/2019	<u>87</u>	NOTICE OF SELECTION of Jay M. Cohen as mediator by Oscar Insurance Company of Florida. (Lisagar, Matthew) (Entered: 03/15/2019)
03/21/2019	<u>88</u>	NOTICE by United States of America <i>of Intent to File a Statement of Interest</i> (Kuhlmann, Patrick) (Entered: 03/21/2019)
04/24/2019	<u>89</u>	STATEMENT OF INTEREST re <u>81</u> MOTION to dismiss for failure to state a claim filed by United States of America. (Kuhlmann, Patrick) Modified on 4/25/2019 (RDO). (Entered: 04/24/2019)
04/26/2019	<u>90</u>	MOTION for leave to file a Response (" <i>Defendants' Motion for Leave to File Response to Statement of Interest Filed by the United States</i> ") by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (DeMasi, Karin) (Entered: 04/26/2019)
04/26/2019	91	ENDORSED ORDER granting <u>90</u> Motion for Leave to File Response to Statement of Interest Filed by the United States. Defendant shall file a response not to exceed ten (10) pages on or by May 8, 2019. Signed by Judge Paul G. Byron on 4/26/2019. (SCM) (Entered: 04/26/2019)
05/08/2019	<u>92</u>	RESPONSE re <u>89</u> Statement of Interest filed by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc. (DeMasi, Karin) Modified on 5/9/2019 (ALL). (Entered: 05/08/2019)
05/10/2019	<u>93</u>	MOTION for leave to file Response to Defendants' Response to the Statement of Interest of the United States of America by Oscar Insurance Company of Florida. (McDonald, Francis) (Entered: 05/10/2019)
05/13/2019	94	ENDORSED ORDER granting <u>93</u> Motion for Leave to File. Plaintiff shall file a reply not to exceed five (5) pages on or by Friday, May 17, 2019. Signed by Judge Paul G. Byron on 5/13/2019. (SCM) (Entered: 05/13/2019)
05/17/2019	<u>95</u>	REPLY to <u>92</u> Response to the Statement of Interest of the United States of America) filed by Oscar Insurance Company of Florida. (Reinhart, Tara) Modified on 5/20/2019 (RDO). (Entered: 05/17/2019)
06/21/2019	96	NOTICE of Hearing on Motion re <u>81</u> MOTION to dismiss for failure to state a claim . Motion Hearing set for 7/26/2019 at 1:00 PM in Orlando Courtroom 4B before Judge Paul G. Byron. The Court has set aside three (3) hours for this hearing.(GNB) copies e-mailed (Entered: 06/21/2019)
07/08/2019	<u>97</u>	MOTION for miscellaneous relief, specifically Participate in July 26 Hearing by United States of America. (Kuhlmann, Patrick) (Entered: 07/08/2019)
07/09/2019	98	ENDORSED ORDER denying <u>97</u> Motion to Participate in the July 26 Hearing. The government will not be allocated time to present at the July 26 Hearing. However, the Court may call upon the government to answer questions if the Court deems it necessary. Signed by Judge Paul G. Byron on 7/9/2019. (SCM) (Entered: 07/09/2019)

07/19/2019	<u>99</u>	MOTION to Continue <i>Oral Argument</i> by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (Conner, Timothy) (Entered: 07/19/2019)
07/19/2019	100	ENDORSED ORDER granting <u>99</u> Motion to Continue. The Court will reschedule the hearing at a later date. The parties are advised that the hearing may be rescheduled at short notice. Signed by Judge Paul G. Byron on 7/19/2019. (SCM) (Entered: 07/19/2019)
07/22/2019	101	NOTICE canceling Motion Hearing scheduled for 7/26/2019. Hearing to be rescheduled at a later date. (GNB) copies e-mailed (Entered: 07/22/2019)
07/25/2019	102	Case Reassigned to Magistrate Judge Embry J. Kidd. New case number: 6:18-cv-1944-Orl-40EJK. Magistrate Judge Thomas B. Smith no longer assigned to the case. (ALL) (Entered: 07/25/2019)
08/05/2019	103	NOTICE of Hearing on Motion re <u>81</u> MOTION to dismiss for failure to state a claim . Motion Hearing set for 8/16/2019 at 9:30 AM in Orlando Courtroom 4B before Judge Paul G. Byron. The Court has set aside three (3) hours for this hearing. (GNB) copies e-mailed (Entered: 08/05/2019)
08/08/2019	<u>104</u>	NOTICE of Appearance by Jeffrey D. Negrette on behalf of United States of America (Negrette, Jeffrey) (Entered: 08/08/2019)
08/16/2019	<u>105</u>	Minute Entry. Proceedings held before Judge Paul G. Byron: MOTION HEARING held on 8/16/2019 re <u>81</u> MOTION to dismiss for failure to state a claim filed by Florida Health Care Plan Inc., Health Options Inc., Blue Cross and Blue Shield of Florida, Inc. Court Reporter: Koretta Stanford (GNB) copies e-mailed (Entered: 08/16/2019)
08/19/2019	<u>106</u>	MOTION for leave to file <i>Memorandum of Supplemental Authority</i> by Oscar Insurance Company of Florida. (McDonald, Francis) (Entered: 08/19/2019)
08/19/2019	<u>107</u>	RESPONSE to Motion re <u>106</u> MOTION for leave to file <i>Memorandum of Supplemental Authority</i> filed by Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., Health Options Inc.. (DeMasi, Karin) (Entered: 08/19/2019)
08/20/2019	108	ENDORSED ORDER denying <u>106</u> Motion for Leave to File. The Court finds supplemental briefing to be unnecessary at this time. Signed by Judge Paul G. Byron on 8/20/2019. (SCM) (Entered: 08/20/2019)
08/22/2019	<u>109</u>	AGREED MOTION to extend time to serve expert disclosures by Oscar Insurance Company of Florida. (McDonald, Francis) Motions referred to Magistrate Judge Embry J. Kidd. Modified on 8/23/2019 (RDO). (Entered: 08/22/2019)
08/23/2019	110	ENDORSED ORDER granting <u>109</u> Plaintiff's Agreed Motion to Extend Deadlines for Expert Witness Disclosures. On or before September 25, 2019, Plaintiff shall disclose its expert report. On or before November 6, 2019, Defendants shall disclose their expert report. Signed by Magistrate Judge Embry J. Kidd on 8/23/2019. (JLE) (Entered: 08/23/2019)
08/26/2019		Set/reset scheduling order deadlines: Defendant disclosure of expert report due by 11/6/2019, Plaintiff disclosure of expert report due by 9/25/2019 (RDO) (Entered: 08/26/2019)
09/18/2019	<u>111</u>	TRANSCRIPT of Motion Hearing held on 08/16/19 before Judge Paul G. Byron. Court Reporter/Transcriber Koretta Stanford, stanarm2014@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date, it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 10/9/2019; Redacted Transcript Deadline set for 10/21/2019; Release of Transcript Restriction set for 12/17/2019. (KS) (Entered: 09/18/2019)
09/18/2019	112	NOTICE to counsel of filing of OFFICIAL TRANSCRIPT, Doc 111. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days. Any party needing a copy of the transcript to review for redaction purposes may purchase a copy from the court reporter or view the document at the clerk's office public terminal.

		Court Reporter: Koretta Stanford. (KS) (Entered: 09/18/2019)
09/20/2019	<u>113</u>	ORDER granting <u>81</u> Motion to Dismiss. The Amended Complaint is DISMISSED WITH PREJUDICE. The Clerk is DIRECTED to close the case. Signed by Judge Paul G. Byron on 9/20/2019. (SCM) (Entered: 09/20/2019)
10/15/2019	<u>114</u>	NOTICE OF APPEAL as to <u>113</u> Order on Motion to Dismiss for Failure to State a Claim by Oscar Insurance Company of Florida. Filing fee not paid. (Sunshine, Steven) (Entered: 10/15/2019)
10/16/2019	<u>115</u>	TRANSMITTAL of initial appeal package to USCA consisting of copies of notice of appeal, docket sheet, order/judgment being appealed, and motion, if applicable to USCA re <u>114</u> Notice of appeal. (Attachments: # <u>1</u> Notice of Appeal, # <u>2</u> Order, # <u>3</u> Docket Sheet)(RDO) (Entered: 10/16/2019)
10/22/2019		USCA appeal fees received \$ 505 receipt number ORL086264 re <u>114</u> Notice of appeal filed by Oscar Insurance Company of Florida (BIA) (Entered: 10/22/2019)
10/30/2019	<u>116</u>	TRANSCRIPT information form filed by Oscar Insurance Company of Florida re <u>114</u> Notice of appeal. USCA number: 19-14096. (Sunshine, Steven) (Entered: 10/30/2019)

Doc. 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

OSCAR INSURANCE COMPANY
OF FLORIDA,

CASE NO.:

Plaintiff,

vs.

BLUE CROSS AND BLUE SHIELD OF
FLORIDA, INC., d/b/a Florida Blue; HEALTH
OPTIONS INC., d/b/a Florida Blue HMO; and
FLORIDA HEALTH CARE PLAN INC., d/b/a
Florida Health Care Plans,

Defendants.

_____ /

COMPLAINT

(INJUNCTIVE RELIEF SOUGHT)

Plaintiff Oscar Insurance Company of Florida (“Oscar” or “Plaintiff”) brings this civil action for injunctive relief and damages under the antitrust laws of the United States and the State of Florida and the common law of the State of Florida against Defendants Blue Cross and Blue Shield of Florida, Inc., d/b/a Florida Blue; Health Options Inc., d/b/a Florida Blue HMO; and Florida Health Care Plan Inc. (collectively, “Florida Blue” or “Defendants”). Plaintiff alleges based upon personal knowledge as to facts pertaining to itself, and upon information and belief as to all other matters as follows:

NATURE OF THE ACTION

1. This action arises out of the improper, unlawful and anticompetitive conduct by Florida Blue to stifle competition in Florida for the sale of individual health insurance plans and products in compliance with the Patient Protection and Affordable Care Act of 2010 (“ACA”), a key cornerstone of extending health care to all Americans, regardless of health status.

2. Florida Blue, the entrenched monopolist in Florida, holds approximately a 75 percent share of individual ACA insurance plans sold statewide and a significantly higher share in portions of the state, including the Orlando metro area, where prior to the current enrollment period Florida Blue faced only a single competitor serving the four counties that comprise the Orlando metro area. In fact, since 2015, major insurers including Aetna, Humana, Cigna and UnitedHealthcare, have left the market, leaving Florida consumers little choice but to pay Florida Blue’s steadily increasing rates. Oscar is poised to change that.

3. Oscar, one of the country’s fastest growing health insurance companies, uses technology and a customer-first approach to make health care affordable and accessible to its roughly 230,000 members. Oscar has had significant success bringing down health insurance prices and providing consumers with a superior experience in the health care system in the states outside Florida it has entered.

4. Beginning with the annual enrollment period that started on November 1, 2018, Oscar is now selling ACA plans in the Orlando metro area and is offering innovative plans at lower prices than Florida Blue. For example, in Orange County,

Oscar offers plans in the most popular plan categories with premiums that are \$16-36 less expensive per month, or roughly \$190-430 less per year, than the comparable Florida Blue plans. Oscar's plans also offer richer features than its competitors, like free 24/7 telemedicine and dedicated concierge teams. And Oscar's entry into the Orlando metro area is just the beginning—Oscar has in motion plans to begin selling insurance in other markets, including in the Jacksonville and Tampa metro areas as soon as next fall.

5. Faced with a major threat to its monopoly profits, Florida Blue responded by implementing a blatant scheme targeted at Oscar to keep it out of the state, thereby causing Florida consumers to continue to pay more for health insurance coverage. First and foremost, the scheme involves denying Oscar access to insurance brokers upon whom consumers rely to advise them of their insurance options. Florida Blue has a company policy—brazenly displayed on its website—that no broker may sell Florida Blue's individual plans unless that broker agrees to sell *only* Florida Blue's individual plans. Florida Blue wrongfully uses its monopoly power to compel brokers to sell only its plans when industry standards require independent brokers to find the best options for consumers' needs. Second, during the very same week in October 2018 in which Florida Blue learned Oscar's plans are lower-priced than its own, Florida Blue moved to aggressively enforce this exclusivity policy against Oscar by systematically contacting brokers who have signed contracts with and been appointed as brokers by Oscar to threaten them with permanent termination. In one email to brokers, Florida Blue said **“[you] will have 48 hours to terminate your Oscar appointment or we will terminate your Florida Blue appointment with no eligibility of reappointment with us.”**

6. Florida Blue's monopoly power in Florida makes its scheme devastating to a new entrant like Oscar, as well as deeply injurious to Florida consumers. Brokers face losing the right to sell Florida Blue plans in all product lines throughout *the entire State of Florida* if they decide to sell Oscar plans in the *Orlando metro area*. This anticompetitive leverage is greatest for the most successful brokers in the state, those with the largest client bases and those who operate in the regions, like Orlando, where Florida Blue has an especially dominant market position today. Several brokers have explained they have no choice but to stay with Florida Blue:

- **"I just got word that any Florida Blue agents who will be contracting with Oscar will be terminated immediately. . . . I have a very large book with Blue and Oscar is not in my area here. Losing our Blue Contract would be a financial disaster."**
- **"Unfortunately I need to rescind my request, as Florida Blue has informed me that they will cancel my contract if they see new appointments for any products in any area of Florida. This would be highly detrimental as they would be keeping most of my book of business."**
- **"This is a request to terminate my Oscar contract as I am also appointed with FL blue and they can only allow captive agents to work with them."**

7. Florida Blue's coercion of brokers not to deal with new entrants like Oscar stymies those entrants' ability to compete. Brokers are a critical sales channel in health insurance markets for new entrants in all states, and this is especially so in Florida where brokers are more popular with consumers than in many other regions of the country. Given Florida Blue's dominant market share in Florida (and even larger share in Orlando), brokers with the largest existing client bases have an overwhelming incentive to sell Florida Blue's plans and cannot afford *not* to sell Florida Blue's plans. Consequently, Florida Blue's insistence that brokers sell *only* Florida Blue plans

necessarily forecloses Oscar from access to brokers responsible for selling the vast majority of ACA plans in the Orlando metro area. Oscar will suffer the same fate in other Florida metro areas it intends to enter, where Florida Blue holds similar exclusionary power as a result of its high share of plan sales.

8. Beyond the harm to competition derived from seeking to exclude a new, innovative competitor with lower-priced products from the marketplace, Florida Blue's scheme undermines a key function of the ACA health insurance marketplace. One of the principal purposes of the ACA is to provide consumers with more choices. Independent brokers serve a valuable public purpose in explaining options and helping consumers navigate health insurance exchanges so that they make informed, educated choices about which plan is best for them and their families. But Florida Blue is attempting to force all independent brokers in Florida to become captive brokers beholden to Florida Blue. If successful, Florida Blue will eliminate the independence of the largest brokers (and the valuable services they provide) in the Orlando metro market, such that consumers no longer will have access to objective advice about the full range of their insurance options. Brokers will not review the options of insurers with consumers, but instead will merely help them renew their Florida Blue plans each year.

9. The consequences for Oscar already have been severe. Under pressure from Florida Blue, more than 190 brokers (and counting) backed out of agreements to sell Oscar's plans once they were threatened with termination by Florida Blue. Because this coercive pressure was applied only one week before the beginning of the open enrollment period—the only six weeks during which health insurers selling individual

ACA plans can sign up customers for the entire following year—Oscar had limited opportunity to respond to this blatantly anticompetitive tactic. Even before the recent round of cancellations, other major brokers, including many of the largest and most successful brokers servicing the Orlando area, refused even to discuss dealing with Oscar out of fear of losing Florida Blue’s business. In total, only about a quarter of the local brokers in the Orlando metro area, and very few of the brokers with the type of large client bases necessary for success, have been appointed by Oscar, which is far fewer appointed than in other markets Oscar has entered. Based on the success it has experienced with the limited number of brokers it has appointed in Orlando, Oscar has every reason to believe that Florida Blue’s exclusivity policy is depriving it of the means to compete for a substantial majority of the ACA business in Orlando. In fact, Oscar has sold only a fraction of the plans to date in Orlando that it expected to sell based on its experience in other markets, even as its performance with the limited universe of brokers who have agreed to offer Oscar has been quite positive.

10. While Florida Blue’s scheme is causing harm in the Orlando market right now, its ramifications extend throughout Florida. Oscar plans to enter other Florida markets next year, including the Jacksonville and Tampa metro areas. Entering new insurance markets requires substantial advance work—beginning over a year before the open enrollment period—that includes contracting with hospitals, physicians and specialists to build provider networks, as well as attracting local brokers, and filing rate, plan, and network information for approval by state regulators. Oscar’s ability to negotiate favorable rates with providers and attract brokers are both directly impacted by

how many insureds it has in Florida, as is its ability to recover the significant fixed costs of building new provider networks and marketing itself to consumers. At the moment, all major providers and brokers in Florida are dependent on Florida Blue. Florida Blue's scheme is designed to maintain its monopoly by ensuring Oscar and other potential new entrants cannot obtain the volume of business necessary to achieve a minimum efficient scale that will allow them to become viable competitors.

11. The effects of Florida Blue's scheme are designed to and will have the effect of keeping Oscar out of the Orlando metro area and other major metro areas, and preserving the high prices and monopoly profits that Florida Blue now reaps. The lack of scale will prevent Oscar from negotiating reasonable provider contracts in the Orlando metro area and other markets for 2020 and beyond that are necessary to provide low-cost alternatives to consumers.

12. Another component of Florida Blue's scheme is to ensure that new entrants like Oscar cannot make up for the lack of access to local brokers by turning to out-of-state brokers to sell their insurance plans in Florida. Specifically, Florida Blue has announced to brokers that it does "not appoint agents who reside out of state to sell individual products." In other words, to soften the blow of strong-arming local brokers out of selling insurance plans offered by Florida Blue's competitors, Florida Blue has taken measures to protect those same brokers from their out-of-state competitors. Significantly, the inability to work with Florida Blue, the largest insurer in the state, heavily deters out-of-state brokers from operating in Florida at all. The effect is to deny

the services of out-of-state brokers to new entrants such as Oscar and preserve Florida Blue's monopoly from disruption.

13. Florida Blue's actions are those of a monopolist that believes it can get away with this type of anticompetitive conduct because it is too powerful to be told no. As a result of Florida Blue's anticompetitive conduct, Oscar's sales are substantially lower than they would have been but for Florida Blue's misconduct. Moreover, unless Florida Blue's anticompetitive conduct is enjoined, Oscar will suffer irreparable harm for which it has no adequate remedy at law, including lost goodwill, lost opportunities and potentially its very viability in Florida, not only in the Orlando metro area, but in additional metro areas and counties in Florida it plans to enter in the future.

14. In turn, Florida Blue's actions have harmed the entire insurance marketplace in Florida by deterring and preventing new insurers, like Oscar, from entering Florida markets. Florida Blue's anticompetitive conduct offends the public interest because it deprives consumers of the benefits of a free and competitive market, which would otherwise include new and innovative insurance plans, more choices, lower premiums and better services.

THE PARTIES

I. Plaintiff

15. Plaintiff Oscar Insurance Company of Florida is a Florida corporation with its principal place of business at 295 Lafayette Street, New York, NY 10012. Oscar's affiliates are currently accepting health insurance customers for the 2019 plan year in New York, New Jersey, California, Texas, Ohio, Tennessee, Arizona, and Michigan.

Oscar also now offers for the first time health insurance plans in Lake County, Orange County, Osceola County and Seminole County, in the Orlando, Florida metro area, with a starting coverage date of January 1, 2019.

II. Defendants

16. Blue Cross Blue Shield of Florida, Inc. is a Florida corporation with its principal place of business at 4800 Deerwood Campus Parkway, Jacksonville, FL 32246. Blue Cross Blue Shield of Florida, Inc. is an independent licensee of the Blue Cross and Blue Shield Association. Blue Cross Blue Shield of Florida, Inc. sells health insurance plans across Florida, including in Lake County, Orange County, Osceola County and Seminole County, in the Orlando, Florida metro area.

17. Health Options Inc. is a Florida corporation with its principal place of business at 4800 Deerwood Campus Parkway, Jacksonville, FL 32246. Health Options Inc. is an independent licensee of the Blue Cross and Blue Shield Association. Health Options Inc. sells health insurance plans, specifically Health Maintenance Organization (“HMO”) plans, across Florida, including in Lake County, Orange County, Osceola County and Seminole County, in the Orlando, Florida metro area.

18. Florida Health Care Plan Inc. is a Florida corporation with its principal place of business at 1340 Ridgewood Avenue, Holly Hill, FL 32117. Florida Health Care Plan Inc. is an independent licensee of the Blue Cross and Blue Shield Association. Florida Health Care Plan Inc. sells health insurance plans across Florida, including in Lake County, Orange County, Osceola County and Seminole County, in the Orlando, Florida metro area.

19. Defendants' actions described in this Complaint are part of, and in furtherance of, the unlawful conduct alleged herein, and were authorized, ordered and/or done by Defendants' various officers, agents, employees or other representatives while actively engaged in the management of Defendants' affairs, within the course and scope of their duties and employment, and/or with the actual, apparent and/or ostensible authority of each Defendant.

JURISDICTION AND VENUE

20. This court has federal question jurisdiction under 28 U.S.C. §§ 1331 and 1337 for the claims in this action filed under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26) for damages and to secure injunctive relief against Florida Blue for violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), as alleged herein.

21. This court has supplemental jurisdiction under 28 U.S.C. § 1367 over the remaining state law claims as those claims arise out of the same matters and transactions that give rise to the federal law claims over which this Court has federal question jurisdiction.

22. Venue is proper in this judicial district under Section 12 of the Clayton Act, 15 U.S.C. § 22, as well as 28 U.S.C. § 1391. Defendants' principal places of business are within this district, and Defendants have engaged in anticompetitive behavior in this district, as alleged herein.

23. Defendants' actions described in this Complaint are within the flow of and substantially affect interstate commerce. Defendants' activities foreseeably restrained

interstate commerce by foreclosing out-of-state health insurance plan providers and brokers from competing in Florida.

FACTUAL ALLEGATIONS

I. Individual ACA Insurance Plans in Florida

24. Health care is a significant concern for many Americans. A recent Kaiser Family Foundation survey found that a majority of Floridians view health care as “very important” and 26 percent of Floridians rank it as the “most important issue,” a higher percentage than any other issue. In particular, health care costs continue to be an important issue for Floridians. The same Kaiser Family Foundation survey found that, when asked to explain why health care is the most important issue, consumers most frequently identified costs as the concern.

25. Enacted on March 23, 2010, the central goal of the ACA is “to create a more transparent, competitive marketplace that gives consumers more information about their health insurance options and ensures better value for their premium dollars.” *Health Plan Finder Data*, Centers for Medicare & Medicaid Services, The Center for Consumer Information & Insurance Oversight. The ACA governs the sale of, and in some cases subsidizes consumers’ purchase of, individual insurance plans, which are health insurance plans that a person buys on his or her own as opposed to through an employer or association. As the U.S. Department of Health and Human Services (“HHS”) has explained, the paramount goal of the federal exchange is “to foster issuer competition, facilitate consumers’ comparison shopping, and ensure affordability through financial assistance,” *Health Insurance Marketplace Premiums After Shopping, Switching, and*

Premium Tax Credits, 2015-2016, Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation (April 12, 2016), and to “foster competitive environments in which consumers can choose from a number of affordable and high quality health plans.” *Issue Brief*, Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation (July 30, 2015). That is why HHS proposed to spend roughly \$1.7 billion in 2018 to operate the federal exchange (covering 34 states, including Florida) to “allow individuals . . . to compare health plan options, see if financial assistance with premiums and cost sharing is available, and purchase coverage.” *Justification of Estimates for Appropriations Committee*, Health and Human Services, Centers for Medicare & Medicaid Services, Fiscal Year 2018.

26. Individuals and families who buy individual ACA insurance plans have no reasonable alternatives, because generally they cannot secure health insurance through other means, e.g., employer-sponsored coverage, Medicare or Medicaid. Consumers who already have health insurance through employers or a federal program do not purchase individual ACA insurance plans.

27. In plan year 2018, roughly 1.75 million Floridians purchased individual ACA insurance plans, the highest number of any state in the country. Florida Blue’s public filings indicate that it sold 1.3 million individual ACA plans in 2018, which corresponds to a statewide market share of 75 percent. Approximately 10-12 percent of all individual ACA insurance plan enrollees nationwide are Floridians. A similar number is expected to enroll for plan year 2019.

28. Enrollees select a plan for 2019 coverage during the open enrollment period, which runs between November 1, 2018 and December 15, 2018. Coverage for plans purchased during this open enrollment period starts on January 1, 2019. In the lead up to and during the enrollment period, health insurance companies devote significant resources and money to attracting enrollees, including recruiting brokers, because their performance during this six-week period determines their total revenues for the entire following year.

II. The Role and Importance of Brokers

29. Brokers play a crucial role in driving policy sales in Florida, more so than in other states, which typically have far fewer brokers.¹ To date in the Orlando metro area, even with Florida Blue's exclusionary conduct, 73 percent of Oscar's policy sales have come through brokers compared to 40 percent nationally.

30. Brokers must be licensed by the state to sell insurance. To become licensed, brokers must complete 60 hours of insurance and ethics education coursework and pass a written examination. *See* Fl. Stat. Ann. §§ 626.241, 626.221, 626.8311. Brokers receive income either through customer fees or through commissions received from an insurance company. Though the amount and structure of payments varies from insurer to insurer, compensation from insurance companies typically is tied to the number of plans brokers sell.

¹ In Florida, the terms "broker" and "agent" are used interchangeably in the health insurance context.

31. According to the National Association of Health Underwriters, a trade association representing over 100,000 insurance brokers and agents nationwide, brokers “help millions of consumers by guiding them through the complexities of health insurance purchasing and enrollment, while ensuring they get the best policy at the most affordable price.” Brokers do so by “seek[ing] to understand each personal situation to create recommendations that complement a client’s financial and medical security needs.” Because consumers rely on brokers as expert personal insurance advisors, Florida law recognizes insurance brokers as fiduciaries of their customers and obligates brokers to provide their clients accurate advice about insurance plans and coverage.

32. Thus, independent brokers offer consumers valuable services because they provide one-stop shopping and information about multiple insurers’ competing plans, as well as expertise and advice as to which plan to select. An important part of the strategy of any new entrant into a local health insurance market is to market its offerings to licensed brokers and to convince them to be “appointed”—meaning legally permitted to sell policies for a particular insurer in return for a commission—by the new entrant. This is especially true in Florida, where the broker sales channel is particularly large and an unusually high percentage of all individual insurance plans are sold through brokers.

33. While individual ACA insurance plans are sold by different types of brokers, including brokers working at call centers and at online health businesses, local brokers, i.e., those with a physical presence in the relevant sales area, play a critical role in the marketplace because consumers’ decisions are often relationship-driven. Oscar’s experience in Orlando demonstrates that local brokers have a far greater ability to guide

the decisions of local residents than out-of-state or out-of-area brokers. In other words, many consumers strongly prefer the advice of local brokers whom they interact with in person, rather than brokers who communicate with them solely from a call center or through the Internet. Insurance plan sales are also driven heavily by consumer referrals, and local brokers create more referrals.

34. Brokers in general, and local brokers in particular, offer significant benefits to insurers selling individual ACA insurance plans, including by providing more marketplace exposure and sales representative coverage than insurers are able to generate on their own. Local brokers spend significant resources marketing to residents in their community and building relationships of trust over many years. To date in the Orlando metro area, of the individual ACA insurance policies sold by brokers for Oscar, nearly 80 percent have come from brokers with operations in that area.

35. Certain large brokers, often called contracted general agents (i.e., large entities that provide administrative services and support to local brokers), play a particularly important role because they account for a large volume of the covered lives in the Orlando metro area either through their own policy sales or the sales of the brokers to which they provide services. Oscar has been particularly unsuccessful in engaging these types of brokers because they cannot risk termination by Florida Blue across the entire state.

36. Brokers are thus a vital source of customers for insurance companies that offer individual insurance plans under the ACA in Florida. Without access to brokers, insurance companies cannot effectively compete.

III. Florida Blue's Dominance

37. Competition in the sale of individual ACA insurance plans throughout Florida has diminished as the number of insurers selling those plans has declined. Major insurers like Aetna, Humana, Cigna and UnitedHealthcare stopped selling individual ACA plans in Florida between 2015 and 2017, and Florida Blue absorbed the bulk of the consumers they left behind.

38. Competition in the individual market is even more limited in certain metro area markets. With the addition of Oscar in 2019, the number of insurance companies offering such plans in all four of the Orlando metro area counties will rise to three.

39. As other insurance companies exited, Florida Blue steadily gained share, far eclipsing any other competitor. Florida Blue held approximately 75 percent of the market for individual ACA plans statewide in 2018. Its share is even higher in the Orlando metro area, where it faces almost no competition.

40. As a result of its market power and stranglehold on brokers, Florida Blue is able to charge supracompetitive premiums for its individual ACA insurance plans in the Orlando metro area. With less competition, consumers are left with fewer choices and higher prices.

IV. Oscar's Entry

41. Oscar's founding mission has been to build a technology-driven health care experience that makes accessing health care and navigating the complex health care system easy, seamless and more affordable for consumers. Oscar's decision to enter Orlando comes in its sixth year serving enrollees in states across the country and stems

from its goal of bringing Oscar's uniquely engaging member experience and superior technology to more consumers.

42. To deliver a better health care experience, Oscar has developed tools and resources that simplify the bureaucracy around health insurance that is often associated with traditional insurers. Oscar is one of the first health insurers to integrate telemedicine directly into its plans, offering 24/7 access to telemedicine to enrollees at no additional cost. In 2017, 25 percent of Oscar enrollees used its telemedicine feature, eight times the national average for other large group, employer sponsored health insurers. Oscar also pioneered a concierge team model in the health care industry, which gives each enrollee a dedicated team of care guides and nurses who holistically support enrollees to find conveniently located, high-quality doctors, book appointments, understand and process claims, and answer any general questions related to their care. In 2017, 70 percent of Oscar members contacted and engaged with their concierge team.

43. Oscar's member experience is distinguished from traditional insurers because of its intuitively designed mobile and web application that allow enrollees to manage their health care seamlessly, including searching for in-network doctors, booking appointments (in certain states) and accessing their health records. In fact, 43 percent of members' first visits to the doctor are routed through Oscar's technology and customer service teams. The ability to route enrollees to the right care at the right time is made even more seamless because Oscar does not require referrals for enrollees to see specialist doctors.

44. Because of its superior technology services and integrated benefits, Oscar has the most engaged health insurance plan members in the industry, with the highest number of online accounts and active online users (mobile and otherwise). High member engagement translates to cost savings and member satisfaction, which is why Oscar's member satisfaction rate is three times the industry average.

45. Altogether, these features make it easier and more efficient for enrollees to manage their health care, reducing the amount of time and stress consumers usually spend managing their care and leaving more time for work or family. Since 2014, Oscar and its affiliates have successfully brought its innovative business model to ACA individual plan consumers in 14 metro areas in 9 states.

46. As will be the case in Florida, the entry of Oscar and its affiliates has benefited consumers in those states by providing them more choices, lower premiums and services not offered by other insurers. By focusing on technology and service, Oscar can keep plan members' costs low. As a result, Oscar is usually less expensive than traditional insurers, including Florida Blue, while providing comparable coverage and a high quality of care.

47. Nearly all of Oscar's individual ACA insurance plans in the Orlando metro area are less expensive than alternatives offered by the Florida Blue plans. Oscar's plans are often the lowest-priced plans available, while many of Florida Blue's plans are among the most expensive.

48. For example, plans available to Florida residents on the federal ACA exchange are divided into "metal" tiers that correspond to a specific percentage level of

cost sharing between the insurer and the insured, with “Bronze,” “Silver” and “Gold” plans being the most popular plan categories. Gold plans typically require higher monthly premiums than Bronze and Silver plans, but cover a higher percentage of the insured’s medical bills. Both Oscar and Florida Blue offer all three types of plans in the Orlando metro area, and at each level, Oscar’s monthly premiums are regularly significantly lower than comparable Florida Blue plan premiums. Thus, an individual purchasing an Oscar plan could save many hundreds of dollars a year.

49. These benefits already are available to consumers in the Orlando metro area with Oscar’s entry this year. Absent Florida Blue’s exclusionary conduct, they may be available to consumers in Jacksonville and Tampa as soon as 2020. Oscar intends to enter each of those markets and has taken significant affirmative steps to do so in 2020, including: (1) conducting market research; (2) negotiating with health care providers to build a competitive network of hospitals, physician groups and other ancillary care facilities; and (3) preparing financial analysis regarding the viability and profitability of entry. Oscar has invested, and continues to invest, significant money and resources on these efforts. Oscar’s deadline for entering these markets next year is fast approaching. Oscar would need to execute agreements with health care providers, and file for approval of its insurance plan offerings and expansion proposal with federal and state agencies by May 2019, well before which all of the above efforts must be completed. Thus, time is short.

FLORIDA BLUE’S UNLAWFUL SCHEME TO EXCLUDE OSCAR

50. Florida Blue is well aware that Oscar is a threat to upend the traditional insurance model and undercut Florida Blue’s dominance. Upon learning that Oscar planned to enter the Orlando market, Florida Blue regarded Oscar to be a major threat to its monopoly, and turned its focus on how best to respond to Oscar’s entry into Florida. In response to this threat, Florida Blue launched a targeted campaign to prevent Oscar’s successful entry in Orlando specifically and Florida more generally through unlawful exclusionary conduct.

I. Coercion of Brokers into Anticompetitive Exclusive Agreements

51. Florida Blue makes no secret of its exclusivity policy with respect to brokers that sell individual insurance plans. Its website states “**Our appointment to sell individual products is an exclusive contract . . .**.” Thus, if a broker wants to sell individual plans for Florida Blue, it must agree to sell *only* Florida Blue’s individual plans.

52. Florida Blue obtained and enforced these exclusive dealing agreements through coercion and intimidation, including threatening to exclude brokers from a significant portion of the market for individual ACA insurance plans. Because Florida Blue accounts for approximately 75 percent of these plans statewide and an even higher proportion in the Orlando metro area, brokers cannot afford to refuse Florida Blue. In turn, Florida Blue now holds captive the vast majority of independent brokers in the Orlando metro area from which other competitors, including Oscar, are foreclosed. Without the ability to enter and attract consumers, Florida Blue’s competitors cannot

achieve sufficient scale to negotiate favorable provider contracts and bring real, sustained competition to the state.

53. In late October 2018, with the 2019 ACA open enrollment period approaching, Florida Blue initiated a concerted effort to intimidate brokers into refusing to work with Oscar. In the very week that Oscar's competitive pricing for 2019 plans became public, Florida Blue systematically contacted brokers appointed by Oscar, using appointment information that is publicly available on the Florida Department of Financial Services website. These communications threatened to permanently deny Oscar-appointed brokers business from Florida Blue, not only in the Orlando metro area, but throughout Florida, if they continued to do business with Oscar. Florida Blue's behavior occurred only a week before the commencement of the Open Enrollment period on November 1, 2018 in which health insurance providers sign up all their business for the following year.

54. For example, on October 24, 2018, Beau Shiflet, Area Manager Central Florida Region for Florida Blue, sent an email to brokers threatening, **"You . . . will have 48 hours to terminate your Oscar appointment or we will terminate your Florida Blue appointment with no eligibility of reappointment with us."**

55. In an email received by Oscar that same day, October 24, 2018, one broker wrote to Oscar, **"This is a request to terminate my Oscar contract as I am also appointed with FL Blue and they can only allow captive agents to work with them."**

56. Similarly, on October 29, another broker explained to Oscar, **"I just got word that any Florida Blue agents who will be contracting with Oscar will be**

terminated immediately. . . . I have a very large book with Blue and Oscar is not in my area here. Losing our Blue Contract would be a financial disaster.”

57. Previously, on or around October 10, Florida Blue terminated the appointment of another broker who participated in a radio advertisement promoting Oscar. When that broker asked why his appointment with Florida Blue was terminated, Mr. Shiflet replied, **“We saw and heard your radio program with Oscar leadership promoting them in the Orlando market and the recruiting of agents. This is not what we are looking for in our business partners.”**

58. Florida Blue’s scheme is particularly effective because they have forced all of the contracted general agents in the Orlando metro area to work exclusively with Florida Blue. These contracted general agents account for a high percentage of the consumers in the Orlando metro area either through their own policy sales or the sales of the brokers to which they provide services. The contracted general agents refused even to consider Oscar and have rebuffed Oscar’s initial outreach for fear of losing business from Florida Blue. By forcing all of the contracted general agents in the Orlando metro area to serve as captive agents, Florida Blue has foreclosed access not just to their customers, but to all of the smaller brokers in the area that contract with them for services, including brokers that market themselves as independent brokers.

59. While employing some captive agents is not unusual, what is highly unusual and anticompetitive is Florida Blue, a monopolist, using its market power to coerce all independent brokers, including the largest and most important brokers in the area, to become captive agents beholden to Florida Blue. As a result of Florida Blue’s

anticompetitive scheme, more than 190 brokers (so far) have backed out of agreements to sell Oscar's insurance plans. Of those, 133 terminated their appointments within the 48 hours immediately following Mr. Shiftlet's October 24, 2018 email. To put that number in perspective and highlight Florida Blue's market power, this year Oscar's affiliates have had only 14 broker terminations *nationally* outside of Florida. Oscar has thus been able to appoint only 27 percent of local brokers in the Orlando metro area, compared to nearly 60 percent in other markets where, as in Orlando, Oscar entered with competitive pricing.

60. The sheer percentage of brokers from which Oscar is foreclosed is significant, but does not tell the full foreclosure story. The brokers from which Oscar is foreclosed, which include contracted general agents, account for an even higher percentage of the policies sold and consumers in the Orlando metro area. Thus, while Oscar has access to only about a quarter of the brokers in the Orlando metro area, it has access to, and therefore the ability to compete for, even fewer policies and consumers.

II. Refusal to Deal with Out-of-State Brokers

61. Florida Blue's website also states that **"Florida Blue does not appoint agents who reside out of state to sell individual products."**

62. Through this policy, Florida Blue limits the number of brokers competing for individual plan sales in Florida, including the Orlando metro area. Without the ability to sell individual plans for Florida Blue, which dominates the market, out-of-state brokers—even large multistate, call-center-based brokers—have little incentive to enter Florida.

63. By locking out these out-of-state brokers, Florida Blue reduces the number of brokers competing for sales of insurance plans and for which other insurance companies can turn to compete with Florida Blue.

64. Moreover, this in-state-only broker policy entices local brokers to enter into exclusive agreements with Florida Blue. Local brokers know that to amplify the competition-reducing effects of its exclusive agreements, Florida Blue will keep out-of-state brokers from competing with local brokers.

65. Together with its exclusivity policy, Florida Blue's in-state-only broker policy helps it maintain its monopoly position.

RELEVANT MARKETS

I. The Market for Individual ACA Insurance Plans

66. There is a relevant product market for individual health insurance plans under the ACA ("Individual Plan Market"). The outer boundaries of the Individual Plan Market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between individual health insurance plans under the ACA and potential substitutes.

67. From the perspective of insurance customers, there are no reasonable substitutes for individual health insurance plans under the ACA because, *inter alia*, those individuals and families generally cannot secure health insurance through other means, e.g., employer-sponsored coverage, Medicare and Medicaid. Consumers who already have health insurance through employers or a federal program do not purchase, and often are not eligible to purchase, individual ACA insurance plans.

II. Geographic Markets

68. The relevant geographic markets (the “Relevant Geographic Markets”) are:

- A. The Orlando metro area, consisting of Orange, Osceola, Seminole and Lake counties, or alternatively, each individual county therein (“Orlando Markets”);
- B. The Jacksonville metro area, consisting of Duval, St. Johns, Clay, Nassau and Baker counties, or alternatively, each individual county therein (“Jacksonville Markets”); and
- C. The Tampa metro area, consisting of Hillsborough, Pinellas, Pasco and Hernando counties, or alternatively, each individual county therein (“Tampa Markets”).

69. Insurers offer plans with networks of medical providers that are based on the metro area in which the plan is sold. Because individual insurance consumers are offered health plans based on where they reside and that include provider networks based on the metro area in which they reside, individual insurance plans outside of the metro areas in which they live do not provide reasonable substitutes regardless of how those plans are priced. Alternatively, each of the aforementioned counties is a relevant geographic market because individual ACA insurance plans are sold on a county-by-county basis.

III. Florida Blue's Monopoly Power

70. Florida Blue's monopoly power in the Individual Plan Market in the Relevant Geographic Markets is evidenced directly by its abilities to: (1) charge higher prices than its competitors without losing share; and (2) exclude competitors and, therefore, restrict output.

71. Florida Blue's monopoly power also is evidenced directly by its ability to coerce brokers into exclusive dealing arrangements in the Individual Plan Market in the Relevant Geographic Markets.

72. Florida Blue's monopoly power is evidenced indirectly by its market shares in the Individual Plan Market in the Relevant Geographic Markets. In 2018, Florida Blue's share of the Individual Plan Market in the State of Florida was 75 percent, and Florida Blue's share is even higher in the Orlando Markets. Florida Blue holds market leadership positions in the Jacksonville Markets and the Tampa Markets.

IV. Barriers to Entry and Expansion

73. There are high barriers to entry and expansion in the Individual Plan Market in the Relevant Geographic Markets.

74. As an initial matter, Florida Blue's coercive exclusive dealing arrangements function as both a barrier to entry and expansion because they deter potential competitors from even attempting to enter the Individual Plan Market in the Relevant Geographic Markets and prevent new entrants from expanding to achieve sufficient scale to effectively compete with Florida Blue.

75. Insurers must meet both federal (HHS) and Florida licensing requirements (Florida Office of Insurance Regulation) to offer individual ACA insurance plans in Florida. Certain health insurance plan types also require the approval of the Florida Agency for Health Care Administration. The process to obtain such approvals must generally begin more than ten months before plan open enrollment periods for the following year begin.

76. An insurer seeking to enter the Individual Plan Market must plan for months or years in advance and make significant capital investment before entering. Insurers must reach agreements with providers—hospitals, physicians, specialists and others—sufficient to provide care for the insurer’s enrollees. Given that federal regulations require insurers to include a wide range of services in health insurance plans, and state regulations that require the availability of a wide range of health care providers, insurers must make arrangements with a large number of different providers. With an uncertain number of future enrollees, entrants have less negotiating leverage with doctors and hospitals, meaning they are likely to pay higher prices for care, while at the same time offering lower premiums to attract enrollees. Insurers must also establish relationships with, *inter alia*, pharmacies, laboratories, testing facilities and numerous brokers. Negotiating all of these arrangements can take months or years of protracted negotiation.

77. A new insurer must attract a substantial number of new enrollees in order to have a sustainable business model. The nature of insurance is that it is economical to spread risk across as large of a population as possible. And health insurers face

substantial fixed costs in the form of IT, employees and office space, which can only be efficiently recouped with economies of scale. Consequently, a new health insurer will only seek to enter a new market if it is confident of attracting a sufficiently large number of enrollees. Medical service providers will only enter into contracts for provision of services at reasonable rates if the plan has a sufficiently large number of enrollees. This fact is critical for Oscar's success not only in the Orlando Markets but also in the Tampa Markets, Jacksonville Markets and the rest of Florida.

78. High barriers to entry have contributed to consolidation in health insurance markets, as companies have found it easier to simply buy another health insurer rather than enter a new geographic market on their own, and new entry is deterred.

79. Recent trends establish that insurers are exiting the sale of individual ACA insurance plans in Florida because insurers find them unprofitable. Oscar's entry is only possible because of its innovative approach to insurance, which other insurers do not share and could not quickly replicate.

ANTICOMPETITIVE EFFECTS OF FLORIDA BLUE'S CONDUCT

I. Antitrust Injury to Oscar

80. As a direct result of Florida Blue's exclusionary conduct, Oscar has suffered—and will continue to suffer—damage. In order to offer health insurance products in a particular market, an entity must: (1) obtain a certificate of authority from the state regulator; (2) negotiate contracts with health care provider systems to build a network of hospitals, physician groups and other ancillary care facilities; (3) submit

insurance products and rates for regulator review and approval; (4) fund the insurance entity with enough capital in reserves to meet regulatory requirements; and (5) educate the market of licensed insurance brokers on the company and its insurance products to enlist their support in helping their clients enroll in the products. Oscar invested significant time and millions of dollars to complete these steps in preparation of its entry into Florida, which is now being inhibited and jeopardized by Florida Blue's anticompetitive actions.

81. In the Orlando Markets, Oscar already has been substantially foreclosed from brokers, a crucial path to insurance consumers, with only 27 percent of local brokers willing to work with Oscar, far less than in most other states. And given that the largest brokers are beholden to Florida Blue, those local brokers represent far less than 27 percent of consumers represented by brokers in the area. More than 190 brokers cancelled their appointments to sell Oscar insurance, and many other brokers will not even negotiate with Oscar, all as a result of the Florida Blue's intimidation and coercive behavior. The result is that Oscar lost and continues to lose sales during the current 2019 enrollment period, which started on November 1, 2018 and runs through December 15, 2018. Oscar also stands to lose sales in 2020 and beyond and its very future in the Orlando Markets is jeopardized by Florida Blue's conduct.

82. In the Jacksonville Markets and Tampa Markets, Oscar is likely to suffer the same harm if and when it enters in 2020, as intended. Florida Blue holds a monopoly position in these markets as well, and undoubtedly will engage in the same exclusionary conduct rather than compete with Oscar on the merits. In light of this risk,

unless Florida Blue is enjoined, Oscar may be forced to abandon its plans to enter additional markets in Florida, resulting in a loss of profits in those markets and a loss of the significant investment Oscar has expended as part of those entry plans to date.

II. Oscar Is Suffering Irreparable Harm

83. Oscar is suffering irreparable harm because of Florida Blue's conduct. Specifically, Oscar's ability to compete in the Orlando Markets has been inhibited because brokers have terminated—and likely will continue to terminate—their relationships with Oscar. As a result, Oscar has significantly underperformed its sales projections, selling a fraction of the total number of individual ACA insurance plans that it expected to sell at this point in the 2019 open enrollment period.

84. While independent and experienced Florida actuaries informally advised Oscar that it would sell approximately 70,000 individual insurance plans in the Orlando Markets during the 2019 open enrollment period, current data indicates that it will sell only a fraction of the estimated projection.

85. This harm is irreparable. If Oscar continues to underperform its sales projections, it is likely that it will not achieve the minimum efficient scale necessary for it to become a viable long-term competitor in the Orlando Markets. Oscar's performance this year likely will have major repercussions on its competitiveness in future years. The fewer insureds it has this year, the less leverage it will have to negotiate favorable terms with providers, which will impact the premiums it can afford to charge. And any negative impact on the quality or pricing of its insurance plans—or even the impression thereof—will impact its reputation and ability to attract brokers and

consumers. The cascading effects could ultimately impact Oscar's viability in the Orlando Markets.

86. In addition, if Oscar underperforms in the Orlando Markets, plans to enter other markets, including the Jacksonville Markets and Tampa Markets will be threatened. Underperformance will impact Oscar's ability to negotiate desirable provider networks in other areas, its ability to attract brokers in other areas, and ultimately its ability to attract consumers in other areas.

87. Finally, Oscar continues to expand its services to localities in other states across the country. Its underperformance in, or forced exit from, Florida could cause providers and brokers in other states to question whether they should do business with Oscar and will hinder Oscar's ability to successfully bring its innovative products and services to consumers in other states.

III. Harm to Competition

88. Florida Blue is acting with the purpose and effect of unreasonably restraining and injuring competition in the Insurance Plan Market in the Relevant Geographic Markets by attempting to thwart Oscar's entry. Florida Blue's scheme to foreclose Oscar from access to brokers, which are an indispensable path to insurance customers, prevents Oscar and other new insurers from offering innovative and lower-cost insurance plans to Floridians. Additionally, Florida Blue is reducing output and limiting consumer choice, while also reducing quality by impeding innovation, thereby harming competition and the public interest.

89. As other major insurers have exited the sale of individual ACA insurance plans, Florida Blue has been shielded from the price competition that characterizes a robust health insurance market. Studies have shown that there is an inverse correlation between the number of insurers in a market and premium growth in the market (i.e., the fewer the number of insurers the greater the premium growth), which is reflected in the fact that Florida Blue has steadily raised its prices without much, if any, competitive restraint in recent years. Studies have also shown that, unsurprisingly, many consumers prefer less expensive plans. On average, 65 percent of plans selected are one of the two lowest cost plans available in a tier.

90. The primary anticompetitive effect of Florida Blue's scheme to foreclose Oscar from brokers is that consumers will pay more for health insurance. In the Orlando Markets, Oscar is offering a number of plans that are less expensive than Florida Blue alternatives. Consumers will suffer by not having access to the better service and innovative products that Oscar provides and that would be unlocked by real competition.

91. In Orange County, for example, Oscar offers three plans in the Bronze metal tier, all of which are less expensive than all other competitors' offerings. The lowest price Florida Blue plan for a 40-year-old individual in the Bronze metal tier costs approximately 10 percent, or \$36, more per month, and roughly \$430 more per year, in premiums alone. In the Silver metal tier, which most Florida consumers purchasing plans on the federal exchange select, Oscar has two plans that are less expensive than all other competitors' offerings. The most affordable Florida Blue plan in the Silver metal tier costs approximately \$16 more per month, or roughly \$192 more per year. And in

the Gold metal tier, Oscar's plan is priced lower than all four Florida Blue plans. Some of Florida Blue's plans in Orange County cost several hundred dollars per month more than other competitors' plans.

92. Much is the same in Osceola, Seminole and Lake Counties, and Oscar would aim for the same in the Jacksonville Markets and Tampa Markets. Oscar plans are usually among the lowest priced plans in a particular local market and considerably less expensive than those of local incumbents like Florida Blue.

93. By forcing brokers to become captive agents, Florida Blue's exclusive dealing arrangements with brokers prevent consumers from learning about Oscar's lower premiums or the numerous innovations in Oscar's insurance plans. This undermines the very purposes of the ACA and the federal exchange created thereunder—transparency and reduction of cost. Many consumers, if they were to learn of Oscar's lower prices, would select an Oscar plan over a Florida Blue plan. Oscar has entered other markets in the United States with low-cost plans and achieved large enrollment numbers, despite being less established than traditional insurers, in large part due to its lower prices and innovation. Beyond Oscar and Orlando, Florida Blue's scheme will likely have the effect of deterring entry by other disruptive competitors in many markets across Florida.

94. But for the exclusionary conduct described above: (1) Florida Blue's market power in the Relevant Geographic Markets would be lessened; (2) Florida Blue would be unable to coerce brokers into the exclusive dealing arrangements described above; (3) there would be increased competition in the sale of individual insurance

plans; (4) consumers would have access to, and knowledge of, more choices when selecting an individual ACA insurance plan; and (5) prices would be lower and the quality of care would be higher for consumers.

CAUSES OF ACTION

COUNT I

Sherman Act § 2 Claim for Monopolization

95. Oscar incorporates by reference the allegations in Paragraphs 1 to 94 above as fully set forth herein.

96. Section 2 of the Sherman Act (15 U.S.C. § 2) prohibits the willful monopolization of any part of the trade and commerce among the States.

97. Florida Blue possesses monopoly power in the Individual Plan Market in the Relevant Geographic Markets and is maintaining this power through exclusionary conduct designed to exclude Oscar from competition. This conduct includes coercing brokers into exclusive agreements and limiting the supply of brokers through refusals to deal.

98. Florida Blue's willful and wrongful maintenance and/or extension of its monopoly power is not the result of growth and development as a result of innovation, business acumen or by virtue of offering a superior product. Rather, it is a direct consequence of Florida Blue's exclusionary conduct.

99. There is no efficiency enhancing, procompetitive justification for Florida Blue's conduct.

100. Florida Blue's conduct has substantially harmed and will continue to substantially harm competition in the Individual Plan Market in the Relevant

Geographic Markets. But for Florida Blue's conduct, Oscar would have more successfully entered the Orlando Markets and would enter the Jacksonville Markets and Tampa Markets, which it has taken affirmative steps toward and is prepared to do. As a result, prices are (and will be) higher, and there will be fewer alternatives for consumers in the Individual Plan Market in the Relevant Geographic Markets.

101. Florida Blue's unlawful monopolization of the Individual Plan Market in the Relevant Geographic Markets is and will continue to be the proximate cause of injury to Oscar, a direct competitor to Florida Blue in the Orlando Markets and a prospective competitor in the Jacksonville Markets and Tampa Markets.

102. Florida Blue's activities as alleged herein do not constitute the business of insurance, as they do not have the effect of transferring or spreading policyholder risk, nor are they an integral part of the policyholder relationship between insurer and insured. Moreover, Florida Blue secured its exclusive agreements with brokers through coercion and intimidation within the meaning of the McCarran-Ferguson Act.

COUNT II
Sherman Act § 2 Claim for Attempted Monopolization

103. Oscar incorporates by reference the allegations in Paragraphs 1 to 102 above as fully set forth herein.

104. Section 2 of the Sherman Act (15 U.S.C. § 2) prohibits attempts to monopolize any part of the trade and commerce among the States.

105. If for any reason, Florida Blue is deemed not to have monopoly power in the Individual Plan Market in the Relevant Geographic Markets, there is a dangerous probability that Florida Blue will acquire such power. Further, it was Florida Blue's

conscious objective to acquire monopoly power in the Individual Plan Market in the Relevant Geographic Markets by and through its exclusionary conduct.

106. Florida Blue's attempt to monopolize is not the result of growth and development as a result of innovation, business acumen or by virtue of offering a superior product. Rather, it is a direct consequence of Florida Blue's exclusionary conduct.

107. There is no efficiency enhancing, procompetitive justification for Florida Blue's conduct.

108. Florida Blue's conduct has substantially harmed and will continue to substantially harm competition in the Individual Plan Market in the Relevant Geographic Markets. But for Florida Blue's conduct, Oscar would have more successfully entered the Orlando Markets and would enter the Jacksonville Markets and Tampa Markets, which it has taken affirmative steps toward and is prepared to do. As a result, prices are (and will be) higher, and there will be fewer alternatives for consumers in the Individual Plan Market in the Relevant Geographic Markets.

109. Florida Blue's attempted monopolization of the Individual Plan Market in the Relevant Geographic Markets is and will continue to be the proximate cause of injury to Oscar, a direct competitor to Florida Blue in the Orlando Markets and a prospective competitor in other areas within the State of Florida.

110. Florida Blue's activities as alleged herein do not constitute the business of insurance, as they do not have the effect of transferring or spreading policyholder risk, nor are they an integral part of the policyholder relationship between insurer and

insured. Moreover, Florida Blue secured its exclusive agreements with brokers through coercion and intimidation within the meaning of the McCarran-Ferguson Act.

COUNT III

Sherman Act § 1 Claim Based on Florida Blue's Exclusive Agreements with

Brokers

111. Oscar incorporates by reference the allegations in Paragraphs 1 to 110 above as fully set forth herein.

112. Section 1 of the Sherman Act (15 U.S.C. § 1) prohibits, *inter alia*, (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition; and (4) that harms the plaintiff as a result of the anticompetitive aspect of the practice under scrutiny.

113. Florida Blue has entered into exclusive agreements, either in writing or *de facto*, with brokers, which have foreclosed Oscar from a substantial share of brokers.

114. These agreements unreasonably restrain trade in the Individual Plan Market in the Relevant Geographic Markets.

115. Florida Blue has market power in the Individual Plan Market in the Relevant Geographic Markets.

116. There is no efficiency enhancing, procompetitive justification for the agreements between Florida Blue and brokers.

117. These agreements have substantially harmed and will continue to substantially harm competition in the Individual Plan Market in the Relevant

Geographic Markets. But for these agreements, Oscar would have more successfully entered the Orlando Markets and would enter the Jacksonville Markets and Tampa Markets, which it has taken affirmative steps toward and is prepared to do. As a result, prices are (and will be) higher, and there will be fewer alternatives for consumers in the Individual Plan Market in the Relevant Geographic Markets.

118. These agreements are and will continue to be the proximate cause of injury to Oscar.

119. Florida Blue's activities as alleged herein do not constitute the business of insurance, as they do not have the effect of transferring or spreading policyholder risk, nor are they an integral part of the policyholder relationship between insurer and insured. Moreover, Florida Blue secured its exclusive agreements with brokers through coercion and intimidation within the meaning of the McCarran-Ferguson Act.

COUNT IV
Florida Antitrust Act Restraint of Trade § 542.19 Claim for Monopolization and Attempted Monopolization

120. Oscar incorporates by reference the allegations in paragraphs 1 to 119 above as fully set forth herein.

121. Florida Statute § 542.19 makes it unlawful to monopolize, or attempt to monopolize, any part of the trade or commerce in Florida.

122. Florida Statute § 542.16 states that the purpose of the provisions of the Florida Antitrust Act law is to complement the body of federal law prohibiting restraints of trade or commerce in order to foster effective competition.

123. Accordingly, for the same reasons set forth in Paragraphs 95-110, Florida Blue is violating § 542.19 by maintaining or attempting to acquire monopoly power in the Individual Plan Market in the Relevant Geographic Markets.

124. Unless enjoined, Florida Blue's conduct will continue to cause injury and damage to Oscar, and competition will continue to decrease in the Individual Plan Market in the Relevant Geographic Markets.

COUNT V

Florida Antitrust Act Restraint of Trade § 542.18 Claim Based on Florida Blue's Exclusive Agreements with Brokers

125. Oscar incorporates by reference the allegations in paragraphs 1 to 124 above as fully set forth herein.

126. Florida Statute § 542.18 states that every contract, combination or conspiracy in restraint of trade or commerce in this state is unlawful.

127. Florida Statute § 542.16 states that the purpose of the provisions of the Florida Antitrust Act law is to complement the body of federal law prohibiting restraints of trade or commerce in order to foster effective competition.

128. Accordingly, for the same reasons set forth in Paragraphs 111-119, Florida Blue is violating § 542.18 by entering into exclusive agreements with insurance brokers to foreclose Oscar from those brokers and thereby restraining trade in the Individual Plan Market in the Relevant Geographic Markets.

129. Unless enjoined, Florida Blue's conduct will continue to cause injury and damage to Oscar, and competition will continue to decrease in the Individual Plan Market in the Relevant Geographic Markets.

COUNT VI
Claim for Tortious Interference with a Business Relationship

130. Oscar incorporates by reference the allegations in paragraphs 1 to 129 above as fully set forth herein.

131. Florida common law prohibits tortious interference with a business relationship where: (1) a business relationship exists between the plaintiff and a third party; (2) the defendant knows of the relationship; (3) the defendant intentionally and unjustifiably interferes with the relationship; and (4) damage was caused to the plaintiff as a result of the breach of the relationship.

132. Oscar recruited brokers to market and sell Oscar's insurance plans in the Orlando Markets during the 2019 ACA open enrollment period.

133. Florida Blue is well aware of Oscar's business relationships with these brokers, which is publicly available information.

134. With the intent to sever Oscar from its business partners to avoid competition, Florida Blue has threatened and continues to threaten brokers with which Oscar does business if those brokers continue to sell Oscar insurance plans.

135. Florida Blue's behavior has been and will continue to be the proximate cause of harm to Oscar in the form of lost investment and lost business opportunities.

PRAYER FOR RELIEF

136. WHEREFORE, Plaintiff respectfully demands a trial by jury on all matters so triable under law, and respectfully requests that, based on the verdict of the jury, that judgment be entered:

- A. Enjoining Defendants from taking, or threatening to take, any retaliatory or deterrent actions against a broker based on that broker's marketing of, or consideration of marketing, non-Florida Blue health insurance plans, including suspending or terminating their broker agreement;
- B. Enjoining Defendants from conditioning a broker's ability to market their health insurance plans on that broker refusing to market non-Florida Blue health insurance plans;
- C. Requiring Defendants to remove their exclusive policy from their website and to distribute to each broker that markets Florida Blue plans revised broker criteria;
- D. Requiring Defendants to inform brokers of any injunction or judgment in this matter, including that Defendants will not retaliate against brokers for selling non-Florida Blue health insurance plans;
- E. Enjoining Defendants from engaging in any other exclusionary practices that directly or indirectly foreclose Oscar from marketing its health insurance in Florida;
- F. Awarding Plaintiff treble damages (to the extent the Court finds that such damages may be ascertained), reasonable attorneys' fees, costs, expenses

and such further relief as the Court deems just and proper

Dated: November 13, 2018

Respectfully Submitted,

/s/ Francis M. McDonald, Jr.
FRANCIS M. MCDONALD, JR., ESQ.
Florida Bar No. 0327093
SARAH A. LONG, ESQ.
Florida Bar No. 0080543
MCDONALD TOOLE WIGGINS, P.A.
111 N. Magnolia Avenue, Suite 1200
Orlando, FL 32801
Telephone: (407) 246-1800
Facsimile: (407) 246-1895
fmcdonald@mtwlegal.com
slong@mtwlegal.com
OscarHealthCorpBCBS@mtwlegal.com

STEVEN C. SUNSHINE (*Pro Hac Vice*
Admission to be applied for)
TARA R. REINHART (*Pro Hac Vice*
Admission to be applied for)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, NW
Washington, D.C. 20005
Tel: (202) 371-7000
Facsimile: (202) 393-5760
steve.sunshine@skadden.com
tara.reinhart@skadden.com

PAUL M. ECKLES (*Pro Hac Vice Admission*
to be applied for)
MICHAEL H. MENITOVE (*Pro Hac Vice*
Admission to be applied for)
MATTHEW LISAGAR (*Pro Hac Vice*
Admission to be applied for)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
4 Times Square
New York, NY 10036
Tel: (212) 735-3000
Fax: (212) 735-2000

paul.eckles@skadden.com
michael.menitove@skadden.com
matthew.lisagar@skadden.com

Doc. 75

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

OSCAR INSURANCE COMPANY
OF FLORIDA,

CASE NO.: 6:18-cv-1944

Plaintiff,

vs.

BLUE CROSS AND BLUE SHIELD OF
FLORIDA, INC., d/b/a Florida Blue; HEALTH
OPTIONS INC., d/b/a Florida Blue HMO; and
FLORIDA HEALTH CARE PLAN INC., d/b/a
Florida Health Care Plans,

Defendants.

_____ /

AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

(INJUNCTIVE RELIEF SOUGHT)

Plaintiff Oscar Insurance Company of Florida (“Oscar” or “Plaintiff”) brings this civil action for injunctive relief and damages under the antitrust laws of the United States and the State of Florida against Defendants Blue Cross and Blue Shield of Florida, Inc., d/b/a Florida Blue; Health Options Inc., d/b/a Florida Blue HMO; and Florida Health Care Plan Inc. (collectively, “Florida Blue” or “Defendants”). Plaintiff alleges based upon personal knowledge as to facts pertaining to itself, and upon information and belief as to all other matters as follows:

NATURE OF THE ACTION

1. This action arises out of the improper, unlawful and anticompetitive conduct by Florida Blue to stifle competition in Florida for the sale of individual health insurance plans and products in compliance with the Patient Protection and Affordable Care Act of 2010 (“ACA”), a key cornerstone of extending health care to all Americans, regardless of health status.

2. Florida Blue, the entrenched monopolist in Florida, holds approximately a 75 percent share of individual ACA insurance plans sold statewide and a significantly higher share in portions of the state, including the four counties comprising the Orlando metro area, where prior to the current enrollment period Florida Blue faced only a single competitor in any single county. Since 2015, major insurers, including Aetna, Humana, Cigna and UnitedHealthcare, have left the ACA exchange in Florida, leaving Florida consumers little choice but to pay Florida Blue’s steadily increasing rates. Oscar is poised to change that.

3. Oscar, one of the country’s fastest growing health insurance companies, uses technology and a customer-first approach to make health care affordable and accessible to its more than 230,000 members. Oscar has had significant success bringing down health insurance prices and providing consumers with a superior experience in the health care system in the states outside Florida it has entered.

4. Beginning with the annual enrollment period that ran from November 1, 2018 through December 15, 2018, Oscar sells ACA plans in the four counties that comprise the Orlando metro area and offers innovative plans at lower prices than Florida Blue. For example, in Orange County, Oscar offers plans in the most popular plan categories with

premiums that are \$16-36 less expensive per month, or roughly \$190-430 less per year, than the comparable Florida Blue plans. Oscar's plans also offer richer features than its competitors', like free 24/7 telemedicine and dedicated concierge teams. And Oscar's entry into the Orlando metro area is just the beginning—Oscar has in motion plans to begin selling insurance in other Florida markets as soon as next fall.

5. Faced with a major threat to its monopoly profits, Florida Blue responded by implementing a blatant scheme targeted at Oscar to keep it out of the state, thereby causing Florida consumers to continue to pay more for health insurance coverage. First and foremost, the scheme involves denying Oscar access to insurance brokers upon whom consumers rely to advise them of their insurance options. Florida Blue has a company policy—brazenly displayed on its website—that no broker may sell Florida Blue's individual plans unless that broker agrees to sell *only* Florida Blue's individual plans. Florida Blue wrongfully uses its monopoly power to compel brokers to sell only its plans when industry standards require independent brokers to find the best options for consumers' needs. Second, Florida Blue aggressively and selectively enforced this exclusivity policy against Oscar by systematically contacting brokers who had signed contracts with and been appointed as brokers by Oscar to threaten them with permanent termination. In one email to brokers in October 2018, during the very same week in which Florida Blue learned Oscar's plans are lower-priced than its own, Florida Blue said “[**you**] will have **48 hours to terminate your Oscar appointment or we will terminate your Florida Blue appointment with no eligibility of reappointment with us.**”

6. Florida Blue's monopoly power in Florida makes its scheme devastating to a new entrant like Oscar, as well as deeply injurious to Florida consumers. If appointed by Oscar, brokers face losing the right to sell Florida Blue plans in *all product lines* throughout *the entire State of Florida* if they decide to sell Oscar plans in *a single county in the state*. This anticompetitive leverage is greatest for the most successful brokers in the state, those with the largest client bases and those who operate in the regions, like the counties comprising Orlando, where Florida Blue has an especially dominant market position today. Several brokers have explained they have no choice but to stay with Florida Blue:

- **"I just got word that any Florida Blue agents who will be contracting with Oscar will be terminated immediately. . . . I have a very large book with Blue and Oscar is not in my area here. Losing our Blue Contract would be a financial disaster."**
- **"Unfortunately I need to rescind my request, as Florida Blue has informed me that they will cancel my contract if they see new appointments for any products in any area of Florida. This would be highly detrimental as they would be keeping most of my book of business."**
- **"This is a request to terminate my Oscar contract as I am also appointed with FL blue and they can only allow captive agents to work with them."**

7. Florida Blue's coercion of brokers not to deal with new entrants like Oscar stymies those entrants' ability to compete. Brokers are a critical sales channel in health insurance markets for new entrants in all states, and this is especially so in Florida where consumers purchasing individual ACA plans rely on brokers to a greater extent than in many other regions of the country. Given Florida Blue's dominant share in Florida (and even larger shares in the counties comprising Orlando), brokers with the largest existing client bases have an overwhelming incentive to sell Florida Blue's plans and cannot afford *not* to sell Florida Blue's plans. Consequently, Florida Blue's insistence that brokers sell *only*

Florida Blue plans necessarily forecloses Oscar from access to brokers responsible for selling the vast majority of ACA plans serving the counties comprising Orlando. Oscar will suffer the same fate in other Florida metro areas it intends to enter, where Florida Blue holds similar exclusionary power as a result of its high share of plan sales.

8. The pool of brokers with access to the vast majority of covered lives in Orlando is highly limited. A license to sell health insurance is not enough; many brokers licensed to sell health insurance are not actively doing so and even fewer have the experience and relationships to be successful. Thus, active brokers, who have developed good will and a broad customer base through their own efforts, are a critical path to consumers, especially for a new entrant like Oscar. And it is precisely these brokers that Florida Blue's exclusivity policy has foreclosed to competitors, particularly Oscar.

9. Beyond the harm to competition derived from seeking to exclude a new, innovative competitor with lower-priced products from the marketplace, Florida Blue's scheme undermines a key function of the ACA health insurance marketplace. One of the principal purposes of the ACA is to provide consumers with more choices. Independent brokers serve a valuable public purpose in explaining options and helping consumers navigate health insurance exchanges so that they make informed, educated choices about which plan is best for them and their families. But Florida Blue is attempting to force all independent brokers in Florida to become captive agents beholden to Florida Blue. In doing so, Florida Blue has eliminated the independence of the largest brokers (and the valuable services they provide) in the Orlando metro market, such that consumers no longer have access to objective advice about the full range of their insurance options. Brokers will not

review the options of insurers with consumers, but instead will merely help them renew or steer them towards Florida Blue plans each year.

10. The consequences for Oscar already have been severe. Under pressure from Florida Blue, at least 235 brokers backed out of agreements to sell Oscar's plans once they were threatened with termination by Florida Blue. Because the bulk of this coercive pressure was applied only one week before the beginning of the open enrollment period—the only six weeks during which health insurers selling individual ACA plans can sign up customers for the entire following year—Oscar had limited opportunity to respond to this blatantly anticompetitive tactic. Even before cancellations started mounting, other major brokers, including many of the largest and most successful brokers servicing the Orlando area, refused even to discuss dealing with Oscar out of fear of losing Florida Blue's business. In total, only about twenty percent of the local brokers in the Orlando metro area, and very few of the brokers with the type of large client bases necessary for success, have been appointed by Oscar, which is far fewer appointed than in other markets Oscar has entered. Based on the success it has experienced with the limited number of brokers it has appointed in Orlando, Oscar has every reason to believe that Florida Blue's exclusivity policy is depriving it of the means to compete for a substantial majority of the ACA business in Orlando. In fact, Oscar sold only a fraction of the plans in Orlando that it expected to sell based on its experience in other markets, even as its performance was quite positive with the limited universe of brokers who agreed to offer its plans.

11. While Florida Blue's scheme is causing harm in the Orlando markets right now, its ramifications extend throughout Florida. Oscar currently hopes to enter several

other Florida metropolitan areas in the fall of 2019. Entering new insurance markets requires substantial advance work—beginning over a year before the open enrollment period—that includes contracting with hospitals, physicians and specialists to build provider networks, as well as attracting local brokers, and filing rate, plan, and network information for approval by state regulators. Oscar’s ability to negotiate favorable rates with providers and attract brokers are both directly impacted by how many insureds it has in Florida and its track record of success in entering new markets in the state, as is its ability to recover the significant fixed costs of building new provider networks and marketing itself to consumers. At the moment, all major providers and brokers in Florida are dependent on Florida Blue. Florida Blue’s scheme is designed to maintain its monopoly by ensuring Oscar and other potential new entrants cannot obtain the volume of business necessary to achieve a minimum efficient scale that will allow them to become viable competitors.

12. The effects of Florida Blue’s scheme are designed to and will have the effect of keeping Oscar out of the Orlando metro area and other major metro areas, and preserving the high prices and monopoly profits that Florida Blue now reaps. The lack of scale will prevent Oscar from negotiating reasonable provider contracts in the Orlando metro area and other markets for 2020 and beyond that are necessary to provide low-cost alternatives to consumers.

13. Florida Blue’s actions are those of a monopolist that believes it can get away with this type of anticompetitive conduct because it is too powerful to be told no. As a result of Florida Blue’s anticompetitive conduct, Oscar’s sales are substantially lower than they would have been but for Florida Blue’s misconduct. Moreover, unless Florida Blue’s

anticompetitive conduct is enjoined, Oscar will suffer irreparable harm for which it has no adequate remedy at law, including lost goodwill, lost opportunities and potentially its very viability in Florida, not only in the Orlando metro area, but in additional metro areas in Florida it plans to enter in the future.

14. In turn, Florida Blue's actions have harmed competition throughout insurance markets in Florida by deterring and preventing new insurers, like Oscar, from entering those markets. Florida Blue's anticompetitive conduct offends the public interest because it deprives consumers of the benefits of a free and competitive market, which would otherwise include new and innovative insurance plans, more choices, lower premiums and better services.

THE PARTIES

I. Plaintiff

15. Plaintiff Oscar Insurance Company of Florida is a Florida corporation with its principal place of business at 295 Lafayette Street, New York, NY 10012. Oscar's affiliates are currently accepting health insurance customers for the 2019 plan year in New York, New Jersey, California, Texas, Ohio, Tennessee, Arizona, and Michigan. Oscar also now offers for the first time health insurance plans in Lake County, Orange County, Osceola County and Seminole County, in the Orlando, Florida metro area, with a starting coverage date of January 1, 2019.

II. Defendants

16. Blue Cross Blue Shield of Florida, Inc. is a Florida corporation with its principal place of business at 4800 Deerwood Campus Parkway, Jacksonville, FL 32246.

Blue Cross Blue Shield of Florida, Inc. is an independent licensee of the Blue Cross and Blue Shield Association. Blue Cross Blue Shield of Florida, Inc. sells health insurance plans across Florida, including in Lake County, Orange County, Osceola County and Seminole County, in the Orlando, Florida metro area.

17. Health Options Inc. is a Florida corporation with its principal place of business at 4800 Deerwood Campus Parkway, Jacksonville, FL 32246. Health Options Inc. is an independent licensee of the Blue Cross and Blue Shield Association. Health Options Inc. sells health insurance plans, specifically Health Maintenance Organization (“HMO”) plans, across Florida, including in Lake County, Orange County, Osceola County and Seminole County, in the Orlando, Florida metro area.

18. Florida Health Care Plan Inc. is a Florida corporation with its principal place of business at 1340 Ridgewood Avenue, Holly Hill, FL 32117. Florida Health Care Plan Inc. is an independent licensee of the Blue Cross and Blue Shield Association. Florida Health Care Plan Inc. sells health insurance plans across Florida, including in Lake County, Orange County, Osceola County and Seminole County, in the Orlando, Florida metro area.

19. Defendants’ actions described in this Amended Complaint are part of, and in furtherance of, the unlawful conduct alleged herein, and were authorized, ordered and/or done by Defendants’ various officers, agents, employees or other representatives while actively engaged in the management of Defendants’ affairs, within the course and scope of their duties and employment, and/or with the actual, apparent and/or ostensible authority of each Defendant.

JURISDICTION AND VENUE

20. This court has federal question jurisdiction under 28 U.S.C. §§ 1331 and 1337 for the claims in this action filed under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26) for damages and to secure injunctive relief against Florida Blue for violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), as alleged herein.

21. This court has supplemental jurisdiction under 28 U.S.C. § 1367 over the remaining state law claims as those claims arise out of the same matters and transactions that give rise to the federal law claims over which this Court has federal question jurisdiction.

22. Venue is proper in this judicial district under Section 12 of the Clayton Act, 15 U.S.C. § 22, as well as 28 U.S.C. § 1391. Defendants' principal places of business are within this district, and Defendants have engaged in anticompetitive behavior in this district, as alleged herein.

23. Defendants' actions described in this Amended Complaint are within the flow of and substantially affect interstate commerce. Defendants' activities foreseeably restrained interstate commerce by foreclosing out-of-state health insurance plan providers from competing in Florida.

INDUSTRY BACKGROUND

I. Individual ACA Insurance Plans in Florida

24. Health care is a significant concern for many Americans. A recent Kaiser Family Foundation survey found that a majority of Floridians view health care as "very important" and 26 percent of Floridians rank it as the "most important issue," a higher percentage than any other issue. In particular, the cost of health care continues to be an

important issue for Floridians. The same Kaiser Family Foundation survey found that, when asked to explain why health care is the most important issue, consumers most frequently identified costs as the concern.

25. Enacted on March 23, 2010, the central goal of the ACA is “to create a more transparent, competitive marketplace that gives consumers more information about their health insurance options and ensures better value for their premium dollars.” *Health Plan Finder Data*, Centers for Medicare & Medicaid Services, The Center for Consumer Information & Insurance Oversight. The ACA governs the sale of, and in some cases subsidizes consumers’ purchase of, individual insurance plans, which are health insurance plans that a person buys on his or her own as opposed to through an employer or association. As the U.S. Department of Health and Human Services (“HHS”) has explained, the paramount goal of the federal exchange is “to foster issuer competition, facilitate consumers’ comparison shopping, and ensure affordability through financial assistance,” *Health Insurance Marketplace Premiums After Shopping, Switching, and Premium Tax Credits, 2015-2016*, Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation (April 12, 2016), and to “foster competitive environments in which consumers can choose from a number of affordable and high quality health plans.” *Issue Brief*, Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation (July 30, 2015). That is why HHS proposed to spend roughly \$1.7 billion in 2018 to operate the federal exchange (covering 34 states, including Florida) to “allow individuals . . . to compare health plan options, see if financial assistance with premiums and cost sharing is available,

and purchase coverage.” *Justification of Estimates for Appropriations Committee*, Health and Human Services, Centers for Medicare & Medicaid Services, Fiscal Year 2018.

26. Individuals and families who buy individual ACA insurance plans have no reasonable alternatives, because generally they cannot secure health insurance through other means, e.g., employer-sponsored coverage, Medicare or Medicaid. Consumers who already have health insurance through employers or a federal program do not purchase individual ACA insurance plans.

27. In plan year 2018, roughly 1.75 million Floridians purchased individual ACA insurance plans, the highest number of any state in the country. Florida Blue’s public filings indicate that it sold 1.3 million individual ACA plans in 2018, which corresponds to a statewide share of 75 percent. Approximately 10-12 percent of all individual ACA insurance plan enrollees nationwide are Floridians. A similar number was expected to enroll for plan year 2019.

28. Enrollees selected a plan for 2019 coverage during the open enrollment period, which ran between November 1, 2018 and December 15, 2018. Coverage for plans purchased during this open enrollment period started on January 1, 2019. In the lead up to and during this and other enrollment periods, health insurance companies devote significant resources and money to attracting enrollees, including recruiting brokers, because their performance during this six-week period determines their total revenues for the entire following year.

II. The Importance of Pricing in the Sale of Individual ACA Insurance Plans

29. Plans available to Florida residents on the federal ACA exchange are divided into “metal” tiers that correspond to a specific percentage level of cost sharing between the insurer and the insured, with “Bronze,” “Silver” and “Gold” plans being the most popular plan categories. Gold plans typically require higher monthly premiums than Bronze and Silver plans, but cover a higher percentage of the insured’s medical bills. To be eligible for sale in a specific metal tier, a plan must meet federally mandated requirements, based on actuarial values, regarding how costs of care are split between the insurer and a typical consumer. For instance, as explained on Healthcare.gov, Silver plans must be split on average 70/30, with the insurer paying 70 percent of costs and the typical consumer paying 30 percent.

30. As explained on Healthcare.gov, all plans on the exchange “must cover the same set of essential health benefits,” including emergency services, hospitalization, pregnancy, mental health and prescription drugs. To appeal to consumers and for regulatory reasons, plans must have a minimally sufficient provider network, which typically includes a major hospital network, and offer a choice of other providers, such as primary care physicians and specialists. But once an individual plan meets this provider network threshold, the far more important factor to consumer choice is the amount of a plan’s premium, rather than any incremental increase in the breadth of the provider networks.

31. Because of the manner in which the federal government subsidizes ACA insurance plans, offering Silver plans with the lowest premiums, as Oscar did in three of the four Orlando counties, is the most critical factor to attracting enrollees. The federal

government provides subsidies called Advance Premium Tax Credits (APTCs), which are reductions in monthly premiums, to Floridians with incomes between 100 percent and 400 percent of the federal poverty line. APTCs are calculated for each eligible individual using a formula that is based on the monthly premium of the second-lowest cost Silver plan offered in a consumer's county. Specifically, the APTC to which a consumer is entitled is the price of the second-lowest cost Silver plan minus the amount the consumer is deemed able to pay based on his income. For example, if the second-lowest cost Silver plan available to the consumer costs \$500 per month, and the consumer is deemed able to pay \$25 per month, the federal government will provide a subsidy of \$475 per month. The consumer can use the APTC to purchase any individual ACA plan that he or she chooses, but must cover any costs above \$475 per month. Moreover, if the consumer chooses a plan that is less expensive than the APTC—for example, a Bronze metal tier plan—the government keeps the difference between the cost of the plan and the APTC.

32. In addition, the federal government also requires ACA insurers to provide Cost-Sharing Reduction (CSR) subsidies—which reduce out-of-pocket costs for medical care, such as doctor visits and prescription co-pays—to Floridians with incomes less than 250 percent of the federal poverty line. Only those consumers who purchase a Silver plan are eligible for CSR subsidies, a fact that further drives business toward Silver plans.

33. For these reasons, most consumers purchase one of the two least expensive Silver plans because they offer lower out-of-pocket costs than more expensive plans and better coverage at no additional cost to the consumer above less expensive Bronze plans. In 2017, Silver plans accounted for 80 percent of all individual on-exchange ACA enrollments

in Florida, the vast majority of which were subsidized. In 2017, 90 percent of all on-exchange individual ACA plans purchased in Orange County were subsidized with APTCs, and 79 percent were subsidized with CSRs.

34. Both Oscar and Florida Blue offer plans in all three metal tiers in each county in the Orlando metro area. At the Bronze and Silver tiers, Oscar's monthly premiums are regularly significantly lower than comparable Florida Blue plan premiums. Thus, an individual purchasing an Oscar plan could save many hundreds of dollars a year.

III. The Role and Importance of Brokers and Contracted General Agents

35. Brokers play a crucial role in driving policy sales in Florida, more so than in other states, where brokers play a less prominent role. In the counties comprising the Orlando metro area, even with Florida Blue's exclusionary conduct, 75 percent of Oscar's policy sales came through brokers compared to 40 percent nationally.

36. Brokers must be licensed by the state to sell insurance. To become licensed, brokers must complete 60 hours of insurance and ethics education coursework and pass a written examination. *See* Fl. Stat. Ann. §§ 626.241, 626.221, 626.8311. Brokers receive income either through customer fees or through commissions received from an insurance company. Though the amount and structure of payments varies from insurer to insurer, compensation from insurance companies typically is tied to the number of plans brokers sell.

37. According to the National Association of Health Underwriters, a trade association representing over 100,000 insurance brokers and agents nationwide, brokers "help millions of consumers by guiding them through the complexities of health insurance

purchasing and enrollment, while ensuring they get the best policy at the most affordable price.” Brokers do so by “seek[ing] to understand each personal situation to create recommendations that complement a client’s financial and medical security needs.” Because consumers rely on brokers as expert personal insurance advisors, Florida law recognizes insurance brokers as fiduciaries of their customers and obligates brokers to provide their clients accurate advice about insurance plans and coverage.

38. Thus, independent brokers offer consumers valuable services because they provide one-stop shopping and information about multiple insurers’ competing plans, as well as expertise and advice as to which plan is best suited for a particular customer. This is especially true in Florida, where the broker sales channel is particularly large and an unusually high percentage of all individual insurance plans are sold through brokers (as compared to other regions in the country). The broker channel is even more important for new entrants because it offers an efficient and cost effective way to gain brand awareness. It is easier to educate brokers about Oscar’s cost position, service quality and network quality who can then, in turn, share their expertise with their customers. Conversely, marketing directly to consumers, such as through billboards and advertisements, is expensive and it can take much longer to build broad awareness of the existence and quality of our product with consumers.

39. While individual ACA insurance plans are sold by different types of brokers, including brokers working at call centers and at online health businesses, local brokers, i.e., those with a physical presence in the relevant sales area, play a critical role in the marketplace because consumers’ decisions are often relationship-driven. Oscar’s

experience in Orlando demonstrates that local brokers have a far greater ability to guide the decisions of local residents than out-of-state or out-of-area brokers. In other words, many consumers strongly prefer the advice of local brokers whom they interact with in person, rather than brokers who communicate with them solely from a call center or through the Internet. Insurance plan sales are also driven heavily by consumer referrals, and local brokers create more referrals. Of the individual ACA insurance policies sold by brokers for Oscar in Orlando during the 2019 enrollment period, 75 percent came from brokers with operations in that area, even though those brokers represent only approximately 25 percent of Oscar's brokers appointed to sell ACA plans in Florida.

40. Certain brokers, often called general agents or contracted general agents ("CGAs"), play a particularly important role in insurance plan sales. In addition to selling insurance plans through their own employees, CGAs contract with and provide administrative services and support to local brokers. These CGAs thus account for and are the primary avenue for reaching a large volume of the covered lives in the Orlando metro area either through their own policy sales or the sales of the brokers to which they provide services.

41. According to the Florida Department of Financial Services website, there are approximately 2,200 brokers operating in Orlando with a valid appointment to sell plans for an insurer that offers individual health insurance in Florida. This group of appointed brokers that are actively selling individual insurance plans is the pool of brokers with access to the vast majority of covered lives in Orlando, and therefore the pool that insurers seek to appoint (and must if they wish to effectively compete).

42. While there may be other brokers licensed to sell health insurance plans in Orlando (either exclusively or as part of a joint license to sell life insurance), they are largely irrelevant to competition in the sale of individual insurance plans. First, many individuals—roughly a third—that hold a license that permits them to sell health insurance are not appointed by any insurer to sell any form of insurance, indicating that they are not active brokers. Further, many brokers that could sell health insurance are appointed with *life* insurers, indicating that they are not actively selling health insurance. In either case, brokers who are merely licensed but not actively selling health insurance plans lack infrastructure, experience and, most importantly, a client base, and therefore are not viable substitutes for active brokers who have books of business. Active brokers, including the brokers with the most covered lives, have invested time and capital building the good will, relationships and business operations that make them successful. These active brokers become and remain successful through their own independent efforts, not merely because of their affiliation with, or even support from, a particular insurer. Thus, for insurers, finding effective brokers is not a simple matter of recruiting anyone with a license. It is not feasible to compete solely by appointing and attempting to train new brokers with no client base, especially given the effects of Florida Blue's exclusionary conduct. Instead, to become and remain viable, insurers, especially in Florida, must have access to active, established brokers—the very same brokers that Florida Blue has foreclosed to competitors.

43. When planning to enter Orlando, Oscar made a concerted effort to identify and reach out to prominent agencies in Florida, including CGAs, within the relevant pool of brokers. In other states that Oscar has entered, CGAs work with multiple insurers, including

Oscar. Oscar identified these agencies based on publicly available information, including via the database on the Federally Facilitated Marketplace (“FFM”) website. Brokers listed in this database are typically more active in enrolling lives because registering for the FFM requires additional training beyond standard licensing requirements. But because of Florida Blue’s exclusivity policy, many of these brokers would not even speak with Oscar, let alone work with Oscar. Florida is the only state Oscar has entered where CGAs have refused to work with it due to exclusivity agreements with another insurer.

IV. Oscar’s Entry

44. Oscar’s founding mission has been to build a technology-driven health care experience that makes accessing health care and navigating the complex health care system easy, seamless and more affordable for consumers. Oscar’s decision to enter the counties comprising the Orlando metro area comes in its sixth year serving enrollees in states across the country and stems from its goal of bringing Oscar’s uniquely engaging member experience and superior technology to more consumers.

45. To deliver a better health care experience, Oscar has developed tools and resources that simplify the bureaucracy around health insurance that is often associated with traditional insurers. Oscar is one of the first health insurers to integrate telemedicine directly into its plans, offering 24/7 access to telemedicine to enrollees at no additional cost. In 2017, 25 percent of Oscar enrollees used its telemedicine feature, eight times the national average for other large group, employer-sponsored health insurers. Oscar also pioneered a concierge team model in the health care industry, which gives each enrollee a dedicated team of care guides and nurses who holistically support enrollees to find conveniently

located, high-quality doctors, book appointments, understand and process claims, and answer any general questions related to their care. In 2017, 70 percent of Oscar members contacted and engaged with their concierge team.

46. Oscar's member experience is distinguished from traditional insurers because of its intuitively designed mobile and web application that allow enrollees to manage their health care seamlessly, including searching for in-network doctors, booking appointments (in certain states) and accessing their health records. In fact, 43 percent of members' first visits to the doctor are routed through Oscar's technology and customer service teams. The ability to route enrollees to the right care at the right time is made even more seamless because Oscar does not require referrals for enrollees to see specialist doctors.

47. Because of its superior technology services and integrated benefits, Oscar has the most engaged health insurance plan members in the industry, with the highest number of online accounts and active online users (mobile and otherwise). High member engagement translates to cost savings and member satisfaction, which is why Oscar's member satisfaction rate is three times the industry average.

48. Altogether, these features make it easier and more efficient for enrollees to manage their health care, reducing the amount of time and stress consumers usually spend managing their care and leaving more time for work or family. Since 2014, Oscar and its affiliates have successfully brought its innovative business model to individual ACA plan consumers in 14 metro areas in 9 states.

49. As will be the case in Florida, the entry of Oscar and its affiliates has benefited consumers in those states by providing them more choices, lower premiums and

services not offered by other insurers. By focusing on technology and service, Oscar can keep plan members' costs low. As a result, Oscar is usually less expensive than traditional insurers, including Florida Blue, while providing comparable coverage and a high quality of care.

50. Nearly all of Oscar's individual ACA insurance plans in each Orlando metro area county have lower premiums than alternatives offered by Florida Blue's plans. Oscar's plans are often the lowest-priced plans available, while many of Florida Blue's plans are among the most expensive.

51. These benefits already are available to consumers in the Orlando metro area with Oscar's entry this year. Oscar currently hopes to enter several other Florida metropolitan areas in the fall of 2019 and has taken significant affirmative steps to doing so, including: (1) conducting market research; (2) negotiating with health care providers to build a competitive network of hospitals, physician groups and other ancillary care facilities; and (3) preparing financial analysis regarding the viability and profitability of entry. Oscar has invested, and continues to invest, significant money and resources on these efforts. Oscar's deadline for entering these markets is fast approaching. Oscar would need to execute agreements with health care providers, and file for approval of its insurance plan offerings and expansion proposal with federal and state agencies by May 2019, well before which all of the above efforts must be completed. Thus, time is short.

FLORIDA BLUE’S UNLAWFUL SCHEME TO EXCLUDE OSCAR

I. Coercion of Brokers Into Refusing to Deal With Oscar

52. Florida Blue is well aware that Oscar is a threat to upend the traditional insurance model and undercut Florida Blue’s dominance. Upon learning that Oscar planned to enter the Orlando market, Florida Blue recognized Oscar as a major threat to its monopoly, and turned its focus on how best to respond to Oscar’s entry. Florida Blue responded by launching a targeted campaign to prevent Oscar’s successful entry in Orlando specifically and Florida more generally through unlawful exclusionary conduct.

53. Florida Blue makes no secret of its exclusivity policy with respect to brokers that sell individual insurance plans. Its website states “**Our appointment to sell individual products is an exclusive contract . . .**” Thus, if a broker wants to sell individual plans for Florida Blue, it must agree to sell *only* Florida Blue’s individual plans.

54. Florida Blue obtained and enforced these exclusive dealing agreements through coercion and intimidation, including threatening to exclude brokers from a significant portion of the market for individual ACA insurance plans. Because Florida Blue accounts for approximately 75 percent of these plans sold statewide and even higher shares in Orlando and other metro areas, brokers who already do significant business with Florida Blue cannot afford to refuse them. In turn, Florida Blue has foreclosed competitors, including Oscar, from the vast majority of potentially independent brokers in the Orlando metro area by forcing these brokers to become exclusive “agents” for Florida Blue. Without the ability to enter and attract consumers through brokers, Florida Blue’s competitors cannot

achieve sufficient scale to negotiate favorable provider contracts and bring real, sustained competition to the state.

55. After Oscar's planned entry into Orlando became public in the summer of 2018, Florida Blue, on its own and through the CGAs upon which it has forced exclusivity, initiated a concerted effort to intimidate brokers into refusing to work with Oscar.

56. During a conference attended by approximately 400 brokers on or about August 29, 2018 at an Embassy Suites in Lake Buena Vista, Florida, a Florida Blue representative stated that any brokers with any other company listed on their licenses or selling other plans would be found in violation of the exclusivity policy, permanently terminated and have their commission payments withheld.

57. At a meeting attended by brokers on or about September 25, 2018 at Florida Blue's offices in Lake Mary, Florida, Beau Shiflet, the Central Florida Area Manager for Florida Blue, stated that he had attended an Oscar informational meeting held in Kissimmee, Florida, and had observed that there were agents appointed by Florida Blue in attendance. As a result, Mr. Shiflet went on to threaten the brokers that attended the meeting at Florida Blue's offices that their Florida Blue contracts would be canceled if they were found to be working with Oscar. Oscar was the only competitor that Mr. Shiflet mentioned in reference to Florida Blue's exclusivity policy.

58. Two days later, on September 27, 2018, an employee of Rogers Benefit Group, a CGA, sent an email to insurance agencies, copying Frank Merlino, Southern Area Manager of Individual Sales for Florida Blue, regarding Florida Blue's exclusivity policy. The email stated that some agencies seeking to appoint Florida Blue agents had been "using

an outdated exclusivity form.” The email purported to attach the most up-to-date form and requested that agencies “**send this exclusivity form to ALL YOUR AGENTS and have them sign it, along with an email reminding them of the exclusivity requirements.**” The email further stated that “**if an agent does not sign this form and submit it to us, Frank will terminate them.**”

59. On or around October 10, 2018, Florida Blue terminated the appointment of another broker who hosts a local radio show and simply had an Oscar representative as a guest on his show. When that broker asked why his appointment with Florida Blue was terminated, Mr. Shiflet replied, “**We saw and heard your radio program with Oscar leadership promoting them in the Orlando market and the recruiting of agents. This is not what we are looking for in our business partners.**”

60. Florida Blue’s intimidation efforts intensified as the 2019 ACA open enrollment approached. In the week before the start of the open enrollment period, the very week that Oscar’s competitive pricing for 2019 plans became public, Florida Blue systematically contacted brokers appointed by Oscar, using appointment information that is publicly available on the Florida Department of Financial Services website. These communications threatened to permanently deny Oscar-appointed brokers business from Florida Blue, not only in the Orlando metro area, but throughout Florida, if they continued to do business with Oscar. Florida Blue’s behavior occurred only a week before the commencement of the open enrollment period on November 1, 2018 in which health insurance providers sign up all their business for the following year.

61. For example, on October 24, 2018, Mr. Shiflet sent an email to brokers threatening, **“You . . . will have 48 hours to terminate your Oscar appointment or we will terminate your Florida Blue appointment with no eligibility of reappointment with us.”**

62. In an email received by Oscar that same day, October 24, 2018, one broker wrote to Oscar, **“This is a request to terminate my Oscar contract as I am also appointed with FL Blue and they can only allow captive agents to work with them.”**

63. Similarly, on October 29, 2018, another broker explained to Oscar, **“I just got word that any Florida Blue agents who will be contracting with Oscar will be terminated immediately. . . . I have a very large book with Blue and Oscar is not in my area here. Losing our Blue Contract would be a financial disaster.”**

64. On October 25, 2018, Florida Blue again updated its exclusivity policy. The new form added questions that Florida Blue required appointed agents to answer, including **“Do you understand the exclusivity clause and agree to not sell any other carriers for over and under 65 policies . . . ?”** The exclusivity policy states **“You must sell and solicit Florida Blue Over 65 Products exclusively at all times. There is not any circumstance where you may sell an O65 competitor medical product”** and **“You must sell and solicit Florida Blue U65 medical products exclusively at all times. There are not any circumstances where you can sell an Under 65 medical product.”** According to the policy, **“Any agent or agency that violates the exclusivity arrangement with Florida Blue will be permanently terminated for cause.”**

65. Florida Blue's intimidation tactics are particularly effective because it works in concert with the CGAs to propagate its threats to other brokers. Florida Blue's CGAs wield significant control over commission payments to brokers. Florida Blue pays CGAs a lump sum from which CGAs are responsible for distributing broker commission payments based on broker performance. CGAs have considerable leeway in distributing commission payments, and they can withhold commissions or even terminate a broker if that broker violates the terms of Florida Blue's exclusivity policy.

66. As a result, Florida Blue's CGAs exert considerable control over the many brokers they recruit for Florida Blue. And through its CGAs, Florida Blue has more help policing and enforcing exclusivity. Florida Blue requires exclusivity not just from its CGAs, but also the many brokers that contract with CGAs, who often market themselves as independent brokers. In turn, Oscar and other potential new entrants are foreclosed from access not just to direct customers of CGAs, but also to the customers of the brokers with whom the CGAs contract.

67. While directly employing some brokers is not unusual, what is highly unusual and anticompetitive is Florida Blue, a monopolist health insurance provider, using its market power to coerce CGAs and in turn independent brokers, into signing exclusivity agreements.

II. The Lack of Procompetitive Justifications for Florida Blue's Conduct

68. Florida Blue has selectively enforced its exclusivity policy. Florida Blue has aggressively threatened to terminate—and has terminated—its appointment of any broker who obtains and does not cancel an appointment with Oscar. Yet, many brokers who have cancelled their appointments with Oscar due to threats from Florida Blue are still appointed

with both Florida Blue and other major insurance companies, according to the Florida Department of Financial Services website. For example, Rizwana Khan, whose signature block identifies her as an independent broker, emailed Oscar terminating her appointment on October 24, 2018 after receiving Mr. Shiflet's email. But in addition to Florida Blue, Ms. Khan maintains active appointments with Sunshine State Health, a subsidiary of Centene Corporation ("Centene"), and Molina Healthcare of Florida, Inc. ("Molina"), each of which competes with Florida Blue in the sale of individual ACA plans.

69. Likewise, 51 of 72 brokers from CR Insurance Group that terminated their appointments with Oscar following Mr. Shiflet's October 24, 2018 email still hold active appointments with Florida Blue and other major insurers. For example, Maria Debes terminated her Oscar appointment on October 25, 2018, but still holds an active appointment with Celtic Insurance Company ("Celtic"), a subsidiary of Centene, in addition to Florida Blue. Similarly, Joseph Fonte terminated his Oscar appointment on October 25, 2018, but still holds active appointments with Celtic and Molina, in addition to Florida Blue. Both Ms. Debes and Mr. Fonte received their Celtic appointments in September 2018, only one month before obtaining their Oscar appointments. This selective enforcement explains why other ACA insurers, such as Centene and Molina, have been able to survive (so far) despite the existence of Florida Blue's exclusivity policy. The fact that they have not exited the market provides no assurance that Oscar will be able to survive when it is the target of Florida Blue's enforcement efforts.

70. Florida Blue also permits "grandfathering" of appointments—brokers that are appointed with Florida Blue are permitted to maintain previous appointments with other

health insurance carriers and continue to sell their plans. Indeed, data from the Florida Department of Financial Services indicates that of the nearly 1,700 Orlando area brokers that are appointed by Florida Blue, roughly 240, or 14 percent, have appointments with other insurers that offer individual health insurance, while nearly 650, or 38 percent, have appointments with other insurers that offer Medicare Advantage policies. Even though they are not exclusive, brokers with grandfathered appointments receive the same benefits from Florida Blue as its other exclusive brokers or “agents.” Florida Blue’s exclusivity policy is thus calculated not to protect Florida Blue’s investments or to prevent “free riding,” but rather to thwart new entry, preserving its monopoly position.

71. Indeed, while Florida Blue claims that its exclusive agents present themselves as its dedicated representatives, and use Florida Blue branding and marks in selling insurance policies, the overwhelming majority of brokers appointed with Florida Blue also are appointed with other insurance companies, including life insurance, property insurance and casualty insurance providers. On average, brokers appointed with Florida Blue hold 15 appointments from different insurance companies, indicating that, contrary to Florida Blue’s assertions, its exclusive agents are not actually exclusive—except where Oscar is concerned.

72. There is no material difference in the sales materials (which Florida Blue calls “training” materials) that Florida Blue provides to its brokers than those offered by other insurance companies, including Oscar, that do not require exclusivity. For example, Oscar hosts in-person and web-based seminars, provides extensive broker marketing materials, and has an entire business team dedicated to providing broker support. Exclusivity is thus not a prerequisite to offering the type of benefits Florida Blue offers.

73. Moreover, Florida Blue's sales and promotional efforts with its agents are brand-specific, directly aimed at building Florida Blue's brand and expanding Florida Blue's sales, not sales of individual health insurance policies more generally. For example, Florida Blue's agents can participate in its "Blue Rewards Program," which provides marketing funding to advertise Florida Blue and its plans. Similarly, much of the "training" material Florida Blue offers to its agents is nothing more than sales pitches about marketing the right Florida Blue plans relative to the competition. Because these efforts are highly brand-specific, Oscar and other competitors cannot free ride on them.

74. In other areas of the country where Oscar has entered (such as Texas), insurance carriers, including Blue Cross Blue Shield entities, do not demand broker exclusivity as Florida Blue does in Florida, even though they offer brokers similar sales and promotional material.

75. Each of these facts undermines any purported legitimate justification for Florida Blue's exclusivity policy.

RELEVANT MARKETS

I. The Relevant Product Market

76. There is a relevant product market for individual health insurance plans under the ACA ("Individual Plan Market"). The outer boundaries of the Individual Plan Market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between individual health insurance plans under the ACA and potential substitutes.

77. From the perspective of insurance customers, there are no reasonable substitutes for individual health insurance plans under the ACA because, *inter alia*, those

individuals and families generally cannot secure health insurance through other means, e.g., employer-sponsored coverage, Medicare and Medicaid. Consumers who already have health insurance through employers or a federal program do not purchase, and often are not eligible to purchase, individual ACA insurance plans. Thus, the Individual Plan Market is inelastic, and a small but significant increase in price would not result in substitution.

II. The Relevant Geographic Markets

78. Markets for health care services are highly localized, as the vast majority of insureds consume health care services close to where they live and/or work. The geographic markets for individual health insurance plans under the ACA are determined by the regulatory scheme. ACA plans are approved for sale to consumers only in defined Rating Areas. In Florida, Rating Areas are set at the county level. Thus, consumers cannot purchase individual ACA plans outside the county in which they reside even if they would prefer a plan in a neighboring county due to its price or other characteristics. Accordingly, there is no substitute for plans available within a purchaser's county of residence, and competition is limited to only those insurance providers who have been approved to provide insurance plans in that county.

79. As a result, the relevant geographic markets (the "Relevant Geographic Markets") are:

- A. Each individual county comprising the Orlando metro area, i.e., Orange County, Osceola County, Seminole County and Lake County (collectively, the "Orlando Markets"); and

- B. Each individual county comprising the other Florida metropolitan areas that Oscar enters in the fall of 2019.¹

III. Florida Blue's Monopoly Power

80. Florida Blue's monopoly power in the Individual Plan Market in the Relevant Geographic Markets is evidenced directly by its abilities to: (1) charge higher prices than its competitors without losing share; and (2) exclude competitors and, therefore, restrict output.

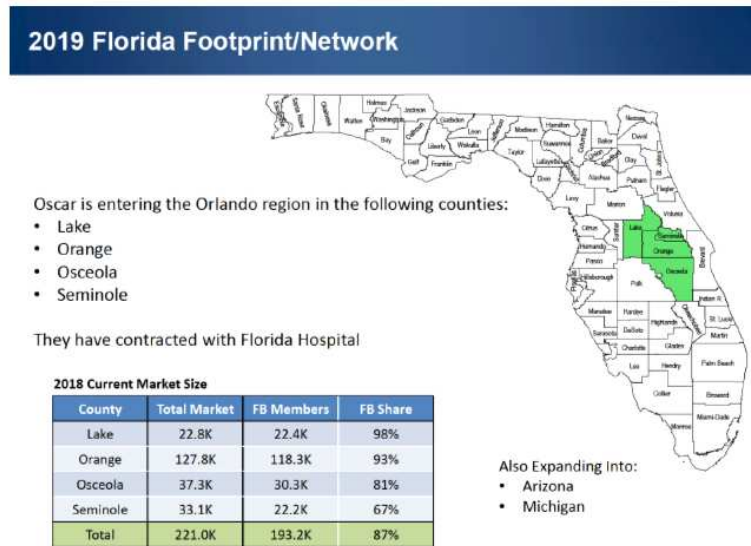
81. Florida Blue's monopoly power also is evidenced directly by its ability to coerce brokers into exclusive dealing arrangements in the Individual Plan Market in the Relevant Geographic Markets.

82. Florida Blue's monopoly power is evidenced indirectly by its dominant market shares in the Individual Plan Market in the Relevant Geographic Markets. In 2018, Florida Blue's share of the Individual Plan Market in the Orlando Markets was as follows:

	County	Florida Blue Market Share
Orlando	Lake	100%
	Orange	93.8%
	Seminole	84.5%
	Osceola	82.4%

¹ The identity of which specific markets Oscar is currently planning to enter is competitively sensitive.

83. Florida Blue's internal documents calculate shares at the county level and reflect similar shares in the Orlando Markets:²



84. Florida Blue's monopoly position is not the result of any superior product, business acumen or historical accident, but rather its seizure and maintenance of monopoly power through exclusionary conduct. Competition in the sale of individual ACA insurance plans throughout Florida has diminished as the number of insurers selling those plans has declined. Major insurers like Aetna, Humana, Cigna and UnitedHealthcare stopped selling individual ACA plans in the Orlando Markets between 2015 and 2017.

85. As the number of competitors dwindled, Florida Blue recognized that it could leverage its growing share to effectively put a stranglehold on new entry or expansion through the use of its statewide exclusivity policy, thereby entrenching its monopoly

² Florida Blue, 2019 U65 Competitive Outlook Oscar Entry Baseline Findings (June 29, 2018).

position. Brokers that previously sold plans for other major insurers were left with little choice but to agree to Florida Blue's exclusivity policy even though they are independent businesses, market themselves as independent brokers, and maintain appointments with other insurers.

86. As a result of its exclusionary conduct, Florida Blue steadily gained share, far eclipsing any other competitor. By 2018, Florida Blue sold 75 percent of all individual ACA plans in Florida. As the shares above indicate, its sales were even higher in certain counties, including in the counties comprising the Orlando metro area.

87. Florida Blue now has a 100 percent monopoly position in forty (40) counties in Florida. Therefore, brokers who desire to sell ACA plans in any of those counties have no choice but to agree to exclusively sell Florida Blue plans statewide.

88. As a result of its market power and stranglehold on brokers, Florida Blue is able to charge supracompetitive premiums for its individual ACA insurance plans in the counties comprising the Orlando metro area. With less competition, consumers are left with fewer choices and higher prices.

IV. Barriers to Entry and Expansion

89. There are high barriers to entry and expansion in the Individual Plan Market in the Relevant Geographic Markets.

90. As an initial matter, Florida Blue's coercive exclusive dealing arrangements function as both a barrier to entry and expansion because they deter potential competitors from even attempting to enter the Individual Plan Market in the Relevant Geographic

Markets and prevent new entrants from expanding to achieve sufficient scale to effectively compete with Florida Blue.

91. Insurers must meet both federal (HHS) and Florida licensing requirements (Florida Office of Insurance Regulation (“FLOIR”)) to offer individual ACA insurance plans in Florida. Certain health insurance plan types also require the approval of the Florida Agency for Health Care Administration. The process to obtain such approvals must generally begin more than ten months before plan open enrollment periods for the following year begin.

92. An insurer seeking to enter the Individual Plan Market must plan for months or years in advance and make significant capital investment (often millions of dollars) before entering. Insurers must reach agreements with providers—hospitals, physicians, specialists and others—sufficient to provide care for the insurer’s enrollees. Given that federal regulations require insurers to include a wide range of services in health insurance plans, and state regulations require the availability of a wide range of health care providers, insurers must make arrangements with a large number of different providers. With an uncertain number of future enrollees, entrants have less negotiating leverage with doctors and hospitals, meaning they are likely to pay higher prices for care, thus jeopardizing their long-term viability by making it more difficult for them to offer lower premiums and attract customers. Insurers must also establish relationships with, *inter alia*, pharmacies, laboratories, testing facilities and numerous brokers. Negotiating all of these arrangements can take months or years of protracted negotiation.

93. Scale is important. A new insurer must attract a substantial number of new enrollees in order to have a sustainable business model. And health insurers face substantial fixed costs in the form of IT, employees and office space, which can only be efficiently recouped with economies of scale. Consequently, a new health insurer will only seek to enter a new market if it is confident in its ability to attract a sufficiently large number of enrollees. Medical service providers will only enter into contracts for the provision of services at reasonable rates if the plan has or is anticipated to have a sufficiently large number of enrollees. This fact is critical for Oscar's success not only in the Orlando Markets but also in other markets it enters in Florida.

94. High barriers to entry have contributed to consolidation in health insurance markets, as companies have found it easier to simply buy another health insurer rather than enter a new geographic market on their own, and new entry is deterred.

95. In recent years, insurers that entered the Individual Plan Market in Florida markets have exited shortly afterward because the insurers find them unprofitable. Oscar's entry is only possible because of its innovative approach to insurance, which other insurers do not share and could not quickly replicate.

ANTICOMPETITIVE EFFECTS OF FLORIDA BLUE'S CONDUCT

I. Antitrust Injury to Oscar

96. As a direct result of Florida Blue's exclusionary conduct, Oscar has suffered—and will continue to suffer—damage. In order to offer health insurance products in a particular market, an entity must: (1) obtain a certificate of authority from the state regulator; (2) negotiate contracts with health care provider systems to build a network of

hospitals, physician groups and other ancillary care facilities; (3) submit insurance products and rates for regulator review and approval; (4) fund the insurance entity with enough capital in reserves to meet regulatory requirements; and (5) educate the market of licensed insurance brokers on the company and its insurance products to enlist their support in helping their clients enroll in the products. Oscar invested significant time and millions of dollars to complete these steps in preparation for its entry into Florida, which is now being inhibited and jeopardized by Florida Blue's anticompetitive actions.

A. Oscar Has Been Substantially Foreclosed From Brokers in Orlando

97. Florida Blue's efforts to deny Oscar access to brokers have been highly effective and have substantially foreclosed Oscar from brokers in Orlando. To date, as a result of Florida Blue's exclusionary scheme, at least 235 brokers have backed out of agreements to sell Oscar's insurance plans. Of those, 133 terminated their appointments within the 48 hours immediately following Mr. Shiftlet's October 24, 2018 email. To put that number in perspective and highlight Florida Blue's market power, this year Oscar's affiliates have had only 14 broker terminations *nationally* outside of Florida.

98. Of the approximately 2,200 relevant brokers in Orlando, roughly 76 percent have appointments with Florida Blue and are foreclosed to Oscar and other competitors. Only 21 percent have appointments with Oscar. In stark contrast, in other markets Oscar has entered where no insurer employs an exclusivity policy similar to Florida Blue's policy, Oscar has appointed approximately 60 percent of the active brokers.

99. This foreclosure has resulted even though Oscar offered higher commissions on a per policy basis than Florida Blue during the 2019 open enrollment period. Oscar is

offering commissions of \$22 per month while a policy is in force. In contrast, brokers have indicated to Oscar that Florida Blue is offering commissions of only \$200 per life for new policies and \$110 per life for renewal business. For policies that are in force for the full year, a broker would earn \$264 in commissions from Oscar, \$64 more than he or she would earn from new Florida Blue business and \$154 more than he or she would earn on renewal business.

100. The sheer percentage of brokers from which Oscar is foreclosed is significant, as it denies Oscar the ability to compete for at least half the covered lives in Orlando. Florida Blue forecloses 76 percent of the brokers and brokers in Florida account for sales of 65 percent of individual ACA plans, including in Orlando. And this estimate likely understates the foreclosure story because Florida Blue's CGAs likely account for an even higher percentage of the covered lives and plans sold. As Oscar's open enrollment results confirm, certain brokers are more effective than others at reaching consumers. Less than 5 percent of Oscar-appointed brokers were responsible for approximately 73 percent of Oscar's broker-channel sales.

101. Oscar has been particularly unsuccessful in engaging CGAs because they cannot risk termination by Florida Blue across the entire state. Because of their large size and Florida Blue's monopoly position in the counties in the Orlando Markets, these CGAs necessarily have a large number of customers insured with Florida Blue. They generally also have offices in other areas of Florida and multiple product lines, all of which they stand to lose if terminated by Florida Blue.

102. Forcing CGAs to be “captive” to a particular insurer is not standard in the industry. CGAs that work with Oscar in other states have refused to work with Oscar in Florida out of fear of losing Florida Blue’s business. For example, Fiorella Insurance Agency is a large contracted general agent with offices in multiple states. Oscar has successfully worked with Fiorella in Texas. When Oscar reached out to Fiorella’s office in Florida in connection with its launch in Orlando, Fiorella informed Oscar that it could not sell Oscar’s policies in Florida because of Florida Blue’s exclusivity policy.

B. Underperformance Due To Foreclosure

103. The preliminary results of the open enrollment period illustrate that, as a result of its foreclosure from brokers due to Florida Blue’s exclusivity policy, Oscar sold significantly fewer plans than it otherwise would have.

104. In total, Oscar enrolled 33,251 individuals in the four-county Orlando metro area. Based on an estimated enrollment effectuation of 29,648 individuals (i.e., customers who pay their premiums following sign up, which typically occurs at a rate of 89 percent in Florida) Oscar estimates that it obtained a 13 percent share of individual ACA plan sales in the Orlando metro area.

105. Oscar enrolled the following numbers of individuals across the four counties comprising the Orlando metro area: 20,405 in Orange County; 8,372 in Osceola County; 3,755 in Seminole County; and 719 in Lake County. Based on estimated enrollment effectuation, Oscar estimates that it obtained the following shares of individual ACA plan sales in those counties: 13 percent in Orange County; 18 percent in Osceola County; 10 percent in Seminole County; and 3 percent in Lake County.

106. As a result of Florida Blue's exclusivity policy, these enrollment figures are well below what Oscar would have obtained given its low-cost pricing position. In Orange, Osceola and Seminole Counties, which account for about 90 percent of all Orlando-area effectuations, Oscar offered the lowest-cost and second-lowest cost Silver tier plans. In Lake County, which only accounts for approximately 10 percent of Orlando-area effectuations, Oscar offered the second- and third-lowest cost Silver tier plans.

107. Because Oscar offered both the lowest- and second-lowest cost Silver plans in all but one of the four Orlando-area counties, it had a significant pricing advantage. In order to purchase a plan from Florida Blue, many low-income consumers would have to spend significantly more than they would to purchase an Oscar plan. For example, in Orange County, Oscar offered three plans in the Bronze metal tier, all of which are less expensive than all other competitors' offerings. The lowest price Florida Blue plan for a 40-year-old individual in the Bronze metal tier cost approximately 10 percent, or \$36, more per month, and roughly \$430 more per year, in premiums alone. In the most popular Silver metal tier, Oscar offered two plans that were less expensive than all other competitors' offerings. The most affordable Florida Blue plan in the Silver metal tier cost approximately \$16 more per month, or roughly \$192 more per year, for a 40-year-old male non-smoker. And in the Gold metal tier, Oscar's plan was priced lower than all four Florida Blue plans. Some of Florida Blue's plans in Orange County cost several hundred dollars per month more than other competitors' plans.

108. Much was the same in Osceola, Seminole and Lake Counties, and Oscar would aim for the same in other markets it enters. Oscar plans are usually among the

lowest-priced plans in a particular local market and considerably less expensive than those of local incumbents like Florida Blue.

109. In addition to its price advantage (which is far and away the most important consideration for customers), Oscar offers a strong provider network in Orlando that includes Florida Hospital, by far the largest hospital system in the Orlando area, among other providers. Oscar's plans offer more than 4,000 providers, including primary care physicians and specialists, which is more than sufficient to satisfy consumers.

110. Despite Oscar's low-cost plans, it fell short of its enrollment estimates. In June 2018, before insurer plan rates were finalized and made public, Oscar estimated in connection with its initial rate submission to the FLOIR that it would obtain 35,000 enrollments in Orlando during the 2019 open enrollment period. Subsequently, based on insurer initial rate submissions, independent and experienced Florida actuaries from FLOIR informally advised Oscar that, based on its price advantage, it should obtain approximately 70,000 enrollments. On October 26, 2018, the rates for Oscar and other insurance carriers were publicly released, and Oscar learned that it had significant price advantages for Bronze and Silver plans relative to its competition. Based on that advantage, in the week before the start of the enrollment period, Oscar estimated that it would obtain 63,000 enrollments. While Oscar was aware at that time of Florida Blue's damaging exclusionary conduct, it did not have any prior experience with such conduct to allow it to assign a precise quantity to this factor, so it simply made an effort to be conservative where possible in developing its overall estimate. Oscar's actual enrollments during the 2019 open enrollment period fell

short of all of these estimates and amounted to approximately half of its best and most informed estimate of 63,000 enrollments.

111. In other areas outside of Florida where Oscar has achieved a similar pricing advantage as in Orlando but was not foreclosed from brokers, Oscar's entry has been more successful. In 2018, Oscar began offering individual ACA plans in Austin, where—like Orlando—a Blue Cross Blue Shield entity had a significant presence. As when it entered Orlando this year, Oscar offered the lowest- and second-lowest cost Silver tier plans when it entered Austin. Oscar also offered a similarly strong provider network, similar plans and faced similar competition. Unlike Orlando, however, Oscar was able to appoint approximately 60 percent of the local brokers in Austin because no insurance carrier, including the Blue Cross Blue Shield entity operating there, imposed exclusivity on brokers like Florida Blue has done in Florida. With its cost advantage and access to brokers, Oscar obtained a nearly 38 percent share of individual ACA enrollees in Austin in its first year in that area.

112. Similarly, in 2016, Oscar began offering individual ACA plans in San Antonio. Oscar offered the lowest- and second-lowest cost Silver tier plans when it entered San Antonio, and it had access to brokers because unlike in Orlando, the Blue Cross Blue Shield entity operating in San Antonio did not impose exclusivity on brokers like Florida Blue does. In comparison to Orlando, Oscar offered a similarly strong provider network, offered similar plans and faced similar competition. With its cost advantage and access to brokers, Oscar obtained a 28 percent share of individual ACA enrollees in San Antonio in its first year in that area. In 2017, Oscar again offered the lowest- and second-lowest cost

on-exchange Silver plans in San Antonio and obtained a 65 percent share of individual ACA enrollees in the area. These results indicate that if Oscar had the same access to brokers in Orlando as it did in Austin and San Antonio, Oscar would have achieved similar—or even better—results in Orlando.

113. Conversely, the instances in which Oscar has struggled or been less successful are limited to those markets in which Oscar did not have a low-cost price position.

114. Oscar stands to underperform and lose sales in 2020 and beyond in the Orlando Markets, and its very future in those markets is jeopardized by Florida Blue's conduct. Likewise, in other Florida regions, Oscar is likely to suffer the same harm if and when it enters in 2020, as intended. Florida Blue holds a monopoly position in a number of these markets, and undoubtedly will engage in the same exclusionary conduct rather than compete with Oscar on the merits. In light of this risk, unless Florida Blue is enjoined, Oscar may be forced to abandon its plans to enter additional markets in Florida, resulting in a loss of profits in those markets and a loss of the significant investment Oscar has expended as part of those entry plans to date.

II. Oscar Is Suffering Irreparable Harm

115. Oscar is suffering irreparable harm because of Florida Blue's conduct. Specifically, Oscar's ability to compete in the Orlando Markets has been inhibited because brokers have terminated—and likely will continue to terminate—their relationships with Oscar. As a result, Oscar has significantly underperformed its sales projections, selling significantly fewer individual ACA insurance plans than it expected and otherwise would have during the 2019 open enrollment period.

116. This harm is irreparable. If Oscar continues to underperform its sales projections, it is likely that it will not achieve the minimum efficient scale necessary for it to become a viable long-term competitor in the Orlando Markets. Oscar's underperformance this year likely will have major repercussions on its competitiveness in future years. The fewer insureds it has this year, the less leverage it will have to negotiate favorable terms with providers, which will impact the premiums it can afford to charge. And any negative impact on the quality or pricing of its insurance plans—or even the impression thereof—will impact its reputation and ability to attract brokers and consumers. The cascading effects could ultimately impact Oscar's viability in the Orlando Markets.

117. In addition, Oscar continued underperformance in the Orlando Markets will threaten its plans to enter other markets. Underperformance will negatively impact Oscar's ability to negotiate desirable provider networks in other areas, its ability to attract brokers in other areas, and ultimately its ability to attract consumers in other areas.

118. Finally, Oscar continues to expand its services to localities in other states across the country. Its continued underperformance in, or forced exit from, Florida could cause providers and brokers in other states to question whether they should do business with Oscar and will hinder Oscar's ability to successfully bring its innovative products and services to consumers in other states.

III. Harm to Competition

119. Florida Blue is acting with the purpose and effect of unreasonably restraining and injuring competition in the Individual Plan Market in the Relevant Geographic Markets by attempting to thwart Oscar's entry. Florida Blue's scheme to foreclose Oscar from

access to brokers, which are an indispensable path to insurance customers, prevents Oscar and other new insurers from offering innovative and lower-cost insurance plans to Floridians. Additionally, Florida Blue is reducing output and limiting consumer choice, while also reducing quality by impeding innovation, thereby harming competition and the public interest.

120. As other major insurers have exited the sale of individual ACA insurance plans, Florida Blue has been shielded from the price competition that characterizes a robust health insurance market. Studies have shown that there is an inverse correlation between the number of insurers in a market and premium growth in the market (i.e., the fewer the number of insurers the greater the premium growth), which is reflected in the fact that Florida Blue has steadily raised its prices without much, if any, competitive restraint in recent years. Studies have also shown that, unsurprisingly, many consumers prefer less expensive plans. On average, 65 percent of plans selected are one of the two lowest-cost plans available in a tier.

121. The primary anticompetitive effect of Florida Blue's scheme to foreclose Oscar from brokers is that consumers will pay more for health insurance. In the Orlando Markets, Oscar offered a number of plans that are less expensive than Florida Blue alternatives. Consumers will suffer by not having access to the better service and innovative products that Oscar provides and that would be unlocked by real competition.

122. By forcing brokers to become captive agents who may market and sell only Florida Blue plans, Florida Blue's exclusive dealing arrangements with brokers prevent consumers from learning about Oscar's lower premiums or the numerous innovations in

Oscar's insurance plans. This undermines the very purposes of the ACA and the federal exchange created thereunder—transparency and reduction of cost. Many consumers, if they were to learn of Oscar's lower prices, would select an Oscar plan over a Florida Blue plan.

123. Oscar has entered other markets in the United States with low-cost plans and achieved large enrollment numbers, despite being less established than traditional insurers, in large part due to its lower prices and innovation. Beyond Oscar and Orlando, Florida Blue's scheme will likely have the effect of deterring entry by other disruptive competitors in many markets across Florida.

124. But for the exclusionary conduct described above: (1) Florida Blue's market power in the Relevant Geographic Markets would be lessened; (2) Florida Blue would be unable to coerce brokers into the exclusive dealing arrangements described above; (3) there would be increased competition in the sale of individual insurance plans; (4) consumers would have access to, and knowledge of, more choices when selecting an individual ACA insurance plan; and (5) prices would be lower and the quality of care would be higher for consumers.

FLORIDA BLUE'S CONDUCT IS NOT EXEMPT FROM ANTITRUST SCRUTINY

125. Florida Blue's activities as alleged herein are not exempted under the McCarran-Ferguson Act because they (1) do not constitute the "business of insurance," (2) are not regulated by state law, and (3) involve acts of "boycott, coercion or intimidation."

126. Florida Blue's activities do not satisfy any of the factors relevant to whether a practice constitutes the business of insurance. First, requiring broker exclusivity has nothing to do with transferring or spreading policyholder risk. *See Ray v. United Family Life Ins.*

Co., 430 F. Supp. 1353, 1357 (W.D.N.C. 1977) (“Refusals to deal with agents in furtherance of an attempt to monopolize” are not “within the ‘business of insurance.’”). Second, Florida Blue’s exclusive contracts are not an integral part of the policy relationship between an insurer and insured. Florida Blue is the only ACA insurer in the State of Florida, if not the country, that requires exclusivity. Further, the exclusive contracts have no impact on policy terms; insureds can purchase the exact same policy without using a broker. Third, exclusive contracts are not a practice limited to the insurance industry. To the contrary, exclusive dealing relationships exist across a wide array of industries.

127. Florida Blue’s exclusivity requirement is also not exempt because it is not regulated by state law. In response to an inquiry in connection with the termination of a Florida Blue agent for violating the exclusivity policy, the Florida Department of Financial Services, Division of Insurance Agent and Agency Services responded that “[v]iolation of an agent’s contract with an insurer to maintain exclusivity is a civil contractual issue between the parties to the contract involved. There is no law in the Florida Insurance Code that could be applied to this civil employment issue.” (Dec. 12, 2017 email from Jimmy Patronis to Lasandra Henderson.)

128. Florida Blue’s activities are also not exempt because Florida Blue enforces its exclusive agreements with agents through coercion and intimidation within the meaning of the McCarran-Ferguson Act. Florida Blue has threatened agents with permanent termination and refusals to pay commission if they deal with Oscar or other competitors. The threats are coercive in both intent and effect because of the power that Florida Blue has throughout the State of Florida. Florida Blue threatens to terminate agents throughout the

State of Florida if they sell any Oscar plans just in the Orlando area. Florida Blue's coercive enforcement of its exclusivity requirement involves "concerted action" between it and its CGAs. Florida Blue requires that its CGAs impose and enforce its exclusivity policy upon the brokers with whom they contract. Indeed, both the forms requiring exclusivity and the actual threats of termination often are sent by the CGAs at the direction of Florida Blue.

CAUSES OF ACTION

COUNT I

Sherman Act § 2 Claim for Monopolization

129. Oscar incorporates by reference the allegations in Paragraphs 1-14 and 27-124.

130. Section 2 of the Sherman Act (15 U.S.C. § 2) prohibits the willful monopolization of any part of the trade and commerce among the States.

131. Florida Blue possesses monopoly power in the Individual Plan Market in the Relevant Geographic Markets and is maintaining this power through exclusionary conduct designed to exclude Oscar from competition. (*See supra* ¶¶ 52-67, 76-88.) This conduct includes coercing brokers into exclusive agreements. (*See supra* ¶¶ 43, 52-67, 97-102.)

132. Florida Blue's willful and wrongful maintenance and/or extension of its monopoly power is not the result of growth and development as a result of innovation, business acumen or by virtue of offering a superior product. Rather, it is a direct consequence of Florida Blue's exclusionary conduct. (*See supra* ¶¶ 52-67, 80-95.)

133. There is no efficiency enhancing, procompetitive justification for Florida Blue's conduct. (*See supra* ¶¶ 68-75.)

134. Florida Blue's conduct has substantially harmed and will continue to substantially harm competition in the Individual Plan Market in the Relevant Geographic Markets. (*See supra* ¶¶ 119-24.) But for Florida Blue's conduct, Oscar would have more successfully entered the Orlando Markets and would successfully enter other markets in Florida, which it has taken affirmative steps toward and is prepared to do. (*See supra* ¶¶ 103-14.) As a result, prices are (and will be) higher, and there will be fewer alternatives for consumers in the Individual Plan Market in the Relevant Geographic Markets.

135. Florida Blue's unlawful monopolization of the Individual Plan Market in the Relevant Geographic Markets is and will, unless enjoined, continue to be the proximate cause of injury to Oscar, a direct competitor to Florida Blue in the Orlando Markets and a prospective competitor in other Florida markets.

COUNT II
Sherman Act § 2 Claim for Attempted Monopolization

136. Oscar incorporates by reference the allegations in Paragraphs 1-14 and 27-124.

137. Section 2 of the Sherman Act (15 U.S.C. § 2) also prohibits attempts to monopolize any part of the trade and commerce among the States.

138. The same allegations relevant to Count I are also relevant to Count II. If for any reason, Florida Blue is deemed not to have monopoly power in the Individual Plan Market in the Relevant Geographic Markets, there is a dangerous probability that Florida Blue will acquire such power. (*See supra* ¶¶ 52-67, 76-88.) Further, it was Florida Blue's conscious objective to acquire monopoly power in the Individual Plan Market in the

Relevant Geographic Markets by and through its exclusionary conduct. (*See supra* ¶¶ 43, 52-67, 97-102.)

139. Florida Blue's attempt to monopolize is not the result of growth and development as a result of innovation, business acumen or by virtue of offering a superior product. Rather, it is a direct consequence of Florida Blue's exclusionary conduct. (*See supra* ¶¶ 52-67, 80-95.)

140. There is no efficiency enhancing, procompetitive justification for Florida Blue's conduct. (*See supra* ¶¶ 68-75.)

141. Florida Blue's conduct has substantially harmed and will continue to substantially harm competition in the Individual Plan Market in the Relevant Geographic Markets. (*See supra* ¶¶ 119-24.) But for Florida Blue's conduct, Oscar would have more successfully entered the Orlando Markets and would successfully enter other Florida markets, which it has taken affirmative steps toward and is prepared to do. (*See supra* ¶¶ 103-14.) As a result, prices are (and will be) higher, and there will be fewer alternatives for consumers in the Individual Plan Market in the Relevant Geographic Markets.

142. Florida Blue's attempted monopolization of the Individual Plan Market in the Relevant Geographic Markets is and will, unless enjoined, continue to be the proximate cause of injury to Oscar, a direct competitor to Florida Blue in the Orlando Markets and a prospective competitor in other areas within the State of Florida.

COUNT III
Sherman Act § 1 Claim Based on
Florida Blue's Exclusive Agreements with CGAs and Brokers

143. Oscar incorporates by reference the allegations in Paragraphs 1-14 and 27-124.

144. Section 1 of the Sherman Act (15 U.S.C. § 1) prohibits, *inter alia*, (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition; and (4) that harms the plaintiff as a result of the anticompetitive aspect of the practice under scrutiny.

145. The same anticompetitive conduct that violates Section 2 of the Sherman Act (Counts I and II) also constitutes an unreasonable restraint of trade under Section 1 of the Sherman Act because Florida Blue's conduct involves concerted action with CGAs and brokers—with which it has entered into exclusive agreements—that have foreclosed Oscar from a substantial share of brokers. (*See supra* ¶¶ 35-43, 52-67, 96-102.)

146. These agreements unreasonably restrain trade in the Individual Plan Market in the Relevant Geographic Markets. (*See supra* ¶¶ 76-88, 97-102.)

147. Florida Blue has market power in the Individual Plan Market in the Relevant Geographic Markets. (*See supra* ¶¶ 76-88.)

148. There is no efficiency enhancing, procompetitive justification for Florida Blue's agreements with CGAs and brokers. (*See supra* ¶¶ 68-75.)

149. These agreements have substantially harmed and will continue to substantially harm competition in the Individual Plan Market in the Relevant Geographic Markets. (*See supra* ¶¶ 119-24.) But for these agreements, Oscar would have more successfully entered the Orlando Markets and would enter other Florida markets, which it has taken affirmative steps toward and is prepared to do. (*See supra* ¶¶ 103-14.) As a result, prices are (and will be) higher, and there will be fewer alternatives for consumers in the Individual Plan Market in the Relevant Geographic Markets.

150. These agreements are and will, unless enjoined, continue to be the proximate cause of injury to Oscar.

COUNT IV
Florida Antitrust Act Restraint of Trade § 542.19 Claim for Monopolization and Attempted Monopolization

151. Oscar incorporates by reference the allegations in Paragraphs 1-14 and 27-124.

152. Florida Statute § 542.19 makes it unlawful to monopolize, or attempt to monopolize, any part of the trade or commerce in Florida.

153. Florida Statute § 542.19 is an analogue to Section 2 of the Sherman Act. Florida Statute § 542.16 states that the purpose of the provisions of the Florida Antitrust Act law is to complement the body of federal law prohibiting restraints of trade or commerce in order to foster effective competition.

154. Accordingly, the same allegations relevant to Counts I and II are also relevant to Count IV. For the same reasons set forth in Paragraphs 131-35 and 138-42, Florida Blue

is violating § 542.19 by maintaining or attempting to acquire monopoly power in the Individual Plan Market in the Relevant Geographic Markets.

155. Unless enjoined, Florida Blue's conduct will continue to cause injury and damage to Oscar, and competition will continue to decrease in the Individual Plan Market in the Relevant Geographic Markets.

COUNT V

Florida Antitrust Act Restraint of Trade § 542.18 Claim Based on Florida Blue's Exclusive Agreements with CGAs and Brokers

156. Oscar incorporates by reference the allegations in Paragraphs 1-14 and 27-124.

157. Florida Statute § 542.18 states that every contract, combination or conspiracy in restraint of trade or commerce in this state is unlawful.

158. Florida Statute § 542.18 is an analogue to Section 1 of the Sherman Act. Florida Statute § 542.16 states that the purpose of the provisions of the Florida Antitrust Act law is to complement the body of federal law prohibiting restraints of trade or commerce in order to foster effective competition.

159. Accordingly, the same allegations relevant to Counts III are also relevant to Count V. For the same reasons set forth in Paragraphs 145-50, Florida Blue is violating § 542.18 by entering into exclusive agreements with CGAs and brokers that foreclose Oscar from access to brokers and thereby restrain trade in the Individual Plan Market in the Relevant Geographic Markets.

160. Unless enjoined, Florida Blue's conduct will continue to cause injury and damage to Oscar, and competition will continue to decrease in the Individual Plan Market in the Relevant Geographic Markets.

PRAYER FOR RELIEF

161. WHEREFORE, Plaintiff respectfully demands a trial by jury on all matters so triable under law, and respectfully requests that, based on the verdict of the jury, that judgment be entered:

- A. Enjoining Defendants from taking, or threatening to take, any retaliatory or deterrent actions against any CGA or broker based on the CGA's or broker's marketing of, or consideration of marketing, non-Florida Blue health insurance plans, including suspending or terminating any broker's appointment with Florida Blue;
- B. Enjoining Defendants from conditioning any CGA's or broker's ability to market their health insurance plans on that CGA or broker refusing to market non-Florida Blue health insurance plans;
- C. Requiring Defendants to remove their exclusive policy from their website and to distribute to each CGA or broker that markets Florida Blue plans revised broker criteria;
- D. Requiring Defendants to inform CGAs and brokers of any injunction or judgment in this matter, including that Defendants will not retaliate against CGAs or brokers for selling non-Florida Blue health insurance plans;

- E. Enjoining Defendants from engaging in any other exclusionary practices that directly or indirectly foreclose Oscar from marketing its health insurance in Florida; and
- F. Awarding Plaintiff treble damages (to the extent the Court finds that such damages may be ascertained), reasonable attorneys' fees, costs, expenses and such further relief as the Court deems just and proper.

Dated: February 13, 2019

Respectfully Submitted,

/s/ Steven C. Sunshine

STEVEN C. SUNSHINE (*Admitted Pro Hac Vice*)

TARA L. REINHART (*Admitted Pro Hac Vice*)

**SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP**

1440 New York Avenue, NW

Washington, D.C. 20005

Tel: (202) 371-7000

Facsimile: (202) 393-5760

steve.sunshine@skadden.com

tara.reinhart@skadden.com

PAUL M. ECKLES (*Admitted Pro Hac Vice*)

MICHAEL H. MENITOVE (*Admitted Pro Hac Vice*)

MATTHEW LISAGAR (*Admitted Pro Hac Vice*)

**SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP**

4 Times Square

New York, NY 10036

Tel: (212) 735-3000

Fax: (212) 735-2000

paul.eckles@skadden.com

michael.menitove@skadden.com

matthew.lisagar@skadden.com

FRANCIS M. MCDONALD, JR., ESQ.

Florida Bar No. 0327093

SARAH A. LONG, ESQ.

Florida Bar No. 0080543

MCDONALD TOOLE WIGGINS, P.A.

111 N. Magnolia Avenue, Suite 1200

Orlando, FL 32801

Telephone: (407) 246-1800

Facsimile: (407) 246-1895

fmcdonald@mtwlegal.com

slong@mtwlegal.com

OscarHealthCorpBCBS@mtwlegal.com

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2019, a true and correct copy of the foregoing document was filed electronically via the Court's CM/ECF Filing System.

/s/ Steven C. Sunshine

Steven C. Sunshine
Counsel for Plaintiff
Oscar Insurance Company of Florida

Doc. 81

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

OSCAR INSURANCE COMPANY
OF FLORIDA,

Plaintiff,

vs.

Case No.: 6:18-cv-01944-ORL-40-TBS

BLUE CROSS AND BLUE SHIELD OF
FLORIDA, INC., d/b/a Florida Blue; HEALTH
OPTIONS INC., d/b/a Florida Blue HMO; and
FLORIDA HEALTH CARE PLAN INC., d/b/a
Florida Health Care Plans,

ORAL ARGUMENT REQUESTED

Defendants.

**DEFENDANTS' DISPOSITIVE MOTION TO
DISMISS FOR FAILURE TO STATE A CLAIM**

Blue Cross and Blue Shield of Florida, Inc., Health Options Inc. and Florida Health Care Plan, Inc. (collectively, "Florida Blue") respectfully move pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss Plaintiff Oscar Insurance Company of Florida's ("Oscar") Amended Complaint for failure to state a claim upon which relief can be granted. Florida Blue submits the below memorandum of law in support of its motion to dismiss.

MEMORANDUM OF LAW

The Amended Complaint is Oscar's second attempt to plead its case, after its first complaint was dismissed *sua sponte*. Oscar's lawsuit rests on the premise that Oscar is being "foreclosed" from the individual insurance market by Florida Blue's long-time use of exclusive agent agreements to sell individual health insurance in every county in the state. Although Oscar claims the effects of these agreements are "devastating" (Am. Compl. ¶ 6),

Oscar in fact entered the Orlando market with 13% market share in its very first year—nearly matching its own projections. In the face of this success, Oscar acknowledges that it “hopes to enter several other Florida metropolitan areas in the fall of 2019,” (*id.* ¶ 11) but “must have access” to Florida Blue’s agents in order to “effectively compete” (*id.* ¶¶ 41–42).

Despite having Florida Blue’s prior motion to dismiss in hand, Oscar’s second complaint fares no better than its first. Using the information gained during Oscar’s unsuccessful motion for a preliminary injunction, Oscar has now gerrymandered its allegations in an attempt to maneuver around the fundamental problems with its legal theory. For example, recognizing that Florida Blue has relationships with only a tiny fraction of the more than 330,000 brokers and agents licensed by the state of Florida, Oscar now alleges that the “relevant pool of brokers” is the “2,200 brokers operating in Orlando” and “actively selling individual health insurance” (*id.* ¶¶ 41, 43). Oscar has chosen that “pool” deliberately to make Florida Blue’s relationships with nearly 1,700 agents located in Orlando seem significant—even though over 19,000 licensed brokers and agents reside in Orlando.¹ (*Id.* ¶ 70.) The Amended Complaint also alleges the importance of the “broker sales channel,” while failing to account for other available channels, including the public federal exchange, www.healthcare.gov. In doing so, Oscar’s latest complaint lays bare the relief it really seeks: Oscar wants to sell *Oscar* insurance using *Florida Blue* agents. Rather than compete head-to-head with Florida Blue, Oscar wants to free-ride.

¹ Because these data are publicly available on a government website, *see Licensee Search*, Fl. Dep’t of Fin. Servs., <https://licenseesearch.fldfs.com/> (last visited Feb. 27, 2019), the court may take judicial notice of such information on a motion to dismiss, *see Setai Hotel Acquisition, LLC v. Miami Beach Luxury Rentals, Inc.*, No. 16-21296-Civ-Scola, 2017 WL 3503371, at *7 (S.D. Fla. Aug. 15, 2017).

Like its first complaint, Oscar's Amended Complaint fails to state a claim and should be dismissed, this time with prejudice. **First**, Oscar's Sherman Act Claims (Counts I-III) are barred by the McCarran-Ferguson Act, which immunizes insurers from federal suits involving the "business of insurance." The Act's limited exception for boycotts, coercion and intimidation does not apply because Oscar has failed to allege any concerted action or intimidation within the meaning of the Act. (*See infra* Section I.)

Second, the Amended Complaint fails to state a claim for monopolization or attempted monopolization under § 2 of the Sherman Act and Florida state law (Counts I, II and IV) because Oscar has not plausibly alleged monopoly power, substantial foreclosure or harm to competition. (*See infra* Section II.)

Third, Oscar has failed to plead an unreasonable restraint of trade pursuant to Sherman Act § 1 and Florida state law (Counts III and IV) for the same very same reasons. (*See infra* Section III.)

Thus, the Amended Complaint should be dismissed, and the parties should focus on vigorous competition rather than baseless litigation.

STATEMENT OF FACTS²

Florida Blue is a long-time provider of individual health insurance in Florida. (Am. Compl. ¶ 2.) While several of its competitors exited the individual insurance market following implementation of the Affordable Care Act ("ACA"), Florida Blue maintained its commitment to offer individual health insurance in every county in the State. (*Id.* ¶ 120.) Consumers turned to Florida Blue as other insurers disappeared, and Florida Blue now sells a

² In this motion to dismiss, Florida Blue takes as true the facts alleged in Oscar's Amended Complaint.

large portion of individual ACA plans in the Orlando area. (*Id.* ¶ 2.)

Florida Blue uses a network of exclusive agents to sell its individual health insurance plans. (*Id.* ¶ 53.) Florida Blue displays this policy on its website, alerting competitors, agents and the public at large that Florida Blue’s agents may not also sell individual insurance plans offered by other health insurers. (*Id.* ¶¶ 5, 53.)

Oscar, a young health insurance company, began offering individual health insurance in Florida during this past open enrollment period. (*Id.* ¶¶ 3–4, 48.) Oscar sells itself on its “superior technology,” including its “technology-driven health care experience” and “intuitively designed mobile and web application.” (*Id.* ¶¶ 44, 46.)

Despite its purportedly innovative business model, Oscar claims that it cannot compete in Florida without access to Florida Blue’s exclusive agents. (*Id.* ¶ 42.) According to Oscar, Florida Blue’s enforcement of its exclusive contracts has stymied Oscar’s entry into the Orlando market. (*Id.* ¶¶ 5–7.) In particular, Oscar alleges that it has been foreclosed from “many of the largest and most successful brokers servicing the Orlando area,” who have declined to work with Oscar for “fear of losing Florida Blue’s business.” (*Id.* ¶ 10.) Oscar contends that “at least 235 brokers” who have existing exclusive contracts with Florida Blue have “backed out of agreements to sell Oscar’s insurance plans.” (*Id.* ¶ 97.)

Shortly after the 2019 open enrollment period began, Oscar brought this lawsuit claiming that Florida Blue’s exclusive contracts amount to tortious interference under Florida common law and violate the Sherman Act and related state antitrust laws. A week later, Oscar moved for a preliminary injunction, which the Court denied following an evidentiary hearing. (Dkt. No. 72.) On February 1, Florida Blue moved to dismiss Oscar’s

initial complaint, which was dismissed *sua sponte* on February 6. (Dkt. No. 73.) On February 13, Oscar filed the Amended Complaint, alleging that Florida Blue uses its exclusivity arrangements to maintain, or attempt to maintain, monopoly power under Sherman Act § 2 and Florida Antitrust Act § 542.19 (Am. Compl. ¶¶ 129–42, 151–55), and that such contracts are unlawful agreements in restraint of trade, in violation of Sherman Act § 1 and Florida Antitrust Act § 542.18 (*id.* ¶¶ 143–50, 156–60).³

LEGAL STANDARD

A complaint must be dismissed if it fails to “state a claim to relief that is plausible on its face,” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)), and does not “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” *id.* Although the Court must take all well-pleaded factual allegations in the complaint as true, the “assumption of truth” does not apply to allegations that “are no more than conclusions.” *Id.* at 679. Moreover, “courts may infer from the factual allegations in the complaint ‘obvious alternative explanation[s],’ which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer.” *Am. Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 682).

³ In the Amended Complaint, Oscar appropriately abandons its prior claim for tortious interference. As explained in Florida Blue’s Motion to Dismiss Oscar’s original complaint (Dkt. No. 70), it is Oscar that has interfered with Florida Blue’s lawful business relationships—not the other way around.

ARGUMENT

I. The McCarran-Ferguson Act Bars Oscar’s Sherman Act Claims (Counts I–III)

The McCarran-Ferguson Act “exempts insurer activities from the reach of the Sherman Act when three elements are met: (1) the challenged activity is part of the ‘business of insurance’; (2) the challenged activity is regulated by state law; and (3) the challenged activity does not constitute a boycott of unrelated transactions.” *Gilchrist v. State Farm Mut. Auto. Ins. Co.*, 390 F.3d 1327, 1330 (11th Cir. 2004). As McCarran-Ferguson creates a jurisdictional bar on federal antitrust claims exempt under the Act, a court must “initiate an inquiry into [its] subject-matter jurisdiction” before considering the merits of such claims. *Id.* at 1330. Because each element of the McCarran-Ferguson exemption is satisfied here, Oscar’s Sherman Act claims must be dismissed.

A. Florida Blue’s Use of Exclusive Agents Is Part of the “Business of Insurance”

With respect to the first element, “[a]n activity is part of the business of insurance if it has ‘the effect of transferring or spreading a policyholder’s risk,’ is ‘an integral part of the policy relationship between the insurer and the insured,’ and is limited to entities within the insurance industry.” *Id.* at 1331 (quoting *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982)). Applying this standard, “most courts have held that routine dealings between insurers and brokers or agents do constitute the business of insurance.” *Sanger Ins. Agency v. HUB Int’l, Ltd.*, 802 F.3d 732, 744 (5th Cir. 2015); *see also Thompson v. New York Life Ins. Co.*, 644 F.2d 439, 443 (5th Cir. 1981) (“[E]xclusive agency clauses have been

deemed exempt from anti-trust scrutiny as part of the business of insurance.”⁴

i. Florida Blue’s Use of Exclusive Agents Has the Effect of Transferring or Spreading Policyholder Risk

While “[t]he Supreme Court has ‘identified three criteria relevant to determining whether a particular practice is part of the business of insurance,’” the first element—“whether the practice has the effect of transferring or spreading a policyholder’s risk”—is “indispensable.” *Sanger*, 802 F.3d at 742 (quoting *Pireno*, 458 U.S. at 129); *see also Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 212 (1979); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 356 (3d Cir. 2010). The Supreme Court long ago intimated—and several circuit courts have since held—that agreements between insurers and agents or brokers implicate the spreading of risk. *See Grp. Life & Health Ins. Co.*, 440 U.S. at 224 n.32 (“[T]he ‘business of insurance’ may have been intended to include dealings within the insurance industry between insurers and agents.”); *Sanger*, 802 F.3d at 744 (“[R]outine dealings between insurers and brokers or agents do constitute the business of insurance.”); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 355 (noting that “authorizing agents to solicit individual or group policies” qualifies as the “business of insurance”); *Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 65 (1st Cir. 2005) (same).

Sanger is particularly instructive here. In *Sanger*, the Fifth Circuit considered whether an insurance broker’s “alleged exclusive dealing arrangements with insurers constitute ‘the business of insurance.’” *Sanger*, 802 F.3d at 743. In holding that they did, the

⁴ *Thompson* was decided on May 4, 1981, prior to the former Fifth Circuit’s split, and is therefore binding authority. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981).

court explained that exclusivity arrangements constitute the “business of insurance” because they ensure that other insurers cannot “siphon off” the broker’s customers, which would “alter the composition of policyholders in the Program and thus would likely impact the Program’s ability to spread risk.” *Id.* at 744. Thus, the *Sanger* court held: “The insurers’ alleged agreements with [the defendant] not to insure other brokers’ competing group plans are . . . fundamental to the risk spreading characteristics of insurance,” and the defendant had “therefore established the first criterion in assessing whether the challenged activity constitutes the business of insurance.” *Id.* at 745.

The reasoning of *Sanger* applies equally to this case. Absent Florida Blue’s exclusive arrangements with its agents, Florida Blue’s competitors would be able to “siphon off” its customers and “alter the composition of policyholders” in its insurance pool. *See id.* at 744. Indeed, that is precisely the outcome Oscar seeks. (*See* Am. Compl. ¶ 13 (alleging that, but for the exclusive arrangements, Oscar would have made “substantially” more sales by converting Florida Blue’s customers)). Therefore, because Florida Blue’s exclusive relationships affect Florida Blue’s ability to attract customers and “spread risk,” these arrangements constitute the “business of insurance.” *See Sanger*, 802 F.3d at 744.⁵ Oscar’s allegation to the contrary rests on a legal conclusion espoused by an out-of-circuit district

⁵ Oscar may point to *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300 (3d Cir. 2010), to claim that Florida Blue’s exclusivity policy does not implicate the “spreading of risk.” There, the Third Circuit held that an alleged agreement among insurers not to compete for each other’s incumbent business did not implicate the “spreading of risk” because, by dividing consumers amongst themselves, the insurers altered “which insurer” would bear the risk of insuring policy holders, but not “whether or to what extent a prospective insurance purchaser would transfer its risk to an insurer.” *Id.* at 357. That case does not apply here. This is not a market allocation case, and Oscar does not and cannot allege that every sale by Florida Blue’s agents would translate into a sale for a competitor absent Florida Blue’s exclusive dealing. Indeed, that would be impossible, given that Florida Blue has a more expansive footprint in Florida than Oscar—or any other competitor, for that matter. (*See* Am. Compl. ¶¶ 4, 6.)

court. (*See* Am. Compl. ¶ 126.) This Court is “not bound to accept as true a legal conclusion couched as a factual allegation,” *Papasan v. Allain*, 478 U.S. 265, 286 (1986)—particularly where, as here, that conclusion contravenes other leading authority on the matter.

ii. Florida Blue’s Use of Exclusive Agents Is an Integral Part of the Policyholder Relationship

With respect to the next aspect of the “business of insurance” test, Oscar alleges that “Florida Blue’s exclusive contracts are not an integral part of the policy relationship between an insurer and insured” because Florida Blue is the only “ACA insurer” in Florida that uses such contracts and because the contracts have “no impact on policy terms.” (Am. Compl. ¶ 126.) But that is not the test in this Circuit. Rather, exclusive contracts between insurers and agents are an integral part of the policyholder relationship when the restrictions “concern[] the agent’s insurance dealings as such.” *Thompson*, 644 F.2d at 444 (citation omitted). As Florida Blue’s exclusive contracts fall within these parameters, they are “exempt from anti-trust scrutiny.” *Thompson*, 644 F.2d at 443.

The *Thompson* case—decided by the Fifth Circuit, pre-split—controls. In *Thompson*, the court was asked to decide whether a contract between an insurance company and its agent fell within the McCarran-Ferguson immunity. *See id.* at 442. Among other things, the contract at issue prohibited the agent from “represent[ing] any other insurance company []or plac[ing] any application for life or any other type of insurance or annuity with any other insurer . . . without the written consent of the [insurer].” *Id.* at 441. In concluding that this agency agreement “is within the business of insurance,” the court focused on the “important factor” of whether “the participation of the agent in the [challenged policy] concerned the agent’s insurance dealings as such.” *Id.* at 444 (citation omitted). Because the

insurer’s “restrictions did not force [the agent] to engage in activities unrelated to insurance”—but rather “offered [the agent] various incentives . . . so that [the agent] would agree to focus all his entrepreneurial skills solely on selling insurance”—the McCarran-Ferguson immunity applied. *Id.*

So too here. Florida Blue’s exclusivity policy bears directly on its agents’ “insurance dealings.” *Id.* The policy governs Florida Blue’s agents’ ability to market and sell non-Florida Blue plans; it does not force its agents to engage in activities unrelated to insurance. (*See* Am. Compl. ¶¶ 5, 53.) As in *Thompson* (and as Oscar admits), Florida Blue’s policy also gives its agents “an overwhelming incentive to sell Florida Blue’s plans” (*id.* ¶ 7). Thus, Florida Blue’s exclusivity arrangements are an integral part of the policyholder relationship and constitute the “business of insurance.”

iii. Florida Blue’s Use of Exclusive Agents Is Limited to Entities Within the Insurance Industry

Finally, Florida Blue’s exclusivity policy is “limited to entities within the insurance industry” and thus satisfies the third aspect of the “business of insurance” test. *See Gilchrist*, 390 F.3d at 1331; *see also Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 132, (1982) (holding that challenged conduct is “not limited to entities within the insurance industry” when it “inevitably involves third parties wholly outside the insurance industry”).

Oscar attempts to circumvent this requirement by alleging that “exclusive contracts are not a practice limited to the insurance industry.” (Am. Compl. ¶ 126.) But a practice need not exist solely in the insurance industry to fall within McCarran-Ferguson’s protections. As the Supreme Court itself has clarified, even typical dealings between insurers and their agents may constitute the “business of insurance,” *Royal Drug Co.*, 440 U.S. at 224

n.32. Following *Royal Drug*, the Fifth Circuit held in *Thompson* (which, again, is binding on this Court) that a contract between an insurer and its agent containing typical noncompete and exclusivity clauses—an agreement that plainly could exist outside the insurance industry—was “exempted” under McCarran-Ferguson. 644 F.2d at 444. Since *Thompson*, the Fifth Circuit has expressly held that alleged exclusive dealing between an insurer and its agents “undisputably” satisfies the “third criterion” of the “business of insurance” test, even though such a practice “would be expected . . . in any industry.” *Sanger*, 802 F.3d at 744–45 (citation omitted). Oscar’s conclusory allegations to the contrary are not entitled to any weight. *See Iqbal*, 556 U.S. at 681 (explaining that “bare assertions” and “conclusory” allegations are “not entitled to be assumed true”).

B. Florida Blue’s Use of Exclusive Agents is Regulated by State Law

The second criterion for McCarran-Ferguson immunity—that the challenged practice “is regulated by state law”—is also satisfied here. *Gilchrist*, 390 F.3d at 1330. As the Eleventh Circuit has recognized before, “[t]he State of Florida heavily regulates the insurance industry.” *Id.* at 1334. More specifically, Florida also regulates the contractual relationship between insurers and their agents, Fl. Stat. § 626.112, as well as the permissible use of exclusivity agreements between entities more broadly, *see* Fl. Stat. §§ 542.18, 542.19. McCarran-Ferguson’s state-law regulation requirement is thus plainly satisfied in this case.

Recognizing this problem, Oscar alleges that the Florida Department of Financial Services (“DFS”) considers exclusive agency arrangements an issue of contract, not insurance, law. Specifically, Oscar selectively quotes an email produced by Florida Blue during the preliminary injunction proceedings where DFS informed Florida Blue that

“[v]iolation of an agent’s contract with an insurer to maintain exclusivity is a civil contractual issue between the parties to the contract involved,” and “[t]here is no law in the Florida Insurance Code that could be applied to this civil employment issue.” (Am. Compl. ¶ 127.) Even if that were a proper reading of the email (it is not), it cannot establish that Florida does not regulate insurance or the specific relationships at issue here. Such a conclusion would fly in the face of Florida statutes, as set forth above. In any event, as the full email exchange makes clear,⁶ DFS stated only that an agent’s breach of an insurer’s exclusivity policy does not constitute a violation of Florida insurance law, and thus cannot be the basis for terminating the agent’s appointment “with cause.” In other words, DFS was merely confirming that the dispute at issue between Florida Blue and its agent was not resolved by the Florida Insurance Code; DFS was *not* stating (nor could it) that insurers’ agency relationships are somehow unregulated by Florida law.

C. Oscar’s Complaint Does Not Allege Boycott, Coercion or Intimidation

Under a narrow exception to the McCarran-Ferguson Act’s immunity from federal antitrust suits, plaintiffs may pursue Sherman Act claims alleging acts of “boycott, coercion, or intimidation.” 15 U.S.C. § 1013(b). That exception does not apply here.

With respect to “boycott,” Oscar does not allege one. To allege a boycott under the Act, a plaintiff must allege a “refusal to deal” that extends “beyond the targeted transaction,” such that “unrelated transactions are used as leverage to achieve the terms

⁶ As a document relied upon in the operative complaint, the Court may consider the full content of the DFS email on this motion to dismiss (attached hereto as Exhibit A). *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) (“[W]here the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff’s claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal, and the defendant’s attaching such documents to the motion to dismiss will not require conversion of the motion into a motion for summary judgment.”).

desired.” *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 803 (1993). Oscar does not allege that any entities refused to deal with Oscar in “unrelated transactions” so as to achieve preferential terms in “targeted transactions.” *See id.* Rather, Oscar alleges only that *Oscar* was unable to contract with *Florida Blue*’s exclusive agents in selling *Oscar* insurance. That is not a boycott.

Nor does Florida Blue’s conduct amount to “coercion or intimidation.”

Although few courts have considered the issue, the “leading” antitrust treatise concludes that “concerted action” is required to establish coercion or intimidation within the meaning of the McCarran-Ferguson Act. *Sanger*, 802 F.3d at 732 n.12. In other words, to fall within the exception, the alleged misconduct must involve “an agreement of at least two firms” to engage in coercive or intimidating behavior—not “independent conduct” by a single company “seeking to leverage its supposed monopoly position.” *Id.* at 746.

This concerted-action requirement derives from the Supreme Court’s decision in *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944), which concerned an alleged *conspiracy to boycott*. Following *South-Eastern Underwriters*, courts have limited the Act’s exception to unlawful “agreement[s] and concert of action.” *Id.* at 535; *see also Sanger*, 802 F.3d at 744; *Feinstein v. Nettleship Co.*, 714 F.2d 928, 934 (9th Cir. 1983). The legislative history of the McCarran-Ferguson Act likewise supports the “concerted action” requirement. When debating the bill, the Senate distinguished between unilateral practices, which would be immunized under the Act, and concerted refusals to deal, which would not. *Feinstein*, 714 F.2d at 934 & n.1. “Monopoly alone is therefore not within any exception to the McCarran-Ferguson Act.” *Feinstein*, 714 F.2d at 934.

Oscar's attempt to plead around this problem fails. Oscar alleges that Florida Blue "works in concert with CGAs [contracted general agencies] to propagate its threats to other brokers" because the CGAs "can withhold commissions or even terminate a broker if that broker violates the terms of Florida Blue's exclusivity policy." (Am. Compl. ¶ 65) That is not concerted action. As the Florida courts have made clear, agents cannot "conspire" with their "corporate principal" when acting within the scope of their authority. *See, e.g., Richard Bertram, Inc. v. Sterling Bank & Trust*, 820 So. 2d 963, 966 (Fla. 4th Dist. Ct. App. 2002). Thus, as a matter of law, Florida Blue cannot act "in concert" with its agents.⁷

The Tenth Circuit's opinion in *Card v. National Life Ins. Co.*, 603 F.2d 828, 834 (10th Cir. 1979), is particularly instructive on this point. In *Card*, the court held that an organization comprised of general agents of the insurer—analogous to the CGAs that contract with Florida Blue—"was really a part of the [insurer]" and thus could not be considered a "legally viable conspirator[]" for the purposes of the boycott exemption to the McCarran-Ferguson Act. *Id.* at 834. The same reasoning applies here and precludes Oscar's attempts to plead around McCarran-Ferguson's grant of immunity.

Moreover, even if—contrary to law—Florida Blue could act in concert with its general agents, Oscar's allegations do not amount to "coercion" or "intimidation" as those terms are used in McCarran-Ferguson. As the Supreme Court has made clear, "a concerted agreement to terms"—*i.e.*, "obtaining and exercising market power by concertedly exacting terms like those which a monopolist might exact"—does "not constitute 'coercion' or

⁷ Oscar plainly alleges that the CGAs are agents of Florida Blue. For example, Oscar alleges that Florida Blue acts "through its CGAs," which "help polic[e] and enforce[e] exclusivity." (Am. Compl. ¶ 66.)

‘intimidation’ within the meaning of the statute.” *Hartford Fire Ins. Co.*, 509 U.S. at 802, 808 n.6. In other words, where two (or more) parties agree to use their market power to get preferential terms from another party in a transaction, that is a “concerted agreement to terms,” not actionable “coercion” or “intimidation.” At most, the Amended Complaint alleges a “concerted agreement to terms”: a purported effort by Florida Blue and its CGAs to use their “market power” to “exact[]” exclusivity from agents and brokers. (Am. Compl. ¶ 65.) Such conduct does not amount to “coercion” or “intimidation” under *McCarran-Ferguson*. See *Hartford Fire Ins. Co.*, 509 U.S. at 808 n.6.

Oscar’s allegations also fall short under the common-sense meaning of the terms “coercion” and “intimidation.” The Amended Complaint alleges only that Florida Blue and the CGAs took steps to enforce existing contracts with their agents and that at least some of those agents, preferring to remain with Florida Blue, dropped their Oscar appointments. (Am. Compl. ¶¶ 6, 65–66.) It is not coercion or intimidation to enforce the terms of a lawful contract. Indeed, fulfilling obligations is the very purpose of contract law. *MCC-Marble Ceramic Ctr., Inc., v. Ceramica Nuova d’Agostino, S.p.A.*, 144 F.3d 1384, 1387 n.9 (11th Cir. 1998) (“[P]arties who sign contracts will be bound by them.”).

II. Oscar Fails to State a Claim for Monopolization or Attempted Monopolization under Sherman Act § 2 or Florida Statute § 542.19 (Counts I, II and IV)

To state a claim for monopolization under the Sherman Act and Florida law,⁸

⁸ Oscar’s monopolization and attempted monopolization claims under Florida’s Antitrust Act § 542.19 require identical showings. See *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc.*, 457 So. 2d 1028, 1032 (Fla. Dist. Ct. App. 1984) (“The Florida legislature has, in effect, adopted as the law of Florida the body of antitrust law developed by the federal courts under the Sherman Act.”). Oscar’s state-law claims thus share the fate of its federal claims.

Oscar must allege that Florida Blue (i) has monopoly power in a relevant geographic and product market, and (ii) has wilfully acquired or maintained that power “as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966)). Similarly, to state a viable claim for attempted monopolization under the Sherman Act, Oscar must allege that “(1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power” within the relevant market. *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc’ns, Inc.*, 376 F.3d 1065, 1074 (11th Cir. 2004) (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993)); *see also T. Harris Young & Assocs., Inc. v. Marquette Elecs., Inc.*, 931 F.2d 816, 823 (11th Cir. 1991). In either case, a plaintiff must allege harm to the competitive process—not merely harm to a competitor—to state a viable claim. *Morris Commc’ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1294 (11th Cir. 2004).

Here, Oscar has failed to state any plausible monopolization or attempted monopolization claims. *First*, Oscar has failed to allege monopoly *power*, focusing instead on Florida Blue’s allegedly high market *share*. Oscar’s cursory allegations regarding barriers to entry are insufficient to plead monopoly power. *Second*, Oscar has failed to allege substantial foreclosure of the relevant market; at most, Oscar’s allegations indicate that Oscar cannot avail itself of one method of distribution—sales through Florida Blue own agents. Such allegations do not demonstrate foreclosure from the market for the sale of individual health insurance. Finally, Oscar alleges only harm to *Oscar*, rather than harm to *competition*.

A. Oscar Fails to Plausibly Allege Monopoly Power

To plead monopoly power, Oscar must allege facts tending to show either that Florida Blue has “the ability ‘to control prices or exclude competition’ or ‘a dangerous probability of achieving it.’” *McWane v. F.T.C.*, 783 F.3d 814, 830 (11th Cir. 2015) (citations omitted). Oscar offers three allegations to support monopoly power, each of which fails.

First, Oscar alleges that Florida Blue’s purportedly high market share demonstrates monopoly power. (Am. Compl. ¶ 72.) But in this Circuit, high market share alone “is not enough to establish a *prima facie* show of monopoly power.” *Fin-S Tech., LLC v. Surf Hardware Int’l-USA, Inc.*, No. 13-CV-80645, 2014 WL 12461350, at *3 (S.D. Fla. Sept. 3, 2014) (60–70% market share not enough to demonstrate monopoly power); *see also Tyntec Inc. v. Syniverse Techs., LLC*, No. 8:17-CV-591-T-26MAP, 2017 WL 2733763, at *1, 5 (M.D. Fla. June 26, 2017) (70% market share not enough to demonstrate monopoly power). That is particularly true where, as here, Florida Blue’s market share is due to “growth or development as a consequence of a superior product, business acumen, or historic accident.” *Grinnell Corp.*, 84 U.S. at 570–71. For example, Oscar concedes that Florida Blue’s market share is due at least in part to the fact that consumers turned to Florida Blue after “major insurers . . . left the ACA exchange in Florida.” (Am. Compl. ¶ 2.)

Second, Oscar claims that Florida Blue’s “ability to coerce brokers into exclusive dealing arrangements” evidences monopoly power. (Am. Compl. ¶¶ 81, 90.) Stripped of its incendiary language, however, this allegation boils down to the claim that Florida Blue’s exclusive relationships are *themselves* evidence of monopoly power—a suggestion that flies in the face of well-settled case law. Exclusive dealing relationships are

typically “legitimate business practices,” *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1224 (11th Cir. 2002), and companies may compete amongst themselves for exclusive deals with the best agents, *see McWane*, 783 F.3d at 834. Oscar’s allegation that the very existence of exclusive dealing is evidence of monopoly power is therefore wrong.

Third, Oscar alleges that “[t]here are high barriers to entry and expansion in the Individual Plan Market in the Relevant Geographic Markets.” (Am. Compl. ¶ 89.) Oscar principally alleges that high barriers to entry exist because new insurers must (1) satisfy both federal and state licensing requirements to offer ACA insurance plans in Florida, and (2) “plan for months or years in advance and make significant capital investment” before entering the market. (Am. Compl. ¶¶ 91–92). Courts have rejected such claims before. In *Ball Mem’l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986), for instance, the Seventh Circuit noted, where “insurers need only a license and capital” to enter a market, “[t]here are no barriers to entry.” *Id.* at 1335. As the Seventh Circuit explained, “[t]he insurance industry is not like the steel industry, in which a firm must take years to build a costly plant before having anything to sell.” *Id.* Rather, “[t]he ‘productive asset’ of the insurance business is money, which may be supplied on a moment’s notice, plus the ability to spread risk, which many firms possess and which has no geographic boundary.” *Id.* Oscar offers no factual support to suggest that the licensing and capital requirements needed to enter the individual health insurance market in Florida (or Orlando, or its constituent counties) is somehow more onerous than the minimal requirements discussed in *Ball*.⁹

⁹ Oscar’s bald assertion that “often millions of dollars” are needed before entry (Am. Compl. ¶ 92) is insufficient, and, in any event, does not address the fact that money—unlike plants or factories—“may be supplied on a moment’s notice.” *Ball*, 784 F.2d at 1335.

Oscar's conclusory assertions should, therefore, be disregarded. *See Iqbal*, 556 U.S. at 678 (“A pleading that offers ‘labels and conclusions’ . . . will not do.” (citation omitted)).

Oscar's other alleged barrier to entry—that “a new health insurer will only seek to enter a new market if it is confident in its ability to attract a sufficiently large number of enrollees” (Am. Compl. ¶ 93)—is likewise too vague to withstand a motion to dismiss. Because Oscar does not define a “sufficiently large number of enrollees,” there is no way to know whether, with a meaningful 13% market share in its first year,¹⁰ Oscar satisfied its own standard during the 2019 open enrollment period. In any event, Oscar entered the Orlando market with full knowledge of Florida Blue's exclusive agreements with agents, demonstrating that those arrangements in fact did not deter entry. Thus Oscar's cursory allegations do not state a claim. *Spanish Broad. Sys.*, 376 F.3d at 1079.

B. Oscar Fails to Plausibly Allege Substantial Foreclosure

Exclusive deals can be unlawful only if they substantially foreclose competitors from the relevant market. *McWane*, 783 F.3d at 837. Although Oscar alleges that it was substantially foreclosed “from brokers in Orlando” (Am. Compl. ¶ 97), it alleges no facts to support this claim. So long as Oscar can reach consumers through its own broker relationships or through alternative channels of distribution, the alleged fact that 235 agents have opted to work exclusively with Florida Blue (*id.*), has no antitrust significance. *See McWane*, 783 F.3d at 839. Indeed, Florida's DFS website confirms that over 146,000 brokers and agents residing in the state are appointed to sell insurance in Florida.¹¹ Over

¹⁰ Based on Oscar's own data, 13% market share in Orlando means 33,251 subscribers in Oscar's very first year. (Am. Compl. ¶ 104.)

¹¹ *See Licensee Search*, Fl. Dep't of Fin. Servs., <https://licenseesearch.fldfs.com/> (last visited Feb. 27,

186,000 agents residing outside the state hold the same license. And of the over 19,000 brokers and agents licensed in Orlando,¹² Florida Blue works with fewer than 1,700. (Am. Compl. ¶ 70.) Thus, even if Oscar were “foreclosed” from 235 Florida Blue agents, that is a tiny fraction—less than one-thousandth of a percent—of all available agents and brokers (themselves only one of many available distribution channels). That is not just insufficient, it is negligible.

Aware of this problem through the preliminary injunction hearing, Oscar tries to gerrymander the “relevant pool of brokers,” claiming it is limited to the “2,200 brokers operating in Orlando with a valid appointment to sell plans for an insurer that offers individual health insurance in Florida.” (Am. Compl. ¶¶ 41, 43.) According to the Amended Complaint, “finding effective brokers is not a simple matter of recruiting anyone with a license” because “[i]t is not feasible to compete solely by appointing and attempting to train new brokers with no client base.” (*Id.* ¶ 43.) Appointing and training new brokers is, of course, precisely what any competitor (including Florida Blue) has to do in order to establish an effective agent network. This argument, therefore, is nothing more than an assertion that Oscar, as a new entrant, is somehow entitled to free-ride off of the work of competitors already in the market. That is not the aim of the antitrust laws. *See N. Am. Soccer League, LLC v. U.S. Soccer Fed’n, Inc.*, 883 F.3d 32, 43 (2d Cir. 2018) (noting that “[e]liminating free riders” is a “procompetitive advantage of alleged restraints on competition”). Moreover,

2019). Courts in this circuit regularly take judicial notice of information available to the public on government websites. *See Setai Hotel Acquisition, LLC*, 2017 WL 3503371, at *7 (collecting cases).

¹² *See Licensee Search*, Fl. Dep’t of Fin. Servs., <https://licenseesearch.fldfs.com/> (last visited Feb. 27, 2019).

Oscar has not alleged any facts showing it has relied on brokers with established client bases in other markets, or that other competitors in Orlando depend on these so-called “active brokers” to compete. Oscar’s allegations, therefore, are mere conclusions that “are not entitled to the assumption of truth.” *See Iqbal*, 556 U.S. at 679.

Moreover, in its myopic focus on 2,200 brokers, the Amended Complaint fails to account for any of the other distribution channels available to Oscar. Under federal law, individuals can purchase health insurance plans through a government-run “call center” or “Internet Web site,” 45 C.F.R. § 155.205(a)–(b); 45 C.F.R. § 155.405(c), or through insurers’ own websites, 45 C.F.R. § 156.265(b). Oscar makes no effort to allege that such channels are foreclosed.¹³ The failure to plead such “conspicuously omit[ted]” facts alone warrants dismissal. *See Kadel v. Flood*, 427 F. App’x 778, 780 (11th Cir. 2011) (dismissing complaint where plaintiff “conspicuously omit[ted] any facts that would require one to rule out an innocent explanation for the alleged behavior” (internal citation omitted)); *In re Terazosin Hydrochloride Antitrust Litig.*, 160 F. Supp. 2d 1365, 1377 (S.D. Fla. 2001) (dismissing claim when supporting facts were “[c]onspicuously absent” from the complaint).

Oscar also alleges that access to Florida Blue’s agents is “indispensable” because Florida Blue holds captive “many of the largest and most successful brokers serving the Orlando area” (Am. Compl. ¶¶ 10, 119), and consumers “strongly prefer” to work with local brokers rather than “out-of-area brokers” working at call centers or online health

¹³ Oscar’s assertion that it cannot successfully “market[] directly to consumers, such as through billboards and advertisements” (Am. Compl. ¶ 38) is not enough to plausibly allege substantial foreclosure of alternative means of distribution. Oscar suggests a false binary between access to Florida Blue’s exclusive agents and direct-to-consumer advertising without alleging any facts tending to show that only these two options exist.

businesses (*id.* ¶ 39). Once again, these are conclusions, not allegations. Oscar pleads no factual support regarding the “largest and most successful brokers,” and it supports the assertion that consumers prefer local brokers with nothing more than the statistic that 75% of Oscar policies “sold by brokers” in Orlando were sold by “brokers with operations in that area.” (*Id.*) Oscar does not describe whether its out-of-area brokers made similar efforts to sell to consumers in Orlando as the in-area brokers, or whether other insurers similarly rely on regionalized brokers to market their plans. Indeed, given that 75% of Oscar’s policies in Orlando “came through brokers” and 75% of those sales came from brokers in Orlando (*id.* ¶¶ 35, 39), Oscar has revealed that little more than half of its sales were made by local brokers. This fact, taken as true, does not support the claim that “consumers strongly prefer the advice of local brokers” when purchasing ACA health insurance plans.

Ultimately, Oscar presents little more than its say-so in support of its alleged dependence on Florida Blue’s network of exclusive agents to compete effectively in Orlando. This Court need not credit such self-serving claims on a motion to dismiss.

C. Oscar Fails to Plausibly Allege Harm to Competition

It is axiomatic that the antitrust laws exist to protect “competition, not competitors.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962); *see also Spanish Broad. Sys.*, 376 F.3d at 1075; *Morgan Yacht*, 457 So. 2d at 1032 (holding that Florida’s Antitrust Act tracks federal law). “Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws.” *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993). Moreover, “injury to a competitor need not always result in injury to competition.” *Mfg.*

Research Corp. v. Greenlee Tool Co., 693 F.2d 1037, 1043 (11th Cir. 1982).

Here, the Amended Complaint alleges only purported harm to *Oscar* arising out of Florida Blue’s exclusivity arrangements. (See Am. Compl. ¶¶ 115, 117 (alleging that Oscar’s “ability to compete in the Orlando Markets has been inhibited,” and its “plans to enter other markets” are “threaten[ed]”).) Such allegations alone cannot sustain a claim for monopolization or attempted monopolization. See *Spanish Broad. Sys.*, 376 F.3d at 1075.

To the extent Oscar alleges harm to competition at all, it insists that “[t]he primary anticompetitive effect of Florida Blue’s scheme to foreclose Oscar from brokers is that consumers will pay more for health insurance.” (Am. Compl. ¶ 121.) As support, Oscar focuses on alleged differences between Florida Blue’s and Oscar’s premiums—without any discussion of total cost, the difference in coverage or any other metric. (*Id.* ¶¶ 31, 34, 107.) Oscar also summarily asserts that “Florida Blue is reducing output and limiting consumer choice, while also reducing quality by impeding innovation.” (*Id.* ¶ 119.) But again, Oscar offers no facts supporting its claim that market output and consumer choice would increase absent Florida Blue’s exclusive arrangements—a claim that is particularly implausible given that Oscar’s proposed relief would affect Florida Blue’s sales “throughout *the entire State of Florida*,” while Oscar only serves a single metropolitan area. (*Id.* ¶ 6.) Nor does Oscar attempt to compare objectively the quality of Oscar’s plans to the Florida Blue plans it seeks to offset. Once again, bald assertions may not be credited. See *Iqbal*, 556 U.S. at 678.

Finally, Oscar’s own allegations point to Florida Blue’s “superior product, business acumen, or historic accident” as the reason for its success. See *Trinko*, 540 U.S. at 407 (quoting *Grinnell*, 384 U.S. at 570–71). As Oscar acknowledges, “since 2015, major

insurers . . . have left the ACA exchange in Florida” and consumers have turned to Florida Blue in their wake. (Am. Compl. ¶¶ 2.) Oscar does not allege (nor could it) that these competitors’ decision to exit Florida had anything to do with Florida Blue’s exclusivity policy. There is thus an “obvious alternative explanation[]” for Florida Blue’s purported dominance in the individual health insurance market, which this Court may readily credit. *Cigna Corp.*, 605 F.3d at 1290 (quoting *Iqbal*, 556 U.S. at 682).

Indeed, Oscar’s own allegations on this issue are inconsistent. On the one hand, Oscar alleges that, following other insurers’ exit from the exchange, Florida Blue “recognized that it could leverage its growing share to effectively put a stranglehold on new entry or expansion through the use of its statewide exclusivity policy,” and “[a]s a result of its exclusionary conduct, Florida Blue steadily gained share.” (Am. Compl. ¶¶ 85–86.) At the same time, however, Oscar alleges that Florida Blue “selectively enforced [its] exclusivity policy against Oscar,” which is “why other ACA insurers, such as Centene and Molina, have been able to survive.” (*Id.* ¶¶ 5, 69.) Either Florida Blue has long used its “statewide exclusivity policy” (in which case the continued success of competitors like Centene and Molina disproves anticompetitive harm) or Florida Blue has only recently enforced its policy only against Oscar (in which case Florida Blue’s market share to date must be explained by its “superior product, business acumen, or historical accident”). Oscar cannot have it both ways. *See Jackson v. Conner Collins, Inc.*, No. CRIM-A-5:09-CV-63(HL), 2009 WL 500858, at *1 (M.D. Ga. Feb. 27, 2009) (dismissing case for failure to state a claim where plaintiff’s complaint made “contradictory allegations”).

III. Oscar Fails to Plausibly Allege Sherman Act Section 1 or Florida Antitrust Act Section 542.18 Claims (Counts III and V)

Oscar claims that Florida Blue's exclusivity policy violates Sherman Act § 1 (Count III) and Florida Antitrust Act § 542.18 (Count V). Both statutes use the same legal standards to ban agreements that unreasonably restrain trade. *See Levine v. Central Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1545 (11th Cir. 1996); *Hill Dermaceuticals, Inc. v. Anthem, Inc.*, 228 F. Supp. 3d 1292, 1300 & n.3 (M.D. Fla. 2017).

Where, as here, a plaintiff challenges a vertical agreement between a supplier and its dealers, the plaintiff must establish that the agreement involves an entity with market power and causes anticompetitive harm that exceeds any procompetitive benefits.¹⁴ *See Levine*, 72 F.3d at 1551; *Graphic Prods. Distribs., Inc. v. ITEK Corp.*, 717 F.2d 1560, 1566, 1571 (11th Cir. 1983). For the reasons set forth above, Oscar has failed to allege either market power or anticompetitive harm, and its Sherman Act § 1 and Florida Antitrust Act § 542.18 claims must fall together with its other claims.

CONCLUSION

Florida Blue respectfully asks that the Court dismiss Oscar's Amended Complaint with prejudice. Florida Blue further requests oral argument on its motion to dismiss, with 30 minutes allocated to each side, and has contemporaneously filed its Request for Oral Argument pursuant to Local Rule 3.01(j).

¹⁴ Oscar has also failed to allege plausibly a lack of procompetitive benefits. Because Oscar has failed the "first step" of its burden—to establish that Florida Blue has "market power" and has caused an "anticompetitive effect," *Graphic Prods. Distribs., Inc.*, 717 F.2d at 1571, the Court need not reach this issue.

February 27, 2019

HOLLAND & KNIGHT LLP,

by

/s/ Timothy Conner

Timothy Conner, Esq.
Florida Bar No. 767580
Jerome W. Hoffman, Esq.
Florida Bar No. 258830

50 North Laura Street, Suite 3900
Jacksonville, FL 32202
(908) 798-7362
timothy.conner@hklaw.com
jerome.hoffman@hklaw.com

CRAVATH, SWAINE & MOORE LLP,

by

/s/ Karin A. DeMasi

Evan R. Chesler
Christine A. Varney
Karin A. DeMasi
Lauren Roberta Kennedy

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
echesler@cravath.com
cvarney@cravath.com
kdemasi@cravath.com
lkennedy@cravath.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of February, 2019, a true and correct copy of the foregoing Motion was electronically filed using the ECF/CM portal system, which will serve as such filing on all counsel of record.

/s/ Karin A. DeMasi

Karin A. DeMasi

Doc. 81-1

Exhibit A

From: Henderson, Lasandra
Sent: Tuesday, December 12, 2017 1:09 PM
To: 'agentlicensing@myfloridacfo.com'
Subject: FOR CAUSE TERMINATION- VIOLATION OF FLORIDA STATUTE- ANAMARIE ISMODES A128367
Attachments: ANA MARIA_Redacted.pdf; Anamarie Ismodes Lice# A128367 Doc 1_Redacted.pdf

Good afternoon,

Please accept the attached documents to term this agent for the following violation of Florida Statutes:

626.9541 Unfair methods of competition and unfair or deceptive acts or practices defined.--
(1)(k)(1). "Knowingly making a false ... representation on, or relative to, an application or negotiation for an insurance policy for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, broker, or individual." *[Representing that the agent is not bound by contractual exclusivity provisions.]*

(1)(k)(2). "Knowingly making a material omission in the comparison of a ... health ... insurance replacement policy with the policy it replaces for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, broker, or individual." *[Omitting the fact that the agent is bound by contractual exclusivity provisions.]*

If you need any additional information, please feel free to respond to this email.

Thank you

LaSandra Henderson

*Analyst II-Business Support
Channel Partner Information Management
DCC 200, 2nd Floor, Cube 271
Lasandra.henderson@floridablue.com
904-905-1862
Ext 51862*



[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Subject: FW: Anamarie Ismodes

[REDACTED]

[REDACTED] I need to terminate this agent with cause for violation of exclusivity. Her licensing should be sufficient evidence as she became licensed with many of our competitors after she was appointed with Florida Blue. She has also been seen twice offering Humana Medicare products at an event. [REDACTED]

[REDACTED]

[REDACTED]

CONFIDENTIAL AND PROPRIETARY

Not for further distribution without express written consent.

This responds to your request submitted to Channel Partner Information Management (CPIM) to terminate agent Ana Maria Jimenez for the following **CAUSE**:

*Violation of the **contractual exclusivity** provisions governing sales of Florida Blue individual medical products. These provisions govern certain Under 65 (U65) and Over 65 (O65) medical products. Specifically:*

- *Agent must market, sell and renew Florida Blue and affiliated O65 products exclusively.*
- *Agent must initially market, sell and renew Florida Blue and affiliated U65 products unless
 - *the client does not meet Florida Blue's enrollment criteria; or*
 - *Agent maintains a passive renewal relationship with an existing client, currently enrolled with another carrier with whom the agent was contracted prior to his/her Florida Blue appointment.**

In order to document the contractual and legal basis for the requested action **[CONTRACT/APPOINTMENT TERMINATION - FOR CAUSE]**, Florida Blue is required to gather and submit to regulators evidence of the "cause" and documentation of the facts leading to our termination decision. This information will be sent to the FL Department of Financial Services, Division of Agent and Agency Services, and as such will likely become part of the terminated agent's State compliance/licensure enforcement file and a public record.

Please provide the following:

1. Summary of facts and allegations supporting decision (i.e., Date and description of each known violation; carriers involved; source of information; etc.)
2. Copies of all documents supporting decision (e.g., communications, records indicating sales or solicitation activity on behalf of, contract/appointment verification, etc.)
3. Written managerial authorization (Agency Owner; Area Manager; Sales VP/Director; etc.) of FOR CAUSE termination action.
4. Any other information supporting the decision.
5. Move the Book of Business from [REDACTED] to [REDACTED].
6. Confirmation that employment of and/or contract with the above named agent has been terminated by agency YES ☒ NO ☐.

Upon receipt of the information listed above, CPIM will review with the Legal Affairs and Compliance areas as needed per State regulatory procedure, and will advise of any additional requirements.

From: AskDFS [<mailto:askdfs@myfloridacfo.com>]

Sent: Tuesday, December 12, 2017 2:27 PM

To: Henderson, Lasandra

Subject: FW: FOR CAUSE TERMINATION- VIOLATION OF FLORIDA STATUTE- ANAMARIE ISMODES A128367

CAUTION : *This is an external email.*

*Carefully consider the source before clicking a link, opening an attachment or replying to this message. If you feel this message is suspicious in nature please go to the intranet home page and search for **Report a Suspicious E-mail**.*

Ms. Henderson,

Your email to Agent Licensing was referred to us. Violation of an agent's contract with an insurer to maintain exclusivity is a civil contractual issue between the parties to the contract involved. There is no law in the Florida Insurance Code that could be applied to this civil employment issue.

Thank you for contacting the Department of Financial Services.

Bureau of Investigation

Florida Department of Financial Services

Representing Chief Financial Officer Jimmy Patronis

Tallahassee, Florida 32399-0320

55

We comply with applicable Federal civil rights laws and do not discriminate.

You may access the Non-Discrimination and Accessibility Notice [here](#).

Language Assistance Available:

[Español, Kreyol Ayisien, Tiếng Việt, Português, 中文, français, Tagalog, русский, italiano, Deutsche, 한국어, Polskie, Gujarati, ไทย, العربية, 日本語, فارسی](#)

Florida Blue is a trade name of Blue Cross and Blue Shield of Florida, Inc. Blue Cross and Blue Shield of Florida, Inc., and its subsidiary and affiliate companies are not responsible for errors or omissions in this e-mail message. Any personal comments made in this e-mail do not reflect the views of Blue Cross and Blue Shield of Florida, Inc. The information contained in this document may be confidential and intended solely for the use of the individual or entity to whom it is addressed. This document may contain material that is privileged or protected from disclosure under applicable law. If you are not the intended recipient or the individual responsible for delivering to the intended recipient, please (1) be advised that any use, dissemination, forwarding, or copying of this document IS STRICTLY PROHIBITED; and (2) notify sender immediately by telephone and destroy the document. THANK YOU.

Doc. 113

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

OSCAR INSURANCE COMPANY OF
FLORIDA,

Plaintiff,

v.

Case No: 6:18-cv-1944-Orl-40EJK

BLUE CROSS AND BLUE SHIELD OF
FLORIDA, INC., FLORIDA HEALTH
CARE PLAN INC. and HEALTH
OPTIONS INC.,

Defendants.

ORDER

This cause is before the Court on the following pleadings:

1. Defendants Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan Inc., and Health Options Inc.'s (collectively, "**Florida Blue**") Motion to Dismiss (Doc. 81 (the "**Motion**"));
2. Plaintiff Oscar Insurance Company of Florida's ("**Oscar**") Response in Opposition to Defendants' Motion to Dismiss (Doc. 86);
3. Statement of Interest of the United States of America (Doc. 89)¹;

¹ 28 U.S.C. § 517 does not create a right for the Government to appear and submit argument in any case in which the United States articulates an interest in the development and correct application of the law. *United States v. Salus Rehab.*, No. 8:11-cv-1303, 2017 WL 1495862 (M.D. Fla. Apr. 26, 2017). *Cf.* 28 U.S.C. § 2403(a) (empowering the Government to intervene in a federal court action that questions the constitutionality of an Act of Congress affecting the public interest). The Government's briefing and participation at oral argument, while siding with Oscar, was unhelpful to the resolution of the issues at bar.

4. Defendants' Response to the Statement of Interest of the United States of America (Doc. 92); and
5. Plaintiff's Reply to Defendants' Response to the Statement of Interest of the United States of America (Doc. 95).

At the parties' request, the Court held oral argument on August 16, 2019. (Doc. 105). With briefing complete, the Motion is ripe. Upon consideration, the Motion is due to be granted and the case dismissed with prejudice.²

I. BACKGROUND³

Oscar contends Florida Blue is engaged in improper, unlawful, and anticompetitive conduct designed to stifle competition in Florida for the sale of individual health insurance plans and products via the Affordable Care Act of 2010 ("**ACA**"). (Doc. 75, ¶ 1). Oscar describes itself as one of the country's fastest-growing health insurance companies, utilizing technology and a customer-first approach to make health care affordable and accessible to its members. (*Id.* ¶ 3). Oscar accuses Florida Blue of implementing a "blatant scheme targeted at Oscar to keep it out of the state" by "denying Oscar access to insurance brokers upon whom consumers rely to advise them of their insurance options." (*Id.* ¶ 5). In support of this contention, Oscar notes that Florida Blue entered into exclusivity agreements with its brokers under which brokers agree to sell only Florida

² The Court finds the complained-of conduct is immune from antitrust scrutiny under the McCarran-Ferguson Act and will not reach the merits of whether Plaintiff has adequately pled claims under the Sherman Act and the Florida Antitrust Act.

³ This account of the facts comes from Plaintiff's Amended Complaint. (Doc. 75). The Court accepts these factual allegations as true when considering motions to dismiss. See *Williams v. Bd. of Regents*, 477 F.3d 1282, 1291 (11th Cir. 2007).

Blue's individual ACA plans. (*Id.*). Oscar asserts that Florida Blue employs illegal coercion by "aggressively and selectively enforc[ing] this exclusivity policy against Oscar by systematically contacting brokers who had signed contracts with . . . Oscar to threaten them with permanent termination." (*Id.*).

Florida Blue moves to dismiss the Amended Complaint on two grounds: first, the Sherman Act Claims (Counts I–III) are barred by the McCarren-Ferguson Act, which immunizes insurers from federal suits involving the "business of insurance"⁴; and second, the Amended Complaint fails to state a claim for monopolization or attempted monopolization under § 2 of the Sherman Act and Florida law, and fails to state a claim for unreasonable restraint of trade pursuant to § 1 of the Sherman Act and Florida law. (Doc. 81, p. 3).

II. STANDARD OF REVIEW

To survive a motion to dismiss made pursuant to Rule 12(b)(6), the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Legal conclusions and recitation of a claim's elements are properly disregarded, and courts are "not bound to accept as true a

⁴ Pursuant to Fla. Stat. § 542.20, "[a]ny activity or conduct . . . exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of this chapter [542]." Accordingly, if the McCarran-Ferguson Act exemption applies, Fla. Stat. § 540.20 requires dismissal of the state law antitrust claims. *In re Jet 1 Ctr., Inc.*, 322 B.R. 182, 197 (M.D. Fla. 2005); see also *Golta, Inc. v. Greater Orlando Aviation Auth.*, 761 F. Supp. 778 (M.D. Fla. 1991).

legal conclusion couched as a factual allegation.” *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Courts must also view the complaint in the light most favorable to the plaintiff and must resolve any doubts as to the sufficiency of the complaint in the plaintiff’s favor. *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1483 (11th Cir. 1994) (per curiam). In sum, courts must (1) ignore conclusory allegations, bald legal assertions, and formulaic recitations of the elements of a claim; (2) accept well-pled factual allegations as true; and (3) view well-pled allegations in the light most favorable to the plaintiff. *Iqbal*, 556 U.S. at 67.

III. DISCUSSION

A. The McCarran-Ferguson Act

In 1945, Congress passed the McCarran-Ferguson Act. 15 U.S.C. §§ 1011–1015. Congress passed the Act “to allow insurers to share information relating to risk underwriting and loss experience without exposure to federal antitrust liability and to preserve for the states the power to regulate the insurance industry.” *Gilchrist v. State Farm Mut. Auto. Ins.*, 390 F.3d 1327, 1330 (11th Cir. 2004) (citing *Union Labor Life Ins. v. Pireno*, 458 U.S. 119, 133 (1982)).⁵ The Act provides, in pertinent part:

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee

⁵ “Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.” 15 U.S.C. § 1011.

or tax upon such business, unless such Act specifically relates to the business of insurance

15 U.S.C. § 1012.

The exemption from antitrust liability is not without limitation:

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Id. § 1013. The Act, therefore, exempts the activities of insurance companies from antitrust liability when the following three elements are met: “(1) the challenged activity is part of the ‘business of insurance’; (2) the challenged activity is regulated by state law⁶; and (3) the challenged activity does not constitute a boycott of unrelated transactions.” *Gilchrist*, 390 F.3d at 1330. It is well settled that exemptions from the antitrust laws are narrowly construed. *Grp. Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979).

1. *The Business of Insurance*

The first requirement for determining whether an insurer’s conduct falls within the scope of the McCarran-Ferguson exemption is that the activity is part of the “business of insurance.”⁷ The Act does not exempt all activities undertaken by insurance companies;

⁶ “The legislative history of the proviso clause indicates that Congress never intended state insurance department regulation of *some* insurance company activities to be enough to completely oust the federal antitrust laws for *all* activities. Otherwise a gap would exist where neither federal nor state law applied, and the public would be left wholly unprotected.” Charles D. Weller, *The McCarran-Ferguson Act’s Antitrust Exemption for Insurance: Language, History and Policy*, 1978 DUKE L.J. 587, 607 (1978).

⁷ “The issue is difficult to resolve because the Act does not define ‘business of insurance,’ and the legislative history is ambiguous.” Alan M. Anderson, *Insurance and Antitrust Law: The McCarran–Ferguson Act and Beyond*, 25 WILLIAM & MARY L.R. 81, 89–90 (1983) (citing 91 CONG. REC. 480 (1945) (remarks of Sen. Murdock) (suggesting that the ‘business of insurance’ is synonymous with ‘insurance companies’)).

that is, the Act exempts the “business of insurance,” not the “business of insurers.” *Royal Drug*, 440 U.S. at 211. In *Royal Drug*, the Court observed that “[t]he relationship between the insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the ‘business of insurance.’” *Id.* at 215–16. Included within this definition are activities that “relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder.” *Id.* at 216 (citing *SEC v. Nat’l Sec., Inc.*, 393 U.S. 453, 460 (1969)).⁸

The Supreme Court in *Royal Drug* articulated a three-prong test for determining whether an insurer’s activity is within the business of insurance: first, whether the practice has “the effect of transferring or spreading a policyholder’s risk”; second, whether the practice is “an integral part of the policy relationship between the insurer and the insured”; and third, whether the practice is “limited to entities within the insurance industry.” *Gilchrist*, 390 F.3d at 1331 (quoting *Pireno*, 458 U.S. at 129).

a. Transferring or Spreading Risk

At issue is whether Florida Blue’s exclusivity agreements with its brokers constitute the business of insurance. In applying the test to a given relationship or transaction, the Court relies “on [Plaintiff’s] characterization of its claim, as it is supported by the allegations in the complaint . . . because we must accept the plaintiff’s theory of the case in conducting the McCarran-Ferguson inquiry.” *Sanger Ins. Agency v. HUB Intern., Ltd.*,

⁸ “The process of deciding what is and is not the ‘business of insurance’ is inherently a case-by-case problem.” *Royal Drug*, 440 U.S. at 252.

802 F.3d 732, 743 (5th Cir. 2015). Oscar describes Florida Blue's exclusivity agreement with its brokers, as follows:

. . . First and foremost, the scheme involves denying Oscar access to insurance brokers upon whom consumers rely to advise them of their insurance options

(Doc. 75, ¶ 5)

Brokers play a crucial role in driving policy sales in Florida, more so than in other states, where brokers play a less prominent role. In the counties comprising the Orlando metro area, even with Florida Blue's exclusionary conduct, 75 percent of Oscar's policy sales came through brokers compared to 40 percent nationally.

(*Id.* ¶ 35)

Brokers must be licensed by the state to sell insurance. To become licensed, brokers must complete 60 hours of insurance and ethics education coursework and pass a written examination. See Fl. Stat. Ann. §§ 626.241, 626.221, 626.8311.

(*Id.* ¶ 36)

According to the National Association of Health Underwriters, a trade association representing over 100,000 insurance brokers and agents nationwide, brokers 'help millions of consumers by guiding them through the complexities of health insurance purchasing and enrollment, while ensuring they get the best policy at the most affordable price.' Brokers do so by 'seek[ing] to understand each personal situation to create recommendations that complement a client's financial and medical security needs.' Because consumers rely on brokers as expert personal insurance advisors, Florida law recognizes insurance brokers as fiduciaries of their customers and obligates brokers to provide their clients accurate advice about insurance plans and coverage.

(*Id.* ¶ 37)

. . . Oscar's experience in Orlando demonstrates that local brokers have a far greater ability to guide the decisions of local residents than out-of-state or out-of-area brokers. In other

words, many consumers strongly prefer the advice of local brokers whom they interact with in person, rather than brokers who communicate with them solely from a call center or through the Internet. Insurance plan sales are also driven heavily by consumer referrals, and local brokers create more referrals. Of the individual ACA insurance policies sold by brokers for Oscar in Orlando during the 2019 enrollment period, 75 percent came from brokers with operations in that area, even though those brokers represent only approximately 25 percent of Oscar's brokers appointed to sell ACA plans in Florida.

(*Id.* at ¶ 39).

The Supreme Court instructs the trial court to focus on the relationship between the insurance company and the policyholder. Here, Oscar concedes that Florida Blue's brokers help consumers by guiding them through the complexities of health insurance purchasing and enrollment. (See *id.* ¶ 37). Florida Blue's brokers ensure consumers get the best policy at the most affordable price, and they seek to understand each personal situation and create recommendations that complement the client's financial and medical security needs. (See *id.*). In short, consumers rely on Florida Blue's brokers as expert personal insurance advisors, and indeed Florida law recognizes the brokers as the client's fiduciary. Florida Blue's brokers increase the number of policyholders, therefore spreading the risk. It is hard to imagine a relationship more squarely at the core of the business of insurance than the one described by Oscar as existing between Florida Blue's brokers and ACA consumers.

In *Thompson v. New York Life Insurance*, 644 F.2d 439, 440 (5th Cir. 1981),⁹ appellant entered into a Soliciting Agents Contract with New York Life Insurance

⁹ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981). *Thompson* was decided May 4, 1981, and is therefore binding precedent.

Company, authorizing appellant to solicit insurance applications subject to approval by the appellee. The Agreement precluded appellant from engaging in any other business or occupation for remuneration or profit during the contract year absent the written consent of New York Life. *Id.* Appellant was terminated when he failed to procure \$50,000 of new insurance as required by the Agreement. *Id.* at 441. Appellant sued New York Life for violating § 1 of the Sherman Act. *Id.* Appellee argued the exclusive agency contract was exempt from antitrust scrutiny under the McCarran-Ferguson Act because it constituted the business of insurance. *Id.*

The Fifth Circuit considered the relationship between New York Life's exclusive broker and the consumer, and observed:

The trial court correctly recognized that the proper focus of its inquiry should be upon the impact of the challenged activity or restriction on the insurer/insured relationship. The trial court concluded, without lengthy analysis, that at the center of this relationship was the agent, a middle-man in the truest sense, and that therefore, the terms and conditions of the agency contract were, a fortiori, within the business of insurance.

Id. at 443. The Fifth Circuit noted that the Supreme Court in *Royal Drug* did not address the validity of agency restrictions and left open whether transactions between an insurer and its agents is the business of insurance. However, the Fifth Circuit went on to hold that “exclusive agency clauses have been deemed exempt from anti-trust scrutiny as part of the business of insurance.” *Id.* (citations omitted).¹⁰

¹⁰ The court cited to *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453 (1969), for the proposition that “the fixing of rates is part of [the] business [of insurance]” and “[t]he selling and advertising of policies and the licensing of companies and their agents are also within the scope of the statute.” *Thompson*, 644 F.2d at 442–43 (citations omitted). Oscar concedes Florida Blue's brokers are instrumental in selling policies of insurance.

Twenty-four years after *Thompson*, the Fifth Circuit had the opportunity to expound upon the McCarran-Ferguson Act in *Sanger Insurance Agency v. HUB Intern., Ltd.*, 802 F.3d at 732. Appellant Sanger claimed it was forced to abandon prospective business due to HUB's anticompetitive practices. *Id.* at 734. HUB was the Broker of Record and Administrator of an insurance program issued through the American Veterinary Medical Association Professional Liability Insurance Trust. *Id.* The program offered various forms of insurance to members of the American Veterinary Medical Association. *Id.* Sanger claimed the program accounted for 90% of the market for veterinary professional liability insurance. *Id.* at 735. The alleged anticompetitive behavior consisted of HUB having entered into exclusive dealing arrangements with its insurers to prevent them from writing veterinary insurance through other brokers. *Id.*

Sanger alleged that after it approached the Texas Equine Veterinary Association and Continental, HUB contacted its insurers to find out if they were underwriting coverage for Sanger. *Id.* at 735–36. HUB also objected to its insurers raising program premiums because doing so might have driven customers to Sanger. *Id.* at 736. Accordingly, Continental, Zurich, The Harford, and Travelers told Sanger they had an exclusive arrangement with HUB and could not do business with Sanger. *Id.* Sanger sued HUB for violations of Sections 1 and 2 of the Sherman Act and related state law claims. *Id.*¹¹ The

¹¹ Sanger's complaint alleged that "HUB violated federal and state antitrust law when, by entering into exclusive arrangements with the companies willing to underwrite these policies, it prevented competitors from brokering veterinary insurance policies." *Sanger*, 802 F.3d at 736.

trial court granted HUB's motion to dismiss, holding the McCarran-Ferguson Act exempted HUB's alleged anticompetitive activity from federal antitrust law. *Id.*¹²

The Fifth Circuit applied the test announced in *Pireno* to answer the question whether "HUB's alleged exclusive dealing arrangements with insurers constitute[d] the 'business of insurance.'" *Id.* at 743. Sanger, like Oscar in the instant case, relied on *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300 (3d Cir. 2010). *Id.* However, in that decision, the court confronted an agreement between insurer-partners not to compete for incumbent business; that is, accounts up for renewal. *Id.* (citing *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 340, 356). Thus, the agreement did not involve the extent to which a prospective consumer would spread its risk to an insurer; rather, it concerned merely to which insurer that risk would be transferred. *Id.* (citing *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 357). The Fifth Circuit noted that HUB's exclusive dealing arrangement, unlike the agreement in *In re Insurance Brokerage Antitrust Litigation*, results in "[k]eeping a large, geographically and professionally diverse pool of veterinarians in the [p]rogram—including significant numbers of small-animal, large-animal, mixed, and equine veterinarians—[and] spreads risk." *Id.*

Instead, the Fifth Circuit found HUB's conduct to be closer to *Feinstein v. Nettleship Co. of L.A.*, 714 F.2d 928, 932 (9th Cir. 1983).¹³ There, the Ninth Circuit held

¹² Unlike Florida, Texas antitrust law does not incorporate the McCarran-Ferguson exemption. See Tex. Bus. & Comm. Code § 15.05(g) ("[T]he McCarran-Ferguson Act does not serve to exempt activities under this Act." (citation omitted)). Therefore, the Fifth Circuit held that "[w]hether HUB is entitled to the exemption thus has no effect on Sanger's state antitrust claims." *Sanger*, 802 F.3d at 742.

¹³ The Ninth Circuit distinguished this case from the agreement providing peer review of chiropractors' fees in *Pireno* and the agreement between the insurer and pharmacists to offer low cost drugs in *Royal Drug*, holding that those practices are aimed solely at

the agreement between the medical association and insurers to offer malpractice insurance only to members of the Los Angeles County Medical Association was “demonstrably related to the allocation and spreading of risk,” because “it defines the pool of insureds over which risk is spread.” *Id.* (citing *Feinstein*, 714 F.2d at 932). Because it had the effect of spreading the risk, the exclusivity agreement in *Feinstein* was determined to constitute the business of insurance. *Id.* (citing *Feinstein*, 714 F.2d at 932).

The Fifth Circuit further held that Sanger’s attempt to siphon off HUB’s veterinarians by offering group plans through HUB’s insurers would alter the composition of policyholders in the program and likely impact the program’s ability to spread risk. *Id.* at 744. The same is true here. Florida Blue’s exclusive brokers work to create a broad risk pool, thereby spreading the risk. Allowing Oscar to have access to Florida Blue’s exclusive brokers would result in Oscar siphoning off ACA consumers and altering the composition of policyholders, impacting Florida Blue’s ability to spread risk. Finally, the Fifth Circuit, being well aware of the Supreme Court’s holding in *Pireno*, stated that “even if viewed more narrowly as just a ‘broker’ case, most courts have held that routine dealings between insurers and brokers or agents do constitute the business of insurance even if that relationship may not be ‘distinctively different from ordinary relationships with dealers marketing a product or service.’” *Id.*¹⁴

cutting insurers’ costs—the business of insurers—and had nothing to do with the allocation of risk—the business of insurance. *Feinstein*, 714 F.2d at 932.

¹⁴ The Department of Justice argues that *Thompson* does not survive *Pireno*. (Doc. 89, p. 11). The Department also contends that *Thompson* did not discuss *Pireno*’s factors on whether a practice is an integral part of the policy relationship. (*Id.*). However, *Gilchrist* and *Sanger* were decided in 2004 and 2015, respectively, long after *Pireno*, and neither criticize the reasoning in *Thompson*. Similarly, the First Circuit decided *Arroyo-Melecio v. Puerto Rican American Insurance*, 398 F.3d 56, 68 (1st Cir. 2005),

Oscar contends that “a broader pool of insureds under the ACA does not spread policyholder risk because each individual ACA plan customer is risk-neutral for insurers.” (Doc. 86, p. 4). Oscar explains that “[f]ederal regulation requires insurers to charge all ACA plan customers the same rates regardless of health status, and then funds are reallocated from plans with lower-risk enrollees to plans with higher-risk enrollees to compensate.” (*Id.* (citing 42 U.S.C. § 18063)).

First, the Amended Complaint does not allege that under the ACA an insurer need no longer worry about spreading the risk, and the Court must limit its factual review to the allegations contained in the Amended Complaint. Second, even if the Court were permitted to stray outside the Amended Complaint, Oscar’s argument that § 18063 defeats the first prong of the “business of insurance” test announced in *Pireno* and reiterated in *Gilchrist* is not quite as simple as Oscar’s suggests. Notably, Oscar does not cite any precedent or a single government study discussing whether the risk allocation envisioned by § 18063 works, and the United States Department of Justice did not advance this argument in its Statement of Interest. (Doc. 89).

The Risk Adjustment statute states:

(a) In general

(1) Low actuarial risk plans

Using the criteria and methods developed under subsection (b), each State shall assess a charge on health plans and health insurance issuers (with respect to health insurance coverage) described in subsection (c) if the actuarial risk of the enrollees of such plans or coverage for a year is less than the average actuarial risk of all enrollees in all plans

after *Pireno* and *Royal Drug*, and observed that *Royal Drug* left open the question of whether the business of insurance includes dealings within the insurance industry between insurers and agents. The Department of Justice is too quick to dismiss binding precedent, and this Court declines to follow suit.

or coverage in such State for such year that are not self-insured group health plans (which are subject to the provisions of the Employee Retirement Income Security Act of 1974).

(2) High actuarial risk plans

Using the criteria and methods developed under subsection (b), each State shall provide a payment to health plans and health insurance issuers (with respect to health insurance coverage) described in subsection (c) if the actuarial risk of the enrollees of such plans or coverage for a year is greater than the average actuarial risk of all enrollees in all plans and coverage in such State for such year that are not self-insured group health plans (which are subject to the provisions of the Employee Retirement Income Security Act of 1974).

(b) Criteria and methods

The Secretary, in consultation with States, shall establish criteria and methods to be used in carrying out the risk adjustment activities under this section. The Secretary may utilize criteria and methods similar to the criteria and methods utilized under part C or D of title XVIII of the Social Security Act. Such criteria and methods shall be included in the standards and requirements the Secretary prescribes under section 18041 of this title.

(c) Scope

A health plan or a health insurance issuer is described in this subsection if such health plan or health insurance issuer provides coverage in the individual or small group market within the State. This subsection shall not apply to a grandfathered health plan or the issuer of a grandfathered health plan with respect to that plan.

42 U.S.C. § 18063. The statute merely provides that the Secretary, in consultation with States, shall establish criteria and methods to carry out the task of risk assessment. The statute envisions that first, the actuarial risk of enrollees must be calculated, after which the Secretary and the States attempt to agree upon criteria and methods for carrying out risk adjustment. While Florida Blue conceded at oral argument that § 18063 “softens” the

risk for providers of ACA coverage, the plain wording of § 18063 does not convince the Court that spreading risk is no longer a concern for insurers selling ACA coverage.¹⁵

The relationship between the insurer and its brokers is at the core of the business of insurance—that is, spreading risk. Furthermore, as Oscar concedes in their Amended Complaint, this relationship is fundamental to the type of policy which could be issued, its reliability, interpretation, and enforcement. (Doc. 75, ¶ 35–39); *see also Royal Drug*, 440 U.S. at 215–16. As Oscar aptly noted, Florida Blue’s brokers are fiduciaries to the ACA customer under Florida law. (*Id.* ¶ 37). The services provided by Florida Blue’s brokers go directly to the allocation and spreading of risk. The argument advanced by Plaintiff and the Department of Justice that Florida Blue’s brokers, who are bound to work exclusively for Florida Blue, are not engaged in the transfer of risk and are not an integral part of the policy relationship between the insurer and the insured ignores the allegations set forth in the Amended Complaint and disregards the holdings in *Thompson* and *Sanger*.

It is worth noting that during oral argument, Plaintiff at times framed Florida Blue’s exclusive agreement with its brokers as an impediment to market entry by Oscar. This argument places the cart before the horse. Whether a dominant firm uses exclusivity agreements with its brokers to maintain its monopoly power is relevant only if the

¹⁵ See *Insights on the ACA Risk Adjustment Program*, AM. ACAD. OF ACTUARIES (Apr. 2016), <https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/RA-March-31-White-Paper-032416.pdf>; *see also* March 31, 2016, *HHS-Operated Risk Adjustment Methodology Meeting*, CTR. FOR MEDICARE & MEDICAID SERVS. (Mar. 24, 2016), https://www.actuary.org/sites/default/files/files/imce/Insights_on_the_ACA_Risk_Adjustment_Program.pdf.

exemption from federal antitrust law does not apply. *McWane, Inc. v. FTC*, 783 F.3d 814, 832 (11th Cir. 2015). For purposes of the McCarran-Ferguson Act, the Court's inquiry is limited to whether Florida Blue's use of exclusive brokers is part of the relationship between the policyholder and the insurer, along with the other factors expressed in *Royal Drug*, *Pireno*, and *Gilchrist*. The legality and propriety of exclusivity agreements are beyond dispute.

b. Integral Part of the Policyholder Relationship

This prong of the "business of insurance" analysis requires little discussion. As discussed in the preceding section, the brokers employed by Florida Blue provide invaluable services to customers trying to navigate the complex world of health insurance coverage. The services provided by Florida Blue's brokers are neither logically nor temporally unconnected to the transfer of risk accomplished by procuring a diverse pool of insureds. Additionally, the Fifth Circuit announced in *Thompson* that "[a]n important factor in assessing whether an exclusive agency arrangement constitutes the business of insurance is whether the exclusivity requirement 'concern[s] the agent's insurance dealings as such.'" *Thompson*, 644 F.2d at 444. As in *Thompson*, Florida Blue did not force its brokers to engage in activities unrelated to insurance. Rather, their brokers received incentives beyond the usual agency relationship—access to all of Florida Blue's lines of insurance—in exchange for which the brokers agreed to focus all their entrepreneurial skills on selling only Florida Blue's insurance products. *See id.*; (Doc. 75, ¶ 60). It is up to the State of Florida to decide whether such restrictive covenants are a good policy.

c. *Limited to Entities within the Insurance Industry*

The Court next considers whether Florida Blue's activities are limited to entities within the insurance industry. *Gilchrist*, 390 F.3d at 1331; *see also Pireno*, 458 U.S. at 132. The Supreme Court in *SEC v. National Securities, Inc.*, held “‘the business of insurance’ pertained to those activities peculiar to the insurance industry. Business activities of insurance companies not peculiar to the insurance industry were found to be subject to federal regulatory laws.” *Am. Family Life Assurance Co. of Columbus v. Planned Mktg. Assocs., Inc.*, 389 F. Supp. 1141, 1145 (E.D. Va. 1974) (citing *Nat’l Sec., Inc.*, 393 U.S. at 459–60). The court in *Sanger* summarized several opinions addressing this concept and concluded that “most courts have held that routine dealings between insurers and brokers or agents do constitute the business of insurance even if that relationship may not be ‘distinctively different from ordinary relationships with dealers marketing a product or service.’” *Sanger Ins. Agency*, 802 F.3d at 744. For example, “authorizing agents to solicit individual or group policies [and] accepting or rejecting coverages tendered by brokers” are exempt activities. *Id.* (quoting *Owens v. Aetna Life & Cas. Co.*, 654 F.2d 218, 226 (3d Cir. 1981)). And in *Thompson*, the Fifth Circuit held that an insurance company’s contract with an agent prohibiting him from engaging in “any other business or occupation for remuneration or profit” and offering “various incentives . . . so that [he] would agree to focus all of his entrepreneurial skills solely on selling insurance” is within the business of insurance. *Thompson*, 644 F.2d at 439.

One could easily argue that exclusive relationships can be found in businesses unrelated to insurance. However, to exclude from the business of insurance any activity that could, hypothetically, also be present in a business unrelated to insurance is too

expansive and would effectively exclude nearly all activity from the McCarran-Ferguson Act. In *Pireno*, the Supreme Court clarified that conduct involving “third parties wholly outside the insurance industry” is not the business of insurance. 458 U.S. at 132. Brokers, such as those employed by Florida Blue, are not parties wholly outside the insurance industry. To the contrary, Oscar concedes the brokers play an instrumental role in the sale of health insurance. For the foregoing reasons, Florida Blue’s exclusive broker agreement constitutes the business of insurance.

2. *Regulated by State Law*

The second element of the McCarran-Ferguson Act is whether the challenged activity is regulated by state law. *Gilchrist*, 390 F.3d at 1330. The Eleventh Circuit previously held “[t]he State of Florida heavily regulates the insurance industry.” *Id.* at 1334. Chapters 624 through 651 govern the insurance industry in Florida. For example, Florida Statutes §§ 626.011–711 govern licensing procedures and general requirements for insurance representatives, Florida Statutes §§ 626.826–839 control health insurance agents, and Florida Statutes §§ 627.601–64995 concern health insurance policies. Oscar’s argument that the Florida Insurance Code does not specifically regulate exclusive brokerage agreements, thereby taking Florida Blue’s exclusive brokerage agreements outside the McCarran-Ferguson Act, is misplaced.¹⁶

Florida law comprehensively regulates the insurance industry, including the relationship between principles and their agents. In *Gilchrist*, auto insurance policyholders

¹⁶ Oscar cites a portion of a statement by the Florida Department of Financial Services (“DFS”) in the Amended Complaint. The Court agrees with Florida Blue that the entire text of the communication does not support Oscar’s claim that Florida law does not govern the insurer’s agency relationship with its brokers. (Doc. 81, p. 12).

sued State Farm Mutual Insurance for using non-original equipment manufactured (“**OEM**”) parts when making repairs. *Gilchrist*, 390 F.3d at 1330. In applying the McCarran-Ferguson Act, the Eleventh Circuit held that Florida regulates the insurance industry in general and the use of non-OEM parts in particular. *Id.* at 1334. Here, Florida regulates the insurance industry in general and the relationship between principles and their agents in particular. It is, therefore, unnecessary that the state enact a specific statute regulating insurance/non-OEM parts or insurance/exclusive brokerage agreements. Oscar’s construction of the law creates an impossibly high bar where each challenged relationship or activity must be regulated by a single, specific statute. The Fifth Circuit was correct in holding that the second element of the exemption requiring the challenged activities to be regulated by state law “is not a high bar for antitrust defendants to clear.” *Sanger*, 802 F.3d at 745. Accordingly, the Court finds the challenged activity is regulated by state law.

The Court’s finding that Florida regulates the business of insurance is a catch-22 situation. The McCarran-Ferguson Act specifies that the business of insurance is exempt from the antitrust laws only if regulated by the state. Florida law regulates the insurance industry and restraint of trade. See Fla. Stat. §§ 542.18–19. However, Florida’s legislature enacted § 542.20 which exempts from Florida’s regulation of monopolies and restraint of trade any activity exempt from provisions of the antitrust laws of the United States. Thus, activity exempt under McCarran-Ferguson is exempt from Florida’s laws regulating that same conduct. Not every state has enacted this “pass-through” exemption from antitrust scrutiny, but Florida has. A reasonable argument can be made that Florida’s pass-through exemption precludes a finding that the activity is regulated by the state. That is, one can

argue that state regulation means *effective* state regulation and that such regulation is defeated by Fla. Stat. § 542.20. Yet, the McCarran-Ferguson Act only requires that the state regulates the activity, which is indeed the case here. Florida is free to enact exemptions from its own antitrust law—the wisdom of which is left to the state legislature to ponder. This Court may not add language to the McCarran-Ferguson Act that is clearly absent. Had Congress intended for the exemption to exist only when state laws both regulate the activity and preclude exemption from the state’s scrutiny, it would have said as much.

3. *Boycott, Coercion, or Intimidation*

The third and final element of the Act requires the Court to decide if the challenged activity constitutes a boycott, coercion, or intimidation. 15 U.S.C. § 1013(b).¹⁷ At issue in this case is whether the challenged exclusive broker agreements involve coercion. Oscar’s Amended Complaint contains several paragraphs alleging facts which Oscar contends demonstrate coercion by Florida Blue over its brokers. The Amended Complaint also sets forth numerous paragraphs which contain a factual statement surrounded by conclusory allegations and legal assertions. (See Appendix A). The Court will focus upon the statements of fact as opposed to the conclusory allegations, formulaic recitations of the elements of a claim, and legal assertions.

Stripped of argument and advocacy, the Amended Complaint alleges that Florida Blue’s brokers entered into exclusivity agreements, and Florida Blue enforced those agreements by: 1) reminding the brokers of their legal obligation to sell health insurance

¹⁷ “Nothing contained in this chapter shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation.”

only for Florida Blue; and 2) by terminating a broker who promoted a competitor's product and recruited brokers to work for the competition. The issue is whether the enforcement of exclusivity agreements is coercion such that the McCarran-Ferguson exemption is defeated.

The Eleventh Circuit unequivocally held in *McWane, Inc. v. FTC*, that "exclusive dealing arrangements are not per se unlawful, but they can run afoul of the antitrust laws when used by a dominant firm to maintain its monopoly." 783 F.3d at 832.¹⁸ The court in *McWane* was addressing market share and monopoly power or the dangerous probability of achieving it. *Id.* at 829. The court provided the following example to show how a company with a dominant position may run afoul of antitrust scrutiny:

[S]uppose an established manufacturer has long held a dominant position but is starting to lose market share to an aggressive young rival. A set of strategically planned exclusive-dealing contracts may slow the rival's expansion by requiring it to develop alternative outlets for its product, or rely at least temporarily on inferior or more expensive outlets. Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth.

Id. at 832 (citations omitted). Florida Blue's use of exclusive brokerage agreements predates Oscar's entry into the market. Oscar asks this Court to find that the continued use of exclusivity agreements, and Florida Blue's enforcement of such lawful contractual relationships, constitutes coercion. In so doing, Oscar focuses upon the analysis reserved for assessing the existence and maintenance of a monopoly, not the analysis used when applying the McCarran-Ferguson Act.

¹⁸ Exclusivity agreements were also present in *Sanger Insurance Agency*, and insurers declined to do business with Sanger due to their exclusive arrangement with HUB. 802 F.3d at 734. See also *Thompson v. New York Life Ins.*, 644 F.2d at 444; *Arroyo-Melecio*, 398 F.3d at 68.

The Government similarly ignores the Eleventh Circuit's holding in *McWane* approving of exclusive brokerage agreements. The Government disregards the lawful exclusivity agreements entered into between Florida Blue and its brokers and avers that Florida Blue's communications with its brokers designed to enforce the contract is coercive. (Doc. 89, p. 11). The Government relies upon definitions of coercion found in *Black's Law Dictionary* and *Webster's Second New International Dictionary* instead of discussing or distinguishing *McWane*, *Sanger*, *Thompson*, and *Arroyo-Melecio*. The Court is not persuaded by the reasoning advanced by Plaintiff or the Government's contribution.

At oral argument, Florida Blue observed that—according to Oscar—once a competitor attempts to enter the market, a company may not enforce a lawful contractual relationship with its brokers because an attempt to enforce the contract is transformed into coercion. Florida Blue's argument is well taken. Oscar focuses upon the strenuous language employed by Florida Blue to impress upon its brokers their obligations under the exclusive agreement, but the tone of the message is irrelevant. If a contractual relationship is lawful, a party may enforce the agreement without those efforts morphing into coercion. Similarly, it is irrelevant to the issue of coercion that brokers who violate the agreement lose all of Florida Blue's business. The brokers agreed to work exclusively for Florida Blue in exchange for access to all of Florida Blue's product lines. The consequences of violating the agreement is the broker's inability to sell insurance for Florida Blue. There is nothing coercive about enforcing the contractual relationship. Obviously, if the McCarran-Ferguson exemption did not apply, the Court would consider the continued use of exclusive brokerage agreements in the context of maintaining

monopoly power. The Court, however, declines to jump forward to considerations of the maintenance of monopoly power when the only issue is whether Florida Blue engaged in coercion vis-à-vis its brokers.¹⁹

IV. CONCLUSION

Florida Blue's brokers provide services that spread the policyholder's risk, and their work in providing guidance to ACA consumers is an integral part of the policy. The brokers act within the business of insurance, and the exclusive broker arrangement is regulated by state law. That is, state law provides comprehensive regulation of the insurance industry and agency relationships. The fact that the Florida Legislature chose to enact a law exempting from state antitrust scrutiny activity exempted under the McCarran-Ferguson Act is not outcome-determinative. The State of Florida has the right to create exemptions from its antitrust laws, and any modification of that law is left to the discretion of the Legislature. Finally, Florida Blue's contract with its brokers requiring them to sell insurance only for Florida Blue at the risk of losing access to all of Florida Blue's product lines is lawful, and Florida Blue has the right to enforce the agreement. Florida Blue's efforts at enforcing a lawful contract are not coercive, regardless of the tone or tenor of the language employed by Florida Blue.

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that Defendant Florida Blue's Motion to Dismiss (Doc. 81), pursuant to the McCarran-Ferguson Act, is

¹⁹ Oscar and Florida Blue disagree over whether § 1013(b) requires concerted action for coercion, with the Government siding with Oscar. (Doc. 81, pp. 13–15; Doc. 86, pp. 8–11; Doc. 89, pp. 13–16). The Court will not address this dispute, having found that the challenged activity—enforcement of a contractual relationship—does not meet the definition of coercion even assuming concerted action is not required.

GRANTED. The Amended Complaint is **DISMISSED WITH PREJUDICE.** The Clerk is **DIRECTED** to close the case.

DONE AND ORDERED in Orlando, Florida on September 20, 2019.



PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties

APPENDIX A

¶ 5 Faced with a major threat to its monopoly profits, Florida Blue responded by implementing a blatant scheme targeted at Oscar to keep it out of the state, thereby causing Florida consumers to continue to pay more for health insurance coverage. First and foremost, the scheme involves denying Oscar access to insurance brokers upon whom consumers rely to advise them of their insurance options. Florida Blue has a company policy—brazenly displayed on its website—that no broker may sell Florida Blue’s individual plans unless that broker agrees to sell *only* Florida Blue’s individual plans. Florida Blue wrongfully uses its monopoly power to compel brokers to sell only its plans when industry standards require independent brokers to find the best options for consumers’ needs. Second, Florida Blue aggressively and selectively enforced this exclusivity policy against Oscar by systematically contacting brokers who had signed contracts with and been appointed as brokers by Oscar to threaten them with permanent termination. In one email to brokers in October 2018, during the very same week in which Florida Blue learned Oscar’s plans are lower-priced than its own, Florida Blue said “[**you**] **will have 48 hours to terminate your Oscar appointment or we will terminate your Florida Blue appointment with no eligibility of reappointment with us.**”

¶ 6 ... If appointed by Oscar, brokers face losing the right to sell Florida Blue plans in *all product lines* throughout *the entire State of Florida* if they decide to sell Oscar plans in *a single county in the state*... Several brokers have explained they have no choice but to stay with Florida Blue:

- **“I just got word that any Florida Blue agents who will be contracting with Oscar will be terminated immediately. . . . I have a very large book with Blue and Oscar is not in my area here. Losing our Blue Contract would be a financial disaster.”**
- **“Unfortunately I need to rescind my request, as Florida Blue has informed me that they will cancel my contract if they see new appointments for any products in any area of Florida. This would be highly detrimental as they would be keeping most of my book of business.”**
- **“This is a request to terminate my Oscar contract as I am also appointed With FL blue and they can only allow captive agents to work with them.”**

¶ 7 Florida Blue’s coercion of brokers not to deal with new entrants like Oscar stymies those entrants’ ability to compete...

¶ 10 The consequences for Oscar already have been severe. Under pressure from Florida Blue, at least 235 brokers backed out of agreements to sell Oscar’s plans once they were threatened with termination by Florida Blue. Because the bulk of this coercive pressure was applied only one week before the beginning of the open enrollment period—the only six weeks during which health insurers selling individual ACA plans can sign up customers for the entire following year—Oscar has limited opportunity to respond to this

blatantly anticompetitive tactic. Even before cancellations started mounting, other major brokers, including many of the largest and most successful brokers servicing the Orlando area, refused even to discuss dealing with Oscar out of fear of losing Florida Blue's business...

¶ 53 Florida Blue makes no secret of its exclusivity policy with respect to brokers that sell individual insurance plans. Its website states **"Our appointment to sell individual products is an exclusive contract"** Thus, if a broker wants to sell individual plans for Florida Blue, it must agree to sell only Florida Blue's individual plans.

¶ 54. Florida Blue obtained and enforced these exclusive dealing agreements through coercion and intimidation, including threatening to exclude brokers from a significant portion of the market for individual ACA insurance plans. Because Florida Blue accounts for approximately 75 percent of these plans sold statewide and even higher shares in Orlando and other metro areas, brokers who already do significant business with Florida Blue cannot afford to refuse them.

¶ 55. After Oscar's planned entry into Orlando became public in the summer of 2018, Florida Blue, on its own and through the CGAs upon which it has forced exclusivity, initiated a concerted effort to intimidate brokers into refusing to work with Oscar.

¶ 56. During a conference attended by approximately 400 brokers on or about August 29, 2018 at an Embassy Suites in Lake Buena Vista, Florida, a Florida Blue representative stated that any brokers with any other company listed on their licenses or selling other plans would be found in violation of the exclusivity policy, permanently terminated and have their commission payments withheld.

¶ 57. At a meeting attended by brokers on or about September 25, 2018 at Florida Blue's offices in Lake Mary, Florida, Beau Shiflet, the Central Florida Area Manager for Florida Blue, stated that he had attended an Oscar informational meeting held in Kissimmee, Florida, and had observed that there were agents appointed by Florida Blue in attendance. As a result, Mr. Shiflet went on to threaten the brokers that attended the meeting at Florida Blue's offices that their Florida Blue contracts would be canceled if they were found to be working with Oscar. Oscar was the only competitor that Mr. Shiflet mentioned in reference to Florida Blue's exclusivity policy.

¶ 58. Two days later, on September 27, 2018, an employee of Rogers Benefit Group, a CGA, sent an email to insurance agencies, copying Frank Merlino, Southern Area Manager of Individual Sales for Florida Blue, regarding Florida Blue's exclusivity policy. The email stated that some agencies seeking to appoint Florida Blue agents had been "using an outdated exclusivity form." The email purported to attach the most up-to-date form and requested that agencies **"send this exclusivity form to ALL YOUR AGENTS and have them sign it, along with an email reminding them of the exclusivity requirements."** The email further stated that **"if an agent does not sign this form and submit it to us, Frank will terminate them."**

¶ 59. On or around October 10, 2018, Florida Blue terminated the appointment of another broker who hosts a local radio show and simply had an Oscar representative as a guest on his show. When that broker asked why his appointment with Florida Blue was terminated, Mr. Shiflet replied, **“We saw and heard your radio program with Oscar leadership promoting them in the Orlando market and the recruiting of agents. This is not what we are looking for in our business partners.”**

¶ 60. Florida Blue’s intimidation efforts intensified as the 2019 ACA open enrollment approached. In the week before the start of the open enrollment period, the very week that Oscar’s competitive pricing for 2019 plans became public, Florida Blue systematically contacted brokers appointed by Oscar, using appointment information that is publicly available on the Florida Department of Financial Services website. These communications threatened to permanently deny Oscar-appointed brokers business from Florida Blue, not only in the Orlando metro area, but throughout Florida, if they continued to do business with Oscar. Florida Blue’s behavior occurred only a week before the commencement of the open enrollment period on November 1, 2018 in which health insurance providers sign up all their business for the following year.

¶ 61. For example, on October 24, 2018, Mr. Shiflet sent an email to brokers threatening, **“You . . . will have 48 hours to terminate your Oscar appointment or we will terminate your Florida Blue appointment with no eligibility of reappointment with us.”**

¶ 62. In an email received by Oscar that same day, October 24, 2018, one broker wrote to Oscar, **“This is a request to terminate my Oscar contract as I am also appointed with FL Blue and they can only allow captive agents to work with them.”**

¶ 63. Similarly, on October 29, 2018, another broker explained to Oscar, **“I just got word that any Florida Blue agents who will be contracting with Oscar will be terminated immediately. . . . I have a very large book with Blue and Oscar is not in my area here. Losing our Blue Contract would be a financial disaster.”**

¶ 64. On October 25, 2018, Florida Blue again updated its exclusivity policy. The new form added questions that Florida Blue required appointed agents to answer, including **“Do you understand the exclusivity clause and agree to not sell any other carriers for over and under 65 policies . . . ?”** The exclusivity policy states **“You must sell and solicit Florida Blue Over 65 Products exclusively at all times. There is not any circumstance where you may sell an O65 competitor medical product”** and **“You must sell and solicit Florida Blue U65 medical products exclusively at all times. There are not any circumstances where you can sell an Under 65 medical product.”** According to the policy, **“Any agent or agency that violates the exclusivity arrangement with Florida Blue will be permanently terminated for cause.”**

¶ 65. Florida Blue’s intimidation tactics are particularly effective because it works in concert with the CGAs to propagate its threats to other brokers. Florida Blue’s CGAs

wield significant control over commission payments to brokers. Florida Blue pays CGAs a lump sum from which CGAs are responsible for distributing broker commission payments based on broker performance. CGAs have considerable leeway in distributing commission payments, and they can withhold commissions or even terminate a broker if that broker violates the terms of Florida Blue's exclusivity policy.

¶ 66. As a result, Florida Blue's CGAs exert considerable control over the many brokers they recruit for Florida Blue. And through its CGAs, Florida Blue has more help policing and enforcing exclusivity. Florida Blue requires exclusivity not just from its CGAs, but also the many brokers that contract with CGAs, who often market themselves as independent brokers. In turn, Oscar and other potential new entrants are foreclosed from access not just to direct customers of CGAs, but also to the customers of the brokers with whom the CGAs contract.

CERTIFICATE OF SERVICE

I hereby certify that today, December 30, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

I further certify that today, December 30, 2019, I caused two paper copies of the foregoing to be sent by Federal Express to the Clerk of Court and one paper copy to be sent via Federal Express to counsel at the following address:

EVAN CHESLER
CRAVATH SWAINE & MOORE, LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

/s/ Seth P. Waxman

SETH P. WAXMAN