

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

**OSCAR INSURANCE COMPANY
OF FLORIDA,**

Plaintiff,

v.

**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.

CASE NO: 6:18-cv-01944

Supplemental Declaration of

Mark A. Israel, Ph. D.

December 21, 2018

I.	INTRODUCTION AND OVERVIEW	1
A.	ASSIGNMENT	1
B.	SUMMARY OF CONCLUSIONS	2
II.	FLORIDA BLUE’S EXCLUSIONARY CONDUCT HAS RESULTED IN OSCAR ACHIEVING LOWER SUBSCRIBERSHIP THAN IT FORECAST OR SHOULD REASONABLY HAVE BEEN EXPECTED.....	2
A.	OSCAR HAS OBTAINED LOWER SUBSCRIBERSHIP THAN IT HAD FORECAST PRIOR TO LAUNCH.....	2
B.	ABSENT THE EXCLUSIONARY CONDUCT, OSCAR’S LOW PRICES WOULD LIKELY HAVE RESULTED IN SUBSTANTIAL SHARE GAINS	3
C.	OSCAR’S EXPERIENCE IN COMPARABLE MARKETS IN TEXAS INDICATES THAT OSCAR SHOULD HAVE OBTAINED A MORE SUBSTANTIAL MARKET SHARE IN ORLANDO	5
III.	FLORIDA BLUE’S CONDUCT HAS RESULTED IN HARMS TO OSCAR, CONSUMERS, AND COMPETITION	7
	APPENDIX A: MATERIALS RELIED UPON.....	A-1

I. INTRODUCTION AND OVERVIEW

A. ASSIGNMENT

I, Mark A. Israel, Ph.D., declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

1. I am a Senior Managing Director at Compass Lexecon. I have previously submitted a declaration in support of Oscar Insurance Company of Florida's ("Oscar's") motion for a preliminary injunction.¹ That declaration contains a full statement of my qualifications, including my CV and a list of matters in which I have offered expert testimony.
2. I have been asked by counsel for Oscar to supplement my declaration to incorporate new information about Oscar's performance in Orlando. In particular, I have been asked:
 - To review the data on Oscar's Orlando area enrollments and estimated subscribership, which has become available since the close of the Patient Protection and Affordable Care Act (ACA) open enrollment period, and to assess how the level of subscribership Oscar has achieved compares to its projection;
 - To analyze whether Oscar would have obtained a higher level of subscribership than it did absent Florida Blue's anticompetitive acts and what effect Oscar's actual performance has on my conclusions about Florida Blue's anticompetitive foreclosure; and
 - To assess how the newly available evidence affects my opinion that Florida Blue's acts have resulted in irreparable harm to Oscar (based on the legal definition of irreparable harm I have been provided).²

¹ Declaration of Mark A. Israel, Ph.D. in Support of Oscar's Motion for a Preliminary Injunction, November 19, 2018 (hereafter "Israel Decl.").

² Counsel has advised me that in order to obtain a preliminary injunction, Oscar must demonstrate that it is likely to suffer irreparable harm absent injunctive relief. Counsel has further advised me: (i) that irreparable harm must represent an injury that cannot be remedied by monetary damages; (ii) that loss of customers and goodwill can constitute irreparable harm; and (iii) that the difficulty of calculating damages can render harm irreparable. See Israel Decl., ¶8.

3. A list of the materials that I have relied upon in this supplemental declaration is attached as Appendix A.

B. SUMMARY OF CONCLUSIONS

4. In my initial declaration, I explained that evidence available at that time indicated that Florida Blue has exploited its market power in an anticompetitive fashion, with effects that include limiting Oscar's competitive effectiveness in Orlando and other Florida metropolitan areas, and that such exclusionary conduct is likely to cause irreparable harm to competition, consumers, and Oscar. The more recent evidence I have reviewed only serves to bolster that conclusion. In particular:

- The actual level of subscribership that Oscar has achieved in Orlando is well below what it forecasted prior to the open enrollment period.
- Because of the low pricing position it achieved, Oscar would likely have obtained substantial market share in Orlando absent the exclusionary acts of Florida Blue. Hence, Oscar's underperformance bolsters my conclusion that Florida Blue's anticompetitive actions have harmed Oscar's competitive effectiveness in Orlando.
- The shortfall in subscribership has caused and will continue to cause irreparable harm to Oscar (based on the legal definition of that term), as well as to competition and consumers.

II. FLORIDA BLUE'S EXCLUSIONARY CONDUCT HAS RESULTED IN OSCAR ACHIEVING LOWER SUBSCRIBERSHIP THAN IT FORECAST OR SHOULD REASONABLY HAVE BEEN EXPECTED

A. OSCAR HAS OBTAINED LOWER SUBSCRIBERSHIP THAN IT HAD FORECAST PRIOR TO LAUNCH

5. Based on the most recent data from the recently closed ACA open enrollment period, Oscar has enrolled 33,251 individuals in its health plans. Oscar expects that roughly 29,600 of these individuals will ultimately become Oscar subscribers, resulting in an estimated 13 percent

market share in Orlando.³ This is below pre-open enrollment period projections of the level of subscribership Oscar would achieve given its advantaged price position.

6. As discussed below, an important determinant of Oscar's success in attracting subscribers is the relative pricing of its health plans. Oscar's pricing position is not certain until just before the open enrollment period begins, as it is dependent on the prices charged by both Oscar and its competitors. By late October, rates for Oscar and other insurance carriers were finalized, and Oscar had a nine percent premium advantage for Bronze plans and a three percent premium advantage for Silver plans.⁴ At that time Oscar also was aware that some portion of Florida insurance brokers would not be available as a distribution channel because of Florida Blue's exclusivity policy. Based on both the advantageous pricing position (which would be expected to lead to a higher forecast of subscribership) and the unavailability of some portion of Florida brokers (which would be expected to lead to a lower forecast of subscribership), Oscar forecast that it would obtain 63,000 lives.⁵

7. The October forecast (63,000 lives) is substantially above the actual lives that Oscar obtained – 29,600. And notably, since that October forecast *did* account for difficulties in obtaining distribution through brokers, it likely underestimates the number of lives Oscar would have obtained, absent Florida Blue's exclusionary conduct. Put simply, Oscar's performance fell far short of the October forecast when absent Florida Blue's exclusive behavior it would likely have substantially exceeded it.

B. ABSENT THE EXCLUSIONARY CONDUCT, OSCAR'S LOW PRICES WOULD LIKELY HAVE RESULTED IN SUBSTANTIAL SHARE GAINS

8. As discussed in the accompanying Supplemental Declaration of Nicholas Gossen, Oscar believes that (conditional on having at least a minimally sufficient provider network) by far the

³ Supplement Declaration of Nicholas Gossen in Support of Oscar's Motion for a Preliminary Injunction, December 21, 2018 (hereinafter "Gossen Supp. Decl."), ¶4. Only a portion of individuals that enroll in ACA plans actually pay their premiums and become subscribers of an insurer's health plans. Those individuals that do pay their premiums are referred to as "effectuations." Oscar estimates its subscribership assuming an 89 percent enrollee effectuation rate, which is the Florida average. See Gossen Supp. Decl., footnote 1. Oscar estimates that the total number of individual health insurance subscribers in Orlando is roughly 233,000. See Gossen Supp. Decl., ¶4

⁴ Gossen Supp. Decl., ¶10.

⁵ Gossen Supp. Decl., ¶10.

most important factor in attracting enrollees in an area is the pricing of its plans relative to the plan prices of other individual health insurance providers.⁶ In particular, due to the nature of federal subsidies for individual health insurance plans offered on the ACA exchanges, Oscar believes that offering the first or second lowest priced Silver plan in an area is a main predictor of marketplace success.

9. By way of further background, consumers whose income is between 100 percent and 400 percent of the federal poverty line can receive subsidies called advance premium tax credits (APTCs), which are reductions in monthly premiums, and are set based on the monthly premium of the second lowest priced Silver plan.⁷ In addition to reductions in premium payments due to APTCs, those consumers whose income is less than 250 percent of the federal poverty line are also eligible for cost-sharing reductions (CSRs), whereby they enjoy richer benefits (e.g., in the form of lower deductibles and copays) at the same APTC-adjusted premium cost. These CSR reductions are only offered to consumers who select Silver plans – but not other metal plan levels.⁸ Both of these subsidies are widespread, with CMS reporting that for Plan Year 2018, 91 percent of Florida enrollees received APTC subsidies and 64 percent received CSR subsidies.⁹ Since the APTC subsidy is tied to the level of the second lowest priced Silver plan, the effect of purchasing higher-cost plans would result in substantial increases in premium costs to consumers, particularly in percentage terms. At the same time because CSRs only apply for Silver plans, low-income customers are better served purchasing Silver plans, since out-of-pocket costs may be greater for Bronze plans. Together, these two subsidy programs incentivize many consumers to purchase the first or second lowest priced Silver plans. Thus, the most important factor in driving sales is achieving those lowest Silver plan price positions, and, consequently, Oscar seeks to be among the two lowest priced Silver plans when setting its premiums.

⁶ Gossen Supp. Decl., ¶6.

⁷ Gossen Supp. Decl., ¶6.

⁸ Gossen Supp. Decl., ¶7.

⁹ See ASPE Research Brief, “2019 Health Plan Choice and Premiums in healthcare.gov States”, October 26, 2018, (hereinafter “APSE 2018”), p. 33, Table 5A available at <https://aspe.hhs.gov/system/files/pdf/260041/2019LandscapeBrief.pdf>

10. When Oscar and its competitors set their final premiums just prior to the start of the ACA open enrollment period, Oscar had the first *and* second lowest priced Silver plans in Orange, Osceola, and Seminole Counties, and had the second and third lowest priced plans in Lake County, where a Florida Blue plan was the lowest priced plan.¹⁰ Consistent with Oscar's beliefs about the importance of offering low priced Silver plans, Oscar's worst performance in the Orlando area was in Lake County, where Oscar estimates that it obtained a three percent share. In contrast, Oscar's shares in the other three Orlando-area counties ranged from ten to 18 percent.¹¹

11. Due to this low-price position relative to Florida Blue and other health insurance providers in the Orlando area, in a freely competitive market, Oscar would be expected to obtain substantial market share. Indeed, as I discuss in the next section, in other areas outside Florida where Oscar offered the lowest priced Silver plans, it has obtained a substantial market share. In Orlando, the fact that Oscar failed to capture substantial market share despite having a strongly advantaged price position provides clear evidence that Florida Blue's actions thwarted the competitive process.

C. OSCAR'S EXPERIENCE IN COMPARABLE MARKETS IN TEXAS INDICATES THAT OSCAR SHOULD HAVE OBTAINED A MORE SUBSTANTIAL MARKET SHARE IN ORLANDO

12. Experience in Texas further supports Oscar's ability to obtain high share – much higher than it actually realized in Orlando – when it has a price advantage and its rivals do not engage in anticompetitive conduct. Moreover, due to the importance of insurance brokers in distributing individual health insurance in Florida, Oscar's success in Texas is likely a conservative benchmark.

13. Oscar entered into the San Antonio, TX market in 2015 (for the 2016 plan year) and entered into the Austin, TX market in 2017 (for the 2018 plan year). Unlike in Florida, the incumbent Blue Cross Blue Shield Association member firm, Blue Cross Blue Shield of Texas (BCBS-TX) does not have a policy that demands that insurance brokers exclusively sell its individual health insurance policies – and I am not aware of any other BCBS Association

¹⁰ Gossen Supp. Decl., ¶5.

¹¹ Gossen Supp. Decl., ¶3.

member firm that does impose such a policy.¹² Indeed, strikingly, I understand that some insurance brokers that operate in both Texas and Florida sell both Oscar and BCBS-TX health plans in Texas, but only sell Florida Blue plans in Florida due to Florida Blue's required exclusivity.¹³ I further note that while Florida Blue has alluded to unspecified pro-competitive justifications for its exclusivity demands,¹⁴ the fact that BCBS-TX does not demand exclusivity – even though, for example, it (like other insurers) provides training seminars for its brokers – casts substantial doubt on Florida Blue's supposed pro-competitive rationales.¹⁵

14. In Texas, where Oscar offered the lowest cost plans, as it does in Florida, but where the incumbent Blue does not demand exclusivity from insurance brokers, Oscar has been very successful. In San Antonio, as in Orlando, Oscar offered the first and second lowest cost Silver plans. However, in its first year in the market, Oscar was much more successful than in Orlando, obtaining a 28 percent market share.¹⁶ Similarly, when Oscar entered into Austin in 2018, it offered the first and second lowest priced Silver plans, and obtained a 38 percent share.¹⁷

15. Oscar's Texas experience is also likely a conservative benchmark for Oscar's performance in Florida. This is because the greater importance of brokers in Florida should – absent anti-competitive exclusion – make entrants with low rates and high quality networks especially successful in Florida, as it can help overcome any brand disadvantage. As I discussed in my initial declaration, insurance brokers are an important distribution channel in Florida,

¹² Interview of Mike Smith, December 17, 2018.

¹³ Interview of Mike Smith, December 17, 2018.

¹⁴ Scheduling Conference Transcript, December 6, 2018, 17:13-21 (“And so, there is no dispute that Florida Blue works with exclusive agents. It provides individual health care in every single county in the state, and it enforces those exclusive arrangements. There's no – there's no question about that. Those agency relationships are lawful, and they are pro-competitive. And Your Honor and Mr. Sunshine are exactly right, that will be a big portion of the submission that Florida Blue makes in opposing the PI and throughout this case.”)

¹⁵ Similarly, I note that the fact that over 200 brokers were appointed as Oscar agents but subsequently resigned those appointments under threat of losing Florida Blue's business calls into question whether Florida brokers understood they were exclusive agents of Florida Blue, or whether there were in fact pro-competitive justifications for the exclusivity.

¹⁶ Gossen Supp. Decl., ¶12.

¹⁷ Gossen Supp. Decl., ¶11. These figures are based on Oscar's information on its covered lives in those areas and its estimate of the total market size of the Austin market, and differ somewhat from the market share estimates based on publicly available data that I reported in Table 7 of my initial declaration.

accounting for 65 percent of the individual health insurance policies sold in Florida, as opposed to accounting for only 41 percent in Texas.¹⁸ The prevalence of broker sales in Florida should have increased Oscar's market share (relative to Oscar's experience based on states with a smaller role for brokers) since relationships with and reputations of brokers can effectively substitute for established carrier brand names. Brokers can and do present information on relevant plans and rates to consumers, and offer advice on the most cost effective plans for a given consumer's circumstances. In that way, if a new entrant or a lesser known carrier offers the best value, brokers can "vouch" for it, reducing the barriers to entry and expansion that would otherwise exist. Moreover, as I previously noted, Oscar's commission structure in Florida offered higher commission payments to brokers,¹⁹ which would incentivize them to recommend Oscar plans when appropriate for their clients' needs. For all these reasons, the important role for brokers should have given Oscar an effective way to compete with established carriers (like Florida Blue) and limitations on access to brokers are particularly important restrictions on competition.

III. FLORIDA BLUE'S CONDUCT HAS RESULTED IN HARMS TO OSCAR, CONSUMERS, AND COMPETITION

16. As discussed above, due to Florida Blue's conduct, Oscar has achieved fewer subscribers than it projected, and that projection likely understates the success that Oscar would have had absent the exclusionary conduct. This clearly results in harms to Oscar in terms of lost market share, revenues, and profits.

17. While the magnitude of the lost subscribers – and hence market share, revenues, and profits – is difficult to estimate with precision, simulations of the effect of Florida Blue's exclusionary conduct indicate that the harm to Oscar is likely substantial. Data from the just concluded open enrollment period indicates that, of the roughly 33,000 enrollments obtained by Oscar, about 25,000 were obtained through brokers, with the remaining portion coming through

¹⁸ Israel Decl., ¶44; CMS, "Marketplace Open Enrollment Wrap Up and Tips to Assist Clients to Stay Enrolled," January 18, 2018, p. 5.

¹⁹ Israel Decl., ¶39.

other sales channels, such as a consumer directly accessing healthcare.gov.²⁰ Of the enrollments obtained through the broker channel, 95 percent were from Florida brokers, and 75 percent were from Orlando area brokers.²¹ It is likely that if Oscar had more unfettered access to brokers, it would have been a much more effective competitor and obtained greater subscribership.

18. Table 1 performs simple simulations, assuming that the roughly 8,700 lives that were obtained through channels other than Florida brokers would also have been obtained in the but-for world free of Florida Blue's exclusionary conduct. For example, suppose that 50 percent of brokers were foreclosed from Oscar due to Florida Blue's conduct. In the but-for world, assuming all brokers generated the same number of lives on a pro rata basis, then Oscar would expect to have gained 42,000 lives through brokers (twice as many as it actually did since it would have access to twice as many brokers) and roughly 51,000 lives overall, obtaining a 22 percent overall market share. I understand from the Declaration of Will Johnson, Oscar typically appoints about 60 percent of the available brokers in the other markets in which it has entered.²² Assuming that Oscar could have appointed 60 percent of brokers in Orlando, then Oscar would be expected to have gained about 52,000 lives through the broker channel and roughly 61,000 lives overall, implying a 26 percent share in Orlando. Mr. Johnson has previously explained that Oscar believes that the effect of the foreclosure is concentrated in the larger brokers and contracted general agents that account for a larger percentage of plans sold and covered lives in the Orlando area.²³ Assuming that 70 percent of covered lives are effectively foreclosed from Oscar because of Florida Blue's acts, then unfettered access to those brokers implies that Oscar would be expected to obtain nearly 70,000 lives through the broker channel and roughly 79,000 lives overall, and obtain a market share of roughly 34 percent.

²⁰ Gossen Supp. Decl., ¶14.

²¹ Gossen Supp. Decl., ¶14.

²² See Declaration of Will Johnson in Support of Oscar's Motion for a Preliminary Injunction, November 19, 2018 (hereinafter "Johnson Decl."), ¶14.

²³ Johnson Decl., ¶16.

Table 1
Simulations of Oscar's Market Share at Different Levels of Broker Access

Scenario	Total Expected Subscribers	Implied Market Share	Subscribers Assuming Additional Access to Brokers/Lives	Actual Subscribers from Florida Brokers	Subscribers from Other Channels
Actual	29,648	12.7%	NA	20,985	8,663
Access to 50% of Brokers/Lives	50,633	21.7%	41,971	20,985	8,663
Access to 60% of Brokers/Lives	61,126	26.2%	52,463	20,985	8,663
Access to 70% of Brokers/Lives	78,614	33.7%	69,951	20,985	8,663

Source: Gossen Supp. Decl., ¶14 and footnote 1.

Note: Actual Subscribers from Florida Brokers estimated as number of enrollments from brokers (24,820), multiplied by share of broker enrollments from Florida brokers (95%), multiplied by effectuation rate (89%).

19. The substantial lost market share, in addition to directly harming Oscar through lost revenues and profits, will likely reduce Oscar's future competitiveness in Orlando. As I discussed in my initial declaration, the prices that a health insurer negotiates with health care providers are determined by the volume of patients an insurer can bring to a healthcare provider.²⁴ By reducing Oscar's subscribership, Florida Blue's exclusionary conduct makes it more difficult for Oscar to negotiate favorable rates with healthcare providers, puts upward pressure on Oscar's premiums, and makes it more difficult for Oscar to obtain market share in the future. However, the precise magnitude of these effects is difficult to quantify.

20. Additionally, if Florida Blue's exclusionary conduct is left unchecked, it could reduce the effectiveness of Oscar's planned entry into other Florida markets such as the Tampa metro area, with a similar loss of subscribers, market share, revenues, and profits due to Florida Blue's anticompetitive conduct. In particular, if Florida Blue successfully thwarts Oscar's entry into Orlando, healthcare providers in other areas may believe that Oscar will be unable to obtain a

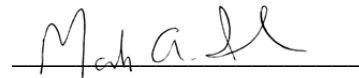
²⁴ Israel Decl., ¶¶48-51.

critical mass of lives that would justify negotiating attractive rates with Oscar. This in turn will hamper Oscar's competitiveness in those areas, since the prices that Oscar pays providers constrain the rates it can charge consumers. These harms will continue unless Florida Blue is enjoined from continuing to impose exclusive dealing arrangements on brokers.

21. As I discussed in my initial declaration, Florida Blue's conduct has also irreparably harmed consumers.²⁵ Florida Blue's conduct deprives Florida consumers of an innovative, low cost provider of individual health insurance products. And thus it also deprives consumers of the benefits of the competitive pressure, and thus likely competitive responses, that Oscar places on other insurers, including Florida Blue.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 21, 2018 in Miami, FL.

A handwritten signature in cursive script, appearing to read "Mark A. Israel", is written over a horizontal line.

Mark A. Israel, Ph. D.

²⁵ Israel Decl., ¶¶55-58.

APPENDIX A: MATERIALS RELIED UPON

Court Documents

Scheduling Conference Transcript, December 6, 2018.

Declarations

Declaration of Mark A. Israel, in Support of Oscar's Motion for a Preliminary Injunction, November 19, 2018

Declaration of Will Johnson in Support of Oscar's Motion for a Preliminary Injunction, November 19, 2018

Supplement Declaration of Nicholas Gossen in Support of Oscar's Motion for a Preliminary Injunction, December 21, 2018

Government Publications

CMS, "Marketplace Open Enrollment Wrap Up and Tips to Assist Clients to Stay Enrolled," January 18, 2018

ASPE Research Brief, "2019 Health Plan Choice and Premiums in healthcare.gov States", October 26, 2018, available at <https://aspe.hhs.gov/system/files/pdf/260041/2019LandscapeBrief.pdf>

Interviews

Interview of Will Johnson, December 13, 2018

Interview of Mike Smith, December 17, 2018

Interview of Joel Klein, Hank Greenberg, Edith Chan and Cornelia Miller, December 17, 2018

Interview of Peter Joseph, December 17, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2018, 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