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,

Defendants.
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**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Defendants Blue Cross and Blue Shield of Florida, Inc., Health Options Inc. and Florida Health Care Plan Inc. (collectively, "Florida Blue") respectfully submit this memorandum of law in opposition to Oscar Health Insurance Company of Florida's ("Oscar") motion for a preliminary injunction ("PI Motion").

**PRELIMINARY STATEMENT**

For decades, Florida Blue has been committed to providing individual health insurance in Florida. Unlike its competitors, Florida Blue offers individual plans in all 67 Florida counties, including in underserved areas that other insurers avoid. Although Florida Blue faces vibrant competition in 27 of those counties, it is the *only* insurer offering individual plans in the other 40 counties. Florida Blue's commitment to serve the whole state is a key reason why Florida leads the nation in Affordable Care Act ("ACA") enrollment.

To offer affordable healthcare across the state, Florida Blue utilizes a multi-channel distribution strategy that enables consumers to access Florida Blue's offerings in person, by phone, through the federal ACA Exchange, on Florida Blue's website, in stores, at mobile trucks, in clinics and more. To support this strategy, Florida Blue has developed a network of exclusive agents who live and work in Florida, and who serve as a face of Florida Blue. These agents sell individual products solely for Florida Blue; they are *not* brokers who market many insurers' plans. Each year, Florida Blue invests heavily in its exclusive agents, who in turn help Floridians understand, select, maintain and use their health insurance.

Oscar, a new entrant into Florida that targets "tech-savvy" consumers, brings this lawsuit to attack Florida Blue's lawful agent relationships. Although Oscar largely met its 2019 enrollment objectives through head-to-head competition in Orlando (the one area it currently serves),[1] Oscar claims that it is somehow foreclosed from competing for the sale of individual health insurance. That position rests on a fundamental misunderstanding of the Florida health insurance industry—including the erroneous position (rejected by the Florida Supreme Court) that insurance agents and brokers are synonymous. Florida Blue has not foreclosed Oscar from using a single broker (or from any other distribution channel, including Oscar's own exclusive agents); indeed, Florida Blue does not even use brokers to sell its individual plans. In fact, Oscar has more than 1,800 brokers in Florida already, and it touts in marketing materials that it "takes only 5 minutes" for agents to apply for an Oscar appointment. In short, Oscar's complaint is baseless, and its PI Motion fares no better.

[1] Upon entering Orlando, Oscar projected that it would enroll 36,000 members during the 2019 open enrollment period; by the close of the period, Oscar had enrolled more than 33,000 members. Notably, a week before open enrollment began—as Oscar was contemplating this lawsuit—Oscar increased its projected enrollment estimate to 63,000. (Gossen Supp. ¶ 10; Baker ¶ 228.)

*First*, Oscar cannot show a likelihood of success on the merits. Oscar's federal antitrust claims are barred by the McCarran-Ferguson Act, and in any event, fail.

*Second*, Oscar cannot show irreparable harm. Oscar has successfully entered Orlando and fails to show how Florida Blue's exclusivity agreements would cause any—much less immediate and inestimable—harm to Oscar going forward. Moreover, any harm could be remedied by money damages, which Oscar's own expert admits are calculable.

*Third*, Oscar's conclusory analysis of the equities involved overlooks the significant injury Florida Blue and its customers would suffer from any injunction.

*Fourth*, Oscar's requested injunction would harm the public, who benefit from Florida Blue's exclusivity arrangements. Oscar is welcome to compete, but it has no basis to disrupt Florida Blue's lawful, procompetitive relationships.

## STATEMENT OF FACTS[2]

Florida Blue has sold individual health insurance plans in Florida since the mid-1940s. (Tant ¶ 3.) Since before passage of the ACA in 2010, Florida Blue has been committed to offering individual health insurance to Floridians, even when several of its competitors exited in the face of lower profits. (Baker ¶¶ 104–10.) Today, Florida Blue is the only individual health insurer to offer plans in each of the State's 67 counties, and is the only individual insurer in 40 of those counties. (*Id.* ¶ 65.)

Florida has approximately 4.2 million insurance-eligible individuals, 1.7 million of whom purchased individual plans (on- and off- Exchange) during the 2019 open

[2] Additional relevant facts can be found in the Declaration of Dr. Laurence Baker and the Declaration of Nicholas Tant, submitted in support of Florida Blue's opposition.

enrollment period. (*Id.* ¶¶ 26, 62.) Indeed, the state leads the country in ACA enrollment.[3] The remaining 2.7 million insurance-eligible individuals are uninsured, making them the largest pool of potential consumers in the state. (*Id.* ¶ 26.)[4]

Florida Blue competes aggressively for its customers.[5] To that end, it has developed a multi-channel distribution strategy, which enables it to reach the insurance-eligible population through the ACA Exchanges, Florida Blue's website, physical retail centers, call centers, agencies and more. (*Id.* ¶ 71.) Florida Blue does not use brokers (i.e., intermediaries who work with multiple insurers) to sell its individual plans. (*Id.* ¶¶ 52, 73.) Rather, Florida Blue relies on employees and exclusive agencies, who in turn contract with agents who are contractually obligated to represent only Florida Blue when selling individual health insurance. (*Id.* ¶ 74.) These employees and exclusive agents engage with consumers as representatives of Florida Blue. (*Id.* ¶ 83; Tant ¶ 16.)

Over the years, Florida Blue has invested heavily in its agent network. (Baker ¶ 82.) Among other things, Florida Blue holds conferences and trainings for exclusive agents and provides them with educational materials and marketing materials. (*Id.*). Further, Florida Blue invests in its exclusive agencies' businesses by providing software and marketing dollars and hosts hundreds of events each year with its appointed agents. (*Id.*)

Florida Blue's investment in exclusive agencies inures directly to the benefit of consumers. Florida Blue's appointed agents serve as a knowledgeable source of

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[3] CMS, "Final Weekly Enrollment Snapshot for the 2019 Enrollment Period," Jan. 3, 2019, https://www.cms.gov/newsroom/fact-sheets/final-weekly-enrollment-snapshot-2019-enrollment-period.

[4] "Insurance-eligible individuals" do not include individuals insured through employer/group plans.

[5] In 27 counties, Florida Blue currently faces competition for individual plans from some or all of Oscar, Centene, Cigna, Molina, Health First and AvMed. (Baker ¶¶ 85–107.)

information, education and guidance. (*Id.* ¶¶ 210–12.) Beyond helping customers select insurance, these agents work with customers to set up doctors' appointments and maintain government subsidies. (*Id.* ¶ 81.) Exclusive agents also benefit non-customers, who can attend events to learn about the ACA or to receive a flu shot. (Tant ¶ 22–23.) In short, Florida Blue's localized, knowledgeable agents distinguish Florida Blue from its competitors—hence Florida Blue's 2019 open-enrollment slogan: "Our agents make the difference." (Baker ¶ 80.)

To protect its investment, Florida Blue requires exclusivity from the appointed agents selling its individual plans. (*Id.* ¶¶ 219–20.) Florida Blue has enforced its exclusive arrangements for years—long before Oscar's entry into Florida. (*Id.* ¶¶ 76–77.) Absent exclusivity, Florida Blue would invest less in its agencies and agents, to the detriment of consumers. (Tant ¶ 24.)

## ARGUMENT

A preliminary injunction is an "extraordinary and drastic remedy." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000). Such unusual relief is appropriate only if the movant "clearly" meets its burden to show each of four elements: (1) "it has a substantial likelihood of success on the merits"; (2) it will suffer "irreparable injury" unless the injunction issues; (3) "the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party"; and (4) "if issued, the injunction would not be adverse to the public interest." *Id.* Oscar fails on every one.

### I. Oscar Has Not Established a Substantial Likelihood of Success on the Merits

#### A. The McCarran-Ferguson Act Bars Oscar's Sherman Act Claims

In relevant part, the McCarran-Ferguson Act "exempts insurer activities from the reach of the Sherman Act when the challenged activity is part of the "business of insurance." *Gilchrist v. State Farm Mut. Auto. Ins. Co.*, 390 F.3d 1327, 1330 (11th Cir. 2004). An activity is the business of insurance if it "transfer[s] or spread[s] 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)). The McCarran-Ferguson Act does not, however, ban antitrust claims involving "coercion." *See* 15 U.S.C. § 1013(b).

Relying exclusively on *Ray v. United Family Life Ins. Co.*, 430 F. Supp. 1353 (W.D.N.C. 1977), Oscar argues that Florida Blue's exclusivity arrangements are not the "business of insurance" because they govern only the relationship between an insurer and its agents. (*See* PI Mot. at 20–21.) Two years after *Ray* was decided, however, the U.S. Supreme Court noted that "the 'business of insurance' may have been intended to include dealings within the insurance industry between insurers and agents." *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 224 n.32 (1979). Several circuit courts have since endorsed this view, holding 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); *accord Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 65 (1st Cir. 2005); *Owens v. Aetna Life & Cas. Co.*, 654 F.2d 218, 225 (3d Cir. 1981). In the face of such authority, Oscar's lone citation to a 1977 North Carolina case is unavailing.

Oscar alternatively argues that Florida Blue's enforcement of its exclusivity arrangements amounts to "coercion" under the McCarran-Ferguson Act. (PI Mot. at 21.)

That cannot constitute coercion, however, because enforcement is *unilateral* conduct by Florida Blue whereas coercion requires *concerted* action.[6] *See Sanger*, 802 F.3d at 747 n.12 (noting that "few courts" have considered the issue, but "the leading treatise concludes that concerted activity is likely required to establish coercion or intimidation"). Oscar does not acknowledge, let alone satisfy, this concerted-action requirement. Oscar's failure to establish a substantial likelihood of success under McCarran-Ferguson alone defeats its PI motion.

**B. Oscar's Sherman Act Claims Fail on the Merits**

Exclusive dealing arrangements are typically "legitimate business practices." *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1224 (11th Cir. 2002). Such arrangements are therefore lawful unless they unreasonably restrain trade, in violation of Sherman Act § 1, or improperly prolong a monopoly, in violation of Sherman Act § 2. *See McWane, Inc. v. FTC*, 783 F.3d 814, 833 (11th Cir. 2015); *Tidmore Oil Co. v. BP Oil Co.*, 932 F.2d 1384, 1388 (11th Cir. 1991). There is no Sherman Act violation here.

**i. Oscar's Sherman Act § 2 Claims Will Fail**

Section 2 prohibits entities from (i) wilfully acting to acquire or maintain "monopoly power" and possessing such power (monopolization), or (ii) engaging in anticompetitive conduct with a specific intent to obtain monopoly power and comes dangerously close to achieving it (attempted monopolization). *See United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966); *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1074 (11th Cir. 2004).

[6] Even taken as true, Oscar's allegation that Florida Blue threatened agents with termination unless they complied with their exclusivity agreements (*see* PI Mot. at 18) does not amount to "concerted action" under the McCarran-Ferguson Act, as the victim of alleged coercion cannot act in concert with the one coercing.

In assessing whether exclusive dealing amounts to unlawful "monopoly maintenance," this Court has endorsed a "'rule of reason'-style" analysis. *McWane*, 783 F.3d at 832–33. First, plaintiff must show that defendant's conduct harmed competition in the relevant market. *Id.* To do so, plaintiff must define the relevant market along "both a product and a geographic dimension." *T. Harris Young & Assocs., Inc. v. Marquette Elecs., Inc.*, 931 F.2d 816, 823 (11th Cir. 1991). Next, the defendant must "present procompetitive justifications for the . . . conduct, which the [plaintiff] can refute." *McWane*, 783 F.3d at 833. The court then "decide[s] whether the conduct's procompetitive effects outweigh its anticompetitive effects." *Id.*

(1) **Oscar Has Not Properly Defined A Relevant Market**

"Where there is no Market, there is no Monopoly." *Marquette,* 931 F.2d at 823. That is the case here because (among other reasons) Oscar fails to define a viable relevant market. With respect to product market, Oscar sometimes confines the market to sales made on the ACA exchange (Israel ¶ 22; PI Mot. at 9–10), while at other times, references both on- and off-Exchange sales (Israel ¶ 17). Moreover, Oscar fails to account for the full population of insurance-eligible individuals in Florida. Approximately 2.7 million individuals in Florida are uninsured and eligible for individual plans—meaning that uninsured insurance-eligible individuals actually exceed those already enrolled in plans. (Baker ¶ 26.) Oscar simply ignores this large group of people, even though a considerable portion of the currently uninsured population moves in and out of coverage (*see id.* ¶ 187), and thus cannot reasonably be omitted from the population of plan purchasers.

Oscar's geographic-market definition is similarly flawed. A relevant

geographic market is "the area in which the product or its reasonably interchangeable substitutes are traded." *Marquette*, 931 F.2d at 823. In drawing boundaries, parties must consider "[p]rice data," as well as "transportation costs, delivery limitations, customer convenience and preference, and the location and facilities of other producers and distributors." *Id.* Oscar ignores these factors, offering no principled geographic market. Instead, Oscar's proposal alternates between the county, the metropolitan area, and the state. (*See* Israel ¶¶ 13–28, Tables 1 & 2, Figure 1; *see also* PI Mot. at 9;[7] Compl. ¶ 68.) Such a varying, scattershot approach cannot satisfy Oscar's burden.

(2) **Oscar Cannot Establish Monopoly Power**

Oscar likewise cannot establish that Florida Blue has "monopoly power or a dangerous probability of achieving it." *McWane*, 783 F.3d at 830. Monopoly power is defined as "the ability 'to control prices or exclude competition.'" *Id.* (quoting *Grinnell Corp.*, 384 U.S. at 571). Oscar contends that "Florida Blue's shares are more than sufficient to establish its monopoly power in the Relevant Markets" (PI Mot. at 11)—an argument that courts in this circuit reject. Although "market share is a measure of gauging monopoly power . . ., alone, it is not enough to establish a *prima facie* show of monopoly power." *Tyntec Inc. v. Syniverse Techs., LLC*, No. 8:17-CV-591-T-26MAP, 2017 WL 2733763, at *5 (M.D. Fla. June 26, 2017) (quoting *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)).

Nor can Oscar prove "barriers to entry into the relevant market." *Id.* Oscar alleges two barriers to entry. First, Oscar insists that the time and money needed to enter a

[7] Oscar has since dropped all claims concerning Jacksonville from this case. (Gossen Supp. ¶ 17 n.3.)

new market limits insurers' ability to "timely respond[] to an increase in price above the competitive level." (PI Mot. at 12.) The data do not support this claim. Numerous competitors have entered and exited Florida over the past five years, with new entrants rapidly gaining significant market share. (*See* Baker at ¶¶ 84, 148, 168–71.) Centene, for instance, began offering individual health insurance in Florida in 2014, gained nearly a quarter of enrolled lives in the state within four years and continues to compete in Florida today. (*See id.* ¶¶ 96–98.) There are no barriers to entry when competitors are "currently working and surviving" in the market. *See Fin-S Tech, LLC*, 2014 WL 12461350, at *3.

Second, Oscar argues that Florida Blue's exclusivity arrangements are themselves a barrier to entry because they "limit the ability of new entrants like Oscar to sell their plans through brokers, the largest distribution channel and the most effective means of selling Individual Plans." (PI Mot. at 13.) That is wrong, and conflates brokers and exclusive agents, which are two (of several) separate distribution channels in Florida. In fact, brokers and exclusive agents are different: while brokers generally may "represent [the plans of] several companies," exclusive agents may "work for a single health insurance company" and sell only that company's plans. (Baker ¶ 52.) Or, as the Florida Supreme Court has repeatedly put it, "[a] broker . . . act[s] as a middleman between the insured and the insurer, soliciting insurance from the public under no employment from any special company," while an "'insurance agent' represents an insurer under an exclusive employment agreement by the insurance company." *Essex Ins. Co. v. Zota*, 985 So. 2d 1036, 1046 (Fla. 2008); *accord Almerico v. RLI Ins. Co.*, 716 So. 2d 774, 776 (Fla. 1998). Oscar fails to recognize the difference between brokers and agents, let alone that Florida Blue does not even work with

brokers to sell individual health insurance. This error undermines Oscar's entire case.

Moreover, Oscar has acknowledged that it could easily develop its own broker network—and has done so. Oscar currently has more than 1,800 brokers working for it in Florida. (Gossen Supp. ¶ 16.) Oscar could also contract with any of roughly 146,000 licensed health insurance agents/brokers residing in Florida who are not appointed by Florida Blue; could try to convert Florida Blue's exclusive agents over to Oscar; or could entice new agents or brokers to enter the market. (Baker at ¶¶ 155–60.) In fact, Oscar itself claims that it "takes less than 5 minutes" to apply for an Oscar appointment. (*Id.* ¶ 157.) Thus, Florida Blue's exclusivity arrangements do not "shrink[] the number of available distributors," and—unlike the conduct at issue in *McWane*—do not "pose[] a barrier to entry." 783 F.3d at 831.

In addition, evidence that consumers readily "switch" among plans undercuts any claim that Florida Blue exercises market power. A company does not have market power if its customers are able and willing to switch to competitors' products in response to a price increase by the allegedly dominant firm. *See United States v. Eastman Kodak Co.*, 63 F.3d 95, 104–05 (2d Cir. 1995). Here, a 2017 research study revealed that 82% of survey respondents shopped for new plans rather than automatically enrolling in their current insurance, and 48% of respondents actually switched plans after comparing the available options. (Baker ¶ 139.) Such behavior belies any suggestion that Florida Blue has the power to lock-in customers and charge supra-competitive prices. Overall, Dr. Baker calculates that at least 60% of purchasers in Orlando in any given year are either new purchasers or switchers (Baker ¶ 141), and are therefore readily contestable. If Oscar developed a preferable product, these consumers would purchase it.

(3) **Oscar Has Not Established Anticompetitive Harm**

"[F]or exclusive dealing to run afoul of the antitrust statutes," the exclusivity arrangements must substantially foreclose the relevant market—i.e., they must significantly limit the ability of other competitors to enter or remain in the market. *McWane*, 783 F.3d at 837. In this way, foreclosure "'serves a useful screening function' as a proxy for anticompetitive harm." *Id.* at 835. As Oscar cannot demonstrate a likelihood of substantial foreclosure here, it has failed at the screening step to establish anticompetitive harm.

Oscar argues that it cannot meaningfully compete in Orlando without access to Florida Blue's exclusive agents. (*See* PI Mot. at 15–16.) The evidence simply does not support this claim. *First*, as noted above, Oscar can take any number of steps to expand its broker network right now. *Second*, fewer than 10% of agents residing in Orlando contract exclusively with Florida Blue—far below the traditional 40% threshold for substantial foreclosure. *McWane*, 783 F.3d at 837. *Third*, in addition to agents or brokers, there are many other distribution channels that Oscar can use, including the Exchange; Oscar's own website; and "web-brokers," who have affirmative obligations of impartiality. (*See* Baker ¶¶ 39, 154.) Beyond summarily asserting these alternative channels are not "viable alternative[s] to brokers," (PI Mot. at 16) Oscar has not demonstrated an inability to use these avenues for distribution. *Fourth*, other competitors have successfully competed in Florida, notwithstanding Florida Blue's longstanding use of exclusive agents. For instance, Aetna and Humana each had over 20% market share after the ACA was first implemented, and Centene's average annual growth exceeded 285% from 2014 to 2018. (Baker ¶¶ 169–70.) If other competitors could thrive despite Florida Blue's exclusivity policy, so too could Oscar.

And so it has: Oscar secured 13% market share in Orlando in its first year. (Baker ¶ 173).

For these reasons, Oscar's reliance on *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 184 (3d Cir. 2005), is misplaced. There, the dominant artificial-tooth manufacturer controlled access to key dealers in the market, and it was not "practical or feasible in the market as it exist[ed] and function[ed]" to sell directly to laboratories. *Dentsply*, 399 F.3d at 193. Although an "insignificant number" of competitors relied on direct sales, these competitors "eked out" only "miniscule 5% and 3% market shares." *Id.* By contrast, individual health insurance carriers in Florida use a wide variety of channels. Indeed, Florida Blue's own business strategy relies heavily on these alternative modes of distribution: nearly 40% of all Florida Blue sales are made without the assistance of an agent. (Baker ¶ 161.) And Florida Blue's exclusivity arrangements do not relegate competitors to "miniscule" portions of the market. As noted above, various insurers have held notable market shares over the years, Florida Blue's exclusivity policy notwithstanding.

Nor does Florida Blue's enforcement of its exclusivity arrangements manifest "anticompetitive intent." In *McWane*, testimony from the defendant's executives made clear that the defendant's exclusive dealing "was a deliberate plan to prevent [a competitor] from 'reach[ing] any critical market mass that will allow them to continue to invest and receive a profitable return.'" 783 F.3d at 840 (second alteration in original). Here, the evidence reveals only that Florida Blue continued to enforce its exclusivity policy in 2018, just as it had in the seven years before Oscar entered the market. (Tant ¶ 13.) The mere existence and enforcement of these arrangements does not demonstrate anticompetitive intent. *McWane*, 783 F.3d at 832 ("[E]xclusive dealing arrangements are not per se unlawful.").

Oscar's attempt to establish anticompetitive harm in Orlando by pointing to its purportedly superior performance in other regions is also unavailing. Oscar has often obtained low market share when it first enters a new market—sometimes multiples below the share it secured in Florida. (*See* Baker ¶¶ 244–45.) Comparing Oscar's performance in Orlando with other regions also ignores key differences between the markets, some of which provided an external boon to Oscar. (*See id.* ¶ 247 (noting that Oscar performed well in Nashville, TN, in part, because the only other competitor increased its rates over 36%).) Highlighting market shares does not explain Oscar's performance across various states.

Nor does Oscar's performance in Orlando suggest anticompetitive harm. Indeed, Oscar substantially met its goal in Orlando (enrollment of more than 33,000 on a projection of 36,000) notwithstanding that it offers fewer products that are less desirable to Floridians. For example, in Orlando alone, Florida Blue offers individuals 77 separate plans, with five or more options in each metal-tier, with varying network sizes, deductible and referral requirements, and premium options. (Baker ¶ 175.) Oscar, by contrast, offers only nine plans in Orlando, all of which have deductibles, require referrals to specialists and come with a narrow provider network. (*Id.* ¶ 176.) These differences are not due to anticompetitive harm; they are reflective of consumer choice in a competitive marketplace.

(4) **Oscar Ignores Significant Procompetitive Benefits**

Oscar cannot succeed on its § 2 claims if the procompetitive benefits of Florida Blue's exclusivity policy outweigh any putative anticompetitive effects. *See McWane*, 783 F.3d at 833. A justification is procompetitive if it "reduce[s] cost, increase[s] output or improve[s] product quality, service, or innovation." *Id.* at 841 (quoting *In re*

*McWane, Inc.*, 2014 WL 556261, at *30 (F.T.C. Jan. 30, 2014)). Florida Blue's exclusivity arrangements exhibit numerous procompetitive benefits that Oscar ignores.

Exclusivity enables Florida Blue to invest significantly in the education and training of its agencies and agents to the benefit of consumers. (*See* Baker, Section IV.D.) Consumers better understand costs, benefits and subsidies as a result of Florida Blue and its agents' efforts. (*See* Baker ¶ 82.) Non-members benefit, as well, as any individual can attend a retail event and receive information and services (and sometimes even a flu shot) from a Florida Blue agent. (Tant ¶ 22.) The exclusivity policy further ensures that Florida Blue's agency network is stable, localized, and able to serve every county in Florida. All told, Florida Blue has invested hundreds of millions of dollars since 2006 to ensure its agents are able to assist and instruct the company's existing and potential customers. (Baker ¶ 82.)

Because its agents are exclusive, Florida Blue can make these investments without fearing that those benefits will be used to promote sales for its competitors. (*See* Baker ¶¶ 218–21.) "Eliminating free riders" is an undeniable "procompetitive advantage of alleged restraints on competition." *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 43 (2d Cir. 2018). Absent exclusivity, Florida Blue's willingness to make such investments would decline considerably. (Tant ¶ 24). As the health insurance regulatory space is notoriously complex,[8] consumers would suffer absent these efforts.

Moreover, Florida Blue's exclusivity arrangements expand the pool of individuals in Florida who obtain insurance (in antitrust terms, they enhance output), as

[8] *See, e.g.*, Olivia Hoppe, *Enrolling in Health Insurance is Complicated. That's Where Navigators Can Help*, Georgetown Univ. Health Policy Inst., (Dec. 19, 2017), http://chirblog.org/enrolling-health-insurance-complicated-thats-navigators-can-help.

Florida Blue works with and invests in its agents to target currently uninsured individuals. (Baker ¶¶ 216–17.) Florida Blue's efforts are paying off. During this year's open enrollment period, Florida increased ACA enrollment by more individuals overall than any other state. (*Id.* ¶ 62.) Such increased demand strengthens the market, particularly since enrolled individuals have high switching rates. (*Id.* ¶¶ 138–41.) Once Florida Blue deploys its exclusive agents to attract uninsureds in Florida, all carriers gain potential sales opportunities going forward. Such consumption-generating behavior is procompetitive and worth protecting. *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 119–20 (1984).

Oscar makes no effort to acknowledge—much less refute—these numerous procompetitive justifications. Instead, Oscar asserts that carriers in other markets do not rely on exclusivity arrangements to sell their plans. (*See* Israel Supp. ¶ 13.) That is frankly irrelevant. Oscar's comparison of its performance in Orlando with its performance in other regions is cursory at best and misleading at worst. (*See* Baker ¶¶ 243–49.) Having failed to consider any of the competitive characteristics that separate the individual health insurance market in Florida from the corresponding market in other states, Oscar cannot plausibly claim that exclusive deals are procompetitive here only if they also exist elsewhere.

### C. Oscar Likely Will Not Succeed on its Sherman Act § 1 Claim

Section 1 bans vertical agreements that unreasonably restrain trade—i.e., agreements involving an entity with market power that cause anticompetitive harm without offsetting procompetitive justifications. *Levine v. Cent. Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1545, 1551 (11th Cir. 1996); *Graphic Prods. Distribs., Inc. v. ITEK Corp.*, 717 F.2d

1560, 1566, 1571 (11th Cir. 1983). Here, Oscar has tethered its success on this issue entirely to its § 2 claims. (*See* PI Mot. at 19.). Oscar's inability to establish a likelihood of success on its § 2 claims thus dooms its § 1 claim, as well. *See* Section I.B.[9]

**II. Oscar Cannot Establish Irreparable Harm Absent an Injunction**

"A showing of irreparable injury is 'the sine qua non of injunctive relief.'" *Siegel*, 234 F.3d at 1176 (quoting *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990)). "[T]he absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper." *Id*. Here, Oscar must show that it would suffer actual and continuing harm that cannot be remedied through money damages. *Id.*; *City of Jacksonville*, 896 F.2d at 1285–86.

Oscar contends that it will be unable to negotiate favorable rates with providers in the future, and that this negotiating setback will cause an unquantifiable amount of lost "profits, market share and goodwill" during the 2020 open enrollment season. (PI Mot. at 22–23.) Oscar provides no verifiable authority to back its claimed injuries, relying instead on the say-so of a lone fact declarant (Nicholas Gossen). (Gossen ¶ 16–17.) A "declaration consist[ing] mainly of conclusory statements and lack[ing] evidentiary support" is an insufficient basis for securing a preliminary injunction. *Nivel Parts & Mfg. Co., LLC v. Textron, Inc.*, No. 3:17-CV-146-J-32JRK, 2017 WL 1552034, at *2 (M.D. Fla. May 1, 2017).

In fact, Oscar *was* able to enter Orlando and negotiate rates with providers this

[9] Some courts read Eleventh Circuit case law as requiring a § 1 plaintiff to prove both no competitive effects *and* no procompetitive justifications in the rule of reason analysis. *See Procaps S.A. v. Patheon Inc.*, 141 F. Supp. 3d 1246, 1286 (S.D. Fla. 2015), *aff'd*, 845 F.3d 1072 (11th Cir. 2016). As Oscar plainly has not established the absence of procompetitive justifications, its § 1 claim fails under this standard, as well.

year without enjoining Florida Blue's exclusivity arrangements.[10] Indeed, Oscar met the very enrollment goal it set: Oscar initially projected an enrollment of 35,877 members in Orlando (Baker ¶ 228) and ultimately secured 33,251 members during the 2019 open enrollment season (Gossen Supp. ¶ 4).[11] As Oscar had no trouble entering Orlando, notwithstanding Florida Blue's relationships, it can do the same in Tampa and other regions.

When confronted with this point at the parties' scheduling conference, counsel for Oscar hypothesized that Florida Blue wielded its exclusivity policy differently against Oscar than it had prior competitors. (Dkt. 53 at 26:18–27:13.) Again, the evidence shows otherwise. Florida Blue has enforced its exclusivity arrangements since at least 2011, and in fact terminated more agents before Oscar entered the fray than it has since. (Tant ¶ 13.)

In any event, any injury to Oscar can be fully remedied through money damages. Oscar's own counsel has conceded that "at 2021, there may be a damages case for Oscar." (Dkt. 53 at 28:6–28:7.) And Oscar's own expert, Dr. Israel, puts forward several "simulations of the effect of Florida Blue's exclusionary conduct," despite his claim that any harm to Oscar "is difficult to estimate with precision." (Israel Supp. ¶ 17.) Moreover, the exclusive dealing allegations at issue in this case are susceptible to a damages analysis (Baker at ¶¶ 261–73), and courts in this district are well-versed in handling such damages cases. *See Lakeland Reg'l Med. Ctr., Inc. v. Astellas US LLC*, No. 8:10-CV-2008-T-33TGW, 2011 WL 3035226, at *2, 4 (M.D. Fla. July 25, 2011); *Vacation Break U.S.A., Inc. v. Mktg. Response Grp. & Laser Co.*, 169 F. Supp. 2d 1325, 1329 (M.D. Fla. 2001).

[10] Oscar Orlando Home Page, https://www.hioscar.com/orl (noting "access to the #1 hospital in Orlando").

[11] Shortly before commencing this lawsuit and "the week prior to the beginning of open enrollment," Oscar increased its projected enrollment estimate to 63,000. This self-serving increase was many months after Oscar applied to enter the market and began negotiating with providers. (Gossen Supp. ¶ 10; Gossen ¶¶ 9, 19.)

**III. Oscar Has Not Established that the Balance of Equities Favor an Injunction**

Oscar's cursory analysis of the balancing of equities in itself warrants denial. *See Regions Bank v. Kaplan*, No. 8:16-CV-2867-T-23AAS, 2017 WL 3446914, at *4 (M.D. Fla. Aug. 11, 2017). Even read generously, Oscar's arguments are not compelling. Oscar first dismisses any harm to Florida Blue as the purported result of ceasing anticompetitive conduct. (PI Mot. at 23.) In support, Oscar cites *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC*, 425 F.3d 964 (11th Cir. 2005)—an inapposite case in which the court enjoined enforcement of a state-agency order after the Federal Communications Commission had *already ruled* that the state agency's order was anticompetitive. *Id.* at 966, 970. Here, by contrast, no agency has condemned Florida Blue's exclusivity arrangements. Rather, the federal government, the Florida Department of Financial Services and the Florida Supreme Court all recognize the use of exclusive agents in the insurance industry. Tant ¶ 15; Baker ¶ 53 n.43; *Zota*, 985 So. 2d at 1046 (Fla. 2008).

Next, Oscar downplays the harm to Florida Blue by claiming that individual plans constitutes only 30% of Florida Blue's business. (PI Mot. at 23.) But Florida Blue has spent nearly 40 years building this business, and causing a company to lose the "significant time and money" it has spent "establishing its presence" in a market is a serious harm. *PWG Franchising, LLC v. FTL Enters., Inc.*, No. 6:14-CV-2056-ORL-40TBS, 2015 WL 12684458, at *5 (M.D. Fla. Mar. 2, 2015). Oscar cannot secure an injunction merely to harm legitimate competition. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 112 (1986).

Moreover, Oscar understates the breadth of its requested relief. Oscar seeks

access to the relationships between Florida Blue's agents and their customers—relationships that Florida Blue has fostered over decades. Companies have a "legitimate business interest" in protecting "confidential knowledge" about their customers. *See Godwin Pumps of Am., Inc. v. Ramer*, No. 8:11-CV-580-T-24 AEP, 2011 WL 2670191, at *5 (M.D. Fla. July 8, 2011). The equities do not favor Oscar's far-reaching request.

**IV. Oscar Has Not Established a Preliminary Injunction is in the Public Interest**

When assessing the "public interest," courts consider "the purposes of the regulatory legislation" undergirding plaintiff's allegations. *United States v. Florida Rock Indus.*, No. CIV.99-516-CIV-J-20A, 1999 WL 33134414, at *15 (M.D. Fla. June 6, 1999). Florida Blue's exclusivity policy promotes the goals of both the ACA and the Sherman Act.

A "central aim of the ACA is to reduce the number of uninsured U.S. residents." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 596 (2012) (Ginsburg, J., dissenting). Florida Blue's exclusivity policy advances this goal, as evidenced by Florida Blue's successful efforts—working alongside its agents—to expand the pool of Floridians who purchase insurance. (*See* Baker at ¶¶ 214–17; *see supra* Section I.B.i.4.)

Florida Blue's exclusive dealings also promote the goals of the Sherman Act, which encourages "the lowest prices, the highest quality and the greatest material progress." *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 4 (1958). As Florida Blue's plans often offer the richest benefits at the lowest total cost, Florida Blue's exclusive agents help consumers access competitively optimal products.

**CONCLUSION**

For the foregoing reasons, the Court should deny Oscar's PI motion.

January 18, 2019

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 18th day of January, 2019, I electronically filed a true and correct copy of the foregoing with the Clerk of the Court by using the CM/ECF system, which will serve notice of such filing on all counsel of record.

*/s/ Karin A. DeMasi*
Karin A. DeMasi