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.
_______________________________________/

**ORAL ARGUMENT REQUESTED**

**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 Action § 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 FACTS[2]

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

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[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

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[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

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[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,

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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).

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[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

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**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