No.

In the Supreme Court of the United States

HOME DEPOT U.S.A., INC., PETITIONER

v.

BLUE CROSS BLUE SHIELD ASSOCIATION, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has long stated that "a prospective waiver of a party's right to pursue statutory remedies for antitrust violations" would violate federal antitrust laws. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (citing *Lawlor v. Nat'l Screen Serv.*, 349 U.S. 322, 329 (1955)). And the United States has taken the position that it is "well-established that parties may not prospectively waive the protections of the antitrust laws." U.S. Amicus Br., *Am. Express Co. v. Italian Colors Restaurant*, No. 12-133, 2013 WL 367051, at *20 (U.S. Jan. 29, 2013).

Respondents nevertheless agreed to settle antitrust claims against the Blue Cross and Blue Shield Association and its members for a prospective release of "indivisible injunctive relief" for over 100 million members of a mandatory Rule 23(b)(2) injunctive class. App.10a. Over the objections of Petitioner Home Depot U.S.A., Inc., the Eleventh Circuit affirmed the approval of the $2.67 billion class settlement—with $675 million in plaintiffs' attorneys' fees—holding that "no public policy prohibits prospective releases in antitrust cases," including when the release "perpetuate[s] conduct" challenged as anticompetitive. App. 13a. That categorical ruling conflicts with the rulings of other circuits, contravenes this Court's precedents, and undermines well-established antitrust enforcement policy.

The question presented is:

Whether settlement agreements may immunize ongoing restraints on competition from private enforcement under the federal antitrust laws by releasing certain claims for injunctive relief that accrue after the settlement's effective date.

PARTIES TO THE PROCEEDING

Petitioner was an objector in the District Court and an appellant in the Court of Appeals. Petitioner is Home Depot U.S.A., Inc., together with all its parents, subsidiaries, affiliates, and associated benefit plans who are—to the extent not excluded by the Settlement Agreement or Court Order—members of the Injunctive Relief Class. The other appellants below were Topographic, Inc.; Employee Services, Inc.; Jennifer Cochran; Aaron Craker; and David G. Behenna.

Respondents were the plaintiff-appellees and defendant-appellees in the Court of Appeals. The plaintiff-appellees below were Galactic Funk Touring, Inc.; American Electric Motor Services, Inc.; CB Roofing, LLC; Pearce, Beville, Leesburg, Moore, P.C.; Pettus Plumbing & Piping, Inc.; Consumer Financial Education Foundation of America, Inc.; Fort McClellan Credit Union; Rolison Trucking Co., LLC; Conrad Watson Air Conditioning, Inc.; Linda Mills; Frank Curtis; Jennifer Ray Davison; Pete Moore Chevrolet, Inc.; Jewelers Trade Shop; Saccoccio & Lopez; Angel Foster; Monika Bhuta; Michael E. Stark; G & S Trailer Repair Incorporated; Chelsea Horner; Montis, Inc.; Renee Allie; John G. Thompson; Avantgarde Aviation, Inc.; Hess, Hess, & Daniel, P.C.; Betsy Jane Belzer; Barlett, Inc.; Matthew Alden Boyd; Gaston GPA Firm; Rochelle McGill; Brian McGill; Sadler Electric; Jeffrey Garner; Amy Macrae; Vaughn Pools, Inc.; Casa Blanca, LLC; Jennifer D. Childress; Clint Johnston; Janeen Goodin; Marla Sharp; Erik Barstow; GC/AAA Fences, Inc.; Angie Hill; Christy Bradberry; Kevin Bradberry; Juanita Aschenbrenner; Tom Aschenbrenner; Free State Growers, Inc.; Jason Goodman; Tom Goodman; Comet Capital, LLC; Barr, Sternberg, Moss, Lawrence, Silver & Munson, P.C.; Mark Krieger; A. Duie

Pyle, Inc.; Deborah Piercy; Lisa Tomazolli; and Hibbett Sports.

The defendants-appellees in the Court of Appeals were Blue Cross Blue Shield Association, Blue Cross and Blue Shield of Alabama; Blue Cross and Blue Shield of Arizona, Inc.; Blue Cross and Blue Shield of Florida, Inc.; Blue Cross and Blue Shield of Massachusetts, Inc.; Blue Cross and Blue Shield of North Carolina, Inc.; BlueCross BlueShield of Tennessee, Inc.; California Physicians' Service d/b/a Blue Shield of California; CareFirst, Inc.; CareFirst of Maryland, Inc.; Group Hospitalization and Medical Services, Inc.; CareFirst BlueChoice, Inc.; Hawaii Medical Service Association (Blue Cross and Blue Shield of Hawaii); Health Care Service Corporation, an Illinois Mutual Legal Reserve Company, including its divisions Blue Cross and Blue Shield of Illinois, Blue Cross and Blue Shield of Texas, Blue Cross and Blue Shield of New Mexico, Blue Cross and Blue Shield of Oklahoma, and Blue Cross and Blue Shield of Montana; Caring for Montanans, Inc., f/k/a Blue Cross and Blue Shield of Montana, Inc.; Wellmark of South Dakota, Inc. (Wellmark Blue Cross and Blue Shield of South Dakota); Wellmark, Inc. (Wellmark Blue Cross and Blue Shield of Iowa); Triple-S Management Corporation; Triple-S Salud, Inc.; Elevance Health, Inc. f/k/a Anthem, Inc., and all of its named subsidiaries in this consolidated action; Aware Integrated, Inc.; Louisiana Health Service & Indemnity Company (Blue Cross and Blue Shield of Louisiana); BCBSM, Inc. (Blue Cross and Blue Shield of Minnesota); Blue Cross and Blue Shield of South Carolina; Horizon Healthcare Services, Inc. (Horizon Blue Cross and Blue Shield of New Jersey); Blue Cross & Blue Shield of Rhode Island; Blue Cross and Blue Shield of Vermont; Cambia Health Solutions, Inc.; Regence BlueShield of Idaho; Regence BlueCross BlueShield of Utah; Regence BlueShield (of

Washington); Regence BlueCross BlueShield of Oregon; Health Care Service Corporation, an Illinois Mutual Legal Reserve Company, including its divisions Blue Cross and Blue Shield of Illinois, Blue Cross and Blue Shield of Texas, Blue Cross and Blue Shield of New Mexico, Blue Cross and Blue Shield of Oklahoma, and Blue Cross and Blue Shield of Montana; Caring for Montanans, Inc., f/k/a Blue Cross and Blue Shield of Montana, Inc.; Highmark Health, a Pennsylvania non-profit organization; Highmark Inc., f/k/a Highmark Health Services; Highmark West Virginia Inc.; Highmark Blue Cross Blue Shield Delaware Inc.; Highmark Western and Northeastern New York Inc.; Premera Blue Cross, d/b/a Premera Blue Cross Blue Shield of Alaska; Blue Cross Blue Shield of Michigan Mutual Insurance Company; Blue Cross & Blue Shield of Mississippi, a Mutual Insurance Company; Independence Hospital Indemnity Plan, Inc.; Independence Health Group, Inc.; USAble Mutual Insurance Company, d/b/a Arkansas Blue Cross and Blue Shield and as Blue Advantage Administrators of Arkansas; Capital Blue Cross; Blue Cross of Idaho Health Service, Inc.; Blue Cross and Blue Shield of Kansas, Inc.; Blue Cross and Blue Shield of Kansas City; Blue Cross and Blue Shield of Nebraska; Blue Cross Blue Shield of North Dakota; Blue Cross Blue Shield of Wyoming; and Excellus Health Plan, Inc., d/b/a Excellus BlueCross BlueShield.

CORPORATE DISCLOSURE STATEMENT

Petitioner Home Depot U.S.A., Inc. is wholly owned by HD Operations Holding Company, Inc., which is wholly owned by The Home Depot, Inc., a publicly traded company. No publicly traded corporation owns 10% or more of the stock of The Home Depot, Inc. The Home Depot Group Benefits Plan and The Home Depot Medical and Dental Plan are related Home Depot entities. Neither plan is publicly traded.

RELATED PROCEEDINGS

1. This case arises out of multi-district litigation consolidated *In re Blue Cross Blue Shield Antitrust Litigation MDL 2406*, 2:13-cv-20000 (N.D. Ala.), before the Northern District of Alabama. The District Court entered a final order and judgment approving the settlement agreement on August 9, 2022. That judgment was amended by the District Court on September 7, 2022.

2. Home Depot appealed that judgment on September 8, 2022. *In re Blue Cross Blue Shield Antitrust Litig. MDL 2406*, No. 22-13051 (11th Cir.). On October 25, 2023, the Eleventh Circuit affirmed the District Court's judgment approving the settlement agreement. *In re Blue Cross Blue Shield Antitrust Litig. MDL 2406*, 85 F.4th 1070 (11th Cir. 2023).

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INTRODUCTION

This Court has expressed "little hesitation in condemning" an agreement that "operate[s] … as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations" as "against public policy" established in federal antitrust law. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). As the United States has explained to this Court, prospective antitrust waivers "would vitiate the effectiveness of the private remedy, making it less likely that anticompetitive conduct will be detected and deterred." U.S. Amicus Br., *Am. Express Co. v. Italian Colors Restaurant*, No. 12-133, 2013 WL 367051, at *22 (U.S. Jan. 29, 2013). That is why it is "well-established that parties may not prospectively waive the protections of the antitrust laws." *Id.* at *20.

But the Eleventh Circuit held categorically that "no public policy prohibits prospective releases in antitrust cases," even though the settlement blessed ongoing practices that had been challenged as anticompetitive. App.13a. That decision deepens a circuit split, fundamentally conflicts with this Court's precedent, and threatens to undermine antitrust enforcement by allowing private parties in class actions to trade away the remedies Congress enacted to protect future competition for entire markets.

Plaintiffs are subscribers of health insurance from thirty-six Blue Cross and Blue Shield businesses. These health-insurance subscribers alleged that the Blue Cross and Blue Shield Association and the association's thirty-six members (together, the "Blues") agreed not to compete with each other in various ways. The District Court agreed and ruled that the combined restrictions were *per se* violations of the Sherman Act. *In re Blue Cross Blue*

Shield Antitrust Litig., 308 F. Supp. 3d 1241, 1267 (N.D. Ala. 2018).

The representatives of separate damages and injunctive-relief classes of health-insurance subscribers then reached a settlement agreement under which the Blues agreed to abate some—but not all—of their allegedly anticompetitive conduct. In exchange, those who remained in the damages class released all past and future claims. And those in the injunctive-relief class—which is a mandatory, no-opt-out class—were required to release their right to seek injunctive remedies against ongoing and future violations of federal antitrust laws.

Under the agreement's express terms, the millions of members of this class must release "any and all known and unknown claims" that "*relat[e] in any way to*" either the "factual predicates of" or "any issue raised in any of the Subscriber Actions" or any new, *post-settlement* restrictions approved by a committee created by the settlement. App.197a-98a (emphases added). The agreement is crystal-clear that the "[r]eleased claims include, but are not limited to, claims that *arise after the [settlement's] Effective Date.*" App.199a (emphasis added).

Petitioner Home Depot opted out of the (b)(3) damages class. But like everyone else, Home Depot had no opportunity to opt out of the (b)(2) injunctive-relief class. Therefore, Home Depot exercised its right to object to the settlement on the ground that it violated the well-established prohibition against the prospective waiver of antitrust claims. App.106a-07a.

After considering the objection, the District Court determined that the release validly foreclosed future class-wide injunctive relief, though it clarified that individual members of the class could nevertheless seek their own "individualized" injunctive relief. App.104a-05a. The settling parties have never agreed on what that

means—as it is not defined anywhere in their agreement—but there is no dispute that as approved, the settlement forbids remedies that would dismantle any of the Blues' on-going competitive restraints or obtain any market-wide relief. The District Court overruled Home Depot's objection and approved the settlement.

The Eleventh Circuit affirmed. Despite this Court's longstanding condemnation of agreements that confer even "a partial immunity from civil liability for future violations" of the antitrust laws, *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955), the Eleventh Circuit reasoned that modern class-action practice has outgrown this precedent: prospective waivers "are commonly approved and enforced in class actions" and "[t]he antitrust context is no different," App.14a. Although Home Depot cited *Lawlor* repeatedly, neither the District Court nor the Eleventh Circuit addressed *Lawlor*.

The judgment below conflicts with rulings from other circuits over whether parties may prospectively waive the right to bring claims arising out of an ongoing antitrust violation. The Eleventh Circuit blanketly "approved prospective releases of antitrust claims," including when the settlement "perpetuates" conduct challenged as anticompetitive. App.14a, 17a. Despite *Lawlor* and other cases from this Court, the Second and Seventh Circuits, like the Eleventh Circuit, say claims concerning ongoing antitrust violations may be prospectively waived. *See MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc.*, 161 F.3d 443, 448 (7th Cir. 1998); *VKK Corp. v. Nat'l Football League*, 244 F.3d 114, 125-26 (2d Cir. 2001). Decisions from the Third, Fifth, Sixth, and Eighth Circuits disagree. *See Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 218 n.9 (3d Cir. 2008); *Redel's Inc. v. Gen. Elec. Co.*, 498 F.2d 95, 98 (5th Cir. 1974); *Watson Carpet & Floor Covering, Inc. v.*

Mohawk Indus., Inc., 648 F.3d 452, 460-61 (6th Cir. 2011); *Gaines v. Carrollton Tobacco Bd. of Trade, Inc.*, 386 F.2d 757, 759 (6th Cir. 1967); *Fox Midwest Theatres, Inc. v. Means*, 221 F.2d 173, 180 (8th Cir. 1955). Although this Court cited *Redel's*, *Fox Midwest*, and *Gaines* with approval in *Mitsubishi*, the split has only deepened since that decision. This Court should resolve this division, which shows no signs of dissipating.

This Court's review is urgently needed because the Eleventh Circuit's judgment threatens effective private enforcement of the antitrust laws. As noted, this Court has long recognized that private agreements that confer even "a partial immunity from civil liability for future violations" of the antitrust laws violate the Sherman Act and the public policy underlying it. *Lawlor*, 349 U.S. at 329. Such waivers themselves operate as an agreement in "restraint of trade" by insulating alleged anticompetitive conduct from antitrust enforcement. 15 U.S.C. § 1. They also undermine federal antitrust statutes by gutting the private-enforcement mechanism that is an "integral part of the congressional plan for protecting competition." *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990). This is especially true here given the massive incentive for private parties to trade future enforcement for gigantic class action settlements, as well as the courts' understandable desire to resolve complex, time-consuming cases.

Several factors in this case compound the threat. For one, use of the MDL and class action mechanisms allows defendants engaged in anticompetitive conduct to negotiate antitrust immunity on a massive scale—here, with 100 million potential plaintiffs. And because class plaintiffs and their counsel have their own incentives to settle—the attorneys' fees here are an eye-popping $675 million—defendants' prospects of doing so are high. To make matters worse, because the Rule 23(b)(2)

injunctive-relief class is mandatory, there is no avenue for a private plaintiff to preserve their future claims for market-wide injunctive relief. Finally, the market here—for national health insurance—is critically important, particularly with an aging population.

The Court should grant this petition to resolve the division among the courts of appeals and to ensure the effective and "normal operation of the antitrust laws." *NCAA v. Alston*, 594 U.S. 69, 74 (2021).

OPINIONS BELOW

The order of the Court of Appeals denying rehearing en banc (App.173a-74a) is unreported. The opinion of the Court of Appeals (App.1a-45a) is reported at 85 F.4th 1070. The opinion of the District Court (App.46a-172a) is unreported but available at 2022 WL 4587618.

JURISDICTION

The Court of Appeals entered its judgment on October 25, 2023. Home Depot filed a timely petition for rehearing en banc on November 15, 2023. The Court of Appeals denied the petition for rehearing en banc on January 26, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other

> person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

STATEMENT

A. Section 1 of the Sherman Act prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce." *NCAA*, 594 U.S. at 80 (quoting 15 U.S.C. § 1). Federal antitrust law enforces that prohibition, in part, by providing that "[a]ny person, firm, corporation, or

association shall be entitled to sue for and have injunctive relief … against threatened loss or damage by a violation of the antitrust laws," as well as obtain treble damages. 15 U.S.C. §§ 15, 26.

Congress's purpose in "giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Rsch., Inc.* (*Zenith I*), 395 U.S. 100, 130-31 (1969). That purpose is "best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 755 (1977) (quotation marks and citation omitted).

That is particularly true of prospective market-wide injunctive relief. "In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints." *Int'l Salt Co. v. United States*, 332 U.S. 392, 401 (1947).

As a result, this Court has long recognized that agreements to take private claims for future antitrust violations off the table run afoul of the antitrust laws. *See Lawlor*, 349 U.S. at 329; *Mitsubishi*, 473 U.S. at 637 n.19. This rule prohibiting prospective waiver of antitrust claims has roots in both the text and structure of federal antitrust law.

First, an agreement to insulate parties from future private enforcement of the antitrust laws would "itself operatively serve as a contract 'in restraint of trade'" in violation of the antitrust laws. *Fox Midwest*, 221 F.2d at 180 (quoting 15 U.S.C. § 1). Such an agreement would "absolve one party from liability for future violations of the

anti-trust statutes against another," thereby "permit[ting] a restraint of trade to be engaged in, which would have impact, not simply between the parties, but upon the public as well." *Id.* at 180. Prospective waivers of private antitrust claims, then, are prohibited by the letter of the antitrust laws. *See Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885, 896 n.27 (3d Cir. 1975).

Second, settlements releasing future antitrust claims also undermine the structure of the antitrust laws. This Court has long recognized that "[w]here a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945). The antitrust laws create precisely such a private right of action. It exists not just for the compensation and protection of individuals, but to promote "the public interest in vigilant enforcement of the antitrust laws." *Lawlor*, 349 U.S. at 329. Prospective waivers "would vitiate the effectiveness of the private remedy, making it less likely that anticompetitive conduct will be detected and deterred." U.S. Amicus Br., *Italian Colors*, 2013 WL 367051, at *22.

B. This consolidated action involves several private antitrust enforcement suits. Numerous health-insurance subscribers filed class-action complaints alleging that the Blues violated federal antitrust law by restricting their competition through the Blue Cross Blue Shield Association (the "Association"). App.3a. The Association consists of thirty-six independent companies that sell health insurance and related services to subscribing customers. App.3a.

The subscribers alleged a variety of anticompetitive conduct on the part of the Blues, including:

- **Exclusive-Service Areas:** This policy allocated customers between horizontal competitors by assigning each of the Blues a generally exclusive geographic area. Additional rules gave the Blue Association member in whose area a large "national account" is headquartered the exclusive right to bid on that account's national business (unless that Blue chooses to cede the exclusive right to a single other Blue). Home Depot qualifies as a national account, so it falls within this customer allocation agreement. App.201-02a.
- **Best-Efforts Rules:** These rules mandate a minimum percentage of business that each of the Blues must do under its Blue name and using its Blue trademark (as opposed to under a non-Blue name). The Blues had a local best-efforts rule (80%) and a national best-efforts rule (66 and 2/3%). App.190a-93a.
- **Third Party Acquisition Limits:** The Blues restricted the right of any member to be sold to a company that is not a member of the Association. App.224a.
- **Other Anticompetitive Conduct:** The Blues also limited competition in other ancillary ways, including by restricting the ability of self-funded subscribers—those, like Home Depot, who pay for healthcare costs themselves but pay a Blue for administrative services—to contract directly with healthcare providers. App.219a-20a.

The subscribers sought money damages, treble damages, restitution, and injunctive relief. App.4a.

In April 2018, the District Court held that the Blues' combined restrictions were *per se* illegal under antitrust law. *BCBS*, 308 F. Supp. 3d at 1267. But the District Court did not decide whether the individual restrictions also constitute *per se* violations. *See id.* at 1267, 1273 n.16, 1277, 1279 n.23.

C. Settlement discussions began in 2015. The District Court concluded that, for the first four years of the settlement discussions, the litigation did not include any claim for self-funded subscribers—like Home Depot—that pay for healthcare costs themselves but pay a Blue for administrative services. App.50a-51a. In July 2019, the plaintiffs "coordinated the recruitment of separate class counsel for [a self-funded] sub-class and a class representative." App.50a.[1] The self-funded subclass began participating in mediation in September 2019, only two months before the parties signed their settlement term sheet. App.50a. The Settlement Agreement followed in October 2020. But it was not until November 2020 that the subscribers filed a Fourth Amended Complaint that first asserted claims for self-funded subscribers. The self-funded subscribers thus had no opportunity to litigate their claims before settlement.

The settlement agreement involved two classes: a Rule 23(b)(2) injunctive-relief class (no opt out) and a Rule 23(b)(3) damages class (opt out). Each class is defined to include virtually all Blue subscribers. App.5a. The primary difference between the classes is that the (b)(2) class also includes beneficiaries and dependents, while the (b)(3) class does not. App.5a.

The Blues agreed to pay $2.67 billion to the (b)(3) damages class. App.7a. Attorney's fees are $675 million of that amount. App.9a.

[1] Citations to "ECF" are to the District Court's docket.

As for the mandatory (b)(2) injunctive class, the Blues agreed to modify some—but not all—of the allegedly anticompetitive practices they had engaged in:

- **Exclusive-Service Areas:** The agreement allowed the Blues—which are horizontal competitors—to continue allocating generally exclusive geographic areas for bidding on national accounts, except that some National Accounts could request a second (but not a third) Blue to bid on its business, so long as it had *not* opted out of the (b)(3) release. App.218a-20a.[2]

- **Best-Efforts Rules:** The Blues agreed to eliminate their national best-efforts rule, but the agreement allowed them to continue using their local best-efforts rule with minor changes. App.216a-17a.

- **Third Party Acquisition Limits:** The agreement perpetuated the Blues' ability to block any third-party acquisition by Association vote. App.224a-25a.

- **Other Anticompetitive Conduct:** The agreement modified some of the Blues' other anticompetitive conduct, including by eliminating several restrictions they had placed on the ability of self-funded subscribers to contract directly with healthcare providers. The agreement also limits

[2] The agreement allows certain national accounts that opted into the (b)(3) damages class to request a second Blue bid in some limited circumstances. App.220a-21a. Because Home Depot opted out of the damages class, it is not one of those national accounts and thus remains restricted to a single bid under the agreement. App.166a.

the Blues' use of most-favored-nation clauses in contracts with healthcare providers. App.225-26a.

In exchange, the subscribers in both classes had to release "any and all known and unknown claims" that "relat[e] in any way to" either the "factual predicates of" or "any issue raised in any of the Subscriber Actions" or any *new* restrictions approved by a committee created by the settlement. App.197a-98a. "Released claims include, but are not limited to, claims that arise *after* the [settlement's] Effective Date." App.199a (emphasis added). And they include "claims for damages or for equitable or injunctive relief of any nature," including under the "antitrust" laws. App.198a. The settlement agreement further instructs that "the releases … be interpreted and enforced broadly and to the fullest extent permitted by law." App.244a-45a.

As due process requires, the settlement provided an opt-out mechanism for the (b)(3) class. App.195a; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011). But it contained no similar mechanism for the (b)(2) class. App.195a. Those who opted out of the (b)(3) class did not release their future claims for damages. App.10a. But they were required to remain in the (b)(2) class and release their right to seek market-wide injunctive relief under the federal antitrust laws. App.10a.

When approving the settlement, the District Court held that members of the mandatory (b)(2) class may nonetheless seek what it called "divisible" injunctive relief, which includes relief based on "a class member's individualized circumstances." ECF 2897 at 4. The settling parties never agreed on what that meant. For example, the Blues contend that the settlement releases even an individual attempt to enjoin the Blues' ongoing restraints, such as their exclusive-service areas. ECF 2895 at 2; ECF

2864 at 97. But there is no dispute that the settlement forbids remedies that would dismantle the Blues' on-going competitive restraints or otherwise obtain any market-wide relief.

Home Depot opted out of the (b)(3) class, App.10a, and objected to the (b)(2) class, App.112a. As Home Depot explained, the settlement "requires members of the injunctive relief class to release future claims for injunctive and equitable relief." App.112a. Because statute and precedent "forbid[] such a prospective release of a private party's right to enforce the antitrust laws against future conduct," Home Depot argued the settlement is unlawful. App.112a.

In November 2020, the District Court rejected Home Depot's objections and approved the settlement. App.46a-172a. The court acknowledged it was "true" that "public policy prohibits the prospective release of future claims." App.120a. But the court asserted that principle did not apply "when the only 'prospective' application of the release in question is the continued adherence to a pre-release restraint on trade." App.121a (citation omitted). The District Court read the release here, contrary to its text, as waiving only those claims that "arise from continued adherence to the existing arrangements that are 'the factual predicates of the Subscribers Actions' or the Injunctive relief provided under the Agreement." App.122a.

The Eleventh Circuit affirmed, but on much broader grounds. App.1a-45a. The Eleventh Circuit held that "no public policy prohibits prospective releases in antitrust cases." App.13a. According to the court, "releases are commonly approved and enforced in class actions," and "[t]he antitrust context is no different." App.14a. In so holding, the Eleventh Circuit cited cases from the Second and Seventh Circuits, which it claimed had "approved and enforced prospective releases in antitrust cases too."

App.15a. And it waved aside this Court's statement in *Mitsubishi* that a "prospective waiver of a party's right to pursue statutory remedies for antitrust violations" should be "condemn[ed] … as against public policy." 473 U.S. at 637 n.19. This statement, the Eleventh Circuit suggested, was "concerned about the *complete absence* of a statutory remedy for any antitrust violation," not "*every* prospective release of antitrust claims." App.15a-16a (first emphasis added).

The court also suggested that there was no need to fear that the release here—which covered the more than 100 million members of the (b)(2) class—would "undermine the enforcement of the antitrust laws." App.16a. "Private enforcement is only one mechanism by which federal antitrust laws may be vindicated," the court suggested, and the settlement "does not affect public enforcement of the antitrust laws." App.16a.

In response to the argument that the settlement nevertheless perpetuated—and immunized—unlawful conduct in violation of the antitrust laws, the court held that "[s]o long as the conduct perpetuated under a settlement agreement does not per se violate antitrust law, the settlement may be approved, even if the perpetuated conduct might not withstand scrutiny under the rule of reason." App.17a-18a.

In response to Home Depot's argument that the release covers future claims that could not have been litigated in the class action, the court did not address the language in the release covering "unknown" claims "that arise after the [settlement's] Effective Date" that "relat[e] in any way to" to "the factual predicates of" *or* "any issue raised in" this case. App. App.198a. Instead, the court asserted that the settlement "limits the release to claims arising from the factual predicates of the subscriber action." App.20a. In other words, the court

claimed the "release does not bar any claims that could not have been litigated before settlement or any claims related to conduct that was not challenged in the underlying lawsuit." App.20a.

Based upon its blinkered reading of the release language, the court held that the settlement agreement was enforceable because it complied with the "identical-factual-predicate doctrine," an apparent mirror of res judicata not specific to the antitrust context that permits settlement agreements to "release claims that share a common nucleus of operative fact with the claims in the underlying litigation." App.19a.

The Eleventh Circuit denied a petition for rehearing en banc.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's Decision Conflicts With the Rulings of Other Circuit Courts.

The Eleventh Circuit's ruling deepens an entrenched circuit split over whether parties may waive the right to bring new claims arising out of a continuing antitrust conspiracy. The Eleventh Circuit unequivocally "approved prospective releases of antitrust claims," App.14a, even though the settlement "perpetuate[d] conduct" challenged as illegal, App.17a. The Second and Seventh Circuits likewise permit settlements that not only perpetuate ongoing antitrust violations but also immunize the violator from future claims challenging those violations. But the Third, Fifth, Sixth, and Eighth Circuits hold that kind of release is unenforceable because each new act in furtherance of an antitrust conspiracy creates a *new* claim, and so settlements authorizing and immunizing new acts unlawfully release prospective claims. This Court should grant review to resolve this conflict.

A. The settlement here allows the Blues to maintain certain practices that the class plaintiffs had challenged as anticompetitive, including exclusive-service areas that eliminate horizontal competition between the Blues. The subscribers presented compelling evidence that the Blues would compete for those accounts in the absence of those restrictions. And the District Court did not resolve the legality of these individual practices before settlement, holding only that all the challenged practices *together* constituted a per se violation. The settlement agreement nevertheless bars Home Depot from seeking to enjoin the exclusive-service areas and other systemic practices even if they cause additional harm in the future and even if future changes in market conditions strengthen Home Depot's antitrust claims.

The Eleventh Circuit was untroubled by the settlement's "perpetuat[ion]" of potentially anticompetitive conduct. App.17a. The settlement explains that the "[r]eleased claims include, but are not limited to, claims that *arise after* the [settlement's] Effective Date." App.199a (emphasis added). And the release covers "any and all known and unknown claims" that "relat[e] in any way to" either the "factual predicates of" or "any issue raised in any of the Subscriber Actions" or any new restrictions approved by a committee created by the settlement. App.198a. Yet the Eleventh Circuit held that "no public policy prohibits prospective releases in antitrust cases." App.13a. And it therefore approved the release over Home Depot's objection that, among other things, the settlement prevented it from suing to end ongoing violations that prevent competition. App.17a-18a. In the court's view, so long as the "illegality" of the allegedly anticompetitive restraints was unresolved, the release was enforceable. App.17a.

B. The Seventh and Second Circuits, like the Eleventh, permit defendants to negotiate releases of liability for ongoing antitrust violations.

In the panel opinion, the Eleventh Circuit cited the Seventh Circuit as having "approved and enforced prospective releases in antitrust cases too." App.15a (citing *MCM Partners*, 161 F.3d at 448-49). In *MCM Partners*, the Seventh Circuit held a release that immunized the defendant from claims arising out of "continued adherence" to a conspiracy did not improperly "release claims for future violations." 161 F.3d at 448. In that case, MCM sued the defendants for "enter[ing] into an agreement to exclude MCM from doing business at McCormick Place." *Id.* The parties settled and MCM released all claims "[a]rising out of any matter, cause or thing from the beginning of the world to [the date of settlement]." *Id.* at 446. But MCM then sued *again*, alleging "continued adherence" to the antitrust conspiracy had continued for years after the settlement. *Id.* at 448-49. The Seventh Circuit found the claim barred by the release and rejected the argument that "each act in furtherance of a conspiracy gives rise to a separate cause of action," suggesting instead that only a "new, post-Release agreement" in restraint of trade would evade the release. *Id.* at 448.

The Second Circuit, too, has held that antitrust law does not prohibit a release that "prevent[s] the releasor from bringing suit against the releasee for engaging in a conspiracy that is later alleged to have continued after the release's execution." *VKK*, 244 F.3d at 126. There, the prior owner of the New England Patriots alleged the NFL conspired to prevent him from moving the team to Jacksonville and then required him to release all antitrust claims against the league before he could sell the team. *Id.* at 120-21. The Second Circuit rejected the argument that the release was an integral part of the conspiracy and

therefore unenforceable. *Id.* at 126. The court admitted that "[s]uch a release would seem always to protect the ongoing conspiracy because it always prevents the releasor from beginning litigation that would establish the scheme's illegality." *Id.* But like the Eleventh Circuit here, the court concluded that such releases must be enforceable because "[it] assume[d]" such releases are "not uncommon." *Id.*

C. The Third, Fifth, Sixth, and Eighth Circuits, by contrast, hold that parties may not agree to a release of new claims arising out of a continuing antitrust conspiracy. In *Toledo Mack Sales & Services, Inc. v. Mack Trucks, Inc.*, the Third Circuit cited this Court's opinion in *Zenith* for the proposition that an antitrust conspiracy involving "a continuing series of acts" creates a new cause of action every time an act in furtherance occurs and the plaintiff is injured. 530 F.3d at 218. The Third Circuit then rejected the idea that a previously signed release could bar claims for "events which occur after the execution of the release," even if the start of the continuing conspiracy predated the release. *Id.* at 218 n.9 (citing *Three Rivers Motors*, 522 F.2d at 896 n.27, for the proposition that "parties may not waive liability for future antitrust violations").

The Fifth Circuit came to a similar conclusion in *Redel's Inc. v. General Electric Co.*, where the plaintiff alleged a price discrimination theory that occurred from 1965 to 1971. 498 F.2d at 97. The defendant relied on a 1969 franchise agreement that released "all claims, demands, contracts, and liabilities … as of the date of the execution of this agreement." *Id.* The Fifth Circuit found the release enforceable as to claims that arose before the franchise agreement was signed. *Id.* at 99-100. But because "[r]eleases may not be executed which absolve a party from liability for future violations of our antitrust

laws," the release was unenforceable as to claims arising out of *continuing* acts in furtherance of the price discrimination scheme. *Id.* at 99; *see also Mitsubishi*, 473 U.S. at 637 n.19 (citing *Redel's* favorably); *but see* App.16a (refusing to follow *Redel's*, even though binding, on the grounds that it involved a broader release).

Similarly, the Sixth Circuit has held that "a mid-conspiracy settlement does not preclude liability for a coconspirator's subsequent actions that further the conspiracy." *Watson Carpet*, 648 F.3d at 460-61 (citing *Zenith Radio Corp. v. Hazeltine Rsch., Inc.* (*Zenith II*), 401 U.S. 321, 338 (1971)). There, Watson Carpet sued Mohawk for refusing to sell to them. They settled the claims in March 2007, but Mohawk again refused to sell in May 2007. *Id.* at 454. The Sixth Circuit held that the claims based on the May 2007 failure to deal fell outside the settlement agreement, explaining that "[s]hrewd conspirators may not pursue conspiratorial objectives with impunity simply by settling early in the conspiracy." *Id.* at 460.

And, in *Gaines v. Carrollton Tobacco Board of Trade, Inc.*, another case cited favorably in *Mitsubishi*, 473 U.S. at 637 n.19, the Sixth Circuit reversed a trial court's holding that the plaintiffs had "estopped themselves from asserting" future antitrust claims against anticompetitive tobacco regulation because they had "participated in the adoption of the … regulation." 386 F.2d at 758. Reasoning that the plaintiffs had "acquiesced" to the unlawful conduct, the district court held they had "in effect compromised and settled their claims for damages" and so were "estopped" from seeking relief under the Sherman Act. *Id.* at 758-59. The Sixth Circuit rejected that reasoning because "if executed in a fashion calculated to waive damages arising from future violations of the antitrust laws, [a compromise] would be invalid on public policy grounds." *Id.* at 759. Any settlement that arguably

"estopped" plaintiffs from asserting future antitrust claims was "unlawful" under the Sherman Act and the "public interest precludes the enforcement of such unlawful agreements." *Id.* (quoting *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 177 (1942)). That was so notwithstanding that the future claims arose from the same conduct at issue in the settlement.

The Eighth Circuit, which this Court also cited favorably, *Mitsubishi*, 473 U.S. at 637 n.19, similarly explained that any release that would "absolve one party from liability for future violations of the anti-trust statutes" would "operatively serve as a contract 'in restraint of trade.'" *Fox Midwest*, 221 F.2d at 180 (quoting 15 U.S.C. § 1). In that case, the Oak Park Theatre alleged that eight film producers, one of whom owned a competing theater company, had conspired to cause Oak Park Theatre "to pay excessive and improper rentals" for films. *Id.* 175. The parties reached a settlement which included a release of claims, but a year later, Oak Park Theatre sued, alleging that the anticompetitive behavior had continued. *Id.* The parties disputed whether the release covered future claims. *Id.* at 176-79. The Eighth Circuit held that, to the extent the release could be read as releasing future claims, it was unenforceable and without "any possible legal effect." *Id.* at 180. The Eighth Circuit thus treated new claims stemming from acts in furtherance of a continuing conspiracy as covered by the general rule: an unenforceable release of prospective claims. *Id.*

If the Third, Fifth, Sixth, and Eighth Circuits are correctly adhering to this Court's precedent, courts in the Second, Seventh, and Eleventh Circuits are endorsing unlawful settlements that perpetuate ongoing violations of the antitrust laws and, worse yet, bar potential plaintiffs from suing to end those violations. The settlement here allows the Blues to continue allegedly anticompetitive acts

on a massive scale. This Court should seize this opportunity to reaffirm precedent and clarify the law.

II. The Eleventh Circuit's Opinion Is Contrary to this Court's Precedent Establishing that Federal Antitrust Law Prohibits Parties from Agreeing to Release Claims for Future Antitrust Violations.

The Eleventh Circuit did not merely bless a release of new claims arising out of an alleged continuing antitrust conspiracy. It held that *nothing* in federal law "prohibits prospective releases in antitrust cases," period. App.13a. That holding flouts this Court's precedent as well as the letter and structure of the antitrust laws.

A. Nearly seventy years ago, in *Lawlor v. National Screen Service Corp.*, this Court held that private agreements that confer even "a partial immunity from civil liability for future violations" of the antitrust laws violate the Sherman Act and the "public policy" Congress enacted. 349 U.S. at 329. It has reiterated that rule multiple times since. *See, e.g.*, *Mitsubishi*, 473 U.S. at 637 n.19 (a "prospective waiver of a party's right to pursue statutory remedies for antitrust violations" should be "condemn[ed] … as against public policy"); *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 236 (2013) (noting "the desire to prevent 'prospective waiver of a party's right to pursue statutory remedies'" under the antitrust laws (emphasis omitted) (quoting *Mitsubishi*, 473 U.S. at 637 n.19)); *accord id.* at 241 (Kagan, J., dissenting) (deeming it "an uncontroversial proposition" that "courts will not enforce a prospective waiver of the right to gain redress for an antitrust injury, whether in an arbitration agreement or any other contract" (citing *Mitsubishi*, 473 U.S. at 637 n.19)). In the Solicitor General's words, it is thus "well-established that parties may not prospectively

waive the protections of the antitrust laws." U.S. Amicus Br., *Italian Colors*, 2013 WL 367051, at *20.

This rule against prospective waivers of antitrust claims applies both to new claims for relief based on new restraint(s) of trade and new claims for relief based on continuing or *ongoing* anticompetitive practice(s), both of which the opinion below would allow. Under black-letter antitrust laws, each act in furtherance of a continuing anticompetitive conspiracy that injures a plaintiff creates a new factual predicate for a new claim, even if the basic nature of the conspiracy remains unaltered. *See Lawlor*, 349 U.S. at 327-28 ("Such a course of conduct … may frequently give rise to more than a single cause of action." (footnote omitted)); *see also, e.g.*, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997); *Zenith II*, 401 U.S. at 338. Because each new injurious act in furtherance of a continuing conspiracy creates a new claim for relief, a release that immunizes a defendant from injunctive relief against new anticompetitive acts unlawfully releases future, not-yet-accrued claims based on not-yet-existing factual predicates. A release covering ongoing violations of the antitrust laws is thus just another type of unlawful prospective release. *See FTC v. Actavis, Inc.*, 570 U.S. 136, 158 (2013) (explaining that if parties structure a settlement with the "desire to maintain and to share patent-generated monopoly profits, then, in the absence of some other justification, the antitrust laws are likely to forbid the arrangement").

B. The settlement agreement here is precisely the sort of "prospective waiver of a party's right to pursue statutory remedies for antitrust violations" that this Court has expressed "little hesitation in condemning … as against public policy." *Mitsubishi*, 473 U.S. at 637 n.19. This agreement bars more than 100 million potential plaintiffs in the mandatory (b)(2) class from ever pursuing any

"antitrust" claim for (indivisible) market-wide injunctive relief that "relat[es] in any way to" either the "factual predicates of" or "any issue raised in any of the Subscriber Actions" or any new restrictions approved by a committee created by the settlement, even if it "arise[s] after the [settlement's] Effective Date." App.198a-99a (emphasis added). The terms of this release violate the prohibition on prospective waivers of antitrust claims by barring both (1) new claims for injunctive relief that could not have been brought during the litigation and (2) claims for injunctive relief based on new harmful acts in furtherance of existing practices in restraint of trade.

First, according to the Blues, the release bars many potential future claims for injunctive relief that could not have been raised during litigation. By barring currently unknown claims so long as they relate "in any way" to any fact or issue raised in any filing at any time during a decade of litigation, the release covers claims that did not exist before the settlement and, indeed, could not have been litigated. For instance, assume that the number of non-Blue health insurers drops dramatically in the future. That change in market conditions may make existing restraints anticompetitive. *See NCAA*, 594 U.S. at 93 ("Whether an antitrust violation exists necessarily depends on a careful analysis of market realities."). Yet the Blues would assert that a claim premised on those new developments would still be barred by the release because it would be "related" to "any issue raised" in the class action litigation here.

Second, the settlement perpetuates restraints that the class challenged as anticompetitive yet imposes a mandatory release of future claims premised on new acts in furtherance of those challenged policies. Before settlement, the District Court ruled that the *aggregation* of all the challenged restraints "constitute[d] a *per se* violation of

the Sherman Act." 308 F. Supp. 3d at 1267. The District Court declined to consider whether individual restrictions, such as the Blue's "Exclusive Service Area policy," violate the Sherman Act on their own. *Id.* at 1266-67, 1273 n.16, 1279 & n.23. It then approved a settlement that modified some of the allegedly anticompetitive practices but left others in place. Critically, the District Court also shielded those remaining systemic practices restraining competition from private claims for injunctive relief. App.109a, 112a-14a.

C. The Eleventh Circuit contravened this Court's precedent by permitting this settlement.

First, the Eleventh Circuit disregarded and misread this Court's precedents regarding the release of future antitrust claims. The panel nowhere cited *Lawlor*, this Court's foundational decision on prospective releases of antitrust claims—a telling omission. The Eleventh Circuit's holding that "no public policy prohibits prospective releases in antitrust cases," App.13a, simply cannot be reconciled with *Lawlor*'s pronouncement that an agreement granting "a partial immunity from civil liability for future [antitrust] violations" is "consistent with neither the antitrust laws" nor the public policy underlying them. 349 U.S. at 329.

The Eleventh Circuit did attempt to distinguish *Mitsubishi*, asserting that this Court "was concerned about the complete absence of a statutory remedy for any antitrust violation." App.15a-16a. But *Mitsubishi* was not so restrictive. This Court said that "a prospective waiver of a party's right to pursue statutory remedies for antitrust violations" should be "condemn[ed] … as against public policy." 473 U.S. at 637 n.19. And it cited *Lawlor*, which expressly recognizes that even a "*partial immunity*" violates the antitrust laws and is unenforceable. 349 U.S. at 329 (emphasis added); *see also Italian Colors*, 570

U.S. at 236 (relying on *Mitsubishi* to affirm that private parties cannot waive the right to pursue statutory antitrust remedies).

The Eleventh Circuit trampled this Court's antitrust precedents in other ways. The Eleventh Circuit's assertion that "[t]he antitrust context is no different" from any other settlement could not be more wrong. App.14a. Start with the text of the Sherman Act. As explained above, *an agreement* to insulate potentially anticompetitive behavior from the antitrust laws itself constitutes a "contract, combination … , or conspiracy, in restraint of trade." 15 U.S.C. § 1; *see supra* pp.6-8. That necessarily makes settlement agreements in antitrust cases different from other contexts.

Next consider the nature of an antitrust violation. The injury is not simply to the plaintiff, but to competition and the broader economy. Thus, "the effect of such a release [of future antitrust claims] could be to permit a restraint of trade to be engaged in, which would have impact, not simply between the parties, but upon the public as well." *Fox Midwest*, 221 F.2d at 180 (quoted and followed by *Redel's*, 498 F.2d at 99).

The Eleventh Circuit's assertion that its holding "will [not] undermine the enforcement of the antitrust laws" because "it does not affect public enforcement" entirely misses the mark. App.16a. This Court has reiterated time and again that private enforcement is "an integral part of the congressional plan for protecting competition," *California*, 495 U.S. at 284; *see also, e.g.*, *Illinois Brick*, 431 U.S. at 755 ("paramount role"); *Mitsubishi*, 473 U.S. at 635 ("central role"). Indeed, it has become the primary

tool for enforcing the antitrust laws.[3] It didn't matter to this Court in *Lawlor* (or *Mitsubishi* or *Italian Colors*) that public enforcement of the antitrust laws remained as an option. Rather, the agreement would have violated "the antitrust laws" simply by extinguishing the claims of "a number of" private advertising businesses. *Lawlor*, 349 U.S. at 324, 329. The agreement here—sidelining more than *100 million* potential antitrust plaintiffs from seeking systemic injunctive relief to restore competition—even more plainly offends the antitrust laws.

Second, the Eleventh Circuit read the settlement agreement to "not bar any claims that could not have been litigated before settlement or any claims related to conduct that was not challenged in the underlying lawsuit." App.20a. But that reading cannot be squared with the plain language of the agreement itself, which expressly releases "any and all known and *unknown* claims" that "relat[e] in *any way* to" either the "factual predicates of" or "any issue raised in any of the Subscriber Actions" or any new restrictions approved by a committee created by the settlement, including those that "*arise after* the [settlement's] Effective Date." App.198a-99a (emphases added). This release plainly applies to new claims that could not have been brought prior to the release.

Third, the Eleventh Circuit wrongly suggested that the settlement does not violate the antitrust laws because it does not "perpetuate[] 'clearly illegal conduct.'" App.17a. This Court's cases have never indicated that prospective releases are permissible so long as a court has not yet held that the alleged restraint on trade is, in fact,

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[3] *See* Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 Loy. Consumer L. Rev. 303, 308 (2004) ("In a typical year, private complaints account for 90-95% of all antitrust actions.").

per se anticompetitive. *Lawlor*, for example, prohibited a prospective release that allegedly "perpetuate[d]" an anticompetitive "conspiracy and monopoly" without requiring any demonstration that the challenged practices were clearly illegal. *Lawlor*, 349 U.S. at 325, 327-28. The question was simply whether the agreement amounted to "a partial immunity from civil liability for future violations." *Id.* at 329. Thus, "a prospective waiver" cannot impinge on "a party's right to *pursue* statutory remedies for antitrust violations." *Mitsubishi*, 473 U.S. at 637 n.19 (emphasis added); *see also Fox Midwest,* 221 F.2d at 180.

This makes sense. For one thing, it is by definition impossible to know whether "unknown claims" that have yet to "arise," App.197a-99a, are based on clearly illegal behavior. The conduct and market conditions giving rise to the claims have not yet developed. If factual or legal doubt at the time of settlement permits release of future antitrust claims, then parties could always immunize conduct that future proceedings may reveal to have an illegal and injurious effect on competition in critical markets, thereby foreclosing any determination of illegality in the first place. This circular analysis imposes an impossible standard and thus insulates alleged anticompetitive conduct from scrutiny in a way Congress did not intend. *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 310 (1949) (rejecting a "standard of proof" that required a "prediction" of future events because that standard would be "if not virtually impossible to meet, at least most ill-suited for ascertainment by courts").

To make matters worse, the Eleventh Circuit conflated legal certainty with the *per se* antitrust merits analysis. App.17a. The Eleventh Circuit determined that "illegality is []certain" when allegedly anticompetitive conduct is a *per se* violation of the antitrust laws under this Court's precedents, but "illegality is uncertain" when allegedly

anticompetitive conduct would be subject to a rule of reason analysis. App.17a-18a. So, under the Eleventh Circuit's approach, a release of prospective antitrust violations comports with the antitrust laws so long as it is not certain that a future, not yet accrued antitrust violation would be *per se* unlawful. Parties are free to prospectively waive antitrust claims based on conduct that may be deemed unlawful under the rule of reason analysis.

This holding fundamentally misunderstands the problem with releasing prospective antitrust claims. The *per se* and rule of reason analyses are two different paths to reaching the same conclusion: conduct either is or is not an antitrust violation.

Thus, allowing the prospective release of antitrust claims subject to the rule of reason analysis would have the perverse effect of allowing the prospective release of the bulk of private antitrust claims, thereby gutting the antitrust laws. This Court's precedents reject that rule: *Lawlor* itself disallowed the prospective release of antitrust claims that did not allege *per se* antitrust violations.[4]

Fourth, the Eleventh Circuit mistook a res judicata doctrine for a principle of antitrust law. The court noted that class-action settlements may generally release claims that arise out of the "identical factual predicate" as the claims asserted in the case. App.19a. But that doctrine is irrelevant here. Despite the Court of Appeals' cramped reading, this release is not cabined to "identical factual predicate[s]" but rather broadly encompasses claims that "*relate[] in any way*" to "any issue raised in" any of the actions or any of their "factual predicates." App.198a (emphasis added). More fundamentally, the identical-factual-

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[4] *Lawlor* involved allegations of a vertical licensing arrangement, 349 U.S. at 323-26, which is not a *per se* violation, *see generally Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

predicate doctrine, which "mirrors res judicata," App.19a, does not displace the separate substantive principle of antitrust law prohibiting the prospective release of antitrust claims. This Court made that clear in *Lawlor* when it explained that a release covering future claims was unenforceable even though "the two suits were based on 'essentially the same course of wrongful conduct.'" 349 U.S. at 326; *see also id.* at 329 (distinguishing between "the antitrust laws" and "the doctrine of res judicata").

In sum, given the terms of the settlement agreement and this Court's precedents, this case should have been straightforward: The agreement expressly releases "antitrust" injunctive-relief "claims that arise after the Effective Date" of the agreement. App.199a. It is therefore "a prospective waiver of a party's right to pursue statutory remedies for antitrust violations," and thus runs afoul of federal antitrust law. *Mitsubishi*, 473 U.S. at 637 n.19. The Eleventh Circuit's departure from this Court's precedent warrants review.

III. The Question Presented Is Exceptionally Important.

A. This Court has already acknowledged that whether and when an agreement may release claims alleging prospective antitrust violations is exceptionally important. *See Lawlor*, 349 U.S. at 326 (granting "certiorari because of the importance of the question … presented in the enforcement of the federal antitrust laws"). And it granted certiorari and reversed another Eleventh Circuit decision that allowed—similarly to here—"near-automatic antitrust immunity." *Actavis*, 570 U.S. at 158.

The effective administration of federal antitrust laws is so important that this Court has repeatedly granted certiorari to consider important antitrust questions even in the absence of an agreed upon conflict among the courts

of appeals. *See, e.g.*, *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 820 (1978) ("Because of the importance of the issue for the agricultural community and for the administration of the antitrust laws, we granted certiorari." (citation omitted)); *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 311 (1978) ("We granted certiorari to resolve an important and novel question in the administration of the antitrust laws."); *NCAA*, 594 U.S. at 74 (certiorari granted where petitioner "[i]n essence … seeks immunity from the normal operation of the antitrust laws").[5] The presence of a split here over the proper application of this Court's longstanding precedent, *see supra* pp.15-21, is all the more reason to grant certiorari.

The United States, too, has recognized the importance of effective private antitrust enforcement. U.S. Amicus Br., *Italian Colors*, 2013 WL 367051, at *21 (stressing "the importance of private enforcement as a means of achieving the policy objectives of the antitrust statutes"). And it has underscored that importance specifically in the health-insurance context. *See, e.g.*, FTC, *Health Care Competition*, https://perma.cc/6S9U-T5BV ("When health care markets are competitive, consumers benefit from lower costs, better care and more innovation."); Sharis A. Pozen, *Competition and Health Care: A Prescription for High-Quality, Affordable Care* (Mar. 19, 2012), https://perma.cc/4Q82-8NJQ ("[T]he Antitrust Division recognized that competition in health insurance markets was critical to lowering the cost of health care delivery.").

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[5] *See* Cert. Reply Br., *Nat'l Broiler Mktg. Ass'n*, No. 77-117, 1977 WL 205332, at *3 n.2 (U.S. Oct. 4, 1977) ("No conflict between the circuits is imminent."); Cert. Reply Br., *Pfizer*, No. 76-749, 1977 WL 189349 (U.S. Jan. 10, 1977) (describing no circuit split); Br. in Opp., *NCAA*, Nos. 20-512 & 20-520, 2020 WL 6693168, at *20 (U.S. Nov. 9, 2020) (arguing that no circuit split exists).

B. If permitted to stand, the Eleventh Circuit's decision would threaten to undermine "one of the surest weapons for effective enforcement of the antitrust laws." *Redel's*, 498 F.2d at 99 (quoting *Zenith II*, 401 U.S. at 336).

As explained above, the private-enforcement mechanism is a critical tool in enforcing the federal antitrust laws. *See supra* pp.7, 25-26 & n.3. A rule that permits prospective releases of private claims for injunctive relief under the antitrust laws would gut that important tool. The United States has forcefully explained that "[i]f prospective waiver agreements were permissible, firms with substantial bargaining power could extract waivers from … any other parties with inferior bargaining power." U.S. Amicus Br., *Italian Colors*, 2013 WL 367051, at *22 (citation omitted).

Through the hydraulic pressure of MDL aggregation and the coercive power of class-wide settlements, plaintiffs' firms in concert with antitrust defendants could imperil effective private enforcement on a massive scale. The class action mechanism allows for the elimination of the claims of millions of—or as here, a hundred million—antitrust enforcers in one fell swoop. Even absent collusion, the incentives push class attorneys and defendants to expand the scale and scope of their settlements. Class attorneys are incentivized to reach settlements that ensure sizeable attorneys' fees awards. Meanwhile, settling defendants trying to buy as much peace as possible will seek to immunize themselves from future private antitrust claims by reaching a settlement the class and its lawyers are predisposed to want.

This case illustrates the point. After nine years of litigation and four years of settlement negotiations, the parties substantially expanded the scope of the litigation to achieve a gigantic settlement. First, the parties amended the pleadings to add new claims for self-funded

subscribers that had never been part of the litigation—and then promptly settled their claims. Second, the subscribers increased the value of the deal to the Blues—and thus the settlement payment and attorneys' fees—by agreeing to release future private enforcement for a mandatory Rule (b)(2) class of 100 million.

Under the Eleventh Circuit's holding, there is nothing to stop antitrust violators from settling to ensure that their anticompetitive scheme can remain in place, free from any future private enforcement. Although Home Depot's objection concerns future claims for indivisible injunctive relief, the Eleventh Circuit's ruling is categorical: there is no prohibition on releasing future antitrust claims. From the named parties' standpoint, everybody wins. But competition and everyone else—both unnamed class members and the public—loses. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 240 (2d Cir. 2016) (finding class counsel did not adequately represent class members when agreeing to a settlement that released future claims).

The mandatory nature of the (b)(2) class at issue here compounds the problem. Home Depot objected to the settlement agreement, in part on the ground that it forced all class members to release statutory private remedies for injunctive relief against future antitrust claims. App.112a. The courts below rejected those objections, and Home Depot had no opportunity to opt out of the (b)(2) class. *See supra* p.12. The settlement agreement here forces Home Depot and 100 million other members of a nationwide (b)(2) class to forever surrender their right to seek critical injunctive remedies eliminating future antitrust violations—whether they want to or not.

This arrangement raises due process concerns. *Cf. Wal-Mart*, 564 U.S. at 363 (leaving this question open). But it also compounds the anticompetitive effect of the

settlement. If it violates public policy for individual plaintiffs to agree to release future antitrust claims, *see Mitsubishi*, 473 U.S. at 637 n.19, then surely it violates public policy for a mandatory agreement to require that 100 million potential plaintiffs release their future claims for injunctive relief against antitrust violations.

C. Finally, given the size and scale of the claims and settlement, this case is important in its own right. *See* ECF 2812-1 at 1 (describing the settlement as "monumental" and "historic"). As noted, the settlement classes here are massive. This case involved "one of the largest notice mailings ever in the history of class action[s]." ECF 2812-2 ¶ 36. The mandatory (b)(2) injunctive-relief class includes more than 100 million subscribers of the Blues' health insurance products. And the Blues are some of the country's largest health insurers with extensive provider networks. Nationwide, 96% of hospitals and 92% of doctors are in-network with the Blues. *BCBS*, 308 F. Supp. 3d at 1257 (noting that "[o]ver the years, certain Plan executives have expressed concern that the [exclusive-service areas]" and "Best Efforts Rules" "violate antitrust laws").

The Eleventh Circuit's opinion here gives some of the health-insurance market's largest players partial "immunity from the normal operation of the antitrust laws." *NCAA*, 594 U.S. at 74; *see id.* at 107 (Kavanaugh, J., concurring) ("The NCAA has long restricted the compensation and benefits that student athletes may receive" and "has long shielded its compensation rules from ordinary antitrust scrutiny."). And as a result, competition in a market that involves more than 15% of the nation's economy will be directed by class action lawyers and an MDL court rather than the vigorous competition backed by private antitrust enforcement that Congress intended. This underscores the need for this Court's review.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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MARCH 2024

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED OCTOBER 25, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

October 25, 2023, Filed

No. 22-13051

IN RE: BLUE CROSS BLUE SHIELD ANTITRUST LITIGATION MDL 2406

2:13-CV-20000-RDP GALACTIC FUNK TOURING, INC., AMERICAN ELECTRIC MOTOR SERVICES, INC., CB ROOFING, LLC, PEARCE, BEVILL, LEESBURG, MOORE, P.C., PETTUS PLUMBING & PIPING, INC., *et al.*,

Plaintiffs-Appellees,

TOPOGRAPHIC, INC., EMPLOYEE SERVICES INC., HOME DEPOT U.S.A., INC., JENNIFER COCHRAN, AARON CRAKER, DAVID G. BEHENNA,

Interested Parties-Appellants,

versus

ANTHEM, INC., EXCELLUS HEALTH PLAN, INC., D.B.A. EXCELLUS BLUECROSSBLUESHIELD, PREMERA BLUE CROSS, BLUE CROSSBLUE

Appendix A

SHIELD OF ARIZONA, HEALTH CARE SERVICE CORPORATION, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Alabama. D.C. Docket No. 2:13-cv-20000-RDP.

Before WILLIAM PRYOR, Chief Judge, ABUDU, Circuit Judge, and BARBER,* District Judge.

WILLIAM PRYOR, Chief Judge:

This appeal requires us to determine whether the district court abused its discretion in approving a settlement agreement for a multi-district antitrust class action against the Blue Cross Blue Shield Association and its member plans. One objector, Home Depot U.S.A., Inc., contends that the settlement violates public policy by releasing prospective antitrust claims and violates due process and class-action rules by allowing the same counsel and class representatives to represent both an injunctive class and a damages class. Another objector, Topographic, Inc., argues that the district court misapplied the law and clearly erred in its factual findings in allocating the settlement fund between different groups of claimants. A third objector, David Behenna, contends that the district court erred in determining that the class counsels' fees

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* Honorable Thomas P. Barber, United States District Judge for the Middle District of Florida, sitting by designation.

were reasonable. And the final objectors, Jennifer Cochran and Aaron Craker, argue that the district court erred in allowing the settlement to treat the unclaimed settlement funds of employers differently than the unclaimed funds of employees and in approving a plan of distribution that fails to address the employers' disbursement obligations under the Employee Retirement Income Security Act of 1974 (ERISA). Because the district court did not abuse its discretion, we affirm.

I. BACKGROUND

The Blue Cross Blue Shield Association is a national health insurance company that owns and licenses its federal trademarks to local member plans and affiliated entities. The Association, its member plans, and the affiliated entities together make up what is known colloquially as Blue Cross.

Over a decade ago, subscribers who bought health insurance filed a class action against Blue Cross, alleging that it violated the Sherman Antitrust Act, 15 U.S.C. §§ 1-3, by restricting the member plans' ability to compete. The initial complaint sought to certify a class action and was the first of many filed across the country. *See* Complaint, *Cerven v. Blue Cross & Blue Shield of North Carolina*, No. 5:12-cv-17 (W.D.N.C. Feb. 7, 2012). Healthcare providers also filed antitrust claims against Blue Cross.

The actions against Blue Cross were consolidated in multi-district litigation in the Northern District of Alabama

and split into two tracks: one for subscribers and another for providers. This appeal concerns the subscriber-track litigation. In their consolidated complaint, the subscribers alleged that Blue Cross allocated geographic territories, limited member plans' competition by mandating a minimum percentage of business under the Blue Cross brand for each member doing business inside and outside their territories, restricted the right of member plans to be sold to companies outside the Association, and agreed to other ancillary restraints on competition. The subscribers sought money damages, treble damages, restitution, and injunctive relief.

In 2018, the district court granted partial summary judgment for the subscribers, ruling that, under section 1 of the Sherman Act, a per se standard applied to Blue Cross's alleged "aggregation of competitive restraints." *In re Blue Cross Blue Shield Antitrust Litig.*, 308 F. Supp. 3d 1241, 1267 (N.D. Ala. 2018). This ruling treated the challenged aggregated restraints as "necessarily illegal." *Id.* at 1259 (quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)). The district court did not rule on the standard that would govern individual restraints if considered separately. *Id.* at 1258.

Amid the ongoing litigation, the subscriber-track plaintiffs and Blue Cross began settlement discussions. Starting in 2017, a court-appointed special master assisted with the negotiations and held dozens of meetings and conference calls. The parties reached a settlement agreement after years of negotiations.

The settlement agreement divided the subscriber-track plaintiffs into two groups: a damages class under Federal Rule of Civil Procedure 23(b)(3) and an injunctive relief class under Rule 23(b)(2). The damages class includes "All Individual Members (excluding dependents and beneficiaries), Insured Groups (including employees, but excluding non-employee Members), and Self-Funded Accounts (including employees, but excluding non-employee Members) that purchased, were covered by, or were enrolled in a Blue-Branded Commercial Health Benefit Product." The injunctive class includes "all Individual Members, Insured Groups, Self-Funded Accounts, and Members that purchased, were covered by, or were enrolled in a Blue-Branded Commercial Health Benefit Product sold, underwritten, insured, administered, or issued by any Settling Individual Blue Plan during the Settlement Class Period." The two classes almost completely overlap in membership. The main difference is that the injunctive class includes beneficiaries and dependents of employees, and the damages class does not.

The damages class and the injunctive class include both "fully insured accounts" and "self-funded accounts." Fully insured accounts buy health insurance from Blue Cross, which as the insurer pays enrollees' medical costs, bears the risk that enrollees' claims will exceed premiums, controls the benefits structure, makes coverage decisions, and provides administrative services. The settlement class period for the fully insured claimants is February 7, 2008, through October 16, 2020.

Self-funded accounts do not buy health insurance. They instead purchase administrative services and unbundled products like vision, dental, and stop-loss insurance from Blue Cross. Self-funded accounts self-insure for healthcare costs, so the employer, not Blue Cross, pays for its employees' healthcare costs at Blue Cross rates. The self-funded account employees might contribute to their premiums or to the cost of the products purchased by their employer. The parties and the district court refer to the self-funded claimants as "self-funded," "self-insured," and "ASOs" interchangeably. In July 2019, self-funded counsel and a self-funded claimants' class representative were appointed to represent separately the self-funded claimants during the settlement negotiations. The settlement class period for the self-funded claimants is September 1, 2015, through October 16, 2020.

The parties first negotiated injunctive relief that requires Blue Cross to make structural reforms to increase competition between its members. The structural changes include eliminating the "National Best Efforts Requirement," which restricted the member plans' ability to market under other brands; allowing member plans to submit competing bids that were previously prohibited; restricting the application of the "Local Best Efforts Requirement," which required each member plan to generate a certain percentage of its revenue within its geographic service area using the Blue Cross brand; restricting the conditions that Blue Cross may place on acquisitions of member plans; eliminating several restrictions that Blue Cross had placed on contracts between self-funded accounts and healthcare providers;

and restricting Blue Cross's ability to include "Most Favored Nation-Differential" clauses in contracts with providers. Other features of Blue Cross's structure, like the Exclusive Service Area policy, are allowed to remain in place post-settlement. The settlement agreement also establishes a monitoring committee to oversee compliance with the structural changes dictated by the agreement. The monitoring committee is charged with mediating certain disputes and reviewing certain rule changes that Blue Cross may make during the five-year monitoring period following approval of the settlement.

The parties next negotiated relief for the damages class that creates a common fund of $2.67 billion to pay damages, provide for notice and administration, and pay attorneys' fees and costs. The subscribers engaged Kenneth Feinberg, a respected mediator in the field of settlement allocations, to help determine an appropriate allocation of the settlement fund between the fully insured claimants and the self-funded claimants. The settlement provides a plan of distribution that allocates 93.5 percent of the net settlement fund to the fully insured claimants and 6.5 percent to the self-funded claimants. This allocation is based on several factors, including the relative volume of payments by the fully insured claimants and the self-funded claimants, the strength of their respective claims, the shorter self-funded damages period, and the premiums paid for fully insured coverage in contrast with the administrative fees charged for self-funded accounts.

The plan of distribution provides a method for calculating damages for each kind of claimant. For fully

insured claimants, the actual premiums paid by individual members and insured groups will be used to determine the pro-rata share of the fully insured claimants' net settlement fund for each member and group. Individuals collect all their pro-rata share. The damages for fully insured groups, which include employers and employees, require further calculations. For fully insured groups in which the employer makes a claim and no employees do so, the employer will receive that group's entire pro-rata distribution. If any employee makes a claim, the group's pro-rata share must be allocated between the employer and any claiming employees. The settlement agreement does not relieve employers of any ERISA obligations, including any fiduciary obligation to distribute claims proceeds to their employees.

Because both fully insured employers and employees can bear a portion of the burden of the premiums paid, the plan of distribution includes a default option for apportioning premiums between fully insured employers and employees. Employees may decline to consent to the default option if they paid a higher contribution percentage than the default option and can provide proof supporting that higher percentage to the settlement administrator for approval. If an employee files a claim but his employer does not, the employee will receive credit for only his portion of the premium. Any money not claimed by employees is reallocated back to the employer. Any money not claimed by an employer is reallocated back to the fully insured claimants' net settlement fund.

For self-funded claimants, disbursements are allocated between employers and employees based on the estimated share of the administrative fees paid by each. The plan of distribution also creates a default option for self-funded accounts from which employees may opt out by presenting proof that they paid more money than the default option provides. The settlement agreement does not relieve self-funded employers from any ERISA obligations they have when distributing settlement funds to employees.

In addition to paying damages, the settlement fund pays attorneys' fees and costs. The parties agreed that the subscribers' counsel could seek a combined fee and expense award up to 25 percent of the $2.67 billion settlement fund. Counsel filed a petition seeking that full amount, with the attorneys' fees accounting for 23.47 percent and incurred expenses accounting for the remainder. This request was supported by a declaration of counsel, a declaration by the special master, and two expert reports that attested that the requested award was reasonable.

In exchange for the relief described above, the subscribers, on the effective date, release all claims "based upon, arising from, or relating in any way to" (i) the "factual predicates of the Subscriber Actions" as described in the relevant subscriber-track complaints from the beginning of time through the effective date; (ii) "any issue raised in any of the Subscriber Actions by pleading or motion;" or (iii) "mechanisms, rules, or regulations" adopted by Blue Cross that are "within the scope" of the settlement's structural relief provisions and

"approved through the Monitoring Committee Process during the Monitoring Period."

Post-settlement, subscribers may still sue Blue Cross, depending on the claim and whether the subscriber opted out of the agreement. Subscribers retain their right to pursue claims relating to coverage, benefits, and administration of claims that are not "based in whole or in part on the factual predicates of the Subscriber Actions or any other component" of the released claims. Those opting out of the settlement may bring claims for individual injunctive or declaratory relief, except that injunctive class opt-outs may not seek indivisible injunctive relief. A self-funded claimant who opts out retains the right to seek some individual injunctive or declaratory relief as defined by the settlement agreement.

After the subscribers moved for final approval of the settlement agreement, the district court conducted a two-day fairness hearing and heard arguments in support of the agreement and from objectors. Home Depot, a self-funded claimant and an opt-out from the damages class, objected to the scope of the release on the ground that it permits illegal conduct and violates public policy. Topographic, a self-funded claimant, objected to the allocation percentages between the fully insured claimants and the self-funded claimants as well as the self-funded claimants' shorter class period of five years.

The district court held another hearing to consider the Topographic objection to the allocation and allowed expert testimony and cross-examination. Before that hearing,

Topographic sought to discover communications between the fully insured claimants' counsel and the self-funded claimants' economic expert witness, Dr. Joseph R. Mason. The district court denied the discovery request based on the common-interest privilege.

Individual class members also raised objections. Behenna, an individual class member, objected to the attorneys' fees request and argued that the settlement required the district court to use the lodestar methodology to determine the reasonableness of the attorneys' fees because the subscribers' claims arose under a fee-shifting statute and because the case was not a common fund case. Cochran and Craker, employees of fully insured employers, objected to the plan of distribution allocating unclaimed employee funds to their employer.

Finally, the Department of Labor, a nonparty, filed a statement of interest in response to the proposed settlement agreement. The Department did not object to the settlement, but it expressed concerns that the settlement agreement might affect employers' and plan fiduciaries' obligations under ERISA. Specifically, the Department was concerned that the settlement did not account for ERISA at all.

The district court overruled all objections, rejected the concern raised by the Department of Labor, and approved the settlement agreement. In a separate order, it approved the subscriber counsel's attorneys' fees and expenses request. The district court also determined that there was "no just reason for delay in the entry of [the]

Final Order and Judgment" and severed the subscriber action from unrelated, still-pending claims in the provider track litigation. The district court certified its order for appeal under Federal Rule of Civil Procedure 54(b). *See Jenkins v. Prime Ins.*, 32 F.4th 1343, 1345 (11th Cir. 2022) (permitting appealable judgment as to fewer than all claims).

II. STANDARD OF REVIEW

We review the approval of a class action settlement agreement for abuse of discretion. *Day v. Persels & Assocs.*, 729 F.3d 1309, 1316 (11th Cir. 2013). Because "determining the fairness of the settlement is left to the sound discretion of the trial court, we will not overturn its decision absent a *clear* showing of abuse of that discretion." *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1273 (11th Cir. 2021) (alteration adopted) (citations and internal quotation marks omitted). "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." *Chi. Trib. Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1309 (11th Cir. 2001).

III. DISCUSSION

We divide our discussion into four parts. First, we address the issues raised by Home Depot. Second, we address the issues raised by Topographic. Third, we address Behenna's appeal. And last, we address the issues raised by Cochran and Craker.

A. Home Depot

Home Depot makes three arguments on appeal. It first argues that release of prospective claims violates public policy, perpetuates clearly illegal conduct, and exceeds the identical-factual-predicate doctrine. It next argues that allowing the injunctive class and the damages class to be represented by the same counsel and class representatives violates Federal Rule of Civil Procedure 23(a) and the Due Process Clause of the Fifth Amendment. And it finally contends that intraclass conflicts within the injunctive class violate Rule 23(a). None of these arguments persuade us that the district court abused its discretion.

1. The District Court Did Not Err by Approving the Release of the Injunctive Class Members' Claims.

We reject Home Depot's arguments that the district court abused its discretion when it approved the release provision of the settlement agreement. First, no public policy prohibits prospective releases in antitrust cases. Second, the release does not perpetuate clearly illegal conduct. Third, the release provision permissibly releases only claims based on an identical factual predicate to the underlying litigation.

a. The Release Does Not Violate Public Policy.

Home Depot argues that the release provision violates public policy because the antitrust laws depend on private

enforcement, and prospective releases undermine that regime. But releases of future claims are an important part of many settlement agreements. *See, e.g., Adams v. S. Farm Bureau Life Ins.*, 493 F.3d 1276, 1286 (11th. Cir. 2007); *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 247-48 (2d Cir. 2011); *Oswald v. McGarr*, 620 F.2d 1190, 1198 (7th Cir. 1980). And releases are commonly approved and enforced in class actions. *See Fager v. Centu-ryLink Commc'ns., LLC*, 854 F.3d 1167, 1176 (10th Cir. 2016) ("[I]nherent in the nature of a class-action settlement is the release of the claims of every class member (except those who opt out)."). The antitrust context is no different.

We have approved prospective releases of antitrust claims. For example, in *In re Managed Care*, 756 F.3d 1222, 1235-37 (11th Cir. 2014), we affirmed the approval of a settlement agreement that included a release of future antitrust claims arising from the same conduct. We have also reversed a refusal to enforce a "broad" release that extended to "any and all causes of action . . . of whatever kind, source, or character that are related to matters addressed in the class action, including antitrust and other statutory and common law claims." *Thomas v. Blue Cross and Blue Shield Ass'n*, 594 F.3d 814, 822 (11th Cir. 2010) (internal quotation marks omitted). And our predecessor court upheld the approval of an antitrust settlement that included a release of future claims. *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 234 (5th Cir. Unit B 1982). It mentioned the importance of "total peace" for defendants in any settlement and stated that the release of future claims was important for the antitrust settlement at issue specifically. *Id.* at 238.

Our sister circuits have approved and enforced prospective releases in antitrust cases too. The Second Circuit has approved broad releases in antitrust settlement agreements and explained that "[b]road class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country." *Wal-mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 106 (2d Cir. 2005). The Seventh Circuit has also approved releases in antitrust settlements when the release involved claims based on conduct central to the underlying litigation, even if they were ongoing after the effective date of the settlement agreement. *See, e.g., MCM Partners, Inc. v. Andrews-Bartlett & Assocs.*, 161 F.3d 443, 448-49 (7th Cir. 1998). Public policy does not categorically prohibit releases of future antitrust claims.

Home Depot cites authorities that rejected releases for over-breadth, but those authorities are inapposite. For example, in one decision, the Supreme Court rejected a release in an international commercial arbitration agreement that completely barred the application of the Sherman Act. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 616, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). The Court said that if the choice-of-law clause in the arbitration agreement worked in tandem with the choice-of-forum clause to require all antitrust claims to be decided under Swiss law instead of the Sherman Act, it would constitute "a prospective waiver of a party's right to pursue statutory remedies for antitrust violations" that would be "against public policy." *Id.* at 637 n.19. The Court was concerned about the complete absence of a statutory

remedy for any antitrust violation: it was possible that, under the arbitration agreement, the Sherman Act would never apply, no matter what the antitrust claims were or when they accrued. The Court did not hold that *every* prospective release of antitrust claims would violate public policy; it stated only that categorically barring parties from seeking relief under the Sherman Act regardless of the underlying claim would violate public policy. Similarly, in *Redel's Inc. v. General Elec. Co.*, our predecessor court held that a general release in a franchise agreement could not bar antitrust claims arising after the effective date of the agreement because of public policy concerns. 498 F.2d 95, 99-100 (5th Cir. 1974). The release in *Redel's* was broad—it released "all claims, demands, contracts, and liabilities." *Id.* at 98 (internal quotation marks omitted). And the court held that if it were to bar claims arising from later antitrust violations without any factual or temporal limitation, the release would violate public policy. *Id.* at 99.

The release in this appeal is limited and affects the rights of only some private individuals to sue Blue Cross, and it does not affect public enforcement of the antitrust laws. Private enforcement is only one mechanism by which federal antitrust laws may be vindicated. The government may also enforce the antitrust laws against companies like Blue Cross. 15 U.S.C. §§ 15a, 15c, 15f. And the settlement agreement does not bar the Department of Justice or state attorneys general from pursuing civil claims or criminal charges against Blue Cross. Home Depot's concern that the release will undermine the enforcement of the antitrust laws is overstated.

b. The Release Does Not Perpetuate Clearly Illegal Conduct.

Home Depot argues that the settlement should not have been approved because it perpetuates "clearly illegal conduct" by allowing the continuation of the Exclusive Service Area policy. In the antitrust context, a settlement agreement may perpetuate conduct when its illegality is uncertain. *Bennett v. Behring Corp.*, 737 F.2d 982, 987 (11th Cir. 1984). The classification of the conduct is crucial.

Under section 1 of the Sherman Act, two standards govern the review of challenged conduct: the per se rule and the rule of reason. *Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 457-58, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986). Conduct governed by the per se rule "unequivocally" violates the Sherman Act. *Consultants & Designers, Inc. v. Butler Serv. Grp., Inc.*, 720 F.2d 1553, 1562 (11th Cir. 1983). Per se violations clearly restrain competition. *Id.* at 1561. The "rule of reason," in contrast, governs conduct that does not per se violate the Act. *Ind. Fed'n of Dentists*, 476 U.S. at 457-58. "Under the rule of reason, the test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Levine v. Cent. Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996) (quoting *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918) (internal quotation marks omitted)). Conduct subject to the rule of reason does not necessarily violate the Sherman Act: a plaintiff must prove its anticompetitive effect. *Id.* So long

as the conduct perpetuated under a settlement agreement does not per se violate antitrust law, the settlement may be approved, even if the perpetuated conduct might not withstand scrutiny under the rule of reason. *Bennett*, 737 F.2d at 987.

The district court did not abuse its discretion. Home Depot offers no evidence that the Exclusive Service Area policy is a per se violation of the Sherman Act. It instead argues that the district court already ruled that the Exclusive Service Area policy is subject to the per se rule. But the district court never made that ruling. It ruled only that the *aggregation* of all the challenged restraints constituted a per se violation of antitrust law; it did not rule that any individual restraint constituted a per se violation. Because Blue Cross materially changed its system by adding procompetitive features and eliminating some anticompetitive features, the district court concluded that the post-settlement system, which included the Exclusive Service Area policy, would not be clearly illegal. Its perpetuation was "no bar to approval." *Id.*

c. The Release Covers Only Claims Based on an Identical Factual Predicate.

Home Depot argues that the settlement exceeds the limits of the identical-factual-predicate doctrine because it releases claims arising from "any issue raised in any of the Subscriber Actions by pleading or motion" and from "mechanisms, rules, or regulations" by the individual plans and the Association, within the scope of the settlement agreement as approved by the monitoring committee.

Home Depot argues that this language exceeds the identical factual predicate because it requires only some overlap with a fact or issue raised in the litigation.

In its review of a settlement, "a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 377, 116 S. Ct. 873, 134 L. Ed. 2d 6 (1996) (citation and internal quotation marks omitted). Under the identical-factual-predicate doctrine, a settlement agreement may release claims that share a common nucleus of operative fact with the claims in the underlying litigation. *See Adams*, 493 F.3d at 1289. In practice, the doctrine mirrors res judicata: a release may lawfully bar later actions arising from the same cause as the settled litigation. *TVPX ARS, Inc. v. Genworth Life and Annuity Ins.*, 959 F.3d 1318, 1325 (11th Cir. 2020). We have recognized that res judicata applies not only to the precise legal theory presented in the previous litigation but to all legal theories and claims arising out of a common nucleus of fact. *Trustmark Ins. v. ESLU, Inc.*, 299 F.3d 1265, 1270 n.3 (11th Cir. 2002).

The district court did not abuse its discretion. The release it approved is no broader than other releases we have approved. We have approved settlement agreements releasing claims "in any way related" to the factual predicate of the underlying litigation. *Thomas*, 594 F.3d at 817 (requiring the district court to enforce a release provision that "released and forever discharged" "all causes of action," including antitrust claims, "that are, were or could have been asserted against any of the

Released Parties by reason of, arising out of, or in any way related to any of the facts, acts, events, transactions, occurrences, courses of conduct, business practices, representations, omissions, circumstances or other matters referenced in the Action"); *see also In re Managed Care*, 756 F.3d at 1226 (holding that the district court did not abuse its discretion in enforcing a release that discharged all claims "based on" the releasing party's prior conduct). So too here.

The settlement agreement limits the release to claims arising from the factual predicates of the subscriber action. It defines released claims as those "based upon, arising from, or relating in any way to: (i) the factual predicates of the Subscriber Actions . . . (ii) any issue raised in any of the Subscriber Actions by pleading or motion; or (iii) mechanisms, rules, or regulations by the Settling Individual Blue Plans and [the Association] within the scope of" the relief awarded to the injunctive class. This language cabins the scope of the release. The release does not extend beyond claims arising from the common nucleus of operative fact: all the released claims either were raised or could have been raised during the litigation that preceded the settlement. The release does not bar any claims that could not have been litigated before settlement or any claims related to conduct that was not challenged in the underlying lawsuit.

2. The District Court Did Not Err by Approving a Settlement in Which the Same Named Plaintiffs and Counsel Represented Both the Injunctive Class and the Damages Class.

Home Depot next argues that the settlement violates Rule 23 and the Due Process Clause because the same named plaintiffs and counsel represented the injunctive class and the damages class when the classes had competing settlement priorities. *See* FED. R. CIV. P. 23(a)(4); U.S. CONST. amend. V. Rule 23(a)(4) and the Due Process Clause require adequate representation of settlement class members by the named representatives and counsel. Home Depot argues that the representation of the injunctive class was *inherently* inadequate because of the shared representation. We disagree.

Our precedents do not categorically prohibit the same plaintiffs and counsel from representing an injunctive relief class and a damages class. Minor conflicts are not enough to render representation inadequate: the conflict must be "substantial" and "fundamental" to the specific issues in controversy. *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003) (citation and internal quotation marks omitted). "A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class." *Id.* Home Depot fails to identify any substantial conflict between the settlement classes. It points out that the Rule 23(b)(2) class would receive injunctive relief and the Rule 23(b)(3) class would receive

distributions from the settlement fund. But it never explains why this difference is "fundamental." *Id.* Unlike the two subclasses in *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 233-34 (2d Cir. 2016), on which Home Depot relies, the classes' memberships here are virtually identical. Considering that most of the class members were eligible for both injunctive and monetary relief, it does not follow that the class representatives and counsel had any incentive to trade away injunctive relief in favor of damages. *Compare In re 1:09-md-02036-JLK, Checking Account Overdraft Litig.*, No. 20-13367, 2022 U.S. App. LEXIS 4277, 2022 WL 472057, at *4-5 (11th Cir. Feb. 16, 2022) (holding that common representation was adequate when different classes of plaintiffs were injured in the same way by the same conduct), *with In re Payment Card*, 827 F.3d at 235 (holding that representation was inadequate when there was little overlap between the Rule 23(b)(2) class and the Rule 23(b)(3) class). Given the near-complete overlap in class membership, Home Depot also does not offer any evidence that one class was harmed by conduct that benefitted the other. Because there was no fundamental conflict of interest between the representatives and the classes, the district court did not abuse its discretion.

3. Home Depot Forfeited Arguments about Intraclass Conflict.

Home Depot also argues that intraclass conflicts within the injunctive class violated Rule 23. The subscriber-proponents moved to strike those arguments because they were not made in the opening brief. We will

not consider issues that a party fails to brief adequately. "A party fails to adequately brief a claim when he does not plainly and prominently raise it, for instance by devoting a discrete section of his argument to those claims." *Sapuppo v. Allstate Floridian Ins.*, 739 F.3d 678, 681 (11th Cir. 2014) (citation and internal quotation marks omitted). If a party makes only passing references to an issue in its statement of the case or its summary of the argument in the opening brief, the issue is considered abandoned. *Id.* at 681-82. We will not consider arguments advanced by appellants for the first time in a reply brief. *Id.* at 683.

We agree that Home Depot abandoned these arguments by only briefly referencing potential intraclass conflicts in the summary of the argument in its opening brief. Home Depot did not devote a discrete section of its opening brief to developing the arguments. Each section Home Depot devoted to the adequacy of representation in its opening brief addresses only conflicts between the two classes, not conflicts *within* the classes. Yet Home Depot's reply brief devotes nine pages to potential intraclass conflicts. Because those arguments were not developed in its opening brief, we will not consider them. We grant the subscriber-proponents' motion to strike.

B. Topographic

Topographic challenges the allocation of the settlement funds. It argues that the district court misapplied Rule 23(e)(2)(D) and made erroneous findings in approving the allocation, and it contends that the district court abused its discretion when it approved a shorter damages period

for the self-funded claimants. It challenges the approval of the fund percentage allocated to the self-funded claimants. And it argues that the settlement fund should have been allocated to all claimants on the same basis. None of these arguments persuade us that the district court abused its discretion.

1. The District Court Applied the Correct Scrutiny to the Settlement Allocation.

Topographic contends that the district court failed to apply the correct scrutiny to the settlement allocation. It argues that the district court misapplied Rule 23(e)(2)(D) as amended because it approved a facially unequal allocation. It also contends that the district court based its approval of the allocation on inadequate evidence and erred in relying on Dr. Mason's expert report. Topographic contends that, in approving the allocation, the district court also erroneously found that self-funded claimants purchased only administrative services from Blue Cross. And Topographic argues that the district court erred when it denied discovery of emails between Dr. Mason and the fully insured claimants' counsel. We address each argument in turn.

a. The District Court Adhered to Rule 23(e)(2).

Topographic argues that the facially unequal allocation between the fully insured claimants and the self-funded claimants establishes that the district court misapplied Rule 23(e)(2)(D), which requires class members to be

treated equitably. *See* Fed. R. Civ. P. 23(e)(2)(D) ("If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether . . . the proposal treats class members equitably relative to each other."). But the text of the amended rule requires equity, not equality, and treating class members equitably does not necessarily mean treating them all equally.

Topographic highlights that some of our sister circuits have explained that since Rule 23(e)(2) was amended, a settlement should not be given a presumption of reasonableness whenever it is the product of an arm's-length negotiation. *See, e.g., Moses v. N.Y. Times Co.*, 79 F.4th 235, 243 (2d Cir. 2023); *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1049 n.12 (9th Cir. 2019). Although we have not interpreted the 2018 amendment, we have recognized that "the district court should consider the impact of Congress' 2018 amendments" to Rule 23(e) when applying it. *Williams v. Reckitt Benckiser LLC*, 65 F.4th 1243, 1261 (11th Cir. 2023). But the district court did not presume that the allocation was reasonable because it was negotiated at arm's length.

The district court instead reviewed the allocation under each subpart of Rule 23(e)(2). It found that the class members were adequately represented in the light of counsel's experience, vigorous advocacy over the course of the litigation, and diligent efforts to obtain discovery and engage expert witnesses. *See* Fed. R. Civ. P. 23(e)(2)(A). It determined that the settlement was negotiated at arm's length because there was no evidence of collusion and

counsel worked diligently through multiple impasses with the special master and mediators to achieve resolution. *See id.* at 23(e)(2)(B). The district court then analyzed the adequacy of relief, considering the costs, risks, and potential delay of trial and appeal, the effectiveness of distributing relief to the class, and the reasonableness of the requested attorneys' fees. *See id.* at 23(e)(2)(C). It considered the length and expense of continued litigation, the efficacy of the plan of distribution, the opportunity for claimants to participate, and the retention of an outside firm to process claims. And the district court found that no collateral agreements needed to be identified for Rule 23(e)(2)(C)(iv). Finally, the district court ruled that the proposal treats class members equitably relative to each other, as required by Rule 23(e)(2)(D). It considered the differences between the self-funded claimants and the fully insured claimants like differing litigation risks, incurred costs, and claim strengths before concluding that the two were treated equitably. The district court did not presume that the settlement was reasonable because it was negotiated at arm's length.

Topographic argues that the district court abused its discretion because our precedent requires settlement proponents to meet a heightened evidentiary burden under *Holmes v. Cont'l Can Co.*, 706 F.2d 1144 (11th Cir. 1983). But Topographic misunderstands that precedent. Although we have stated that "a disparate distribution favoring the named plaintiffs requires careful judicial scrutiny into whether the settlement allocation is fair to the absent members of the class," *id.* at 1148, we have not extended this rule to all unequal distributions of settlement allocations. We impose a heightened burden

only when named plaintiffs receive a benefit at the expense of the absent class members. *Id.* at 1147-48.

There is no *Holmes* issue here: the self-funded claimants were represented by their own counsel and class representatives in the settlement negotiations and received some compensation from the settlement. Although the settlement agreement's allocation is facially unequal, it is not facially unfair. The district court did not abuse its discretion.

b. The District Court Had Evidentiary Support for the Settlement Allocation.

Topographic next argues that the district court approved the settlement allocation based on inadequate evidence and erroneous factual findings. It contends that the allocation could not be approved without a separate analysis of damages for the self-funded claimants. But "when there are subclasses, each independently represented, an allocation formula may be negotiated without each subclass undertaking extensive analysis of its relative damages *if* the available evidence is, at the time of the negotiations, insufficient to indicate a need for it." *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 219 (5th Cir. 1981). The self-funded claimants were represented by separate counsel during the settlement negotiations, and Topographic offers no evidence of a need for a separate analysis. Topographic also points to no caselaw suggesting that a separate analysis for the self-funded claimants was necessary.

Topographic argues that the district court abused its discretion in approving the settlement allocation without evidentiary support. In approving a settlement agreement, the district court must undertake an analysis of the facts and the law relevant to the proposed compromise and support its conclusions "by memorandum opinion or otherwise in the record." *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). The district court must provide us a basis for reviewing the exercise of its discretion. *Holmes*, 706 F.2d at 1147.

Topographic accuses the district court of adopting the representations of class counsel and the mediator without evidentiary support. But the district court cited extensive evidence to support its finding that the allocation was reasonable because of the comparative strengths of each class's antitrust claims and relative competitiveness of the fully insured market. For example, the district court cited several exhibits establishing that fully insured accounts are four to ten times more profitable than self-funded accounts. It also pointed to evidence that self-funded accounts were often loss-leaders for Blue Cross. It relied on expert testimony that the self-funded market was significantly more competitive, more price sensitive, and less capable of sustaining overcharges than the fully insured market. These facts supported the comparative strength of the fully insured claimants' underlying antitrust claims. The district court based its decision on more than the assurances of counsel and the mediator.

c. The District Court Did Not Abuse its Discretion in Relying on Dr. Mason's Expert Report.

Topographic argues that the district court abused its discretion in relying on the expert report of Dr. Joseph Mason, an economist, in its approval of the settlement allocation. Topographic contends that Dr. Mason's report lacks evidentiary support and that the district court needed to justify its reliance on Dr. Mason's report over the other experts. We disagree.

Dr. Mason's report has an evidentiary basis. The record, including evidence from Blue Cross about the differences between the fully insured market and the self-funded market, supports Dr. Mason's conclusions. For example, the record contains documents from Blue Cross that establish differences in profitability between fully insured accounts and self-funded accounts, as well as documents that establish differences between the fully insured market and the self-funded market. And contrary to Topographic's argument, Dr. Mason's report was not based on the assumption that self-funded accounts purchase only administrative services from Blue Cross. In his report, Dr. Mason used four proxy methods to analyze the relative costs borne by the two classes of claimants. In addition to directly comparing fully insured accounts' premiums with self-funded accounts' administrative fees, the analysis compared the relative net revenue, overcharge differentials, operating gain differentials, and revenue-per-member growth differences between fully insured and self-funded accounts. The record belies

any assertion that Dr. Mason's report depended solely on comparing administrative fees with fully insured premiums. The district court also explained why it credited Dr. Mason's testimony. It recounted Dr. Mason's credentials and experience and cited evidence supporting his expert opinions.

Topographic argues that the district court failed to discuss the Topographic expert's report, and that the failure to do so led to a series of errors. But choosing to credit one expert opinion over another is within the sound discretion of the district court. *Battle v. United States*, 419 F.3d 1292, 1299 (11th Cir. 2005) ("[A] district court does not clearly err simply by crediting one opinion over another where other record evidence exists to support the conclusion." (citation omitted)). The district court cited evidence that supported its decision to credit Dr. Mason's report, which is all our precedent required it to do. *See In re Corrugated Container*, 643 F.2d at 215.

d. The District Court Did Not Erroneously Find that Self-Funded Claimants Pay Only Administrative Fees.

Topographic argues next that the district court erroneously found that self-funded claimants pay only administrative fees. Topographic asserts that some self-funded claimants also purchase other unbundled services like dental, vision, or stop-loss insurance from Blue Cross. It contends that this factual error was central to the approval of the settlement agreement. Several

state insurance departments as *amici curiae* echo this concern. They worry that the district court's opinion could be misconstrued as ruling that stop-loss insurance is not insurance, which could cast doubt on the states' authority to regulate stop-loss insurance products.

The district court made no error when it described the differences between the two groups of claimants. It did not rule that self-funded claimants pay only claims processing fees or that stop-loss insurance is not insurance. Instead, it described the distinction between the fully insured claimants and the self-funded claimants: one buys full-service health insurance, and the other does not. Self-funded accounts are often called "administrative services only" or "ASOs"—in fact, the self-funded claimants are sometimes referred to as "the ASOs" in the briefing.

Even if the district court's statement were a factual finding, it is not clear how the "finding that [the] Self-Funded [Claimants] 'purchased administrative services only,' not 'insurance' or other ancillary services," was central to the approval of the settlement. Nothing in the record suggests that the district court's analysis would have changed even if it had defined self-funded accounts as those that purchased administrative services, stop-loss insurance, dental insurance, vision insurance, and other unbundled products. What matters is whether there is a difference between the markets in which the fully insured claimants and self-funded claimants participated. Because the fully insured claimants purchased full-service health insurance from Blue Cross, they paid premiums and other charges that the self-funded claimants did not. That some

self-funded claimants purchased additional unbundled products does not change that reality. So even if the statement that the self-funded claimants "purchased administrative services only" were a finding, it was not central to the approval of the settlement and was not reversible error.

e. The District Court Correctly Denied the Self-Funded Objectors' Discovery Request under the Common-Interest Privilege.

The district court also did not abuse its discretion when it denied the self-funded objectors' request to discover communications between the fully insured claimants' counsel and Dr. Mason under the common-interest privilege, which applies when "multiple clients share a common interest about a legal matter." *United States v. Almeida*, 341 F.3d 1318, 1324 (11th Cir. 2003) (citations and internal quotation marks omitted). The privilege "serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989). "The need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter." *Almeida*, 341 F.3d at 1324 (citations and internal quotations omitted). The common-interest privilege requires only "a substantially similar legal interest," *In re Teleglobe Communs. Corp.*, 493 F.3d 345, 365 (3d Cir. 2007), not a "complete unity of interests among

the participants," *United States v. Bergonzi*, 216 F.R.D. 487, 495 (N.D. Cal. 2003). And "it may apply where the parties' interests are adverse in substantial respects." *Id.*

The district court did not abuse its discretion when it denied the self-funded objectors' discovery request based on the common-interest privilege. The self-funded objectors sought to discover communications between their expert, Dr. Mason, and the fully insured claimants' counsel to determine "Fully Insured [Claimants'] counsel's input into the Mason Report." The self-funded claimants and the fully insured claimants had a substantially similar interest in the litigation against Blue Cross and in the settlement negotiations. That the details of the settlement put them in adverse positions does not undermine their broader mutual interest.

Even if the district court misapplied the common-interest privilege, we would not overturn its decision without any proof that the application harmed the self-funded objectors. "[W]e will not overturn discovery rulings unless . . . [the] ruling resulted in substantial harm to the appellant's case." *Harrison v. Culliver*, 746 F.3d 1288, 1297 (11th Cir. 2014) (citation and internal quotation marks omitted). On appeal, Topographic makes no showing of harm. It instead suggests that there *could have been* collusion between Dr. Mason and the fully insured claimants' counsel and that discovery could have unearthed it. But Topographic admitted to the district court that there was no evidence of collusion and that it did not believe collusion tainted the settlement. The district court did not abuse its discretion when it denied the objectors' discovery request.

2. The District Court Did Not Abuse its Discretion when It Approved the Self-Funded Claimants' Shorter Damages Period.

Topographic argues that the district court abused its discretion in approving the self-funded claimants' five-year damages period while also approving the fully insured claimants' 12.5-year damages period. The shorter damages period, Topographic contends, is based on the erroneous determination that the self-funded claimants did not join the litigation until September 1, 2015. Topographic argues that the original subscriber complaint notified Blue Cross of the self-funded claimants' damages claims, and so the self-funded claimants are entitled to a damages period dating to 2008—the same starting date as the fully insured claimants. And even if self-funded accounts were not included in the *Cerven* damages class, Topographic argues that because the *Cerven* complaint included claims for injunctive relief brought on behalf of the self-funded accounts, the ruling that the self-funded claimants' later request for damages did not relate back under Federal Rule of Civil Procedure 15(c) was erroneous.

Whether the self-funded claimants' damages period dates to 2008 depends on whether the self-funded claimants were included in the *Cerven* complaint. Under Rule 15(c), the original complaint must put the defendants on notice of the claims being asserted. *Makro Cap. of Am., Inc. v. UBS AG*, 543 F.3d 1254, 1260 (11th Cir. 2008); Fed. R. Civ. P. 15(c). Topographic cites record evidence that could be read to suggest that Blue Cross had notice

of the self-funded claimants' damages claims, and the proponents of the settlement agreement offer contrary evidence. But what matters is whether any *pleading* gave Blue Cross notice of the self-funded claimants' request for damages.

The *Cerven* complaint does not include self-funded accounts in its definition of the damages class. It defines the damages class as "[a]ll persons or entities who . . . have paid health insurance premiums to [Blue Cross North Carolina] for individual or small group full-service commercial health insurance." *See* Complaint, *Cerven*, No. 5:12-cv-17. Self-funded accounts do not buy "full-service commercial health insurance" from Blue Cross and do not pay health insurance premiums. The damages class, as defined in the complaint, did not include self-funded claimants, and it did not give Blue Cross notice of the self-funded claimants' potential claims for damages.

Topographic argues that even if self-funded accounts were not included in the damages class of the *Cerven* complaint, self-funded accounts were included in the injunctive class, which should have put Blue Cross on notice that self-funded accounts could later seek damages. But the injunctive class definition also does not clearly include self-funded accounts. The complaint defines the injunctive class as "[a]ll persons or entities . . . who are currently insured by any health insurance plan that is currently a party to a license agreement with [Blue Cross] that restricts the ability of that health insurance plan to do business outside of any geographically defined area." Although some self-funded accounts purchase insurance

products like stop-loss insurance from Blue Cross, they are not "insured" for healthcare. Self-funded accounts pay their own costs for employee healthcare. In other words, in-stead of having Blue Cross pay for healthcare costs, self-funded accounts pay for administrative services and to obtain insurer rates with healthcare providers. The self-funded employers pay their employees' healthcare costs. It is not clear from the *Cerven* complaint's definition of the injunctive class that self-funded accounts are included because they are not necessarily "insured by [a] health insurance plan."

Other parts of the *Cerven* complaint confirm that self-funded accounts were not included in the damages or injunctive classes. The complaint defines self-funded accounts as those that purchase only administrative services, highlighting the difference between self-funded and fully insured accounts. In its description of the anticompetitive structure that it attacks, the complaint never mentions stop-loss insurance or other unbundled products. That the *Cerven* complaint attacks "the Blue structure" is not enough for the self-funded claimants' damages claims to relate back. The complaint did not put Blue Cross on notice that the self-funded claimants would seek damages, and the complaint did not challenge anticompetitive conduct in the self-funded market. *See Caron v. NCL (Bahamas), Ltd.*, 910 F.3d 1359, 1368 (11th Cir. 2018) (finding that the plaintiffs' new claim did not relate back because the original complaint "did not put [the defendant] on notice" that the new claim "could be relevant to the case"). The district court did not abuse its discretion in ruling that the self-funded claimants' request

for damages did not relate back to the *Cerven* complaint and in approving a settlement allocation with a shorter damages period for them.

3. The District Court Did Not Abuse its Discretion in Approving the 6.5 Percent Allocation for the Self-Funded Claimants.

Topographic also argues that the 6.5 percent settlement allocation for the self-funded claimants was based on "an arbitrary, retrospective 50% discount on top of the truncated class period." Approving the 6.5 percent allocation on top of a shorter damages period, according to Topographic, "halv[ed] the Self-Funded [Claimants'] damages allocation a second time." Topographic argues that the district court made three errors in approving the allocation: (1) its approval was based on the clearly erroneous finding that self-funded plans arrived late to the litigation, (2) it approved the application of the 50 percent discount factor without legal or factual support, and (3) it failed to scrutinize the unequal treatment of the self-funded claimants compared with the fully insured claimants.

Topographic is wrong on all three points. First, as we have explained, the district court did not err when it ruled that the self-funded claimants "arrived late to the litigation" because they were not included in either class in the *Cerven* complaint. Second, the argument that there is no "legal or factual support" for the discount is a gross misstatement. The discount, which Dr. Mason applied in his expert report, reflects that the self-funded

claimants, had they been forced to litigate independently without the benefit of the work done by the fully insured claimants, would have faced many years of uncertain and expensive litigation. And the self-funded claimants had comparatively weaker antitrust claims because of the relative competitiveness of the self-funded market. These facts support the approval of the allocation. *See, e.g., In re Corrugated Container*, 643 F.2d at 220; *In re Holocaust Victim Assets Litig.*, 413 F.3d 183, 186, 14 Fed. Appx. 132 (2d Cir. 2005); *In re Agent Orange Prod. Liab. Litig. MDL No. 381*, 818 F.2d 179, 183 (2d Cir. 1987). The district court did not abuse its discretion.

4. The District Court Did Not Abuse Its Discretion when It Allocated the Settlement Fund Between the Claimants.

Finally, Topographic argues that instead of dividing the claimants into classes and allocating the settlement fund between them, the settlement should have been distributed to all subscribers on the same basis. Topographic contends that the district court created a "fundamental intra-class conflict" by creating two sub-classes. *See Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 188-89 (3d Cir. 2012).

But the inverse is true. There might have been a fundamental intraclass conflict had the district court *not* created a subclass for self-funded accounts. The self-funded claimants and the fully insured claimants incurred different costs during the litigation, and their respective antitrust claims involved different markets. Had the

district court not divided them into two subclasses, the potentially adverse interests of the self-funded accounts and the fully insured accounts could have led to a conflict of interest. *See id.* at 189-90.

In any event, dividing a class with potentially adverse interests into subclasses is within the sound discretion of the trial court. *See Califano v. Yamasaki*, 442 U.S. 682, 703, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979); *Clark Equip. Co. v. Int'l Union, Allied Indus. Workers of Am., AFL-CIO*, 803 F.2d 878, 880 (6th Cir. 1986). And the record supports the conclusion that the self-funded claimants and the fully insured claimants had at least potentially adverse interests. The district court did not abuse its discretion in dividing them into subclasses.

C. Behenna

Behenna, a *pro se* class member, argues that the district court erred in not applying a bifurcated analysis when determining the reasonableness of the attorneys' fees award. Because Behenna failed to raise this issue before the district court, it is forfeited. And even if the issue were not forfeited, the district court did not abuse its discretion.

1. Behenna Forfeited the Bifurcated Analysis Issue.

Behenna contends that the district court erred in failing to analyze separately attorneys' fees for billings related to injunctive relief and billings related to damages

when approving the attorneys' fees in the settlement agreement. He argues that the district court should have used the lodestar methodology to assess appropriate fees for work related to the injunctive relief and then used the common fund doctrine to assess appropriate fees for work related to the monetary relief. But Behenna forfeited that issue by failing to raise it in the district court.

If a party tries to raise an issue for the first time on appeal, we ordinarily will not consider it. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004). Behenna made two objections in the district court: first, that the lodestar methodology should be used to determine the subscriber counsel's fee, and second, that the case is not a common fund action. Neither objection hinted at the bifurcated analysis that Behenna now requests. Indeed, his objection that the settlement is not a common fund case directly contradicts his argument on appeal that the district court should have applied a common fund analysis to the damages-related attorneys' fees.

2. Alternatively, the District Court Did Not Abuse its Discretion.

Even if the bifurcated analysis issue were not forfeited, the district court did not abuse its discretion. Behenna contends that a bifurcated analysis was necessary because fee-shifting statutory awards are subject to the lodestar methodology, and Section 16 of the Clayton Act, which governs the injunctive class's claims, is a fee-shifting statute. But whether the claim arose under a fee-shifting statute "is of no consequence." *In re Equifax*, 999 F.3d

at 1279 n.24. What matters is the kind of fund that the settlement agreement creates. *See In re Home Depot Inc.*, 931 F.3d 1065, 1082 (11th Cir. 2019) ("Where there has been a settlement, the basis for the statutory fee has been discharged, and it is only the fund that remains." (citation and internal quotation marks omitted)). The settlement agreement created a common fund. And, in this context, our precedents make clear that the percentage-of-the-fund methodology should be used to determine the reasonableness of attorneys' fees. *See In re Equifax*, 999 F.3d at 1280; *see also Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991). The district court did not abuse its discretion in using the percentage-of-the-fund analysis, not the lodestar methodology or some combination of the two.

The district court also correctly applied the percentage-of-the-fund doctrine. In a common fund settlement, attorneys' fees "shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Camden I*, 946 F.2d at 774. Courts typically award fees of 20 to 30 percent of the common fund, *see In re Home Depot*, 931 F.3d at 1076, and view the mean of that range—25 percent—as a rough benchmark, *Camden I*, 946 F.2d at 775. If a fee award falls between 20 and 25 percent, it is presumptively reasonable. *See Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1242 (11th Cir. 2011). If the fee exceeds 25 percent, the district court must assess the reasonableness of the percentage using the 12 *Johnson* factors. *See Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87,

109 S. Ct. 939, 103 L. Ed. 2d 67 (1989). The actual fee sought by the subscribers' counsel was 23.47 percent of the common fund. Even though this fee fell within the range of reasonableness, *Faught*, 668 F.3d at 1242, the district court reviewed the percentage under the *Johnson* factors. As a cross-check, the district court then used the lodestar to confirm the reasonableness of the percentage. The *Johnson* factors and the lodestar cross-check confirmed that a fee award of 23.47 percent was reasonable. That thorough analysis followed our precedents and was not an abuse of discretion.

D. Cochran and Craker

Cochran and Craker make two arguments on appeal. First, they argue that the plan of distribution violates Rule 23(e)(2)(D) because the unequal distribution of unclaimed funds suggests inadequacy of representation for the employees of fully insured employers. Second, they argue that the district court abused its discretion in failing to address ERISA concerns raised by the settlement agreement. We address these arguments in turn.

1. The Plan of Distribution Does Not Violate Rule 23(e)(2)(D).

The district court did not abuse its discretion in approving a distribution of unclaimed funds that differently allocates the unclaimed funds of the fully insured employers and the unclaimed funds of those employers' employees. Cochran and Craker argue that the settlement agreement's plan of distribution is

fundamentally unfair because it reallocates the unclaimed funds of fully insured employers back into the settlement fund to be distributed on a pro-rata basis to other fully insured claimants but reallocates the unclaimed funds of the employees to the employers. This distribution scheme, Cochran and Craker argue, suggests an adequacy of representation issue under Rule 23(e).

The premise of Cochran and Craker's critique of the plan of distribution—that it is fundamentally unfair—is false. Cochran and Craker argue that the district court abused its discretion in approving the plan of distribution despite Rule 23(e)(2)(D)'s requirement that all class members be treated equitably relative to each other. That some class members' unclaimed funds are treated differently than others, they argue, is inherently inequitable and shows that the employees of fully insured employers were not adequately represented. But like Topographic, Cochran and Craker conflate the terms "equitably" and "equally." The plan of distribution undoubtedly treats funds unclaimed by employers differently than the funds unclaimed by their employees, but the record shows that the plan of distribution was fair and reasonable.

The fully insured employers bore a heavier monetary burden than their employees because most employers paid a portion of their employees' premiums. And some employees of fully insured employers did not pay *any* portion of the premiums for their health insurance coverage. The plan of distribution might be unequal, but it is not inequitable.

Cochran and Craker also fail to show that the employees of the fully insured employers were not adequately represented or that the district court abused its discretion in not creating a separate subclass for the employees. A conflict of interest must be based on differences in the economic interests of class representatives and unnamed class members, and the conflict must be so clear and substantial that it is "fundamental" to the issues in controversy. *Valley Drug Co.*, 350 F.3d at 1189 (citation and internal quotation marks omitted). Neither requirement is satisfied here.

The alleged inequity is not between class representatives and absent class members. It is between fully insured employers—only some of whom are class representatives—and their employees. There is no fundamental conflict between these two groups. Dividing them into subclasses would be necessary only if they had divergent interests. *See In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 272 (3d Cir. 2009). But the district court made clear that the subscriber class representatives share the same interests as absent class members, assert the same or substantially similar claims stemming from a common event, and share the same kinds of injuries. Because fully insured employers made more payments to Blue Cross on behalf of their employees and both employers and employees were subject to the same Blue Cross health insurance plans, it is hard to see how these two groups would have divergent interests requiring separate representation.

2. ERISA Is No Impediment to Approving the Settlement Agreement.

Cochran and Craker also echo the concern of the Department of Labor that the settlement agreement may affect the duties that employers and plan fiduciaries have under ERISA. They argue that because the plan of distribution does not expressly instruct employers to comply with ERISA, its silence could lead to violations when the settlement proceeds are disbursed. But as the district court explained, nothing in the settlement agreement changes ERISA rights: the order approving the settlement states that "all ERISA duties still apply" and that "all ERISA fiduciaries must comply with those duties." Plans and employees retain their rights to sue under ERISA. The fear of a speculative violation is no reason to reject the settlement.

IV. CONCLUSION

We **AFFIRM** the judgment approving the settlement agreement.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION, FILED AUGUST 9, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Master File No.: 2:13-CV-20000-RDP

IN RE: BLUE CROSS BLUE SHIELD ANTITRUST LITIGATION (MDL NO.: 2406)

August 9, 2022, Decided;
August 9, 2022, Filed

FINAL ORDER AND JUDGMENT GRANTING APPROVAL OF SUBSCRIBER CLASS ACTION SETTLEMENT AND APPOINTING SETTLEMENT ADMINISTRATOR

This matter is before the court on Subscriber Plaintiffs'[1] Motion for Final Approval of Class Settlement

1. Subscriber Plaintiffs are Galactic Funk Touring, Inc.; American Electric Motor Services, Inc.; CB Roofing, LLC; Pearce, Bevill, Leesburg, Moore, P.C.; Pettus Plumbing & Piping, Inc.; Consumer Financial Education Foundation of America, Inc.; Fort McClellan Credit Union; Rolison Trucking Co., LLC; Conrad Watson Air Conditioning, Inc.; Linda Mills; Frank Curtis; Jennifer Ray Davidson; Pete Moore Chevrolet, Inc.; Jewelers Trade Shop; Saccoccio & Lopez; Angel Foster (fka Angel Vardas); Monika Bhuta; Michael E. Stark; G&S Trailer Repair Inc.; Chelsea L. Horner; Montis, Inc.; Renee E. Allie; John G. Thompson; Avantgarde

and Appointment of Settlement Administrator. (Doc. # 2812). The Motion has been thoroughly briefed by the parties and certain objectors, both before and after a lengthy fairness hearing. The motion is ripe for decision.

I. Relevant Procedural History

This litigation began more than nine years ago and involves the consolidation of a number of actions filed by Subscriber Plaintiffs against the Blue Cross and Blue Shield Association ("BCBSA") and its Member Plans (the "Member Plans" or "Blue Plans") (collectively, "Defendants" or "Blues"). Subscriber Plaintiffs allege, among other things, that Defendants violated Sections 1, 2, and 3 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-3, by entering into an unlawful agreement that restrained competition between them in the markets for selling health insurance and the administration of Commercial Health

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Aviation, Inc.; Hess, Hess & Daniel, P.C.; Betsy Jane Belzer; Bartlett, Inc., d/b/a Energy Savers; Matthew Allan Boyd; Gaston CPA Firm; Rochelle and Brian McGill; Sadler Electric; Jeffrey S. Garner; Amy MacRae; Vaughan Pools, Inc.; Casa Blanca, LLC; Jennifer D. Childress; Clint Johnston; Janeen Goodin; Marla S. Sharp; Erik Barstow; GC/AAA Fences, Inc.; Keith O. Cerven; Teresa M. Cerven; Sirocco, Inc.; Kathryn Scheller; Iron Gate Technology, Inc.; Nancy Thomas; Pioneer Farm Equipment, Inc.; Scott A. Morris; Tony Forsythe; Joel Jameson; Ross Hill; Angie Hill; Kevin Bradberry; Christy Bradberry; Tom Aschenbrenner; Juanita Aschenbrenner; Free State Growers, Inc.; Tom A. Goodman; Jason Goodman; Comet Capital, LLC; Barr, Sternberg, Moss, Lawrence, Silver & Munson, P.C.; Mark Krieger; Deborah Piercy; and Lisa Tomazzoli. This memorandum is also submitted on behalf of Self-Funded Plaintiff Hibbett Sports, Inc.

Benefit Products in the United States and its territories. Subscriber Plaintiffs contend that the Blues: (1) allocated geographic territories; (2) limited the Member Plans from competing against each other, even when not using a Blue name, by mandating a minimum percentage of business that each Member Plan must do under that name, both inside and outside each Member Plan's territory; (3) restricted the right of any Member Plan to be sold to a company that is not a member of BCBSA; and (4) further agreed to other ancillary restraints on competition. (Doc. # 1082). Subscriber Plaintiffs seek actual damages, treble damages, and injunctive relief to prevent future loss or damage resulting from Defendants' conduct. (*Id.*).

Over the past nine years, this multidistrict litigation has been extraordinarily complex, protracted, and hard-fought. (Doc. # 2625-1 at 3-8). Defendants filed, and the court addressed, over a dozen motions to dismiss. The parties spent substantial time on the production of terabytes of structured health insurance data from thirty-seven separate Defendants, many with different data management systems. (Doc. # 2610-6 ¶ 14). With the invaluable assistance of Magistrate Judge T. Michael Putnam (Ret.), the parties briefed and the court ruled on over 150 discovery motions, which led to 91 discovery orders. Subscriber Plaintiffs obtained and analyzed over 15 million pages of documents, conducted over 120 depositions of Defendants and third-party witnesses, and defended over 20 depositions of class representatives and various experts. (*Id.* ¶¶ 14-15). Subscriber Plaintiffs reviewed and challenged hundreds of thousands of privilege log entries, resulting in 45 Reports & Recommendations by Privilege

Special Master R. Bernard Harwood, Jr. and the full or partial de-designation of over 450,000 documents. (*Id.* ¶ 16).

The parties briefed several rounds of summary judgment motions. (Docs. # 1348; 1350; 1353; 1434). Subscriber Plaintiffs prevailed on their motion seeking application of a *per se* standard of review to Defendants' alleged "aggregation of competitive restraints." *In re Blue Cross Blue Shield Antitrust Litig.*, 308 F. Supp. 3d 1241, 1267 (N.D. Ala. 2018). Although this court certified its standard of review order under 28 U.S.C. § 1292(b), the Eleventh Circuit declined to hear the appeal. *In re Blue Cross Blue Shield Antitrust Litig.*, 2018 U.S. App. LEXIS 36905, 2018 WL 7152887 (11th Cir. Dec. 12, 2018). More recently, the parties briefed motions for class certification of a nationwide injunctive relief class and an Alabama damages class, each side supporting its claims with expert reports totaling hundreds of pages respectively. (Docs. # 2407-2416; 2421; 2422; 2453-2457).

After nearly three years of litigation, the parties first began settlement discussions in 2015. The parties initially hired a mediator and participated in several mediation sessions from 2015 through 2017. Those discussions involved counsel for the Subscriber Plaintiffs, Provider Plaintiffs, Defendants, and Defendants' insurers. (Doc. # 2610-6 ¶¶ 28-29). In November 2017, after the mediation sessions in 2015, 2016, and 2017 failed to gain traction, Special Master Edgar C. Gentle assisted the parties in their settlement discussions. Over the course of the next two years, there were scores of additional mediation

sessions. The negotiations were protracted, complicated, and challenging. Ultimately the parties (with Gentle's able assistance) reached an agreement on proposed structural relief. That relief is historic and substantial. After agreeing to structural relief, the parties also were required to address financial relief. They continued their work and agreed on a common fund for the monetary benefit of the class. Only after the parties agreed on structural relief and the common fund did they begin negotiations about attorneys' fees and costs. (Doc. # 2610-6 ¶ 30).

Three years ago, during their negotiations in July 2019, Subscriber Plaintiffs and the Blues recognized the need for a sub-class of Self-Funded Accounts and their employees (together, the "Self-Funded Sub-Class"), and Subscriber Plaintiffs coordinated the recruitment of separate class counsel for that sub-class and a class representative. (*Id.* ¶ 31).

Self-Funded Sub-Class Counsel asked for and received access to the discovery record in the litigation, along with relevant briefing on class certification and summary judgment. They then engaged their own independent experts to analyze possible damages claims on behalf of the Self-Funded Sub-Class. In September 2019, Self-Funded Sub-Class Counsel began attending mediation sessions. In November 2019, an agreement was reached on a full term sheet. Over the next several months, the parties worked closely with Gentle to reduce the term sheet to a written settlement agreement. This process involved numerous additional conferences and intense negotiation sessions between the parties. (*Id.* ¶ 32).

Subscriber Plaintiffs and Self-Funded Sub-Class Counsel then engaged Kenneth Feinberg,[2] a highly respected mediator who is preeminent in the field of settlement allocations, to serve as Allocation Mediator. Feinberg was tasked with facilitating the determination of an appropriate allocation of the Net Settlement Fund between fully insured Class Members and the Self-Funded Sub-Class. After presentation of the evidence and an in-person mediation, counsel for the parties, with the guidance of Gentle and Feinberg, agreed that an equitable allocation would distribute 93.5% of the Net Settlement Fund among fully insured Class Members and 6.5% of the Net Settlement Fund among the Self-Funded Sub-Class. Feinberg reviewed this proposal and determined it to be reasonable in his professional judgment. (*Id.* ¶ 33).

In August 2020, Subscribers' Counsel and Self-Funded Sub-Class Counsel engaged experts Darrell Chodorow and the Brattle Group to assist with designing a Plan of Distribution. The parties relied on economic analysis conducted by Chodorow and the Brattle Group, along with an analysis of the data available from Settling Defendants. With that input, they sought to design a reasonable and efficient Plan of Distribution that would treat members of the Damages Class equitably and would not overly burden claimants. (*Id.* ¶ 34). Feinberg was again engaged to review the proposed Plan of Distribution. He

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2. Feinberg has worked on a number of complex matters, including the September 11th Victim Compensation Fund, the Troubled Asset Relief Program, the BP Deepwater Horizon Disaster Victim Compensation Fund, and the Boeing 737 MAX victim fund to name a few.

concluded that the proposed Plan of Distribution was reasonable. (*Id.* ¶ 35).

On October 16, 2020, the Subscriber Class Representatives, the Self-Funded Sub-Class Representative, and Settling Defendants entered into a Settlement Agreement, which, if approved, would resolve Subscriber Plaintiffs' classwide claims in this litigation. (Doc. # 2610-2).[3] Under the Settlement, the Settling Defendants agreed to pay $2.67 billion ($2,670,000,000.00) (the "Settlement Fund") and, even more crucially, to provide certain injunctive relief consisting of changes to their business practices. (*Id.*).

On November 30, 2020, this court entered an order granting preliminary approval of the Settlement, Plan of Distribution, and Notice Plan. (Doc. # 2641). Thereafter,

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3. The capitalized terms used herein shall have the same meaning as in the Settlement Agreement. The Settlement Agreement is attached as Exhibit A to Subscriber Plaintiffs' Memorandum of Law in Support of their Motion for Preliminary Approval of the Settlement Agreement. (Doc. # 2610-2).

The term "Subscriber Actions" means lawsuits brought by persons and entities within the Settlement Classes and consolidated in *In re Blue Cross Blue Shield Antitrust Litigation*, including the Consolidated Amended Class Action Complaint, which is currently pending in the court, all actions that may be transferred or consolidated prior to the time Class Notice is mailed, and all actions that are otherwise based, in whole or in part, on the conduct alleged in MDL No. 2406, including *Piercy v. Health Care Service Corp.*, Case No. 124-28, in the Circuit Court for the First Judicial Circuit, Union County, Illinois.

JND Legal Administration ("JND"), the court-appointed notice and claims administrator, effectuated the court-approved Notice Plan. (Doc. # 2812-2). On September 3, 2021, Subscriber Plaintiffs moved for final approval of the Settlement and for the appointment of a Settlement Administrator. (Doc. # 2812). In October 2021, the court conducted a multi-day Fairness Hearing and heard arguments from the parties in support of the Settlement and from class members objecting to the Settlement. (Doc. # 2859).

During the Fairness Hearing, it became clear to the court that the Second Blue Bid relief, which under the Settlement was provided only to certain Self-Funded Accounts (sometimes also referred to as "ASOs"), (1) was problematic because it could burden the opt out rights of those Self-Funded Accounts and, in any event, (2) should be construed as divisible injunctive relief under Federal Rule of Civil Procedure 23(b)(3). (*See, e.g.*, Doc. # 2865 at 25-27, 42-44, 95). Subscriber Plaintiffs moved for the opportunity to provide Supplemental Notice to Self-Funded Accounts to address these concerns. (Doc. # 2885). On February 4, 2022, the court granted that motion and ordered the Settlement Administrator to issue supplemental notice to Self-Funded Entity Accounts (*i.e.*, Self-Funded Accounts themselves, not including Members thereof) to make the following explicit: if they opt out of the Rule 23(b)(3) Class (sometimes referred to as the "Damages Class"), they nevertheless retain the right to seek monetary damages and individualized injunctive relief (which may include a Second Blue Bid or other such individualized injunctive relief, depending on the circumstances surrounding a

Self-Funded Entity Account's claim). (Doc. # 2897). These accounts were afforded an additional opportunity to opt out upon receipt of this information. (*Id.*). In ordering Supplemental Notice, the court overruled objections to the Settlement relating to the inability to opt out of the Second Blue Bid injunctive relief. (*Id.*).

On May 10, 2022, Settlement Class Counsel filed a Notice Certifying Compliance with the court's Order requiring Supplemental Notice. (Doc. # 2914). In response to the Supplemental Notice to Self-Funded Entity Accounts, the Settlement Administrator received thirty-nine timely exclusion requests (opt-outs) but no additional timely objections. (Doc. # 2914-1 at ¶ 27, pp. 65-66).

On May 16, 2022, the court conducted a status conference with the parties and certain interested objectors. In response to the court's inquiry, no one expressed the need for any additional briefing regarding the proposed Settlement.

Subscriber Plaintiffs' Motion for Final Approval of Class Settlement and Appointment of Settlement Administrator (Doc. # 2812) is, therefore, now properly before the court. In the Motion, Subscriber Plaintiffs ask the court to (1) enter a Final Approval Order and (2) enter an Order Appointing the Honorable Irma E. Gonzalez (Ret.) as Settlement Administrator.[4] (*Id.*). Subscriber

4. The court has already entered an Amended Stipulation and Order Regarding Protected Health Information and Personally Identifiable Information for Subscriber Settlement. (Docs. # 2615; 2879).

Plaintiffs' Counsel also seek approval of their Attorneys' Fee and Expense Application. (Doc. # 2733).

The court has carefully considered the Settlement Agreement, Subscriber Plaintiffs' Motion, the memoranda of law and exhibits filed in support thereof by the parties, the proposed Plan of Distribution, the Objections, and briefing by the Objectors, the parties, and other interested persons. For the reasons discussed below, the Motion for Final Approval of Class Settlement and Appointment of Settlement Administrator (Doc. # 2812) is due to be granted.

II. The Settlement Terms and Class Relief

The Settlement Classes include a damages and divisible injunctive relief class under Rule 23(b)(3), as well as an indivisible injunctive relief class under Rule 23(b)(2). The Settlement Classes include any person or entity within the Injunctive Relief Class or the Damages and divisible injunctive relief Class, excluding Government Accounts and Opt-Outs. (Doc. # 2610-2 ¶ 1(llll)). The Fully Insured Settlement Class Period is February 7, 2008 through October 16, 2020 ("FI Class Period"). (Doc. # 2610-2 ¶ 1(nnnn)). The Settlement Class Period for the Self-Funded Accounts is September 1, 2015 through October 16, 2020 ("Self-Funded Class Period"). (*Id.*).

A. The Settlement Class Members

The Settlement Classes agreed to by the parties are defined as follows:

1. The Damages Class

The Damages Class includes "all Individual Members (excluding dependents and beneficiaries), Insured Groups (including employees, but excluding non-employee Members), and Self-Funded Accounts (including employees, but excluding non-employee Members) that purchased, were covered by, or were enrolled in a Blue-Branded Commercial Health Benefit Product[5] (unless the person or entity's only Blue-Branded Commercial Health Benefit Product during the Settlement Class Period was a stand-alone vision or dental product) sold, underwritten, insured, administered, or issued by any member plan during the Settlement Class Period." (Doc. # 2610-2 ¶ 1(v)).

The Damages Class includes employees[6] of Insured Groups and Self-Funded Accounts who were covered by a Blue-Branded Commercial Health Benefit Product during the Settlement Class Period, whether or not they expressly contributed towards their premiums or the cost of that Product, excluding their beneficiaries

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5. Commercial Health Benefit Products mean "any product or plan providing for the payment or administration of health care services," including but not limited to medical, pharmacy, dental, and vision services. (Doc. # 2610-2 ¶¶ 1(o), 1(v)). However, if a person or entity's only Blue-Branded Commercial Health Benefit Product during the Settlement Class Period was a stand-alone vision or dental product, that person or entity is not included in the Damages Class. (*Id.*).

6. Employees "means any current or former employee, officer, director, partner, or proprietor of an entity." (Doc. # 2610-2 ¶ 1(v)).

and dependents. The Damages Class also excludes "Government Accounts,[7] Medicare Accounts of any kind, Settling Defendants, and any parent or subsidiary of any Settling Defendant (and their covered or enrolled employees)" as well as any Opt-Outs, "the judge presiding over this matter, and any members of his judicial staff, to the extent such staff were covered by a Commercial Health Benefit Product not purchased by a Government Account during the Settlement Class Period." (Doc. # 2610-2 ¶ 1(v)). Subscriber Plaintiffs are also seeking certification of a "Self-Funded Sub-Class" consisting of Self-Funded Accounts and their employees during the applicable Settlement Class Period, September 1, 2015 through October 16, 2020. The Self-Funded Sub-Class

7. "Government Account" is defined in the Settlement as "only a state, a county, a municipality, an unincorporated association performing municipal functions, a Native American tribe, or the federal government (including the Federal Employee Program). The term Government Account includes all Members of the Government Account. No other entity that is not a state, county, municipality, unincorporated association performing municipal functions, Native American tribe or the federal government is a Government Account, unless it is required by law to provide any health care coverage it makes available to Members only under, or as a participant in, a Commercial Health Benefit Product approved, selected, procured, sponsored or purchased by a Government Account. Entities that are not Government Accounts (e.g., utility companies, school districts, government-funded hospitals, public retiree benefit plans, public libraries, port authorities, transportation authorities, waste disposal districts, police departments, fire departments) will receive notice and an opportunity to submit a claim form to the extent they are otherwise within the definition of the Damages Class." (Doc. # 2610-2 1(hh)).

is separately represented by Self-Funded Sub-Class Counsel and the Self-Funded Sub-Class Representative. (Doc. # 2610-2 ¶¶ 1(dddd), 1(eeee)).

2. The Injunctive Relief Class

The Injunctive Relief Class includes "all Individual Members, Insured Groups, Self-Funded Accounts, and Members that purchased, were covered by, or were enrolled in a Blue-Branded Commercial Health Benefit Product sold, underwritten, insured, administered, or issued by any Settling Individual Blue Plan during the Settlement Class Period." (Doc. # 2610-2 ¶ 1(pp)). The Injunctive Relief Class includes beneficiaries and dependents of employees (including minors).

B. The Class Relief

The Settlement provides: (a) a $2.67 billion settlement fund; and (b) significant structural changes to Defendants' practices that are to be closely monitored for compliance with both the antitrust laws and the injunctive relief terms of the Settlement by a Monitoring Committee (more fully described below) for a period of five years following the entry of judgment approving the Settlement.

1. The Settlement Fund

The Settlement requires Defendants to establish a Settlement Fund of $2.67 billion, to be deposited into an Escrow Account for ultimate distribution. The Settlement Fund includes the Notice and Administration Fund and Fee and Expense Award(s). (Doc. # 2610-2 ¶ 1(oooo)).

The Settlement Fund will: (1) pay all Settlement Class Members who are entitled to a distribution from the Net Settlement Fund ("Authorized Claimants") in accordance with a court-approved Plan of Distribution (Doc. # 2610-2 ¶ 27); (2) fund a $100 million Notice and Administration Fund to pay Notice and Administration Costs (Doc. # 2610-2 ¶¶ 1(ggg), 29(a)), as well as up to $7 million to "reimburse plaintiffs' counsel's actual and reasonable fees and expenses incurred for Notice and Administration" (Doc. # 2610-2 ¶ 28(h)) and costs of monitoring (Doc. # 2610-2 ¶ 21); and (3) pay court-awarded attorneys' fees and expenses, together not to exceed a combined total of 25% of the Settlement Amount. (Doc. # 2610-2 ¶ 28).

If there is any balance remaining in the $100 million Notice and Administration Fund, it will be returned to Settling Defendants after the completion of the administration and the five-year Monitoring Period. (*Id.* ¶ 30). That is, Defendants' only reversionary interest in the Settlement Fund, if any money remains in the Settlement Fund (apart from any remainder of the $100 million Notice and Administration Fund) after distributions to Authorized Claimants, the Fee and Expense Award, and any court-awarded Service Awards, the Claims Administrator will, subject to court approval, allocate the remaining Escrow Account balance to Settlement Class Members. (*Id.*).[8] Settlement Class Counsel and Self-Funded Sub-Class Counsel may petition the court

8. If it is not economical to distribute any remaining money to Settlement Class Members, subject to court approval, the Claims Administrator may follow the directions set forth in the Plan of Distribution approved by the court. (Doc. # 2610-2 ¶ 30).

for replenishment by Defendants of the Notice and Administration Fund upon a showing of necessity for such replenishment. (*Id.* ¶ 1(ggg)).

Settling Defendants have already transferred $100 million for the Notice and Administration Fund into the Escrow Account and advanced $300 million of the remaining Settlement Amount. (*Id.* ¶ 23(a)). Within thirty calendar days of the court's entry of the Final Judgment and Order of Dismissal, Settling Defendants will transfer the remaining portion of the Settlement Amount into the Escrow Account. (*Id.* ¶ 23(b)).

2. Injunctive Relief

In addition to the $2.67 billion in monetary recovery, Class Representatives, Subscriber Plaintiffs' Counsel, and Self-Funded Sub-Class Counsel secured substantial injunctive relief on behalf of the Settlement Classes. That relief includes structural changes to BCBSA's rules and regulations and the establishment of a Monitoring Committee to oversee compliance with the Settlement. As explained by Dr. Daniel Rubinfeld, each of these hard-won changes to Defendants' rules provides additional relief to the Class, creating opportunities for more competition in the market for the purchase and administration of health insurance and providing the potential for a more competitive environment in which Settlement Class Members may achieve greater consumer choice, better product availability, and increased innovation. (Doc. # 2610-10). Defendants have already taken steps to implement the injunctive relief following entry of the Preliminary Approval Order.

Key provisions of this injunctive relief include the following:

a. Eliminating Restrictions on Non-Blue Competition

BCBSA's license agreements with each Blue Plan have included limitations on Blue Plans' ability to generate revenue using "Green" brands outside the Blue Plan's assigned territorial service area; this restriction is known as the National Best Efforts ("NBE") requirement. (Doc. # 2610-10 ¶ 8). Settling Defendants have agreed to "eliminate and no longer enforce the National Best Efforts Requirement," and to "not adopt or implement any equivalent requirement or any rule in any future License Agreement or Membership Standard that imposes a cap, ratio, or other quantitative limit on a Settling Individual Blue Plan's non-Blue Branded healthcare business outside of its Service Area." (Doc. # 2610-2 ¶ 10). The Settlement's elimination of this restriction unleashes Green competition, which will directly benefit the class.

b. Opening the Door to Expanded Blue Bids and Competition

Class Representatives also secured a path to increased competition among Blue Plans for national accounts in three important ways. First, certain Qualified National Accounts ("QNAs") (defined as Employers with more than 5,000 employees and which also meet certain dispersion criteria, discussed in more detail below) will be able to seek a second bid from the Blue Plan of their choosing,

an option that was previously prohibited. (*Id.* ¶ 15). This provision applies to at least 33 million[9] Members in the aggregate and will promote competition across the market. (*Id.* ¶ 1(u)). Second, for accounts with Independent Health Benefit Decision Locations in more than one Blue Plan's Service Area, each Independent Health Benefit Decision Location may request a bid from the Blue Plan in its Service Area to cover employees working at that Location. (*Id.* ¶ 14(b)). Third, when Multi-Service Area National Accounts (*i.e.*, those with more than 250 total Members and Headquarters in the bidding Blue Plan's Service Area) seek bids, and the Blue Plan for that Service Area decides to bid the Account under a non-Blue brand, the right to bid the Account under the Blue brands must be "ceded" to another Blue Plan, thereby allowing increased opportunities and choice for that account. (*Id.* ¶ 14(a)). All three of these provisions represent structural change to the current system that will produce additional choices for accounts and increased competition.

c. Local Best Efforts

The Local Best Efforts ("LBE") rule requires that 80% of a Blue Plan's healthcare-related revenue within the Blue Plan's Service Area must come from Blue-branded business. The Settlement limits this requirement to 80% and limits the measurement of revenue for purposes of compliance with this requirement to no larger than the state level. (*Id.* ¶ 11).

9. To be clear, this figure includes accounts that already have the right to request a bid from more than one Blue Plan. These accounts will not receive the right to request additional bids. (Doc. # 2610-2 ¶ 15).

d. Acquisitions

BCBSA currently controls -- through Blue Plan voting -- whether any individual Blue Plan may be acquired by another Blue Plan. Under the Settlement Agreement, Settling Defendants are only permitted to impose "legal and reasonable conditions on the acquisition of a member plan, but only to the extent that those conditions are reasonably necessary to prevent impairment of (1) the value of the Blue Marks, or (2) the competitiveness or efficiency of the Blue Branded business or of the Blue Marks." (*Id.* ¶ 17). Any condition must provide that the potential acquirer may request that the Monitoring Committee review any rejection by BCBSA, followed by binding arbitration. (*Id.*).

e. Contracting Provisions for Self-Funded Accounts

The Settlement permits direct contracting between Non-Provider Vendors and Self-Funded Accounts. (*Id.* ¶ 12(a)). The Settlement also permits Blue Plans to do business with Self-Funded Accounts that directly contract with Specialty Service Provider Vendors, subject to certain conditions. (*Id.* ¶ 12(b)). Further, during the Monitoring Period and unless otherwise agreed to by the Settling Individual Blue Plan and Self-Funded Account, the Settlement requires that for a given contracted Provider, the Settling Individual Blue Plan will not enter into different standard commercial fee schedules for medical and surgical claims for its Self-Funded Accounts, on the one hand, and Insured Groups (other than Insured Groups

who purchase an ACA-compliant individual or small-group product), on the other hand; provided, however, that the products, networks, administrative services, and plan designs are the same, excluding differences in reimbursement rates individually negotiated with a contracted Provider. (*Id.* at ¶ 12(d)).

f. Most Favored Nation Clauses

Blue Plans must abide by state laws, and any written agreements in effect as of November 2019 with a state regulatory agency must be disclosed to Settlement Class Counsel, which expressly regulate the use of Most Favored Nations ("MFN") or Most Favored Nation-Differential ("MFN-Differential") clauses in Provider contracts. If there is no governing law or applicable written agreement, the Blue Plan entering into an MFN Differential[10] must demonstrate to the Monitoring Committee that the provision does not violate the terms of the Settlement. (*Id.* ¶ 18).

g. Monitoring Committee

To oversee compliance with the Settlement for five years from the court's entry of Final Judgment and Order of Dismissal, the Settlement establishes a Monitoring Committee "made up of (1) two members appointed collectively by Settling Defendants, (2) one member

10. An MFN Differential is "an MFN which requires that the Provider offer to a health plan financial terms that are more favorable by a specified rate than those it offers any comparable health plan during the performance period of the contract." (*Id.* ¶ 1(bbb)).

appointed collectively by Settlement Class Counsel, (3) one member appointed by Self-Funded Sub-Class Settlement Counsel, and (4) one member appointed by the Court."[11] (*Id.* ¶¶ 1(xx), 1(zz)). Additionally, the Monitoring Committee will mediate certain disputes related to the Settlement. (*Id.* ¶ 20). During the Monitoring Period, BCBSA may advise Settlement Class Counsel, Self-Funded Sub-Class Settlement Counsel, and the Monitoring Committee of BCBSA Board actions to be taken adopting rules or regulations that are within the scope of Paragraphs 10-18. (*Id.*). If the proposed rule or measure is not reported to the Monitoring Committee, or if an arbitrator finds that the proposed rule or measure does not comply with the terms of the Settlement, the rule or measure will not constitute a Released Claim and is not covered under the Settlement. (*Id.*). The inclusion of the Monitoring Committee in the Settlement affords the Settlement Classes and the court substantial assurance of the Settling Defendants' compliance with the Settlement. Any reporting obligation as well as the authority of the Monitoring Committee shall cease at the conclusion of the Monitoring Period. (*Id.*).

C. Settlement Class Release

Upon the Effective Date of the Settlement, Releasors (Class Representatives and Settlement Class Members) who have not timely and validly excluded themselves (*i.e.*, opted out) will have fully released all claims against

11. The Monitoring Committee's reasonable fees and expenses will be paid from the Notice and Administration Fund. (*Id.* ¶ 21).

the Releasees ((i) Individual Blue Plans, (ii) BCBSA, (iii) NASCO,[12] and (iv) Consortium Health Plans, Inc.,[13] as well as related entities). (*Id.* ¶¶ 32, 1(vvv), 1(www)). Opt-Outs will release all claims for indivisible injunctive or declarative relief against the Releasees. However a Self-Funded Account opt-out meeting the criteria to request a Second Blue Bid under the terms of the Settlement Agreement does not release any claims for individualized declaratory or injunctive relief to request a Second Blue Bid during any time it meets the criteria to request such a bid under the terms of the Settlement Agreement. The releases apply to Releasors and their related persons and entities, such as dependents and beneficiaries under their benefits plans.

The Releasors agree to release any and all known and unknown claims:

> based upon, arising from, or relating in any way to: (i) the factual predicates of the Subscriber Actions (including but not limited to the Consolidated Amended Class Action Complaints filed in the Northern District of Alabama) including each of the complaints and prior versions thereof, or any amended complaint or other filings therein from the

12. NASCO is a healthcare technology company owned by several Blue Plans and is involved in processing claims.

13. Consortium Health Plans, Inc. is a marketing company owned by several Blue Plans and provides marketing assistance regarding national accounts to BCBSA and the Blue Plans.

> beginning of time through the Effective Date; (ii) any issue raised in any of the Subscriber Actions by pleading or motion; or (iii) mechanisms, rules, or regulations by the Settling Individual Blue Plans and BCBSA within the scope of Paragraphs 10 through 18 approved through the Monitoring Committee Process during the Monitoring Period.

(*Id.* ¶ 1(uuu)). Thus, the Released Claims in certain circumstances will include those "mechanisms, rules or regulations" enacted after the Effective Date that are approved by the Monitoring Committee during the Monitoring Period, but only to the extent those "mechanisms, rules or regulations" relate to the provisions enumerated in Paragraphs 10 through 18 of the Settlement.

The Releasors retain their right to assert certain claims relating to coverage, benefits and administration of claims that arise in the ordinary course of business and are not "based in whole or in part on the factual predicates of the Subscriber Actions or any other component of the Released Claims discussed in this Paragraph." (*Id.*).

Additionally, Providers who are Settlement Class Members retain the right to assert any claims arising from their sale or provision of health care products or services, and Settling Defendants have agreed not to raise Providers' releases under this Settlement as a defense to Providers' claims brought in their capacity as Providers of health care products or services in MDL No. 2406. (*Id.*).

D. Attorneys' Fees and Costs

In their Motion for Approval of Their Attorneys' Fees and Expenses Application (Doc. # 2733), Settlement Class Counsel have applied to this court separately for: (i) an award of attorneys' fees, plus (ii) reimbursement of expenses and costs reasonably and actually incurred in connection with prosecuting the Subscriber Actions, for a combined total of 25% of the Settlement Amount. (*Id.*). The court will address this request in more detail below and in a separate order.

E. Plan of Distribution

The Claims Administrator, JND, will make all valid distributions for Authorized Claimants in accordance with the terms of the Settlement and the proposed Plan of Distribution. (Doc. # 2610-5; Doc. # 2641 at 52). JND has provided notice to the Classes about the Plan of Distribution. (Doc. # 2812-2; Doc. # 2914-1 (outlining extensive notice efforts)). The Settlement Agreement contemplates that the court will appoint a Settlement Administrator to assist in the implementation of the Plan of Distribution and to resolve any disputes concerning the claims process. Settlement Class Counsel are seeking appointment of Judge Irma E. Gonzalez (Ret.) as Settlement Administrator. The court addresses this issue below.

The Net Settlement Fund is allocated between Individual Members and Insured Groups on the one hand ("Fully Insured Claimants") and the Self-Funded Sub-

Class on the other. Settlement Class Counsel and Self-Funded Sub-Class Counsel (together, "Class Counsel") sought the assistance of Feinberg as Allocation Mediator to facilitate the determination of an appropriate allocation of the Net Settlement Fund between Fully Insured Claimants and the Self-Funded Sub-Class. (Doc. # 2610-6 ¶ 33; Doc. # 2610-7 ¶ 9; Doc. # 2610-8 ¶ 6). Counsel presented evidence to Feinberg concerning the relative volume of payments and differing strengths of claims for Self-Funded Accounts and Fully Insured Claimants. (Doc. # 2610-6 ¶ 33; Doc. # 2610-7 ¶ 9; Doc. # 2610-8 ¶ 6).

Counsel ultimately presented an allocation to Feinberg for his review. (Doc. # 2610-6 ¶ 33; Doc. # 2610-7 ¶ 10; Doc. # 2610-8 ¶ 13). Feinberg reviewed the allocation recommendation and determined that it was reasonable. (Doc. # 2610-8 ¶ 14). The allocation is based on numerous factors including the strengths of the respective claims, the substantially shorter Self-Funded Class Period, and the fact that premiums paid for fully-insured coverage dwarf the administrative fees charged for self-insured coverage. (Doc. # 2610-6 ¶ 33; Doc. # 2610-7 ¶ 10; Doc. # 2610-8 ¶ 14). Under this allocation, the Self-Funded Sub-Class (including Self-Funded Account employees) will receive 6.5% of the Net Settlement Fund ("Self-Funded Net Settlement Fund"), with the remainder allocated to Fully Insured Claimants (and their employees) ("FI Net Settlement Fund"). (Doc. # 2610-5 ¶ 3).

In order to develop an equitable distribution of the Self-Funded Net Settlement Fund and the FI Net Settlement Fund among Authorized Claimants for each

fund, Class Counsel retained the Brattle Group to assist with designing a Plan of Distribution to be administered by JND. (Doc. # 2610-6 ¶ 34). All distributions to Authorized Claimants are subject to a $5 minimum payment threshold to ensure that the resources involved in processing a claim are not out of proportion to the value of the individual claim. (Doc. # 2610-5 ¶ 28).

For the FI Net Settlement Fund, JND will first calculate the actual premiums paid by Individual Members and Insured Groups using data produced by Settling Defendants. (Doc. # 2610-5 ¶ 12). Those premiums will be used to calculate the pro rata share of the FI Net Settlement Fund available to each claiming Individual Member and Insured Group. (*Id.* ¶ 13). For Individual Members, no further calculation is required, and a claiming Individual Member will receive his or her full pro rata share of the FI Net Settlement Fund. (*Id.* ¶¶ 13, 16). For any Insured Group where only the employer makes a claim, and no employees do so, the employer will be eligible for 100% of the Insured Group's pro rata distribution. (*Id.* ¶ 18). If any employees make a claim, the Insured Group's pro rata share must be appropriately allocated between the employer and any claiming employees. Significantly, these allocations relate solely to what an employer or employee receives under the Settlement, and do not in any way purport to dictate or address what, if any, obligations employers may have as fiduciaries of ERISA plans, or how an allocation may impact their use of any funds received.

Typically, both employers and employees bear a portion of the burden of the premiums paid by Insured

Groups. (Doc. # 2610-9). Based on this economic reality, Class Counsel proposed a "Default" option for apportioning premiums between employers and employees. (Doc. # 2610-5 ¶ 19(f)). Given the difference in contribution percentages for single and family coverage, the Default option under the Plan of Distribution sets contribution percentages for Insured Group employees with single coverage at 15% and with family coverage at 34%. (Doc. # 2610-8 ¶ 18; Doc. # 2610-9 ¶ 31 (discussing the economic reasonableness of setting different Default contribution percentages for single and family coverage based on employers historically sharing more of the burden for single coverage than family coverage)). Any Authorized Claimant will automatically be assigned the Default option on their Claim Form, at which point they will not be required to provide further evidence of their premium payments, and their claims will be administered using Settling Defendants' data to the extent possible.

Where both the employer and any employees make a claim, the first step in calculating the employer and employees' portion of the Insured Group's pro rata distribution is to estimate the amount of the Insured Group's premiums attributable to each claiming employee. (Doc. # 2610-5 ¶ 19(a)). JND will use Settling Defendants' data to calculate the "Unallocated Employee Premium" for each claiming employee. (*Id.*) Then, the appropriate Default contribution percentage (based on the type of coverage for the claiming employee during any period for which a claim is made) will be applied to the Unallocated Employee Premium to determine which portion of the Unallocated Employee Premium is deemed to have been

paid by the employee (as opposed to the employer). (*Id.* ¶ 19(e)). The employee will receive credit for the portion of their Unallocated Employee Premium as reduced by the Default contribution percentage. (*Id.* ¶ 19(f)).

This procedure is not fixed in stone. Rather than accepting the Default option on the Claim Form, any employer or employee believing that they paid a higher contribution percentage than the Default may select the "Alternative" option and can provide materials to the Settlement Administrator to support that contribution percentage. (*Id.* at ¶ 19(h)). If sufficient data or records are submitted by either an employer or by employees, then the Settlement Administrator, in the exercise of sound discretion, shall determine the appropriate amount by which to increase or decrease the allocation between the employer and the employees, taking into account the same factors considered in setting the Default option, as well as the reliability of the data presented by the claimant selecting this Alternative option. (*Id.* at ¶ 19(i)). Finally, if an employee files a claim and his or her employer does not, the employee will receive credit only for their portion of the Unallocated Employee Premium as determined by the allocation methodology described above. (*Id.* at ¶ 20).

Similarly, for the Self-Funded Sub-Class, payments will be allocated from the Self-Funded Net Settlement Fund using this same method but based on an employee's estimated share of the employer's administrative fees, with slightly different set contribution percentages for the Default option (18% for employees with single

coverage and 25% for employees with family coverage)[14] and the same ability to select an Alternative option with the presentation of data. (Doc. # 2610-5 ¶¶ 22-26; Doc. # 2610-9 ¶ 51). Again, as with Insured Groups, the amount allocated to employers is for Settlement distribution only, and does not address what, if any, obligations those employers may have under ERISA.

F. Approval of Class Notice

1. Notice to the Classes

JND, the Notice and Claims Administrator, sent direct notice to over 100,000,000 Class Members. (Doc. # 2812-2 ¶ 5). JND sent 77,360,606 postcard notices to Damages Class Members for whom no email address was available and electronic notice to 27,497,063 Damages Class members for whom email addresses were available. (*Id.* ¶¶ 36, 44). With respect to direct mail notice, in order to reasonably ensure that these notices reached Damages Class members given the lengthy Settlement Class Period

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14. The Default option for the Self-Funded Sub-Class was similarly determined by Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel, and found reasonable by the Allocation Mediator, through consideration of the same factors discussed above; however, employee contributions for the Self-Funded Sub-Class during the Self-Funded Class Period were on average higher for single coverage (18% to 19% compared to 14% to 19% for fully insured) and lower for family coverage (24% to 26% compared to 33% to 39% for fully insured), which is reflected in the Default percentages of 18% and 25%. (Doc. # 2610-5 ¶¶ 22-26; Doc. # 2610-8 ¶ 18; Doc. # 2610-9 ¶ 51).

(back to 2008 for some Damages Class members) and the likelihood that many addresses may have changed over time, JND made substantial efforts to confirm mailing addresses, which included updating addresses through credit bureau advanced-level searches and utilizing USPS's National Change of Address search functionality. Due to this rigorous work in perfecting the mailing database, 93.5% of all postcard notices were deemed deliverable, and only 6.5% were deemed undeliverable. (*Id.* ¶¶ 39-40). Similarly, for email notice, JND utilized its industry-leading email solutions to ensure an efficient and effective email campaign, which included designing an email notice that would avoid spam filters and promote readability. (*Id.* ¶ 42). Where emails bounced back for temporary reasons (such as a full email inbox), JND made multiple attempts to resend emails to increase the deliverability rates. (*Id.* ¶ 43). Based on all of this work, JND successfully delivered email notice to 27,497,063 Damages Class Members. (*Id.* ¶ 44).

In addition to direct notice, JND conducted a robust consumer media campaign, which alone reached more than 85% of potential members of the Settlement Classes. (*Id.* ¶ 46). The consumer media campaign included digital, print, radio, and television efforts, with concerted outreach to African-American and Hispanic markets. (*Id.* ¶¶ 47-55). In addition to consumer media notice, JND also targeted individuals responsible for filing claims on behalf of Damages Class members, including human resources employees and business owners. (*Id.* ¶¶ 56-64). JND also purchased a list of HR/employment benefit and other relevant employees and directly reached out

to these contacts to ask for assistance in getting notice out to constituents of these organizations. (*Id.* ¶ 66). This resulted in hundreds of direct calls stating that these individuals were assisting in disseminating notice. (*Id.*). Finally, JND instituted an internet search campaign, and solicited and received extensive press coverage of the Settlement. (*Id.* ¶¶ 67-69).

Once notice was complete, JND immediately began its efforts to encourage Class Members who had not filed a claim to do so, including through reminder emails (to both email addresses provided by Settling Defendants and additional email addresses located by JND) and additional outreach to human resources groups. (*Id.* ¶¶ 71-72).

The Notice Plan directed Settlement Class Members to the settlement website that JND established (www.BCBSsettlement.com) for more information about the Settlement. (*Id.* ¶ 79). The settlement website contains key case documents, including the Long Form Notice, the Claim Form, the operative complaint, the Settlement Agreement, the Preliminary Approval Order, and the Plan of Distribution, along with answers to frequently asked questions (developed in conjunction with Settlement Class Counsel). (*Id.*). The settlement website also allowed for online filing of claims, of which over 99% of Class Members who have submitted claims have availed themselves. (*Id.* ¶ 96). JND expended significant efforts in designing the website to withstand both an enormous volume of traffic and any threats of cyber-security attacks. (*Id.* ¶¶ 79-84). As of August 26, 2021, the website had tracked 14,844,643 unique visitors, 20,666,254 sessions, and 112,006,163 total

pageviews, without any reports of slowness or latency. (*Id.* ¶ 85).

JND also established a call center and an email address, info@BCBSsettlement.com, to answer questions from Class Members. (*Id.* ¶ 86). JND initially established and maintained a toll-free telephone line with automated interactive voice response ("IVR"), which was available 24 hours a day, seven days a week. (*Id.* ¶¶ 87-88). The full call center, with live agents, was launched on March 26, 2021, before the first postcard notices commenced. (*Id.* ¶ 90). With input from Settlement Class Counsel and counsel for Settling Defendants, JND developed an extensive phone script and trained 100 operators (later rising to a high of 240 operators as call volume increased exponentially), with operators available to answer calls in English and Spanish. (*Id.*). JND also trained higher-level escalation officers to assist with more sophisticated questions. (*Id.* ¶ 91). As of August 26, 2021, the toll-free line had received 1,062,431 incoming calls. (*Id.* ¶ 92). JND also employed a team of email agents to field questions that arrive through the dedicated email address. (*Id.* ¶ 93). These agents review and respond to incoming emails sent in many languages, including Spanish, French, Korean, and Chinese, among others. (*Id.*).

JND established two separate United States Postal Service Post Office boxes: one for Class Member inquiries and claim forms, and another dedicated strictly to receiving objections and requests for exclusion. (*Id.* ¶ 95). As of August 31, 2021, JND had received 2,049 timely exclusion requests and 40 timely objections from 123 objectors. (*Id.*).

As of September 3, 2021, JND had already received 6,077,526 claims: 1,381,112 from individual policyholders; 4,194,942 from employees enrolled in their employers' group health plans; and 177,687 from businesses and their group health plans. (*Id.* ¶ 96). Ninety-nine percent of claimants elected the Default option, and claims have been filed by Settlement Class Members in every state in the country. (*Id.* ¶ 97).

Some Objectors complained that there was an improper burden placed on the ability of Self-Funded Accounts to opt out (because opt outs would lose their opportunity to receive a Second Blue Bid). But that concern has been resolved. After the October 2021 Fairness Hearing, Subscriber Plaintiffs requested the opportunity to provide Supplemental Notice to Self-Funded Accounts to allow for that opportunity. (Doc. # 2885). On February 4, 2022, the court granted that motion and ordered the Settlement Administrator to issue supplemental notice to Self-Funded Entity Accounts (*i.e.*, Self-Funded Accounts themselves, not including Members thereof) to make explicit that, if they opt out of the 23(b)(3) Class (sometimes referred to as the "Damages Class"), they retain the right not only to seek monetary damages, but also to seek divisible, individualized injunctive relief, which may include a Second Blue Bid or other individualized injunctive relief, depending on the circumstances surrounding the Self-Funded Entity Account's claim. (Doc. # 2897).

Supplemental direct notice to Self-Funded Accounts was accomplished through mail and email. Both notices provided important summary information about the

opt-out and objection rights of Self-Funded Entity Accounts. Both notices also directed Self-Funded Entity Accounts to the Settlement Website, where updated and detailed information was available, including all of the Settlement documents and a Second Blue Bid section. And, both notices provided a toll-free telephone number and a dedicated email address so that recipients could ask additional specific questions. (Doc. # 2914-1 ¶¶ 12-26).

The Self-Funded Accounts were afforded an additional opportunity to opt out upon receipt of this information. (*Id.*). As of May 10, 2022, JND had received thirty-nine timely exclusion requests and zero timely objections from Self-Funded Entity Accounts related to the Supplemental Notice. (Doc. # 2914-1 at ¶ 27).

2. CAFA Notice

On February 16, 2021, Settling Defendants filed a notice of compliance with the notice requirements of the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715(d). (Doc. # 2704). In compliance with § 1715, CAFA Notice was sent to sixty officials, including the Attorney General of the United States, the Attorneys General of each of the fifty states, the Attorney General for the District of Columbia, and the Attorneys General for Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, and the Northern Mariana Islands. (*Id.*).

3. Court Approval of Notice

The Class has been notified of the Settlement Agreement pursuant to the plan and supplemental

plan approved by the court. Class Members have had the opportunity to be heard on all issues regarding the resolution and release of their claims by submitting objections to the Settlement Agreement to the court. Appropriate and sufficient notice of the Fairness Hearing and the rights of all Class Members has been provided to all people and entities entitled to such notice. In addition, pursuant to CAFA, 28 U.S.C. § 1711 *et seq.*, notice was provided to the Attorneys General for each of the states in which a Class Member resides and to the Attorney General of the United States. (Doc. # 2704). Therefore, the court finds that the form and methods of notifying Class Members of the terms and conditions of the proposed Settlement Agreement constituted the best practicable notice under the circumstances and meets the requirements of Rule 23(c)(2) of the Federal Rules of Civil Procedure, any other applicable law, and due process.

III. Applicable Legal Standards for Final Approval

Federal Rule of Civil Procedure 23(e) requires judicial approval of any class settlement. To be approved, a settlement must be fair, reasonable, and adequate. Fed. R. Civ. P. 23(e). The procedure for judicial approval is well established:

> (1) Certification of a settlement class and preliminary approval of the proposed settlement after submission to the court of a written motion for preliminary approval.

> (2) Dissemination of notice of the proposed settlement to the affected class members.
>
> (3) A final approval hearing, at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement are presented.

Manual for Complex Litig. (Fed. Jud. Center, 4th ed. 2004), § 21.63.

For the reasons more fully explained below, after considering the Settlement Agreement, the arguments and authorities presented by the parties in their motions and briefing, all objections and comments regarding the Settlement Agreement, the arguments at the Fairness Hearing held in October 2021, and the entire record in this case, the court reaffirms its findings in the Preliminary Approval Order and makes a final determination that the Settlement Agreement is fair, reasonable, and adequate within the meaning of Federal Rule of Civil Procedure 23.

A. Certification of the Classes for Settlement Purposes Under Rule 23(a) and (b)

When presented with a motion for final approval of a class action settlement, a court first evaluates whether certification of a settlement class is appropriate under Federal Rule of Civil Procedure 23(a) and (b). The Federal Rules provide that a class action may be maintained if Rule 23(a) is satisfied and if the provisions of Rule 23(b)(1), (b)(2), or (b)(3) are satisfied. Fed. R. Civ. P. 23(b). The

court analyzed these Rules in its Preliminary Approval Order. (Doc. # 2614). It reaffirms its findings here. Specifically, the court finds that all of the prerequisites of Rule 23(a) and the requirements of (b)(2) and (b)(3) have been satisfied for certification of the settlement class for settlement purposes only.

With regard to Rule 23(a), Subscriber Plaintiffs easily satisfy the necessary elements of the Rule. The Damages Class, the Self-Funded Sub-Class, and the Injunctive Relief Class consist of tens of millions of members, a number that is so numerous that joinder of all members is impracticable. The alleged conspiracy at the heart of the Subscriber case implicates several questions of law and fact common to the settlement class. The claims of the settlement class representatives are typical of the claims of the absent settlement class members. And, the settlement class representatives and settlement class counsel have and will adequately and fairly protect the interests of the settlement class.

With regard to Rule 23(b), the proposed classes also satisfy the requirements of Rules 23(b)(2) and (b)(3). Subscriber Plaintiffs have alleged that the Settling Defendants engaged in a nationwide conspiracy and that the conspiracy affected each of the Injunctive Relief Class members in similar ways. The class claims involve common questions of law and fact. And, because the Settling Defendants are alleged to have acted on grounds generally applicable to the injunctive relief class, injunctive relief is appropriate with respect to the class under Rule 23(b)(2).

As to the damages class under Rule 23(b)(3), "[i]n addition to finding that common questions predominate over individual inquiries . . . the Court must find that the class action vehicle is superior to other available methods for adjudication." *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 693 (N.D. Ga. 1991). Rule 23(b)(3) identifies four factors relevant to the superiority requirement: "(A) the Class Members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against Class Members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3).

With respect to factor (A), there are at least tens of millions of Settlement Class Members, which makes the class action device the only feasible method of resolving the claims against the Settling Defendants. Factor (B) also supports certification of the Damages Class. The Judicial Panel on Multidistrict Litigation ("JPML") explained at the outset of this matter that the actions "involve substantial common questions of fact relating to the state BCBS entities' relationship with the national association, BCBSA, and the licensing agreements that limit the Blue Plans' activity to exclusive service areas, among other restrictions." *In re Blue Cross Blue Shield Antitrust Litig.*, 908 F. Supp. 2d 1373, 1376 (J.P.M.L. 2012); *see* 28 U.S.C. § 1407. Moreover, since § 1407 centralization in this court, the court has overseen over nine years of substantial pretrial litigation and is confident in this

finding. Factor C also favors certification. The JPML chose this court as a transferee court because it would "serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation" *Id.* Factor D, manageability of the class action, is of little relevance when a court is faced with certification of a settlement class. *See, e.g., In re Nat. Football League Players' Concussion Inj. Litig.*, 307 F.R.D. 351, 371 (E.D. Pa. 2015), *amended sub nom. In re Nat'l Football League Players' Concussion Injury Litig.*, 2015 U.S. Dist. LEXIS 186581, 2015 WL 12827803 (E.D. Pa. May 8, 2015), and *aff'd sub nom. In re Nat'l Football League Players Concussion Inj. Litig.*, 821 F.3d 410 (3d Cir. 2016), as amended (May 2, 2016).

Having carefully considered the factors set forth above, the court concludes that the Damages Class satisfies the relevant requirements of Rule 23(b)(3).

B. The Settlement is Fair, Reasonable, and Adequate Under Rule 23(e)(2) and the *Bennett* Factors

Next, the court must determine whether the proposed settlement is fair, reasonable and adequate under Rule 23(e)(2). That rule subpart provides as follows:

If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

In addition to Rule 23(e)(2), courts in the Eleventh Circuit also consider the following six factors when assessing the fairness of a settlement: 1) the likelihood of success at trial; 2) the range of possible recovery; 3)

the point on or below the range of possible recovery at which a settlement is fair, adequate, and reasonable; 4) the complexity, expense, and duration of the litigation; 5) the substance and amount of opposition to the settlement; and, 6) the stage of proceedings at which settlement was achieved. *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1273 (11th Cir.), *cert. denied sub nom. Huang v. Spector*, 142 S. Ct. 431, 211 L. Ed. 2d 254 (2021), and *cert. denied sub nom. Watkins v. Spector*, 142 S. Ct. 765, 211 L. Ed. 2d 479 (2022) (quoting *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)); *see also Carroll v. Macy's, Inc.*, 2020 U.S. Dist. LEXIS 99033, 2020 WL 3037067, at *5 (N.D. Ala. June 5, 2020).

1. Class Members Were Adequately Represented

Subscriber Class Representatives here "share the same interests as absent class members, assert claims stemming from the same event [, which] are the same or substantially similar to the rest of the class, and share the same types of alleged injuries as the rest of the class." *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 U.S. Dist. LEXIS 118209, 2020 WL 256132, at *5 (N.D. Ga. Mar. 17, 2020), *aff'd in part, rev'd in part & remanded on other grounds* 999 F.3d 1247 (11th Cir. 2021). Subscriber Class Representatives have demonstrated their adequacy by working collaboratively with well-qualified counsel who are highly experienced and capable in the fields of class action and antitrust litigation. Class Counsel have litigated scores of these cases to resolution, and are recognized as top authorities in their field. And, Class Counsel have

vigorously, professionally, and successfully litigated this extremely hard-fought case for nine years.

Self-Funded Sub-Class Counsel have also vigorously represented the interests of the Self-Funded Sub-Class since joining the settlement process. To ensure that any potential settlement was fair, the Self-Funded Sub-Class Counsel obtained significant discovery materials, retained their own experts, and conducted their own searching analysis of the claims and defenses in this case. (*Id.*).

The court is well-acquainted with Class Counsel's performance in this case. It has spent scores of hours with them and observed their work. The court has no hesitation in concluding that they have more than adequately represented the Settlement Classes in accordance with Rule 23(e)(2)(A).

2. The Settlement Was Negotiated at Arm's Length

Rule 23(e)(2)(B) requires the court to determine whether a proposed settlement "was negotiated at arm's length." Relatedly, one of the *Bennett* factors requires the court to rule out the possibility of fraud or collusion behind a class settlement. *Leverso v. SouthTrust Bank of Ala., Nat. Assoc.*, 18 F.3d 1527, 1530 (11th Cir. 1994).

As this court previously discussed, this was by no means a quick resolution. There is absolutely no evidence of any collusion. The Settlement was extensively negotiated over the course of five years with the assistance of experienced mediators and with input from a number of

subject matter experts. The parties experienced multiple impasses and worked diligently to navigate those difficult decisions. Moreover, only after reaching agreement on the terms of the relief for the Classes did the parties even begin to negotiate attorneys' fees for Class Counsel. Under the terms of the Settlement, the payment of fees does not impact the amount of relief available to Class Members. Moreover, the court's Special Master, Ed Gentle, who helped the parties reach the ultimate agreement, has submitted a declaration attesting to the fact that there was no collusion involved. (Doc. # 2610-12). The court is more than satisfied that the Settlement was negotiated at arm's length, and there was no collusion.

3. The Relief Provided to the Classes Is Adequate

As explained more fully below, the court concludes that a review of the Rule 23(e)(2)(C) factors weighs heavily in favor of granting final approval to the Settlement.

a. The Significant Costs, Risks, and Delay of Trial and Appeal

The Settlement provides immediate and substantial benefits to tens of millions of Class Members. The antitrust claims and defenses before the court are complex. Although this litigation has been pending for nine years, and the parties have spent more than enough time litigating to fully evaluate the case, much remains to be done on the litigation track. If there is no resolution, there will be expensive and hard fought litigation for more years in this court, transferor courts, and appellate courts.

This court would be able to try the accelerated Alabama cases. But there are forty-one subscriber cases. Absent a settlement, most of those will be remanded to transferor courts and the parties will be faced with many years of further litigation. *See In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) (noting that complex litigation "can occupy a court's docket for years on end, depleting the resources of the parties and taxpayers while rendering meaningful relief increasingly elusive"). The history of this litigation demonstrates that continued litigation in Alabama and in dozens of other jurisdictions would be costly, risky, and protracted.

Although the parties have litigated substantial motions, it could still be some years before the court and the parties are in a position to set even the accelerated Alabama cases for trial. In the accelerated Alabama actions, in relation to the class certification motion, Subscriber Plaintiffs have presented a sophisticated damages model estimating impact and damages based on the potential of entry by Blue and Green competitors into Alabama. This but-for world constructed by Subscriber Plaintiffs' experts involves a complex modeling of factors estimating the impact of the entry of competition within the market, including estimated profitability of entry, timing of entry, type of entry, strength of entry, progression of entry, competitive responses to entry, and the effects of entry on competition. Plaintiffs' experts then modeled an estimate of damages.

Defendants' experts have aggressively challenged Subscriber Plaintiffs' damages model and vigorously

attacked Subscriber Plaintiffs' proposed findings and their experts' calculations. Without a settlement, the court will be required to consider contested class certification motions, and complicated motions regarding the admissibility of the parties' respective experts. One side or the other (if not both) is likely to appeal whatever decision the court makes on the class certification and *Daubert* motions. Even if Subscriber Plaintiffs were to succeed in certifying a damages class for Alabama and an injunctive relief class, they would still need to prove their claims and damages at trial. Furthermore, one side or the other is likely, absent a settlement, to appeal the outcome of any trial.

If the parties continue to litigate these cases, they would be required to devote significant time and enormous resources to these cases. There is simply no guarantee that Subscriber Plaintiffs would recover a final judgment more favorable than the considerable $2.67 billion in monetary relief and the injunctive relief secured by the Subscriber Plaintiffs in the Settlement. There is certainly a range on the spectrum of outcomes wherein they could do worse. Therefore, the court concludes that the "costs, risks, and delay of trial and appeal," Fed. R. Civ. P. 23(e)(2)(C)(i), strongly support final approval.

b. The Method of Distributing Relief to the Class Is Effective

The parties' proposed method of processing the Settlement Class Members' claims and distributing relief to eligible claimants is efficient and effective. The

Plan of Distribution will efficiently calculate the value of millions of claims based on data available from the Settling Defendants, rather than requiring every Authorized Claimant to provide years of information about their premium amounts and actual contribution percentages. Every Damages Class member is given an opportunity to make a claim, and if an Authorized Claimant does not agree with the Default option, that claimant can provide additional information in support of an Alternative option, which will be reviewed and adjudicated by the Settlement Administrator.

Class Counsel have retained JND to process claims. JND has a proven track record and has been chosen as the administrator in a number of large, complex, and high-profile class action settlements.[15] Class Counsel is also seeking appointment of the Honorable Irma E. Gonzalez (Ret.) as Settlement Administrator to adjudicate any challenges to claim determinations. Judge Gonzalez is a distinguished retired jurist who has continued to make substantial contributions to the law since leaving the bench. The court finds that the method of distributing relief to the Class Members is effective.

c. The Requested Attorney's Fees Are Reasonable

Settlement Class Counsel have requested a combined fee and expenses award from the $2.67 billion-dollar

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15. For example, JND administered the settlement in *In re Equifax Inc. Customer Data Security Breach Litigation*, 999 F.3d 1247 (11th Cir. 2021), valued by plaintiffs' counsel in excess of $1.3 billion.

common fund of 25%. (Doc. # 2733-1 at 4). Settlement Class Counsel also intend to apply for up to $7 million from the Notice and Administration Fund to "reimburse plaintiffs' counsel's actual and reasonable fees and expenses incurred for Notice and Administration." (Doc. # 2610-2 ¶ 28(h)). This request for fees and expenses is in line with benchmarks set by the Eleventh Circuit and this court for fees alone. *See In re Equifax*, 2020 U.S. Dist. LEXIS 118209, 2020 WL 256132, at *31 ("Typically, awards range from 20% to 30%, and 25% is considered the 'benchmark' percentage."); *In re Equifax*, 999 F. 3d at 1281 (citing favorably to similar authority); *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1243 (11th Cir. 2011) (noting "well-settled law from this court that 25% is generally recognized as a reasonable fee award in common fund cases.").

As noted above, in addition to the requested fees being reasonable, the payment of the requested fee award does not in any way affect the amount of relief available to Class Members. Finally, there are no agreements required to be identified by Rule 23(e)(3). Accordingly, the requirements of Rule 23(e)(2)(C) are satisfied.

4. Class Members Are Treated Equitably Relative to One Another

Under Rule 23(e)(2)(D), courts must consider "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief."

See Fed. R. Civ. P. 23 Advisory Committee's note to 2018 amendment; *see also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 U.S. Dist. LEXIS 217583, 2019 WL 6875472, at *27 (E.D.N.Y. Dec. 16, 2019). The allocation in the settlement between Class Members was negotiated at arm's length under the auspices of Ken Feinberg, the country's leading authority on allocations of large settlements and compensation funds. Feinberg -- who has worked on such matters as the September 11th Victim Compensation Fund, the Troubled Asset Relief Program, and the BP Deepwater Horizon Disaster Victim Compensation Fund, to name just a few -- confirmed that the allocation is reasonable. (*See* Doc. # 2610-8).

With respect to damages, the Plan of Distribution accounts for the differing risks and claim strengths for different Class Members; therefore, it ensures, to the greatest reasonably practicable extent, that Class Members are treated equitably. *See Fitzgerald v. P.L. Mktg. Inc.*, 2020 U.S. Dist. LEXIS 117220, 2020 WL 3621250, at *9 (W.D. Tenn. July 2, 2020) (finding this Rule 23(e)(2) factor to favor approval where distribution took into account the greater risks some class members faced). The Plan of Distribution distinguishes between Fully Insured Claimants, who purchased insurance from Defendants, and Self-Funded Sub-Class Claimants, who purchased administrative services only. Under the Plan, Fully Insured Claimants are allocated 93.5% of the settlement, while Self-Funded Sub-Class Claimants are 6.5%.

Feinberg concluded that distributing 93.5% of the Net Settlement Fund among Fully Insured Claimants and the remaining 6.5% of the Net Settlement Fund among Self-Funded Claimants constituted a reasonable allocation of the Net Settlement Fund. (Doc. # 2610-8 ¶ 6). In Feinberg's opinion, the proposed FI/Self-Funded Allocation "treats class members equitably relative to each other" as is required by Rule 23(e)(2)(D). (*Id.* ¶ 13). As Feinberg explained:

> [T]he proposed FI/Self-Funded Allocation meets [the Rule 23(e)(2)(d) standard], for multiple reasons. First, the negotiated number falls towards the low end of Self-Funded Settlement Sub-Class Counsel's estimate, and the high end of Settlement Class Counsel's estimate. In any negotiation, absent unusual factors, one would expect an outcome in that range. Second, the relative size of the Self-Funded Claimants' share makes sense given the statute of limitations and premiums vs. administrative fees issues discussed above. And finally, although not necessary to my decision, the fact that the division resulted from protracted negotiations between sophisticated counsel also supports its reasonableness. I note that some of the injunctive relief in the Settlement Agreement (such as direct contracting with vendors for self-funded accounts, ¶ 12; and the Second Blue Bid, ¶ 15) applies exclusively to Self-Funded Accounts, rather than to Individual Members and Insured

> Groups. My conclusion that the Settlement's allocation of relief is equitable for Self-Funded Accounts is only strengthened by this additional injunctive relief, which applies solely to those Class Members.

(Doc. # 2610-8 ¶¶ 14-15).

At the Fairness Hearing, Class Counsel and Self-Funded Sub-Class Counsel reiterated that the allocation agreement was the product of a multi-month, vigorous negotiation. (*See* Doc. # 2685 at 124, 135). A guiding principle in these matters is that "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Netflix Privacy Litig.*, 2013 U.S. Dist. LEXIS 37286, 2013 WL 1120801, at *8 (N.D. Cal. Mar. 18, 2013) (quoting *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)). "The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *In re Omnivision Techns., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2009) (quoting *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)); *see also In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 U.S. Dist. LEXIS 57918, 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007). But, the court fully understands its role under Rule 23 to ensure fairness, adequacy, and reasonableness.

The outcome of this hard-fought negotiation was an economically reasonable allocation, as confirmed by Dr. Joseph Mason, who is an experienced antitrust

economist, a chaired professor at LSU, and a fellow at the Wharton School at the University of Pennsylvania. (Doc. # 2825-1). Dr. Mason explains that “one would expect the apportionment of settlement proceeds between the Subscriber Class and the Self-Funded Sub-Class to reflect the relative share of overcharges borne by Fully-Insured and ASO plans, respectively, during the relevant class periods.” (*Id.* ¶ 30). To approximate these overcharges, Dr. Mason examined four proxies: relative gross revenue, net revenue, operating gain differential, and growth in net revenue components per member for ASO and Fully-Insured products. (*Id.* ¶¶ 30-31). Using these four proxies, the implied settlement allocations for the Self-Funded Sub-Class were, respectively, 1.7%, <10.7%, <3.9-6.3%, and 3.4-3.8%. Thus, Dr. Mason’s proxies demonstrate that a 6.5% allocation for the Self-Funded Class is fair, adequate, and reasonable.

Also, as Dr. Mason has explained, “ASO subscribers purchase from a more competitive market than Fully-Insured subscribers.” (*Id.* ¶ 22). For some Blues, fully insured business runs anywhere from as much as four to ten times more profitable than ASO business. (*See* Docs. # 2868-1; 2868-2; 2812-12 at 3). And, for others, ASO business may be break-even or even serve as a loss leader. (*See* Docs. # 2868-3; 2868-4; 2868-5; 2868-6; 2868-7). Because of the availability of substitute products -- such as other third party administrators, the option to administer healthcare plans in-house, and the existence of large national health plan administrators -- the ASO market is significantly more competitive than its counterparts. (*See* Doc. # 2865 at 41-44).

Moreover, the allocation is justified by the different time periods for the classes and the uncertainty regarding litigation outcomes. (Doc. # 2825-1 ¶¶ 30 n.49; 33-35). The Fully Insured Class Period spans twelve and a half years while the Self-Funded class spans five years.[16] Because the ASOs did not become involved in the lawsuit until late 2019, they did not face the same litigation perils and expenses as the rest of the Class. Therefore, a discount factor is appropriate in assessing their portion of the settlement as such a discount reflects "the expected amount of time that would elapse before a litigation or settlement payment is made[,] as well as the risk associated with that payment." (*Id.* ¶ 35). Here, according to Dr. Mason, a "conservative" discount factor would be no less than 50%. (*Id.*).

Finally, every class member is subject to the same release, and the release does not affect the apportionment of relief to other Class Members.

In light of all of these factors, the court finds that the Settlement Agreement treats Class Members equitably.

5. The Proposed Settlement is Fair, Adequate, and Reasonable Under the Remaining *Bennett* Factors

"[I]n order to approve a settlement, the district court must find that it 'is fair, adequate, and reasonable and is

16. "'Settlement Class Period" means February 7, 2008, through the Execution Date, except for the Self-Funded Accounts, for whom the Settlement Class Period is September 1, 2015 through the Execution Date." (Doc. # 2610-2 ¶ 1(nnnn)).

not the product of collusion between the parties.'" *Bennett*, 737 F.2d at 986 (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). A settlement is fair, reasonable, and adequate when "the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." *In re Lorazepam & Clorazepate Antitrust Litig.*, MDL No. 1290, 2003 U.S. Dist. LEXIS 12344, 2003 WL 22037741, at *2 (D.D.C. June 16, 2003) (quoting *Manual for Complex Litig.* (Third) § 30.42 (1995)). In evaluating a proposed settlement, the court is "not called upon to determine whether the settlement reached by the parties is the best possible deal, nor whether class members will receive as much from a settlement as they might have recovered from victory at trial." *In re Checking Acct. Overdraft Litig.*, 2020 U.S. Dist. LEXIS 142012, 2020 WL 4586398, at *8 (S.D. Fla. Aug. 10, 2020), *aff'd sub nom. In re Checking Account Overdraft Litig.*, 2022 U.S. App. LEXIS 4277, 2022 WL 472057 (11th Cir. Feb. 16, 2022) (quoting *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1014 (N.D. Ill. 2000) (citations omitted)).

a. Likelihood of Success at Trial and Complexity, Expense, and Duration of the Litigation

The court considers the first and fourth *Bennett* factors together. Throughout this case, Defendants have vigorously disputed liability and have pressed a number of affirmative and other defenses. In order to proceed to trial, the parties would have to initially devote significant time to briefing class certification motions and motions

to exclude expert testimony. Preparation for trial would involve a slew of new motions and require months of intense work. Even assuming that Plaintiffs prevail at trial, they may not establish damages in the amount of the monetary relief in the Settlement. Finally, if Plaintiffs did prevail at trial, they would certainly face a protracted appellate process.

Counsel have invested over 444,000 hours of attorney time to litigate this case and have made significant investments in expenses. This case has been (and would continue to be) incredibly complex, expensive, and time-consuming. When this reality is combined with the uncertainty of recovery, it is clear that a range of possible recovery includes amounts that are far less than the amount agreed to in the Settlement.

Here, the Settlement provides significant relief to Settlement Class Members. At $2.67 billion, the Settlement represents one of the largest antitrust class settlements in history. And even if the monetary benefit that is actually distributed between Settlement Class Members is not in an amount that a lay observer might expect, as discussed more fully below, the injunctive aspects of the Settlement significantly alter the Blues' business practices and substantially increase the value of the Settlement to the Class Members.

To be clear, the dollar amount of the Settlement is substantial. But, to put it in a context of expected outcomes, Subscriber Plaintiffs' expert Ariel Pakes calculated an overcharge ranging from 3.4% to 5.5%

for Alabama class members. (Doc. # 2411-1 ¶ 10). In extrapolating the Alabama damages model nationwide through 2019, Dr. Pakes, estimated Subscriber damages as ranging from $18.6 billion to $36.1 billion. (Doc. # 2610-11 ¶ 10). A recovery of $2.67 billion represents 7.3% to 14.3% of that estimated damage range, which easily falls within the range of reasonable recoveries. *See Bennett*, 737 F.2d at 986-87 & n.9 (approving $675,000 settlement representing 5.6% of claims with maximum potential recovery of $12,000,000); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1346 (S.D. Fla. 2011) ("[S]tanding alone, nine percent or higher constitutes a fair settlement even absent the risks associated with prosecuting these claims."). The bottom line is this: this financial settlement is one of the largest ever in history, particularly considering that this is a private enforcement settlement.

As significant as the monetary amount of $2.67 billion is, the truly exceptional aspect of this settlement is the structural relief agreed upon. The business practice changes established in the Settlement are significant and are designed to enhance competition going forward. (Doc. # 2610-10 ¶ 37). Subscriber Plaintiffs have explained that the Settlement Agreement remedies the most significant of those restraints by abolishing the National Best Efforts revenue cap and establishing the Second Blue Bid for Qualified National Accounts. In doing so, the settlement will provide for materially greater competition in the field of health care financing. (Doc. # 2610-1 at 52 n.31). To put the value of the negotiated injunctive relief in context, during the litigation phase, Dr. Pakes estimated "that

NBE accounted for 97 percent of the total damages in the case." (Doc. # 2626 at 160).

"In a case where experienced counsel represent the class, the Court 'absent fraud, collusion, or the like, should hesitate to substitute its own judgment for that of counsel.'" *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 691 (N.D. Ga. 2001) (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)).[17] In light of Class Counsel's qualifications, which include substantial experience litigating MDLs, class actions, and other complex cases, the court "has confidence in their collective judgment that the benefits of this settlement far outweigh the delay and considerable risk of proceeding to trial." *Ingram*, 200 F.R.D. at 691. The relief secured by the Subscriber Plaintiffs with this Settlement—both monetary and non-monetary—reflects an excellent result for the Settlement Classes and plainly falls within the range of reasonableness contemplated by these factors.

b. The Stage of the Proceedings/ Development of the Factual Record

The second and third *Bennett* factors are "easily combined and normally considered in concert." *Camp v. City of Pelham*, 2014 U.S. Dist. LEXIS 60496, 2014 WL 1764919, at *3 (N.D. Ala. May 1, 2014). "The law is

17. The United States Court of Appeals for the Eleventh Circuit adopted as binding precedent the decisions of the United States Court of Appeals for the Fifth Circuit handed down prior to September 30, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (1981).

clear that early settlements are to be encouraged, and accordingly, only some reasonable amount of discovery should be required to make these determinations." *Ressler v. Jacobson*, 822 F. Supp. 1551, 1555 (M.D. Fla. 1992). The *Bennett* factors require a court to consider whether "the case settled at a stage of the proceedings where class counsel had sufficient knowledge of the law and facts to fairly weigh the benefits of the settlement against the potential risk of continued litigation." *In re Equifax*, 2020 U.S. Dist. LEXIS 118209, 2020 WL 256132, at *10.

Here, Plaintiffs conducted exhaustive discovery. They obtained and reviewed over 75 million pages of documents and over 100 terabytes of data, took over 100 depositions, and worked extensively with experts on liability and damages analyses. Plaintiffs have had ample opportunity to investigate the facts and law to obtain substantive rulings from the court. Thus, it is clear that the factual record in this matter was sufficiently developed to allow Class Counsel to make a reasoned judgment as to the merits of the settlement. *See Swaney v. Regions Bank*, 2020 U.S. Dist. LEXIS 101215, 2020 WL 3064945, *5 (N.D. Ala., June 9, 2020) (holding that settlement was appropriate where the parties "have litigated this case for over seven years, through dispositive motions" and "have had the opportunity to investigate the facts and law, review substantive evidence relating to the claims and defenses, and brief the relevant legal issues"). The court is satisfied that Class Counsel were able to adequately evaluate the desirability of the settlement as opposed to continuing with the litigation.

6. The Substance and Amount of Opposition to the Settlement

In determining whether a proposed settlement is fair, reasonable, and adequate, the reaction of the class is an important factor. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 117-18 (2d Cir. 2005). Thus, a low percentage of objections as compared to the size of the class points to the reasonableness of a proposed settlement and supports its approval. *Bennett*, 737 F.2d at 986.

As of August 31, 2021, after direct notice was sent to over 100 million class members and after an extensive media and outreach campaign, JND had received 2,049 timely and valid exclusion requests (opt-outs) and 40 timely objections from 123 Objectors. (Doc. # 2812-2 ¶ 95).[18] Over two months before the deadline to file a claim, JND had already received a total of 6,077,526 claims comprised of 177,687 claims on behalf of companies/businesses/entities, 1,381,112 claims from individuals reporting that they purchased health insurance directly from a BCBS Company, and 4,194,942 claims from employees. (*Id.* at ¶ 96). More than 99% of claims opted for the default option. (*Id.* at ¶ 97). As of May 10, 2022, after Supplemental Notice was issued to the Self-Funded Sub-Class, JND had received only thirty-nine timely exclusion requests and zero timely additional objections. (Doc. # 2914-1 at ¶ 27).

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18. Eighty-one of these Objectors, or 66% of all objectors, are represented by the same law firm.

As one court has held, forty-one objections based on 8,822,803 notices mailed constitutes an infinitesimal ratio (.00050%) when compared to the millions of potential class members. *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005). Here, proportionally there actually are *far fewer* objections when comparing the relative sizes of the classes. And, as of the filing of the Motion for Final Approval of Class Settlement, over six million claims had been submitted by class members seeking to participate in the Settlement.

As courts in the Eleventh Circuit have explained, "[i]t is settled that '[a] small number of objectors from a plaintiff class of many thousands is strong evidence of a settlement's fairness and reasonableness.'" *In re Checking Acct. Overdraft Litig.*, 2020 U.S. Dist. LEXIS 142012, 2020 WL 4586398 at *15 (alteration in original) (quoting *Ass'n for Disabled Ams. v. Amoco Oil Co.*, 211 F.R.D. 457, 467 (S.D. Fla. 2002)); *see also Ferron v. Kraft Heinz Foods Co.*, 2021 U.S. Dist. LEXIS 129955, 2021 WL 2940240, at *12 (S.D. Fla., July 13, 2021) ("This Court, like others, considers the reaction of the Settlement Class to the proposed settlement to be an important indicator as to its reasonableness and fairness."). The miniscule number of opt-outs and objections to this proposed Settlement in comparison to the tens of millions of Class Members and the large number of claims filed, militates in favor of approval of the Settlement. *See, e.g., In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347, 355 (E.D.N.Y. 2000) (approving settlement based on small number of opt outs and objections in light of the "huge number of potential Class members and massive nationwide notice"); *Taifa v.*

Bayh, 846 F. Supp. 723, 728 (N.D.Ind. 1994) (approving class settlement, and noting that objectors represent "little more than 10 percent" of the class).

IV. Objections to the Settlement

Federal Rule of Civil Procedure 23(e)(5)(A) affords class members who oppose a settlement the right to object. "Often times objectors play a beneficial role in opening a proposed settlement to scrutiny and identifying areas that need improvement." *In re Equifax*, 999 F.3d at 1257 (quoting David F. Herr, *Annotated Manual for Complex Litigation* § 21.643 (4th ed. 2021)) (internal quotation marks omitted)). All of the objections were publicly filed on the court's docket and are of record. (Docs. # 2812-19; 2812-20; 2812-21; 2812-22). Additionally, certain Objectors filed post-fairness hearing briefs further detailing their objections to the settlement. (Docs. # 2873; 2874; 2875; 2876).

On February 4, 2022, the court addressed the substance of certain objections related to the Second Blue Bid relief provided to certain Self-Funded Accounts and whether that relief should be properly construed as divisible injunctive relief under Federal Rule of Civil Procedure 23(b)(3). (Doc. # 2897). The court granted Subscriber Plaintiffs' Motion (Doc. # 2885) and provided the parties the opportunity to send Supplemental Notice to Self-Funded Accounts. In particular, the court ordered the Settlement Administrator to issue supplemental notice to Self-Funded Entity Accounts to make explicit that, if they opt out of the 23(b)(3) Class (sometimes referred to as the "Damages Class"), they retain the right not only to

seek monetary damages, but also to seek individualized injunctive relief, which may include a Second Blue Bid or other such individualized injunctive relief, depending on the circumstances surrounding the Self-Funded Entity Account's claim. (Doc. # 2897). In ordering Supplemental Notice, the court overruled the objections to the Settlement relating to the inability to opt out of the Second Blue Bid injunctive relief. (*Id.*)

As discussed more fully below, after carefully considering the objections to the Settlement, the court has determined that none of the remaining objections cast any doubt on the fairness of the Settlement. Accordingly, the court overrules all of the remaining objections not already addressed in its February 4, 2022 Memorandum Opinion and Order Granting Motion for Supplemental Notice to Self-Funded Accounts. (Doc. # 2897).

The remaining objections to the Settlement can be broadly categorized as follows:

1. Whether the Settlement perpetuates conduct that the court already found to be *per se* illegal;

2. Whether the Settlement requires the court to issue an advisory opinion that the revised ESAs are lawful;

3. Whether the Settlement Improperly Releases Future Conduct;

4. Whether the allocation between the Subscribers and Self-Funded Sub-Class is fair;

5. Whether the Self-Funded class period should go back to 2008;

6. Whether the QNA Definition is too narrow or the requirements to obtain a Second Blue Bid are unreasonable;

7. Whether the Local Best Efforts Rule should be left intact;

8. Whether Tribal-related entities should be part of the Settlement;

9. Whether Attorney Fees are too high;

10. Whether the Settlement Monetary Relief is too low;

11. Whether the Self-Funded Sub-Class Counsel had a conflict; and

12. The Department of Labor's ERISA concerns.

(Docs. # 2812-19; 2812-20; 2812-21; 2812-22). The court addresses each category in turn.

A. Whether the Settlement perpetuates conduct that the court already found to be *per se* illegal

The Sperling/Sherrard Opt-Out Objectors and Home Depot Inc., U.S.A. ("Home Depot") contend that the Settlement should not be approved because doing so would

perpetuate a *per se* violation of Section 1 of the Sherman Act. The court disagrees.

First, the premise of this objection is wrong. To the extent these objectors argue that the court already found ESAs to be *per se* illegal, they misread the court's standard of review opinion. The court did not find ESAs alone to be *per se* unlawful under *Sealy* and *Topco*.[19] (Docs. # 2812-19 at 17-20; 2812-20 at 43). In the April 5, 2018 Memorandum Opinion and Order Regarding Section 1 Standard of Review, the court held that "Defendants' [then] aggregation of a market allocation scheme *together with certain other output restrictions* is due to be analyzed under the *per se* standard of review. . . ." (Doc. # 2063 at 59) (emphasis added). In fact, the court did not even address ESAs alone. Rather, the court addressed the then-existing accumulation of alleged restraints.

Under *Bennett*, "unless the illegality of an arrangement under consideration is a legal certainty, the mere fact that certain of its features may be perpetuated is no bar to approval." *Bennett*, 737 F.2d at 987. *See also Fraley v. Batman*, 638 F. App'x 594, 597 (9th Cir. 2016) ("a district court abuses its discretion in approving a settlement only if the agreement sanctions 'clearly illegal' conduct.") (citing *Robertson v. Nat'l Basketball Ass'n*, 556 F.2d 682, 686 (2d Cir. 1977) (approving an antitrust settlement over the objection that "it perpetuates for ten years two 'classic group boycotts' in violation of Section 1 of the

19. *United States v. Sealy, Inc.*, 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 598, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972).

Sherman Antitrust Act" because "the alleged illegality of the settlement agreement is not a legal certainty") (citing *Grunin v. International House of Pancakes*, 513 F.2d 114, 124 (8th Cir.), *cert. denied*, 423 U.S. 864, 96 S. Ct. 124, 46 L. Ed. 2d 93 (1975))).

Furthermore, the court certified its standard of review decision -- and its conclusion about the legal effect of the aggregation of restraints -- for interlocutory appeal. (Doc. # 2023). In doing so, the court necessarily found that there is a substantial ground for difference of opinion as to its decision. 28 U.S.C. § 1292(b). If there is a substantial ground for a difference of opinion as to the legality of the aggregation of restraints, it follows that the alleged illegality of one of those restraints alone is not a legal certainty.

To be clear, this Settlement permits ESAs[20] to remain in place. But, that is not cause to reject final approval. *See Fraley*, 638 F. App'x at 594; *Robertson*, 556 F.2d at 686; *Bennett*, 737 F.2d at 987; *Grunin*, 513 F.2d at 123-24. After

20. As the Blues note, "the use of the ESAs by the Blue system has been public knowledge for decades. Yet the federal agencies charged with enforcing our antitrust laws have chosen never to bring the claims brought by the Class Representatives and Subscriber Class Counsel in this case. Nor did any of the Objectors ever see fit to challenge the arrangement they now claim is 'clearly illegal,' even though it was public knowledge for decades before these lawsuits were filed. It is simply not tenable for the Objectors now to arrive on the scene claiming that the ESAs they have been living with for decades are 'clearly illegal,' thus barring final approval of the Settlement." (Doc. # 2812-1 at 83).

careful review, the court concludes that the arrangement that will exist upon implementation of the Settlement is not clearly illegal. Even more to the point, Defendants' Motion Regarding the Antitrust Standard of Review Applicable to Provider Plaintiffs' Section 1 Claims (Doc. # 2722) tees up the issue of whether ESAs alone constitute a *per se* violation of Section 1. That issue is more fully addressed in a Memorandum Opinion and Order on Defendants' Motion, which the court has entered contemporaneously with this Final Order and Judgment. In that Memorandum Opinion and Order the court concludes that it must apply the rule of reason analysis to those of Providers' claims that challenge the ESAs alone in the absence of a National Best Efforts Agreement.

As the court's opinion on that motion concludes, there have been material changes to the Blues' going-forward system which add significant procompetitive features. In light of these changes, and the uncertainty which impelled the court to certify its 2018 standard of review ruling under § 1292(b), the court concludes that the post-settlement Blue system will not be clearly illegal.[21]

Therefore, the objection asserting that the Settlement perpetuates a *per se* violation of Section 1 of the Sherman Act is **OVERRULED**.

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21. The sum and substances of the Objectors' arguments appears to be that the post-settlement changes to the Blue System do not render the system clearly legal. That is not the test. Over the years, the courts have settled on the "clearly illegal" standard because it best comports with the policy favoring settlements.

B. Whether the Settlement requires the court to issue an advisory opinion that the revised ESAs are lawful

Home Depot also objects to the Settlement to the extent its approval may contain an advisory opinion regarding the legality of the going-forward Blues system. (Doc. # 2812-20 at 33). The National Account, Church Plan, and Taft-Hartley Objectors have made similar arguments. (Doc. # 2812-19 at 15-21). Subscribers respond by noting that "the [c]ourt need only satisfy itself that the arrangement left intact under the Settlement is not 'clearly illegal.'" (Doc. # 2812-1 at 83) (citing *Bennett*, 737 F.2d at 987).

The Settlement Proponents' draft order approving the Settlement contains a section regarding the Standard of Review which reads:

> Standard of Review.
>
> 21. The Court finds that its April 5, 2018 Memorandum Opinion Regarding Section 1 Standard of Review and Single Entity Defense (ECF No. 2063) and the accompanying Order (ECF No. 2064) no longer apply to the Blue System, as revised by this Settlement Agreement.

(Doc. # 2812-17 at 11). However, the court is not required to adopt any proposed Order and has conducted its own, independent analysis of the Settlement. Moreover, even

the proposed Order does not suggest that the court issue an advisory opinion.

In the Preliminary Approval Order, the court noted that:

> The proposed Settlement currently under consideration alters Defendants' business model. The Settlement eliminates the National Best Efforts revenue cap[]. [T]he elimination of that policy is a significant change that the court preliminarily finds will drastically alter the forward-looking landscape such that the court's standard of review opinion would no longer apply. Of course, the Settlement does not change the facts as they existed during the class period.

(Doc. # 2641 at 48). The court need not say more. Indeed, to do so would actually involve issuing an advisory opinion on the merits of issues that are not currently before the court. In reviewing a class action settlement, the court does not "have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute." *United States v. Alabama*, 271 F. App'x 896, 902 (11th Cir. 2008) (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)); *see also Fraley*, 638 F. App'x at 597 ("When approving a settlement, a district court should avoid reaching the merits of the underlying dispute.") (citing *Isby v. Bayh*, 75 F.3d 1191, 1198 (7th Cir. 1996)).

Therefore, Home Depot's objection relating to an advisory opinion is **OVERRULED**. Nonetheless, as noted above, in ruling on Defendants' Motion Regarding the Antitrust Standard of Review Applicable to Provider Plaintiffs' Section 1 Claims (Doc. # 2722), the court was called upon to directly address the issue of whether ESAs alone constitute a *per se* violation of Section 1 in deciding a fully briefed Rule 56 Motion. In the court's Memorandum Opinion and Order on that Motion, which has been entered contemporaneously with this Final Order and Judgment, the court concludes that it must apply the rule of reason analysis to Providers' claims based on ESAs alone.

C. Whether the Settlement improperly releases future conduct

Home Depot also objects to the scope of the proposed release provision of the Settlement Agreement. Home Depot argues that the release is impermissible because it requires members of the injunctive relief class to release future claims for injunctive and equitable relief. (Doc. # 2812-20 at 19). Building on that objection, Home Depot further argues that public policy forbids such a prospective release of a private party's right to enforce the antitrust laws against future conduct. (*Id.* at 22). That objection is off the mark.

The Settlement Agreement defines "Released Claims" as follows:

> "Released Claims" means any and all known and unknown claims, causes of action, cross-

claims, counter-claims, charges, liabilities, demands, judgments, suits, obligations, debts, setoffs, rights of recovery, or liabilities for any obligations of any kind whatsoever (however denominated), [] known or unknown, suspected or unsuspected, asserted or unasserted, direct or derivative, *based upon, arising from, or relating in any way to: (i) the factual predicates of the Subscriber Actions (including but not limited to the Consolidated Amended Class Action Complaints filed in the Northern District of Alabama) including each of the complaints and prior versions thereof, or any amended complaint or other filings therein from the beginning of time through the Effective Date; (ii) any issue raised in any of the Subscriber Actions by pleading or motion; or (iii) mechanisms, rules, or regulations by the Settling Individual Blue Plans and BCBSA within the scope of Paragraphs 10 through 18 approved through the Monitoring Committee Process during the Monitoring Period*. Nothing in this Release shall release claims, however asserted, that arise in the ordinary course of business and are based solely on (i) whether a particular product, service or benefit is covered by the terms of a particular Commercial Health Benefit Product, (ii) seeking resolution of a benefit plan's or a benefit plan participant's financial responsibility for claims, based on either the benefit plan document or statutory law, or (iii)

> challenging a Releasee's administration of claims under a benefit plan, based on either the benefit plan document or statutory law. Any claim, however asserted, (i) that a product, service, or benefit should be or should have been covered, but was not covered, (ii) seeking resolution of a benefit plan's or benefit plan participant's financial responsibility for claims, or (iii) challenging a Releasee's administration of claims under a benefit plan, based in whole or in part on the factual predicates of the Subscriber Actions or any other component of the Released Claims discussed in this Paragraph, is released. Notwithstanding any other provision of this Agreement, a Provider who is a Settlement Class Member as defined in this Agreement does not release any claims arising from his, her or its sale or provision of health care products or services (as opposed to the purchase of a Commercial Health Benefit Product). Settling Defendants agree not to raise Providers' releases under this Agreement as a defense to Providers' claims brought in their capacity as Providers of health care products or services in MDL No. 2406. For purposes of clarity, Released Claims include, but are not limited to, claims that arise after the Effective Date.

(Doc. # 2610-2 ¶ uuu) (emphasis added).

Paragraphs 10 through 18 of the Settlement Agreement describe the "Class Injunctive Relief." (*Id.* at ¶¶ 10-18). Paragraph 20 provides:

> 20. Monitoring and Reporting. During the Monitoring Period, BCBSA may advise Settlement Class Counsel, Self-Funded Sub-Class Settlement Counsel, and the Monitoring Committee of BCBSA Board actions to be taken adopting rules or regulations that are within the scope of Paragraphs 10-18. The communications shall remain Confidential. During the Monitoring Period, Settlement Class Counsel, Self-Funded Sub-Class Settlement Counsel, and Settlement Class Members will report to the Monitoring Committee any and all disputes related to the Agreement, and Settling Defendants will report drafts of new rules or measures for approval under Paragraphs 10 through 18 to the extent Settling Defendants advise of such potential rules or measures and disputes related to obligations created by this Agreement. Any reporting obligation and the authority of the Monitoring Committee shall cease at the conclusion of the Monitoring Period.

(Doc. # 2610-2 ¶ 10). Under paragraph 20, the Monitoring Committee is charged with reviewing actions to be taken by the BCBSA Board and "adopting rules or regulations that are within the scope of Paragraphs 10-18," *i.e.*, actions taken relating to the equitable relief provisions of the Settlement. (Doc. # 2812-1 at 88).

The "Released Claims and Covenant Not to Sue" provision of the Settlement Agreement provides:

> 32. Released Claims and Covenant Not to Sue. In addition to the effect of any final judgment entered in accordance with this Agreement, upon the Effective Date as set out in Paragraph 8, and in consideration of the Injunctive Relief and payment of the Settlement Amount into the Settlement Fund, and for other valuable consideration, the Releasors shall be deemed to have, and by operation of the Final Judgment and Order of Dismissal shall have, fully, finally, and forever released, relinquished, and discharged all Released Claims against any and all of the Releasees. Persons or entities in both the Injunctive Relief Class and the Damages Class release all Released Claims. Persons or entities in the Injunctive Relief Class but not the Damages Class, release only claims for equitable or injunctive relief, provided that persons or entities that are within the definition of the Damages Class release any claims for damages that may be asserted by persons or entities (including dependents and beneficiaries) who claim by, for, under, or through a Damages Class member or the Commercial Health Benefit Product that a Damages Class member purchased, was covered by, or was enrolled in.
>
> *The Parties intend that the releases in this Agreement be interpreted and enforced*

broadly and to the fullest extent permitted by law. Each Releasor shall be deemed to have released all Released Claims against the Releasees regardless whether any such Releasor ever seeks or obtains by any means, including without limitation through the Claim Process, any distribution from Settlement Fund. Class Representatives and Settling Defendants acknowledge, and Settlement Class Members shall be deemed by operation of the Final Judgment and Order of Dismissal to have acknowledged, that the foregoing waivers and releases were separately bargained for and a key element of the settlement of which these releases are part.

(Doc. # 2610-2 at 48-49) (emphasis added).

Thus, three categories of claims (including future claims) are released under these provisions. These categories include claims arising from:

(i) *the factual predicates of the Subscriber Actions* (including but not limited to the Consolidated Amended Class Action Complaints filed in the Northern District of Alabama) including each of the complaints and prior versions thereof, or any amended complaint or other filings therein from the beginning of time through the Effective Date;

> (ii) *any issue raised in any of the Subscriber Actions* by pleading or motion; or
>
> (iii) *mechanisms, rules, or regulations* by the Settling Individual Blue Plans and BCBSA *within the scope of Paragraphs 10 through 18* approved through the Monitoring Committee Process during the Monitoring Period.

(*Id.* at ¶ uuu) (emphasis added).

Home Depot argues that "[u]nder the third category of released claims, the proposed monitoring process may add newly-adopted restrictions to the [scope of the] release." (Doc. # 2812-20 at 21). That is, Home Depot asserts that the release "expands to cover restrictions not currently in effect" because for five years, if the Monitoring Committee reviews a newly-adopted rule or regulation relating to the Subscriber Settlement's injunctive relief provisions and decides it is consistent with the Settlement's injunctive relief provisions, claims regarding any such regulations will be included within the release. (*Id.*).

Subscribers respond that "[t]he Monitoring Committee is not empowered to approve, much less immunize from antitrust scrutiny, any new restraints, new arrangements, or future conduct adopted by the Blues that are not within the scope of the matters addressed in the provisions of the Settlement Agreement[.]" (Doc. # 2812-1 at 88). They argue that "[t]o be barred by the release [] any such future claims would have to arise from continued adherence to the existing arrangements that are 'the factual predicates

of the Subscribers Actions' or other prongs of the release." (Doc. # 2812-1 at 92 n.41). They further point out that "[w]ere the Defendants to enter into a new agreement or to adopt a new arrangement, a future plaintiff would not be foreclosed from asserting a new antitrust violation arising under that agreement." (*Id.*).

"Although it is well established that 'federal class action settlements routinely include releases waiving future claims,'[] only those claims that arise from an 'identical factual predicate' as the settled litigation may be released by the terms of a class action settlement agreement." *In re Managed Care Litig.*, 2008 U.S. Dist. LEXIS 129427, 2008 WL 11333988, at *5 (S.D. Fla. Apr. 21, 2008), *report and recommendation adopted*, No. 00-1334-MD, 2008 U.S. Dist. LEXIS 129413, 2008 WL 11333876 (S.D. Fla. May 14, 2008) (citing *Ass'n For Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 471 n.10 (S.D. Fla. 2002) ("[F]ederal class action settlements routinely include releases waiving future claims.")); *see also McClendon v. Georgia Dep't of Cmty. Health*, 261 F.3d 1252, 1254 (11th Cir. 2001) (approving release of future claims in tobacco litigation); *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 239 (5th Cir. 1982) (noting that a release of future claims is an important element of antitrust class settlements); *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 95-96 (2d Cir.), *cert. denied sub nom. Bowes v. Melito*, 140 S. Ct. 677, 205 L. Ed. 2d 440 (2019) ("'The law is well established in [the Second] Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual

predicate' as the settled conduct.'") (quoting *Wal-Mart Stores*, 396 F.3d at 107, in turn quoting *TBK Partners, Ltd. v. W. Union Corp*, 675 F.2d 456, 460 (2d Cir. 1982)); *Williams v. General Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 274 (7th Cir. 1998) ("It is not at all uncommon for settlements to include a global release of all claims past, present, and future, that the parties might have brought against each other.").

Subscribers argue that, here, "[t]o be barred by the release [] any such future claims would have to arise from continued adherence to the existing arrangements that are 'the factual predicates of the Subscribers Actions' or other prongs of the release" (Doc. # 2812-1 at 92 n.41), and that "an action [by the Blues] is covered by the release only if that action implements the relief that the Settlement provides." (Doc. # 2812-1 at 89).

The court agrees that the only new rules and regulations that may be subject to the release are those based on an identical factual predicate and related to the injunctive relief provided by Paragraphs 10 through 18 of the Settlement Agreement. Any new agreement or anticompetitive restraint that is above and/or beyond those within the scope of the Settlement is not released and can be subject to a legal challenge.

Objectors next argue that public policy prohibits the prospective release of future claims. That is a true statement in the most general sense, but the Objectors' argument is nevertheless off target. In the area of antitrust, there is "considerable caselaw stand[ing] for

the proposition that public policy considerations differ when the only 'prospective' application of the release in question is the continued adherence to a pre-release restraint on trade." *In re Managed Care Litig.*, 2010 U.S. Dist. LEXIS 142862, 2010 WL 6532982, at *12 (S.D. Fla. Aug. 15, 2010), *report and recommendation adopted*, 2011 U.S. Dist. LEXIS 46822, 2011 WL 1522561 (S.D. Fla. Mar. 8, 2011) (citing *Madison Square Garden, L.P. v. Nat'l Hockey League*, 2008 U.S. Dist. LEXIS 80475, 2008 WL 4547518, at *8-9 (S.D.N.Y. Oct. 10, 2008) (rejecting defendant's argument that enforcement of the release would violate public policy surrounding antitrust claims where "the cases on which [the party] relies to support its public policy argument ... involve either releases that purport to bar claims based on future violations, *i.e.*, truly 'new and distinctive incidents', or subsequent conduct by the defendant that goes beyond what was released in the first instance," and finding "considerable support in the caselaw for the distinction relied upon here, namely that the public policy considerations differ when the only 'prospective' application of the release in question is the continued adherence to a pre-release restraint") (internal citation omitted) and *MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc.*, 161 F.3d 443, 448 (7th Cir. 1998) (taking a functional approach to the question of enforceability, the court found the conduct "clearly based" on pre-release conduct and thus enforced the release, while acknowledging that a "new, post-release agreement" in restraint of trade may be actionable, but noted that mere "continued adherence" to an alleged pre-released agreement" in restraint of trade could not give rise to a viable claim)).

Cases finding releases void due to public policy "largely contemplate impermissibly broad releases that released all types of claims, including 'future' entirely unrelated antitrust claims not circumscribed to an identical factual predicate or to claims that arose out of the alleged conduct or related conduct that could have been alleged[.]" *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 U.S. Dist. LEXIS 217583, 2019 WL 6875472, at *26 (citing *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 575-76, 78 (E.D. Pa. 2001) (finding a release too broad because it released future claims based not only on past conduct but also on future conduct which did not form the basis of the litigation) and *Madison Square Garden*, 2008 U.S. Dist. LEXIS 80475, 2008 WL 4547518, at *8-9).

Because any released claim here would by definition arise from continued adherence to the existing arrangements that are "the factual predicates of the Subscribers Actions" or the injunctive relief provided under the Agreement, the cases cited by Home Depot are inapposite, and its objections relating to the scope of the release are **OVERRULED.**[22]

22. Whether any particular claim has an identical factual predicate and/or falls within the scope of the release is of course merely hypothetical, and currently unanswerable. Until a particular claim is asserted, comment by the court would likely be an inappropriate advisory opinion. If the court is presented with such a claim, it will be in a position to make an appropriate determination.

D. Whether the allocation between the Subscribers and Self-Funded Sub-Class is fair

A plan of distribution should be approved when it allocates relief in a way that is "fair, adequate, and reasonable." *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d at 241; *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983); *Leverso*, 18 F.3d at 1530; *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1328 n.2 (S.D. Fla. 2001); *Bellocco v. Curd*, 2006 U.S. Dist. LEXIS 17609, 2006 WL 4693490, at *2 (M.D. Fla. Apr. 6, 2006); *Smith v. Floor and Decor Outlets of Am., Inc.*, 2017 U.S. Dist. LEXIS 227308, 2017 WL 11495273, at *5 (N.D. Ga. Jan. 10, 2017). A plan of distribution will pass muster so long as "it has a 'reasonable, rational basis,' particularly if 'experienced and competent' class counsel support it." McLaughlin On Class Actions, § 6.23 (17th ed. 2020); *see also Schwartz v. TXU Corp.*, 2005 U.S. Dist. LEXIS 27077, 2005 WL 3148350, at *21 (N.D. Tex. Nov. 8, 2005) (approving a plan of allocation that "resulted in a settlement agreement that fairly and rationally allocates the proceeds of the settlement").

Not surprisingly, the Bradley Objectors assert that a larger proportion of the Settlement Funds for the Self-Funded Claimants should have been negotiated. There are two problems with this argument. First, the Bradley Objectors have failed to credibly show that they would have been able to have successfully done so. Second, and more fatally, this argument does not address the relevant inquiry: whether the distribution plan is fair, adequate, and reasonable. It is.

The Plan distinguishes between Fully Insured Claimants, who purchased insurance from Defendants, on the one hand, and Self-Funded Sub-Class Claimants who purchased only administrative services from Defendants, on the other. Under the Plan, Fully Insured Claimants are allocated 93.5% of the settlement, while Self-Funded Sub-Class Claimants are allocated 6.5%.

The Bradley Objectors argue that "there are indications that the allocation was not negotiated at arm's length" and "there is nothing in the record to justify an allocation so disproportionate as 93.5% to 6.5%." (Doc. # 2877 at 5-6). The Bradley Objectors are simply wrong. First and foremost, the Bradley Objectors' counsel admitted that this was not a collusive settlement. (*See* Doc. # 2865 at 152 ("I certainly don't think this is a collusive settlement[.]")). Second, the record clearly shows that the settlement was negotiated at arm's length, under the auspices of Ken Feinberg, the country's leading neutral on allocations of large settlements and compensation funds. (*See* Doc. # 2610-8). And, there is expert evidence in the record regarding the reasonableness of the allocation. (Docs. # 2812-9; 2825-1).

The economic reasonableness of the allocation was confirmed by Dr. Mason, an experienced antitrust economist. (Doc. # 2825-1). Dr. Mason utilized four proxies to analyze the reasonableness of the allocation. In their argument, the Bradley Objectors targeted only the first of those four proxies - related to the comparative share of the overcharges borne by Fully-Insured and ASO plans. They argue that "the gross difference between fully insured premiums and administrative fees is an unsound basis

for the allocation." (Doc. # 2877 at 8). But, Dr. Mason has noted that this particular proxy -- in which 1.7% of the full amount is allocated to the Self-Funded Sub-Class -- is particularly imprecise. (*See* 2825-1 ¶ 40 & n.60).

Dr. Mason's second proxy -- net revenue -- "subtract[s] total claims paid on Fully Insured-Plans from revenue associated with these plans," so that they are on equal footing with ASO Plans, resulting in a less than 10.7% allocation to the Self-Funded Sub-Class. (*Id.* ¶ 40). This, in fact, seems to be more or less what the Objectors assert should be the basis for the allocation. Instead of subtracting the claims from Fully-Insured-Plans, they argue that the allocation formula should add in the claims for Self-Funded Plans. (Doc. # 2877 at 25). However, both of these approaches are also imperfect because they "implicitly assume[] the mark-up arising from the exclusionary power of BCBS (the overcharge at issue in this case) is equi-proportional to each dollar of ASO and Fully-Insured Net Revenue." (Doc. # 2825-1 ¶ 41). This is an improper assumption.

As Dr. Mason has explained, "ASO subscribers purchase from a more competitive market than Fully-Insured subscribers." (*Id.* ¶ 22). Because of the greater availability of substitute products -- such as third party administrates, the option to administer healthcare plans in-house, and the existence of large national health plan administrators -- the ASO market actually is significantly more competitive. (*See* Doc. # 2865 at 41-44). Indeed, for some Blues, fully insured business is anywhere from four to ten times more profitable than ASO business. (*See* Docs. # 2868-1; 2868-2; 2812-12 at 3). For some Blues, ASO

business may in fact be break-even or even a loss leader. (*See* Docs. # 2868-3; 2868-4; 2868-5; 2868-6; 2868-7). The Bradley Objectors overlook these crucial differences between the markets. Surprisingly, their expert believes "the allocation of damages should [not] be based on the relative amounts of overcharges that the two groups of customer[s] paid[.]" (*Id.* at 258).

Overcharges are what this case is about. The differences in the markets -- along with the differences in Class Periods -- mean that the Fully Insured Claimants suffered a much greater antitrust injury. In fact, any overcharge an ASO customer paid on administrative fees was likely offset by savings on claims costs, given this customer's ability to directly negotiate discounts with provider networks. (Doc. # 2825-1 ¶ 54). Accordingly, Fully Insured Claimants are deserving of a much greater proportion of the settlement.

Dr. Mason's remaining proxies -- operating gain differential, which indicates a settlement allocation for ASOs of <3.9-6.3%; and revenue per member growth, which indicates a settlement allocation for ASOs of 3.4-3.8% -- reflect the relative profitability of the ASO and fully-insured business. (*See id.* ¶¶ 42-49). Notably, the Self-Funded Objectors do not address these proxies in their arguments. These unchallenged proxies support a finding that a 6.5% allocation for the Self-Funded Class is fair, adequate, and reasonable.

For all of these reasons, the Bradley Objectors' objection regarding the allocation between the Fully-Insured and Self-Funded Classes is **OVERRULED**.

E. Whether the Self-Funded class period should go back to 2008

The next questions to be addressed involve whether the allocation is justified by the different time periods for the classes and the uncertainty regarding litigation outcomes. (*Id.* ¶¶ 30 n.49; 33-35).

The Fully Insured Class Period spans twelve and one-half years while the Self-Funded Class spans five years.[23] Because ASOs did not become involved in the lawsuit until late 2019, they did not face the same litigation expenses, burdens, and perils as the rest of the Class. Even more, they clearly benefitted from the work the Fully Insured counsel had performed for all those years. Accordingly, a discount factor is appropriate in determining the two groups' respective portions of the settlement to reflect "the expected amount of time that would elapse before a litigation or settlement payment is made[,] as well as the risk associated with that payment." (*Id.* ¶ 35). Here, a "conservative" discount factor would be no less than 50%. (*Id.*). Dr. Mason applied this 50% discount to each of his proxies. (*Id.* ¶¶ 39, 40, 43, 48). The Bradley Objectors argue this discount factor is unfair because he applied no discount to the Fully Insured Class. That argument misses the point. As Dr. Mason explained at the Fairness Hearing, "[t]o put things on an apples-to-apples basis, we have to discount what [the Self-Funded Class is] getting

23. "'Settlement Class Period' means February 7, 2008, through the Execution Date, except for the Self-Funded Accounts, for whom the Settlement Class Period is September 1, 2015 through the Execution Date." (Doc. # 2610-2 ¶ 1(nnnn)).

for starting eight years later." (Doc. # 2865 at 204). The court agrees.

The Bradley Objectors also question whether the ASO Class Period should go back further in time. They argue they should get the benefit of the 2012 filing date in *Cerven, et al. v. BCBSNC*, No. 2:12-cv-04169, as the starting point of their class period. (*See* Docs. # 2812-19 at 91-96; 2845 at 3-10). As an initial matter, it is worth noting that Self-Funded Accounts only became involved in this MDL in July 2019 (Doc. # 2610 ¶ 31), yet their claims get the benefit of a class period going back to September 2015.[24]

But in any event, and even more fundamentally, the Bradley Objectors misconstrue the *Cerven* complaint. The proposed damages class in the *Cerven* complaint was:

> All persons or entities who, from February 7, 2008 to the present (the "Class Period") have paid *health insurance premiums* to BCBS-NC *for individual or small group full-service commercial health insurance.*

(*Cerven* Doc. # 1 ¶ 21 (emphasis added)). The *Cerven* complaint mentions ASOs but only in the context of distinguishing them from the proposed class and explaining that "fully-insured health insurance products and ASO products are only substitutes for those consumers able to selfinsure[.]" (*Id.* ¶ 129). Accordingly, as the *Cerven*

24. Of course, this further illustrates that Feinberg mediated what was plainly a hard-fought series of negotiations.

complaint makes clear, "it is appropriate to consider the individual and small group health insurance product market as distinct from the large group health insurance product market" because of, among other things, "the prevalence of ASOs in each market." (*Id.* ¶ 131).

The *Cerven* complaint plainly did not contemplate ASOs being part of that case or the relevant class.[25] "[T]he critical issue in Rule 15(c) determinations is whether the original complaint gave notice to the defendant of the claim now being asserted." *Davenport v. United States*, 217 F.3d 1341, 1345 n.8 (11th Cir. 2000). The *Cerven* complaint simply gave no notice to Defendants whatsoever that they would have to defend against alleged misconduct in the ASO market. So, ASOs cannot get the benefit of the *Cerven* filing date. *See Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1131 (11th Cir. 2004).

The Bradley Objectors argue there is a further asymmetry in the allocation. They question how the settlement proponents can allow relation-back of damages claims for large insured groups, but not ASOs, despite the *Cerven* proposed damages class being limited to individual or small group insurance. Of course, the answer lies in *Cerven*'s proposed injunction class:

> All persons or entities in the United States of America who are currently *insured by any*

25. Nor did the ASOs themselves—not a single Self-Funded Account sought to file suit during the eight years between the *Cerven* complaint and the settlement.

> *health insurance plan* that is currently a party to a license agreement with BCBSA that restricts the ability of that health insurance plan to do business outside of any geographically defined area.

(*Cerven* Doc. # 1 ¶ 20 (emphasis added)). The *Cerven* injunction class includes all entities, regardless of their size, who are "insured by any health insurance plan." (*Id.*). Those who are Self-Funded are just that—self-funded. That is, they did not buy insurance from the Blues. Therefore, under a fair reading of the *Cerven* Complaint, ASOs are excluded from both the proposed damages and the injunction classes.

For all of these reasons, the objection that the Self-Funded Class period should go back to 2008 is **OVERRULED**.

F. Whether the QNA Definition is too narrow or the requirements to obtain a Second Blue Bid are unreasonable

Under the proposed Settlement, Self-Funded Accounts that are determined to be Qualified National Accounts and are headquartered in an area with a single Blue licensee are entitled to request a Second Blue Bid. (Doc. # 2610-2 ¶ 15). QNAs are identified by listing the self-funded single-employer entities with at least 5,000 employees that have the highest Dispersion Percentages or are located in areas with two Blue licensees, until the number of Members covered by those entities reaches

33 million. This is 31% of Members of all Self-Funded Accounts, regardless of carrier. (*Id.* ¶ 1(u), (z), (cccc), (ffff)). The composition of the QNA list is not fixed immutably, but is subject to review and modification every two years.

General Motors challenges the Second Blue Bid criteria, arguing that the criteria are "arbitrary" and "treat[ ] class members differently (by allowing only a minority of them to solicit a Second Blue Bid)." (Doc. # 2874 at 2). Three other groups of Objectors complain that the QNA definition is limited to "employers," and thereby unfairly excludes certain multi-employer plans (here, "Taft-Hartley plans") and church groups, which collectively buy ASO contracts. These objections miss the mark.

Rule 23(e)(2)(D) provides that one of the elements to consider in determining whether a proposed settlement is "fair, reasonable, and adequate" is whether, taken together and evaluated in its entirety, "the proposal treats class members *equitably* relative to each other." Rule 23(e)(2) & (D) (emphasis added). "Higher allocations to certain parties" need only be "based rationally on legitimate considerations." *Pedraza v. United Guar. Corp.*, 2001 U.S. Dist. LEXIS 27166, 2001 WL 37071199, *7 (S.D. Ga. June 22, 2001). In the Eleventh Circuit, "there is no rule that settlements benefit all class members equally" so long as any differences are "rationally based on legitimate considerations." *Holmes v. Continental Can*, 706 F.2d 1144, 1148 (11th Cir. 1983) (citing *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 506 n. 5 (5th Cir. 1981)).

First, these Objectors overlook the context of the settlement, in particular the effect of the elimination of the NBE Rule. The NBE Rule previously placed limits on the business a Blue Plan could do under its non-Blue brands. By eliminating the NBE rule, accounts are now potentially able to receive bids from every Blue Plan in the country—*i.e.*, a Blue-branded bid from the local Blue Plan, and unconstrained Green bids from any other Plan. Moreover, some employers are already headquartered in areas with more than one Blue licensee and so while they may be excluded from receiving a Second Blue Bid under the Settlement, they are already eligible to receive two Blue bids, which meaningfully differentiates them from employers in areas with a single licensee. The Second Blue Bid relief appropriately reflects this difference.

It is also important to note that the Settlement Agreement is a compromise. This portion of it was designed to direct the Second Blue Bid relief to truly national, dispersed employers that have the fewest insurance options when (or if) they choose to contract with a single insurer for national coverage (*e.g.*, United, Cigna, Aetna, or a Blue Plan). In contrast, less dispersed (*i.e.*, more regional) accounts typically have the same national options, plus numerous regional carrier options (*e.g.*, Kaiser Permanente, PacificSource, SelectHealth, and Tufts Health Plan). (Doc. # 2813 at 27).

An employer's Dispersion Percentage is the percentage of its employees located outside the Blue service area containing the employer's headquarters, and is determined by Dun & Bradstreet, a neutral, third-party

source. (Doc. # 2610-2 ¶ 1(w)). Prioritizing the employers with the highest Dispersion Percentages for Second Blue Bid relief directly targets employers with a significant portion of their employees in multiple Blue Plans' service areas, for whom regional carriers may not be realistic options, and who therefore will benefit most from a Second Blue Bid. (Doc. # 2813 at 28). The Second Blue Bid criteria reflect the different competitive circumstances for these accounts and recognize both the relative strength of accounts' claims and which accounts are most likely to benefit from the relief. These considerations are rational and legitimate.

Moreover, the QNA definition is reasonably limited to employers, excluding Taft Hartley Plans and other multi-employer plans. The exclusion of these multi-employer plans is equitable because these groups have options to purchase insurance as single employers from state and regional insurers, a choice not typically available to QNAs as defined by the parties' Agreement. These multi-employer plans have already increased their bargaining power by aggregating their insurance purchases. Each of these employers could comfortably buy health care coverage in its own name and within its own, more competitive market than the market available to QNAs. Each of these considerations, which the parties plainly considered in "drawing lines," are rational and legitimate.

Accordingly, the objections asserting that the QNA definition is too narrow or that the requirements to obtain a Second Blue Bid are unreasonable are **OVERRULED**.

G. Whether the Local Best Efforts Rule should be left intact

In 1994, the Association and the Blues adopted the Local Best Efforts Rule. (Docs. # 2063 at 17-18; 1349-15 at 20-21; 1349-16 at 7). Under the original Blues' LBE, at least 80% of a Plan's annual health revenue from within its designated service area must be derived from services offered under the Blue Marks. (*Id.*). The LBE applies only to health revenue "attributable to health care plans and related services and hospital services . . . offered within the designated Service Area." (Docs. 2063 at 17-18; 1350-10 at 4).

Certain objectors have expressed concern regarding the fact that the LBE was left in place "unchanged." (*See* Doc. # 2812-19 at 34-35 ("The settlement agreement leaves unchanged the Local Best Efforts rules.")). First, the objectors are incorrect in asserting that the LBE is "unchanged." To the contrary, the Settlement Agreement provides that compliance with the LBE going forward will be measured at the state level instead of the service area level. (Doc. # 2610-2 at 31, ¶ 11). Second, even keeping the LBE in place in that modified form, the elimination of NBE has now set the stage for each Blue Plan to have the unfettered ability to use Green marks to compete with other Blues outside of its ESA. The only limit left in place relates to how much Green business a Blue can do within its own state (*i.e.*, in competition with its own Blue business).

Objectors assume, without pointing to any evidence that, absent LBE, a Blue Plan would offer "Green competitive bids" to national accounts in their own service areas (*i.e.*, they would compete against themselves with Green business). (Doc. # 2812-19 at 34). However, this assumption simply ignores the convincing evidence presented by the Blues' expert, Dr. Kevin M. Murphy, the George J. Stigler Distinguished Service Professor of Economics in the Booth School of Business and the Department of Economics at the University of Chicago. (Doc. # 2565-49 at 8). According to Dr. Murphy, as an economic matter, profit-maximizing firms do not compete with themselves. (*Id.* at 100). Moreover, under LBE, all Blues remain free to offer a competitive Green bid in every other Blue Plan's service area.

The court notes that Subscribers took extensive discovery and conducted substantial expert analysis on the LBE rule. After doing so, they negotiated the changes noted above. In its current form, the LBE allows virtually unlimited Green competition by any Blue Plan that is a competitor or potential competitor. The court concludes that, post-settlement, the LBE rule is reasonably tailored to encourage investment in the Blue Marks in each Blue Plan's local market. This is actually pro-competitive because that approach will inure to the benefit of the customer.

Therefore, the objection regarding keeping LBE in place is **OVERRULED**.

H. Whether Tribal-related entities should be part of the Settlement

The Prairie Island Indian Community filed an objection on behalf of three health care plans: (1) Prairie Island Indian Community Self-Funded Group Medical Benefits Plan for Community Members and their Eligible Dependents; (2) Treasure Island Resort & Casino Exclusive Health Care Plan; and (3) Treasure Island Resort & Casino Preferred Provider Organization Health Care Plan. (Doc. # 2812-20 at 84-86). Prairie Island argues that the Settlement and related communications are unclear about whether these plans are within the Self-Funded Damages Sub-Class or are excluded as a Government Account. (*Id.*).

Under the Settlement Agreement, "Government Accounts" are excluded from the Settlement Damages Class.

> hh. "Government Account" means only a state, a county, a municipality, an unincorporated association performing municipal functions, a Native American tribe, or the federal government (including the Federal Employee Program). A Government Account includes all Members of the Government Account. No other entity that is not a state, county, municipality, unincorporated association performing municipal functions, Native American tribe or the federal government is a Government Account, unless it is required by law to provide

> any health care coverage it makes available to Members only under, or as a participant in, a Commercial Health Benefit Product approved, selected, procured, sponsored or purchased by a Government Account. Entities that are not Government Accounts (e.g., utility companies, school districts, government-funded hospitals, public retiree benefit plans, public libraries, port authorities, transportation authorities, waste disposal districts, police departments, fire departments) will receive notice and an opportunity to submit a claim form to the extent they are otherwise within the definition of the Damages Class.

(Doc. # 2610-2 at 12-13, & 1(hh)).

At the Fairness Hearing, Subscribers' Counsel explained that they:

> negotiated with the Blues to ensure that government-like entities are treated like the government and that if they are not, if they're truly operating on their own and only quasi-governmental and purchasing insurance on their own, not under the mandate of a government entity, then they are participants in the class and would have gotten notice and could submit a claim.

(Doc. # 2865 at 271). Blues' Counsel further explained that,

> Prairie Island Indian Community, doing business as Treasure Island Resorts and Casinos, is included in the class and should have received notice and they should file a claim if they have one.

(*Id.* at 277). Moreover, despite Prairie Island's confusion about whether the Casino Plans were part of the Self-Funded Sub-Class, it was the only one of five hundred seventy-four Tribes to file such an objection.

The court is satisfied that the Settlement Agreement is clear enough that 573 of 574 Indian Tribes recognized that commercial entities related to Indian tribes are not considered to be Government Accounts, but the Tribe itself is within the definition of Government Account. (Doc. # 2610-2 at 12-13, & 1(hh)). Moreover, those entities would have received Notice under the Settlement.

Accordingly, Prairie Island Indian Community's objection is **OVERRULED**.

I. Whether Attorney Fees are Too High

Fifteen objectors have expressed their opinion that the attorneys' fees sought by Subscribers' Counsel are too high.[26] (Docs. # 2812-19; 2812-20; 2812-21; 2812-22). One such objector, David Behanna, presented argument on his objection at the Fairness Hearing. Behanna made

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26. None of these objections specifically take issue with reimbursement of counsels' expenses.

the following arguments: (1) Subscribers' counsel's fees should be limited to the lodestar[27] because the Sherman Act is a fee shifting statute, and (2) this is not a common fund case. (Doc. # 2812 at 104-117). The court disagrees.

1. The Subscriber Settlement Created a Common Fund

"It is well established that when a representative party has created a 'common fund' for or has conferred a 'substantial benefit' upon an identifiable class, its counsel is entitled to attorneys' fees based upon the benefit obtained." *Dorado v. Bank of Am., N.A.*, 2017 U.S. Dist. LEXIS 219407, 2017 WL 5241042, at *7 (S.D. Fla. Mar. 24, 2017). To be sure, the Supreme Court in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980) has made clear that a "lawyer who recovers a common fund for the benefit of persons other than ... his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing*, 444 U.S. at 478; *see Amorin v. Taishan Gypsum Co. Ltd.*, 861 Fed. Appx. 730, 2021 WL 2349920, at *3 (11th Cir., 2021) ("[I]n complex litigation, courts have broad managerial power that includes significant discretion in awarding fees"); *see also Camden I Condominium Ass'n*, 946 F.2d at 774 (establishing rule in Eleventh Circuit that percentage-of-fund approach rather than lodestar would apply in common fund cases);

27. Under the lodestar method, a district court determines the number of hours worked by plaintiffs' counsel, multiplies those hours by a reasonable hourly rate, and then adjusts the final amount upward or downward based on various factors. *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 772 (11th Cir. 1991).

In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 325 (N.D. Ga. 1993) (awarding attorneys' fees as a percentage of a common fund in a Sherman Act case). Here, the Subscriber Settlement produced a substantial monetary award and significant injunctive relief for the class. More specifically, the Settlement created a common fund of $2,670,000,000. It also provides transformative, pro-competitive injunctive relief that will benefit the members of the Subscriber Class.

"[C]ommon benefit fees—grounded in the courts' equity power—need not satisfy rigid eligibility requirements." *Amorin*, 861 Fed. Appx. 730, 2021 WL 2349920, at *3 (citing *In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1019 (5th Cir. 1977)). "[T]he key distinction between common-fund and fee-shifting cases is whether the attorney's fees are paid by the client (as in common-fund cases) or by the party (as in fee-shifting cases)." *Id.* (citing *In re Home Depot Inc.*, 931 F.3d at 1089). "[T]he 'broad grant of authority' awarded to trial courts when consolidating cases [such as in an MDL] necessarily includes the ability to compensate appointed counsel that carry 'significant duties and responsibilities.'" *Id.* (citing *Fla. Everglades*, 549 F.2d at 1013-14, 1016). Here, Subscribers' Counsel seek attorneys' fees from the $2,670,000,000 common fund they negotiated for the Class, without regard to the value of the injunctive relief they also secured.

An objector in *In re Equifax* made a similar argument to the one advanced here. That objector argued that the court should apply the lodestar method rather than the

percentage method because there is a statutory fee-shifting provision. 999 F.3d at 1279. However, as the district court noted in considering that argument, "[t]he Supreme Court has never categorically prohibited the percentage method in common fund cases." *Id.* The Eleventh Circuit agreed, holding that "[w]ithout a categorical prohibition on the percentage method in common fund settlement cases, *Camden I* and the percentage method remain the law in this Circuit."[28] *Id.* at 1280. Through their efforts in resolving this case, Subscribers' Counsel created a common fund. That is an unassailable fact. Therefore, a percentage fee is appropriate.

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28. Recently, in *Muransky v. Godiva Chocolatier, Inc.*, a panel of the Eleventh Circuit specified that "[t]he common-fund doctrine applies to class settlements that result in a common fund even when class counsel could have pursued attorney's fees under a fee-shifting statute." 922 F.3d 1175, 1195 (11th Cir. 2019) (citing *Staton v. Boeing Co.*, 327 F.3d 938, 968-69 (9th Cir. 2003); *Florin v. Nationsbank of Ga.*, 34 F.3d 560, 563 (7th Cir. 1994)). Although the *Muransky* decision was later vacated, 939 F.3d 1278 (11th Cir. 2019), and the matter was reheard *en banc*, 979 F.3d 917 (11th Cir. 2020), the full court found that the representative plaintiff lacked standing to pursue the class claims and, therefore, did not evaluate the fairness of the settlement. *See Muransky*, 979 F.3d at 921. "Because the *en banc* court [in *Muransky*] did not reach the attorneys' fees issue, the [c]ourt finds the vacated panel decision on this point, and the cases to which it cites, to be persuasive, albeit not binding authority." *Kuhr v. Mayo Clinic Jacksonville*, 530 F. Supp. 3d 1102, 2021 WL 1207878, at *11, n.13 (M.D. Fla., 2021). Moreover, these cases are consistent with the Eleventh Circuit's pronouncement that the percentage method should be employed in common fund cases.

2. The Appropriate Percentage Fee Award

"[A]ttorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Camden I*, 946 F.2d at 774. The fee sought by Subscribers' Counsel, 23.47%[29] of the Common Fund, is at or below the percentage fee typically awarded in similar cases. The "benchmark range" in this Circuit is 20% to 30% of the common fund. *In re Home Depot Inc.*, 931 F.3d at 1076. In fact, numerous decisions have found that a 30% fee is well within the range of a customary fee. *See, e.g., Cty. of Monmouth New Jersey v. Fla. Cancer Specialists, P.L.*, 2020 U.S. Dist. LEXIS 258583, 2020 WL 11272691, at *2 (M.D. Fla. Mar. 17, 2020) (approving award of 30% of the settlement fund in Sherman Act case); *Wave Lengths Hair Salons of Fla., Inc. v. CBL & Assocs. Properties, Inc.*, 2019 U.S. Dist. LEXIS 239523, 2019 WL 13037028, *14 (M.D. Fla. Aug. 22, 2019) (approving a 30% fee); *In re Terazosin Hydrochloride Antitrust Litig.*, 2005 U.S. Dist. LEXIS 43082, 2005 WL 8181045, at *5 (S.D. Fla. Apr. 19, 2005) (awarding 33-1/3% of the gross Settlement Fund in Sherman Act case); *Managed Care Litig. Class Plaintiffs v. Aetna, Inc. (In re Managed Care Litig.)*, 2003 U.S. Dist. LEXIS 27228, 2003 WL 22850070 (S.D. Fla. Oct. 24, 2003) (awarding a 35.5% fee). The court therefore finds that the requested attorneys' fee award of 23.47% of the Common Fund is well within the reasonable range, particularly

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29. The requested fees and expenses together amount to 25% of the common fund. However, once the $40,916,627 in requested expenses is deducted, the requested fees amount to approximately 23.47% of the fund.

given the fact the claimed fees do not account for the value of the substantial injunctive relief also secured by the Settlement.

Because the requested fee -- even when including expenses -- does not exceed 25%, the court need not consider the factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974),[30] to determine the reasonableness of the requested fees. *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1242 (11th Cir. 2011) ("Where the requested fee exceeds 25%, the court is instructed to apply the twelve *Johnson* factors."). Nevertheless, even if those factors were applied here, that process confirms the requested fee is reasonable.

The Johnson factors include:

> (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the

30. *Johnson* was *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87, 109 (1989).

> case; (11) the nature and the length of the professional relationship with the client; and (12) awards in similar cases.

Camden I, 946 F.2d at 772 n.3. The court evaluates these factors below.

(a) The Settlement has resulted in significant, historic injunctive relief for the class in addition to a substantial monetary award;

(b) This case required an immense amount of time and labor by Subscribers' Counsel (Doc. # 2733 at 13-33), and is a private enforcement action that challenges practices long overlooked by public agencies;

(c) This case presented a plethora of difficult factual issues, and navigating these thorny questions required substantial discovery and pretrial litigation, including the production of millions of pages of documents, the taking of dozens of depositions, and the prosecution and defense of scores of motions;

(d) This case raised novel and complex legal questions, and unlike other historic antitrust actions, is a private-enforcement action that did not follow on a government investigation;

(e) Subscribers' Counsel are among the nation's most experienced and able litigators in the antitrust arena, and they conducted the litigation and worked adeptly to achieve the Settlement with skill, zeal, and expertise;

(f) For many of the Subscriber firms, both large and small, the significant commitment of time and resources that were required to litigate this case undoubtedly precluded them from tackling other cases and/or other work. Through August 15, 2020, Subscribers' Counsel had already devoted 434,054.6 hours to litigating the complex factual and contested legal questions presented in the Subscriber Actions. Using historic blended billing rates, this work resulted in a lodestar of $194,226,321.65. These figures do not include the substantial additional time (9,205.2 hours as of May 28, 2021) spent mediating and finalizing the Settlement Agreement after that date; drafting the preliminary approval papers; and preparing for and attending the day-long preliminary approval hearing. Since May 2021, several thousand additional hours have been spent acquiring data from Defendants for notice and claims administration, working with the notice and claims administrator to provide notice to over 100 million class members, answering calls and emails from thousands of class members once notice was disseminated, and preparing for the final approval hearing. (Doc. # 2273-2 at 411-42).

(g) The fee in this case was contingent on obtaining class relief, and Subscribers' Counsel invested their own money in fronting the expenses in this litigation, all in the face of significant risk that they would recover nothing and lose millions and millions of dollars;

(h) Given the enormous commitments of time and resources, as well as the significant risk entailed in developing and litigating this MDL, few attorneys would have been willing to take on this litigation;

(i) The $2.67 billion Settlement Fund that Subscribers' Counsel negotiated in this case may represent the largest antitrust class action settlement on record (Docs. # 2733-3; 2733-4), and, even more significantly, it is accompanied by historic structural relief which rarely arises out of private enforcement actions;

(j) The amount of attorneys' fees awarded and costs and expenses to be paid from the Settlement Fund are fair, adequate, and reasonable, and consistent with awards in similarly complex cases;

(k) Use of the lodestar cross-check is not required in this Circuit. *In re Home Depot*, 931 F.3d at 1091 n.25; *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1298 (11th Cir. 1999) ("[W]hile we have decided in this circuit that a lodestar calculation is not proper in common fund cases, we *may* refer to that figure for comparison."); *Wilson v. Everbank*, 2016 U.S. Dist. LEXIS 15751, 2016 WL 457011, at *19 (S.D. Fla. Feb. 3, 2016) ("'Under *Camden I*, courts in this Circuit regularly award fees based on a percentage of the recovery without discussing lodestar at all.'" (quoting *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1363 (S.D. Fla. 2011)). Nonetheless, as the expert testimony presented in support of the Fee Motion confirms, a lodestar multiplier of 3.23 that the percentage fee award represents would be fully consistent with the multipliers that courts have found reasonable in similarly complex mega-fund cases. *See, e.g., Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 696 (N.D. Ga. 2001) (noting that courts have approved lodestar multipliers greater than five); *Cox v. Cmty. Loans of Am., Inc.*, 2016

U.S. Dist. LEXIS 195533, 2016 WL 9130979, at *3 (M.D. Ga. Oct. 6, 2016) (noting that lodestar multipliers "in large and complicated class actions range from 2.26 to 4.5 while three appears to be the average[.]"). Moreover, the underlying hours used for the lodestar calculation do not include the substantial additional time spent mediating and finalizing the Settlement.

Therefore, the objections asserting that Attorney Fees are too high are **OVERRULED**.

J. Whether the Settlement Monetary Relief is Too Low

Several individual objectors argue (or at least could be construed as arguing) that the $2.67 billion Settlement Fund is inadequate. Rule 23(e)(2)(C) requires a court to assess the adequacy of relief and, in doing so, to consider "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)."

The monetary relief provided for in this Settlement falls easily within the range of recoveries deemed reasonable by courts, and represents one of the largest monetary recoveries ever achieved in an antitrust class action settlement. (Docs. # 2733-3 ¶ 63; 2733-4 ¶ 17; 2610-12 ¶ 33). The court previously evaluated each of the Rule 23(e)(2)(C) factors above. (*Supra* § III(B)). Moreover, there

is no indication that the Blues would have paid more. The court is well aware of the intensity, length, and tenacity of the parties' negotiations in this matter. This was not just hard-fought litigation, but this matter truly involved collision-course negotiations overseen by an able neutral mediator. Contrary to the objections, the significant monetary relief achieved by the Settlement actually favors final approval.

Accordingly, the objection that the Settlement Monetary Relief is too low is **OVERRULED**.

K. Whether the Self-Funded Sub-Class Counsel had a Conflict

Objector Hutsler argues that a conflict of interest between Subscriber Class Counsel and the Self-Funded Sub-Class has resulted in a settlement agreement that allocates an insufficient portion of the Net Settlement Fund to the Self-Funded Sub-Class. (Doc. # 2812-21 at 61). That argument misses the mark for two reasons. First, the court has already addressed the reasonableness of the allocation. (*Supra* §§ II(E), III(B)(1), III(B)(4)). Second, Hutsler's argument is premised on a misunderstanding of the timing and procedural history of the mediation process that occurred in this case.

During their negotiations in July 2019, while mediation was ongoing, Subscriber Plaintiffs and the Blues recognized the need for a sub-class of Self-Funded Accounts and their employees. Subscriber Plaintiffs thereafter coordinated the recruitment of separate class

counsel for that subclass and a class representative. (Doc. # 2610-6 ¶ 31). Subscriber Plaintiffs approached Warren Burns of Burns Charest LLP to inquire about serving as counsel for a sub-class of Self-Funded Accounts and their employees. Burns agreed, and was retained by Hibbett Sports, Inc., an Alabama-based, publicly-traded retailer of sporting goods that is a Self-Funded Account. Burns became settlement counsel to the putative Self-Funded Sub-Class, with Hibbett as the Self-Funded Sub-Class Representative. (*Id.*). The potential split of the Net Settlement Fund between fully insured and self-funded claimants was not a condition of Burns's retention, and a split was never discussed before Burns was engaged. (*Id.*).

Self-Funded Sub-Class Counsel asked for and received access to the voluminous discovery record in the litigation, along with relevant briefing on class certification and summary judgment. In turn, they engaged independent experts to analyze possible damages claims on behalf of the Self-Funded Sub-Class. In September 2019, Self-Funded Sub-Class Counsel began attending mediation sessions. Over the next several months, the parties worked to develop a written settlement agreement. This process involved numerous additional conferences and intense negotiations between the parties, including the Self-Funded Sub-Class. (*Id.* ¶ 32).

Following those negotiations with the Blues, Subscriber Plaintiffs and Self-Funded Sub-Class Counsel engaged Feinberg as an Allocation Mediator to facilitate the determination of an appropriate allocation. The economic reasonableness of the agreed-upon allocation

was thereafter examined and confirmed by Dr. Mason, an experienced antitrust economist. (Doc. # 2825-1).

Because the Self-Funded Sub-Class was separately represented by competent counsel, there was expert review of the settlement allocation, the negotiations and agreement about the allocation were in good faith, and the allocation is reasonable given the unique circumstances of this litigation, the objection that Sub-Class Counsel had a conflict is **OVERRULED**.

L. The Department of Labor's ERISA Concerns

The Department of Labor ("DOL") has not objected to the proposed Subscriber Settlement, nor has it actually opposed the Settlement. Rather, the DOL has expressed concerns about the Settlement to both the Settlement Proponents and the court. The DOL issued a letter to the Settlement Proponents, and filed a Statement of Interest with the court. Additionally, at its request, the court allowed the DOL to present argument regarding its concerns at the Fairness Hearing. (Docs. # 2863; 2866).

At the Fairness Hearing, it became clear that the DOL was concerned with various hypothetical questions about whether this settlement affects any duties employers or plan fiduciaries might have under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et. seq*. (Doc. # 2866). However, as the Settlement Proponents have made clear, (1) ERISA plan rights are not affected by the Settlement and, further, (2) the Settlement Agreement does not release any claims

that an ERISA plan may have against an employer. (*Id.* at 23, 26, 38). To be clear, all ERISA duties still apply, all ERISA fiduciaries must comply with those duties, and this Settlement does nothing to change or alter ERISA rights. To the extent an ERISA plan does not approve of what an employer does with Settlement proceeds, the plan's right to sue the employer under ERISA is wholly unaffected by this Settlement. (*Id.* at 23).

The DOL expressed concern that Class-member ERISA plans appear to be inadequately represented in the proposed Settlement. However, several Class Representatives are both employers (plan sponsors) and their plans' named fiduciaries-*e.g.*, CB Roofing; Consumer Financial Education Foundation of America, Inc.; Gaston CPA; Pete Moore Chevrolet; Pettus Plumbing; and Hibbett Sports, Inc. The Class Representatives also include employees who were participants covered by their employer-sponsored ERISA plans. The employer Class Representatives understand that they have obligations under ERISA, and that nothing in the Settlement relieves them of those obligations.

The DOL also expressed concern that the proposed Settlement does not address the possibility of double recovery. That is incorrect. The claims process relies on data based on each claimant and each health benefit plan or ASO contract. If more than one claimant attempts to make a claim pointing to the same data (for the same payments on the same policy or ASO contract), that will automatically be flagged by JND as a conflict for resolution. The potential conflict will be readily apparent,

making it easy for JND to identify and for JND (or the Settlement Administrator) to resolve, avoiding any risk of double recovery. The Settlement Administrator would decide any claims by ERISA plans and employers over the same payments for the same policy or ASO contract.

The DOL expressed another concern about whether the proposed plan of distribution may result in violations of ERISA's trust requirements. However, ERISA recognizes an employer's dual status as both plan sponsor and as plan administrator as permissible (*see* 29 U.S.C. § 1108(c)(3)). Therefore, this concern is not really a concern about the terms of the Settlement, but rather a concern that an employer sponsor may breach its duties under ERISA by participating in the Settlement. Again, nothing in the Settlement relieves plan fiduciaries of their ERISA obligations.

The DOL also raised its concern that, in some circumstances, the proposed settlement's release of claims (plan assets) may also involve prohibited transactions for which an exemption is required. However, as the Third Circuit recently explained, the Supreme Court's decision in *Lockheed Corp. v. Spink*, 517 U.S. 882, 893, 116 S. Ct. 1783, 135 L. Ed. 2d 153 (1996), identified the "common thread" to each prohibited transaction in § 406(a)(1) as being "a special risk to the plan from a transaction presumably not at arm's length." *Sweda v. Univ. of Pennsylvania*, 923 F.3d 320, 338 (3d Cir. 2019). Here, the Settlement was most certainly reached at arm's length, and thus does not contain the "common thread" of a prohibited transaction.

The DOL also questioned whether prohibited transactions are likely to occur under the Settlement, which do not appear to be covered by Prohibited Transaction Exemption ("PTE") 2003-39. First, even if the Settlement were covered by § 406(a)(1), it would satisfy the exemption from the prohibition set forth in DOL's PTE 2003-39: there is a genuine controversy involving the plans; any fiduciary approving the Settlement is independent of the Settling Defendants; the Settlement is the result of arm's length negotiations and is reasonable; the Settlement is not designed to benefit the Settling Defendants (and in fact requires them to make significant monetary contributions and structural changes to the benefit of the Settlement Classes); the terms of the Settlement are contained in a written settlement agreement; and no commissions are being paid in connection with the Settlement. *See* PTE 2003-39, § II(a)-(j); 68 Fed. Reg. at 75635. Moreover, the absence of any conflict of interest and the court's extensive review and approval of the Settlement should eliminate any concerns regarding conflicts.

The DOL asks whether the proposed Settlement's release is overbroad. However, there is no blanket release of ERISA claims. Indeed, the Settlement and release make clear that ERISA claims unrelated to the issues raised in this litigation are not released. To be sure, the parties added language that expressly excludes ERISA and related benefit claims from the Settlement's releases. *See* Doc. 2610-2 at & 1(uuu).

Finally, the DOL expressed concern that the proposed Settlement does not take into consideration the Secretary's

guidance on allocating distributions from insurers to plans, employer sponsors, and plan participants. However, these funds are not plan assets at the time of their distribution. The DOL's real concern appears to be with what an employer may do with settlement proceeds after distribution of the Settlement Fund. The simple answer is that employers and ERISA plans are responsible for complying with applicable ERISA and DOL guidance, and nothing in the Settlement or the Plan of Distribution relieves them of those obligations.

For the foregoing reasons, the DOL's objections are **OVERRULED**.

M. Shiyang Huang's Objection

Shiyang Huang is neither a lawyer nor a professional objector. However, in *In re Equifax*, he objected to the settlement, and argued that Plaintiffs lacked Article III standing to bring their claims. *In re Equifax*, 999 F.3d at 1261. The court rejected Huang's contentions. *Id.* at 1261-64.

Here, Huang argues that the court cannot approve the Subscribers' Settlement because the court lacks Article III subject-matter jurisdiction to provide injunctive relief for those class members without a "real" or "immediate" risk of future harm. (Doc # 2833). Huang's objections fail for two reasons: (1) ironically, he lacks standing to assert them and (2) his objections are without merit.

Huang timely opted out of the Subscribers' Settlement damages class (Doc. # 2812-6) and never filed a timely objection to the Settlement. (Doc. # 2812-1 at 163-171). One who opts out of a class settlement lacks standing to object to a settlement. *Aboltin v. Jeunesse LLC*, 2019 U.S. Dist. LEXIS 39851, 2019 WL 1092789, at *2 (M.D. Fla. Feb. 15, 2019); *see also Jones v. United Healthcare Servs., Inc.*, 2016 U.S. Dist. LEXIS 130621, 2016 WL 8738256, at *4 (S.D. Fla. Sept. 22, 2016) (noting that a "successful opt-out" like Huang "cannot also file an objection to the Settlement."); *see also Zamora v. Lyft, Inc.*, 2018 U.S. Dist. LEXIS 191648, 2018 WL 5819511, at *1 (N.D. Cal. Nov. 6, 2018) (noting that a class member "cannot both object and opt out under the terms of the settlement"). "[I]t is well established that class members may either object or opt out, but they cannot do both." *Carter v. Forjas Taurus S.A.*, 2016 U.S. Dist. LEXIS 96054, 2016 WL 3982489, at *13 (S.D. Fla. July 22, 2016) (quoting *Newberg on Class Actions* § 13.23 (5th ed.) ("Class members who opt out of the class . . . are no longer considered class members, and hence Rule 23 does not give them standing to object to the settlement.")).

But, even putting aside that defect, Huang's arguments are off the mark. As this court has already held, "Subscriber Plaintiffs easily satisfy the necessary elements of standing." *In re Blue Cross Blue Shield Antitrust Litig.*, 2020 U.S. Dist. LEXIS 248401, 2020 WL 8256366, at *8 (N.D. Ala. Nov. 30, 2020). Here, the purpose of the injunctive relief sought pursuant to the Settlement is to remedy ongoing, actual harm.

Therefore, Huang's objection is **OVERRULED**.

N. Overruling of Objections

The court hereby **OVERRULES** all remaining objections to the Settlement Agreement and finally **APPROVES** the Settlement Agreement in all respects, and **FINDS** that the Settlement Agreement is fair, reasonable, and adequate, and is in the best interest of the Class Members.

V. Conclusion

"Public policy strongly favors the pretrial settlement of class action lawsuits." *Swaney*, 2020 U.S. Dist. LEXIS 101215, 2020 WL 3064945, at *3 (quoting *In re U.S. Oil & Gas Litig.*, 967 F.2d at 493). Having carefully considered the Motion for Final Approval of Proposed Class Settlement Agreement, the Settlement Agreement, the Proposed Plan of Distribution and Proposed Notice Plan, the Objections, all briefing and argument thereon, as well as all matters of record, the court finds that the proposed Settlement Agreement is sufficiently fair, reasonable, and adequate to be approved.

For all these reasons, Subscriber Plaintiffs' Motion for Final Approval of Class Settlement and Appointment of Settlement Administrator. (Doc. # 2812) is **GRANTED**.

APPROVAL OF THE SETTLEMENT AGREEMENT

It is further **ORDERED** as follows:

1. Having reviewed and considered the Settlement Agreement, all papers filed and proceedings held in

connection with the Settlement, all oral and written comments and objections received regarding the Settlement, and the record in the Action, and for the reasons set forth in detail above, the court **APPROVES** the Settlement Agreement under Rule 23(e)(2). Pursuant to the Settlement Agreement, Settling Defendants have agreed to pay $2.67 billion to create the Settlement Fund, which will be disbursed to Authorized Claimants of the Damages Class, used to pay Notice and Administration Costs, and for any Fee and Expense Award. The Settlement Agreement also provides significant injunctive relief for the benefit of the Settlement Classes.

2. This court **CONCLUDES** it has subject matter jurisdiction over this Action and personal jurisdiction over the parties and the members of the Settlement Classes described below.

3. This Final Order and Judgment incorporates as if set forth verbatim herein the following documents: (a) the Settlement Agreement; (b) the Notice Plan and Claim Form, which were each approved on November 30, 2020; (c) the Supplemental Notice to Self-Funded Accounts, which was approved on February 4, 2022; and (d) the Plan of Distribution, which was preliminarily approved on November 30, 2020.

Certification of the Settlement Classes

4. Pursuant to Rule 23(a) and 23(b) of the Federal Rules of Civil Procedure, and based on the record before the court, including the submissions in support of the

Settlement and objections and responses thereto, the court hereby affirms its forecast in the Preliminary Approval Order and **CERTIFIES** the following Settlement Classes for settlement purposes only:

> **Damages Class**: All Individual Members (excluding dependents and beneficiaries), Insured Groups (including employees, but excluding non-employee Members), and Self-Funded Accounts (including employees, but excluding non-employee Members) that purchased, were covered by, or were enrolled in a Blue-Branded Commercial Health Benefit Product (unless the person or entity's only Blue-Branded Commercial Health Benefit Product during the Settlement Class Period was a stand-alone vision or dental product) sold, underwritten, insured, administered, or issued by any Settling Individual Blue Plan from February 7, 2008 through October 16, 2020 (in the case of all Damages Class members other than the Self-Funded Sub-Class, for whom the Class Period is September 1, 2015 through October 16, 2020).
>
> **Self-Funded Sub-Class**: All Self-Funded Accounts (including employees, but excluding non-employee Members) that purchased, were covered by, or were enrolled in a Blue-Branded Commercial Health Benefit Product (unless the person or entity's only Blue-Branded Commercial Health Benefit Product during

the Settlement Class Period was a stand-alone vision or dental product) sold, underwritten, insured, administered, or issued by any Settling Individual Blue Plan from September 1, 2015 through October 16, 2020.

Injunctive Relief Class: All Individual Members, Insured Groups, Self-Funded Accounts, and Members that purchased, were covered by, or were enrolled in a Blue-Branded Commercial Health Benefit Product sold, underwritten, insured, administered, or issued by any Settling Individual Blue Plan during the Settlement Class Period (February 7, 2008 through October 16, 2020, except for Self-Funded Accounts for whom the Settlement Class Period is September 1, 2015 through October 16, 2020).

5. Excluded from the Damages Class and the Self-Funded Sub-Class are Government Accounts, Medicare Accounts of any kind, Settling Defendants themselves, and any parent or subsidiary of any Settling Defendant (and their covered or enrolled employees). Also excluded from the Damages Class and the Self-Funded Sub-Class are Opt-Outs, the judge presiding over this matter, and any members of his judicial staff, to the extent such staff were covered by a Commercial Health Benefit Product not purchased by a Government Account during the Settlement Class Period.

6. For purposes of the Damages Class and the Self-Funded Sub-Class, the term "employee" means any current or former employee, officer, director, partner, or proprietor of an entity.

7. The court **FINDS** that the requirements of Rule 23(a) and 23(b) of the Federal Rules of Civil Procedure are satisfied solely for settlement purposes. In particular, the court determines that:

a. Pursuant to Rule 23(a)(l), the Settlement Class members are so numerous that their joinder before the court would be impracticable.

b. Pursuant to Rule 23(a)(2), there are one or more questions of fact or law common to the Settlement Classes.

c. Pursuant to Rule 23(a)(3), Subscriber Plaintiffs' claims are typical of the claims of the Settlement Classes.

d. Pursuant to Rule 23(a)(4), the Class Representatives have fairly and adequately protected the interests of the Settlement Classes. Class Representatives are certified as class representatives on behalf of their Settlement Classes; and the Self-Funded Sub-Class Representative is certified as class representative on behalf of the Self-Funded Sub-Class.

e. Pursuant to Rule 23(b)(2), the Settling Defendants have acted and refused to act on grounds that apply generally to the Injunctive Relief Class, so

that final injunctive relief is appropriate respecting the class as a whole.

f. Pursuant to Rule 23(b)(3), common questions of law and fact predominate over questions affecting only individual members.

g. Also pursuant to Rule 23(b)(3), a class action is superior to other available methods for the fair and efficient adjudication of this Action.

Class Counsel and Class Representatives

8. Pursuant to Rule 23(g) of the Federal Rules of Civil Procedure, the court **APPOINTS** Hausfeld, LLP and Boies Schiller Flexner, LLP as Settlement Class Counsel for the Settlement Classes and Burns Charest, LLP as Self-Funded Sub-Class Settlement Counsel for the Self-Funded Sub-Class.

9. The court also **APPOINTS** the following individuals and entities as class representatives:

a. For the Settlement Classes: Galactic Funk Touring, Inc.; American Electric Motor Services, Inc.; CB Roofing, LLC; Pearce, Bevill, Leesburg, Moore, P.C.; Pettus Plumbing & Piping, Inc.; Consumer Financial Education Foundation of America, Inc.; Fort McClellan Credit Union; Rolison Trucking Co., LLC; Conrad Watson Air Conditioning, Inc.; Linda Mills; Frank Curtis; Jennifer Ray Davidson; Pete Moore Chevrolet, Inc.; Jewelers Trade Shop; Saccoccio & Lopez; Angel Foster (*fka* Angel

Vardas); Monika Bhuta; Michael E. Stark; G&S Trailer Repair Inc.; Chelsea L. Horner; Montis, Inc.; Renee E. Allie; John G. Thompson; Avantgarde Aviation, Inc.; Hess, Hess & Daniel, P.C.; Betsy Jane Belzer; Bartlett, Inc., d/b/a Energy Savers; Matthew Allan Boyd; Gaston CPA Firm; Rochelle and Brian McGill; Sadler Electric; Jeffrey S. Garner; Amy MacRae; Vaughan Pools, Inc.; Casa Blanca, LLC; Jennifer D. Childress; Clint Johnston; Janeen Goodin; Marla S. Sharp; Erik Barstow; GC/AAA Fences, Inc.; Keith O. Cerven; Teresa M. Cerven; Sirocco, Inc.; Kathryn Scheller; Iron Gate Technology, Inc.; Nancy Thomas; Pioneer Farm Equipment, Inc.; Scott A. Morris; Tony Forsythe; Joel Jameson; Ross Hill; Angie Hill; Kevin Bradberry; Christy Bradberry; Tom Aschenbrenner; Juanita Aschenbrenner; Free State Growers, Inc.; Tom A. Goodman; Jason Goodman; Comet Capital, LLC; Barr, Sternberg, Moss, Lawrence, Silver & Munson, P.C.; Mark Krieger; Deborah Piercy; and Lisa Tomazzoli.

b. For the Self-Funded Sub-Class: Hibbett Sports, Inc.

Notice

10. The court finds that the notice provisions of the Class Action Fairness Act, 28 U.S.C. § 1715, have been satisfied.

11. The court also finds that the dissemination of Notice and Supplemental Notice: (a) was implemented in accordance with the Notice Plan Approval Order; (b) constituted the best notice practicable under the

circumstances; (c) constituted notice that was reasonably calculated, under the circumstances, to apprise the Settlement Classes of (i) the pendency of the Action; (ii) the effect of the Settlement Agreement (including the releases to be provided thereunder); (iii) Class Counsel's motion for an award of attorneys' fees and reimbursement of expenses; (iv) the right to object to any aspect of the Settlement, the Plan of Distribution, and/or Class Counsel's motion for attorneys' fees and reimbursement of expenses; (v) the right to opt out of the Damages Class opt out of divisible injunctive relief; and (vi) the right to appear at the Fairness Hearing; (d) constitutes due, adequate, and sufficient notice to all persons and entities entitled to receive notice of the Settlement; and (e) satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure and the United States Constitution (including the Due Process Clause).

Final Approval of the Settlement Agreement

12. Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the court hereby **GRANTS** final approval of the Settlement Agreement in all respects (including, without limitation: the Settlement Fund amount; the releases; the Injunctive Relief; and the dismissal with prejudice of the claims asserted against Settling Defendants in the Action), and finds that the Settlement Agreement is, in all respects, fair, reasonable, and adequate to the Settlement Classes. In reaching this conclusion, the court has considered the factors set forth in Rule 23(e) as well as the factors set forth in *Bennett*, 737 F.2d at 986. Moreover, the court **CONCLUDES** that:

a. the Settlement Agreement was fairly and honestly negotiated by counsel with significant experience litigating class actions and is the result of vigorous arm's-length negotiations undertaken in good faith and with the assistance of mediators who are experienced and well-regarded mediators of complex cases;

b. the Action involves contested issues of law and fact, such that the value of an immediate monetary recovery, in conjunction with the significant other relief provided pursuant to the Settlement Agreement (including but not limited to the relief described as "Class Injunctive Relief" in Paragraphs 10-21 of the Settlement Agreement), outweighs the mere possibility of any additional future relief after protracted and expensive litigation;

c. success in antitrust cases such as this one is inherently uncertain, and there is no guarantee that continued litigation would yield a superior result (particularly given the costs, risks, and delay of trial and appeal); and

d. there is a substantial basis for Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel's judgment that the Settlement Agreement is fair, reasonable and adequate.

13. The court **FINDS** the proposed method of distributing relief to the Settlement Classes is adequate, including the method of processing Damages Class member claims.

14. The court **FINDS** the Settlement treats Class Members equitably relative to each other when considering the differences in their claims.

15. The court further **GRANTS** final approval to the Plan of Distribution, which was preliminarily approved by the court on November 30, 2020. The Plan of Distribution was developed and recommended by experienced class counsel with the support of expert economic analysis. The Plan of Distribution represents an efficient and equitable means of distributing the Net Settlement Fund to the Damages Class in a timely fashion, without overly burdening claimants, and treats members of the Damages Class equitably relative to each other. In particular, the court **FINDS** that the allocation of the Net Settlement Fund among different types of claimants is appropriate, and **FURTHER FINDS** that the Plan of Distribution's use of default contribution percentages to calculate employer-employee allocation of premiums paired with an alternative option for claimants who believe they are entitled to more than the default option is reasonable based on the factors identified in the Plan. The Plan of Distribution's methodology strikes a reasonable balance between precision and efficiency.

Releases

16. Except as to any claim of those Rule 23(b)(3) Opt-Outs identified in Document # 2928 who have validly and timely requested exclusion from the Damages Class and the divisible Second Blue Bid relief, the Action and all claims contained therein, as well as all of the Released

Claims against any of the Releasees by Releasors, are each hereby **DISMISSED WITH PREJUDICE**.

17. The Opt-Outs identified in Document # 2928 are **EXCLUDED** from the Damages Class and the divisible Second Blue Bid relief pursuant to properly made exclusion requests. They may not make any claim on or receive any benefit from or under (a) the Settlement Fund, whether monetary or otherwise, or (b) any benefit under Paragraph C(15), the Second Blue Bid portion of the injunctive relief. Nonetheless, the identified Opt-Outs may not pursue any claims released under the Settlement Agreement regarding indivisible relief on behalf of those who are bound by this Final Judgment. For purposes of clarity, if a Self-Funded Account that opted out meets the criteria to request a Second Blue Bid under the terms of the Settlement Agreement, that Self-Funded Account does not release any claims for declaratory or injunctive relief to request a Second Blue Bid during any time it meets the criteria to request such a bid under the terms of the Settlement Agreement. All other claims for indivisible declaratory or injunctive relief released under the Settlement Agreement are released. Each Settlement Class Member not appearing in Document # 2928 is **BOUND BY THIS FINAL JUDGMENT AND WILL REMAIN FOREVER BOUND**.

18. The releases set forth in Paragraphs 32 and 33 of the Settlement Agreement, together with the Definitions contained in Paragraph 1 of the Settlement Agreement relating thereto, are **EXPRESSLY INCORPORATED** herein in all respects. The releases are effective as of the Effective Date.

19. Upon the Effective Date, the Releasors: (a) **SHALL** be deemed to have, and by operation of the Final Judgment and Order of Dismissal **SHALL** have, fully, finally, and forever released, relinquished, and discharged (i) all Released Claims against any and all of the Releasees, and (ii) any rights to the protections afforded under California Civil Code §1542 and/or any other similar, comparable, or equivalent laws; and (b) covenant not to sue any Releasee with respect to any Released Claim, and are permanently barred and enjoined from commencing, maintaining, prosecuting, causing, cooperating with, advising to be commenced or maintained, or encouraging any action, suit, proceeding, or claim in any court, tribunal, administrative agency, regulatory body, arbitrator, or other body in any jurisdiction against any Releasee based in whole or in part upon, arising out of, or in any way connected or related to any Released Claim.

20. This Final Order and Judgment **SHALL NOT** affect, in any way, the right of Releasors to pursue claims, if any, outside the scope of the Released Claims.

Monitoring Committee

21. The court **RESERVES** the issue of the makeup of the Monitoring Committee established in the Settlement. The court will appoint the members of the Monitoring Committee by separate order.

Standard of Review

22. The court **FINDS** that its April 5, 2018 Memorandum Opinion Regarding Section 1 Standard of

Review and Single Entity Defense (Doc. # 2063) and the accompanying Order (Doc. # 2064) only apply to the then-in-effect accumulation of restraints actually addressed in the Memorandum Opinion and Order.

Further Matters

23. Nothing in the Settlement Agreement, this Final Order and Judgment, or any and all negotiations, documents, or discussions associated with them, or any proceedings undertaken in accordance with the terms of the Settlement Agreement constitutes (i) an admission or concession by any of the Settling Defendants (or evidence thereof) in any action or proceeding, (ii) evidence of any violation of any statute or law or of any liability or wrongdoing whatsoever by any Settling Defendant, or (iii) evidence of the truth or validity of any of the claims or allegations contained in any complaint or any other pleading that Class Representatives or Class Members have or could have asserted against Settling Defendants, including without limitation that Settling Defendants have engaged in any conduct or practice that violates any antitrust statute, or other law, regulation, or obligation. Settling Defendants expressly deny any wrongdoing or liability whatsoever for any and all such claims and allegations.

24. Without affecting the finality of this Final Order and Judgment in any way, this court hereby **RETAINS** continuing jurisdiction over: (a) implementation of the Settlement Agreement and any award or distribution of the Settlement Fund, including interest earned thereon;

(b) disposition of the Settlement Fund; and (c) all Parties hereto for the purpose of construing, enforcing, and administering the terms of the Settlement Agreement consistent with those terms. Settling Defendants and each Settlement Class Member have submitted to the exclusive jurisdiction of this court for any suit, action, proceeding, or dispute arising out of or relating to the Settlement Agreement or the applicability of the Settlement Agreement (except those arising under Paragraphs 17 and 20 during the Monitoring Period, which are subject to binding arbitration as further described in those Paragraphs) to resolve any disputes or controversies, including but not limited to enforcement regarding Released Claims and Paragraphs 32 and 33 of the Settlement Agreement. Settling Defendants and Settlement Class Members have agreed that, in the event of such dispute, they are and shall be subject to the jurisdiction of this court and that this court is a proper venue and convenient forum.

25. In the event that (a) the Settlement Agreement is rescinded or terminated, (b) the Settlement Agreement does not become effective in accordance with the terms of the Settlement Agreement, (c) the Effective Date does not occur, or (d) the Net Settlement Fund, or any portion thereof, is returned to Settling Defendants in accordance with the Settlement Agreement, then this Final Order and Judgment shall be rendered null and void to the extent provided by and in accordance with the Settlement Agreement and shall be vacated, and, in such event, all orders entered and releases delivered in connection herewith shall be null and void to the extent provided by and in accordance with the Settlement Agreement.

26. In the event the Settlement Agreement does not become final, or is otherwise rescinded or terminated, litigation of the Subscriber Actions against Settling Defendants will resume in a reasonable manner to be approved by the court upon application by the Parties, and any and all parts of the Settlement Fund caused to be deposited in the Escrow Account (other than Notice and Administration Costs reasonably and actually incurred), along with any income accrued thereon, shall be returned to the entities that paid such amounts into the Escrow Account, in proportion to their respective contributions, within ten (10) calendar days of rescission, termination, or the court's final determination denying final approval of the Agreement and/or any of the Settlement Classes, whichever occurs first.

27. The Parties expressly reserve all of their rights if this Agreement is rescinded or does not otherwise become final.

28. If the Effective Date does not occur with respect to the Settlement Agreement because of the failure of a condition of the Settlement Agreement, the court's assessment of class certification of the Settlement Classes **SHALL** be deemed null and void and the Parties shall retain their rights to seek or to object to certification of this litigation as a class action under Rule 23 of the Federal Rules of Civil Procedure or under any other state or federal rule, statute, law, or provision thereof, and to contest and appeal any grant or denial of certification in this litigation or in any other litigation on any other grounds.

29. The Parties are **DIRECTED** to implement the Settlement Agreement in accordance with its terms once the Settlement Agreement becomes final. Without further order of the court, the Parties may agree to reasonable extensions of time to carry out any of the provisions of the Settlement Agreement.

Dismissal of the Subscriber Actions

30. The Subscriber Actions are hereby **DISMISSED WITH PREJUDICE** and, except as provided for in the Settlement Agreement and any order of this court granting fee, expense, or service awards as contemplated under the Settlement Agreement, without costs. As set out in Paragraph 16, any dismissal with prejudice shall not apply to unreleased claims of the Opt-Outs identified in Document # 2928.

31. There is no just reason for delay in the entry of this Final Order and Judgment. The dismissed Subscriber Actions are severable from all remaining Provider Actions and immediate entry of this Final Order and Judgment by the Clerk of the Court is expressly directed.

APPOINTMENT OF SETTLEMENT ADMINISTRATOR

In addition to moving for final approval of the Class Settlement, Subscriber Plaintiffs have moved the court to appoint the Honorable Irma E. Gonzalez (Ret.) as the Settlement Administrator. (Doc. # 2812). The Motion (Doc. # 2812) in this regard is **GRANTED**.

The Honorable Irma E. Gonzalez (Ret.) is **APPOINTED** as the Settlement Administrator, with responsibility limited to assisting in the "implementation of the Plan of Distribution and the resolution of any disputes between Settlement Class Members and the Claims Administrator pursuant to the Plan of Distribution, as set forth in the Settlement Agreement." (Doc. # 2610-2 ¶ 1(iiii)). The Settlement Administrator's fees, as well as all other costs and expenses reasonably incurred and associated with notice and administration, will be paid directly from the Notice and Administration Fund Settlement upon written authorization by Class Counsel, Self-Funded Sub-Class Settlement Counsel, and a designated representative of the Settling Defendants, and such authorization shall not be unreasonably withheld. (Doc. # 2610-2 ¶¶ 26(a), 29).

DONE and **ORDERED** this August 9, 2022.

/s/ R. David Proctor
R. DAVID PROCTOR
UNITED STATES
DISTRICT JUDGE

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JANUARY 26, 2024

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

January 26, 2024, Filed

No. 22-13051

IN RE: BLUE CROSS BLUE SHIELD
ANTITRUST LITIGATION MDL 2406

2:13-cv-20000-RDP

GALACTIC FUNK TOURING, INC., AMERICAN ELECTRIC MOTOR SERVICES, INC., CB ROOFING, LLC, PEARCE, BEVILL, LEESBURG, MOORE, P.C., PETTUS PLUMBING & PIPING, INC., *et al.*,

Plaintiffs-Appellees,

TOPOGRAPHIC, INC., EMPLOYEE SERVICES INC., HOME DEPOT U.S.A., INC., JENNIFER COCHRAN, AARON CRAKER, DAVID G. BEHENNA,

Interested Parties-Appellants,

v.

ANTHEM, INC., EXCELLUS HEALTH PLAN, INC., D.B.A. EXCELLUS BLUECROSSBLUESHIELD, PREMERA BLUE CROSS, BLUE CROSSBLUE SHIELD OF ARIZONA, HEALTH CARE SERVICE CORPORATION, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama.
DC. Docket No. 2:13-cv-20000-RDP.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

PER CURIAM:

Before WILLIAM PRYOR, Chief Judge, ABUDU, Circuit Judge, and BARBER,* District Judge.

The Petitions for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petitions for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.

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* Honorable Thomas P. Barber, United States District Judge for the Middle District of Florida, sitting by designation.

APPENDIX D — SETTLEMENT AGREEMENT (EXCERPT) OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION, FILED OCTOBER 30, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Master File No. 2:13-cv-20000-RDP MDL 2406

IN RE: BLUE CROSS BLUE SHIELD
ANTITRUST LITIGATION

This document relates to Subscriber Track cases

SETTLEMENT AGREEMENT

TABLE OF CONTENTS
INTENTIONALLY OMITTED

PREAMBLE

This Settlement Agreement[1] is made and entered into on October 16, 2020, by and among Settling Defendants and Class Representatives, for themselves and on behalf of each Settlement Class Member.

WHEREAS, the Class Representatives are prosecuting the Subscriber Actions (including other individual and/or consolidated lawsuits);

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1. All capitalized terms shall have the meaning set forth in Paragraph 1 or the text of this Agreement.

WHEREAS, the Class Representatives allege, *inter alia*, that Settling Defendants violated Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1–2, in addition to state law(s), by illegally entering into a geographic market allocation agreement prohibiting competition in the market for health insurance and administration of Commercial Health Benefit Products in the United States and its territories, as well as agreeing to other means of restricting competition in the market for health insurance and administration of Commercial Health Benefit Products;

WHEREAS, Class Representatives have contended that they and the Settlement Classes are entitled to actual damages, treble damages, and injunctive relief for loss or damage, and threatened loss or damage, as a result of violations of the laws as alleged in the Subscriber Actions, arising from Settling Defendants' conduct;

WHEREAS, Settling Defendants deny any and all purported wrongdoing in connection with the facts and claims that have been or could have been alleged against them in the Subscriber Actions, and have asserted a number of defenses to Class Representatives' claims;

WHEREAS, this action has involved substantial discovery, including obtaining and analyzing over 14 million pages of documents and over 100 depositions, and the investigation and analysis of the facts and underlying events relating to the subject matter of their claims and the applicable legal principles;

WHEREAS, Class Representatives, through Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel, have conducted an investigation into the facts and the law and have concluded that resolving the claims against Settling Defendants, according to the terms set forth below, is in the best interests of the Settlement Classes in order to avoid the substantial uncertainties of litigation and assure that the benefits reflected herein are obtained for the Settlement Classes;

WHEREAS, Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel consider the settlement herein to be fair, reasonable, and adequate, and in the best interests of the Settlement Classes because of the substantial uncertainties of litigation, payment of the Settlement Amount, and the value of the Injunctive Relief that Settling Defendants have agreed to provide pursuant to this Agreement;

WHEREAS, Settling Defendants, despite their beliefs that the claims asserted lack merit and that they have valid defenses to such claims, have nevertheless agreed to enter into this Agreement to avoid further expense, inconvenience, and distraction to their business of burdensome and protracted litigation, and to obtain the releases, orders, and judgment contemplated by this Agreement, and to put to rest with finality this controversy, including releases of all claims that have been or could be asserted against Settling Defendants based on the allegations in the Subscriber Actions;

WHEREAS, vigorous, arm's length settlement negotiations have taken place between Settlement Class Counsel, Self-Funded Sub-Class Settlement Counsel, and counsel for Settling Defendants and with the assistance of four mediators at different times, and this Agreement embodies all the terms and conditions of the settlement between Settling Defendants and Class Representatives, both individually and on behalf of each Class Member;

WHEREAS, Settling Defendants, Settling Defendants' Counsel, Settlement Class Counsel, Self-Funded Sub-Class Settlement Counsel, and Class Representatives have had a full opportunity to examine the facts and circumstances surrounding their respective decisions to accept the terms of this Agreement and have not relied on any representations (or the lack thereof) made by any other Party concerning the facts and circumstances leading to this Agreement;

NOW, THEREFORE, in consideration of the covenants, agreements, and releases set forth herein and for other good and valuable consideration, the adequacy of which is hereby acknowledged, it is agreed by and among the undersigned that the Subscriber Actions be settled, compromised, and dismissed on the merits with prejudice as to the Releasees and except as hereinafter provided, without costs to Class Representatives, the Settlement Classes, or Settling Defendants, subject to the approval of the Court and any appellate review, on the following terms and conditions:

A. DEFINITIONS

1. **Definitions.** As used in this Agreement, the following capitalized terms have the meanings specified below:

a. "Account Benchmarking or Analytic Services" means data-driven services to help Employers analyze their costs, benefits, and/or populations, including assessments of: drivers of past and potential spending; comparison of spend, utilization, and health metrics to similar companies; and impact of past and potential benefit changes.

b. "Agreement" means this Settlement Agreement and the *In Camera* Supplement together.

c. "Authorized Claimant" means any Settlement Class Member who is entitled to a distribution from the Settlement Fund pursuant to the Plan of Distribution approved by the Court in accordance with the terms of this Agreement.

d. "Bank" means Huntington National Bank.

e. "BCBSA" means the Blue Cross Blue Shield Association.

f. "Blue-Branded" means a product or service marketed, offered, or sold under any of the Blue Marks.

g. “Blue Marks” means the Blue Cross and/or Blue Shield service marks, trademarks, names, and/or symbols.

h. “Blue System” means BCBSA, all Settling Individual Blue Plans, and the system of governance among those entities, as reflected through the License Agreements issued by BCBSA and BCBSA policies, rules, and procedures.

i. “Claim Process” means any process approved by the Court by which any eligible Settlement Class Member may make a claim against the Net Settlement Fund.

j. “Claims Administrator” means the third party to be retained by the Settlement Classes, through their respective counsel, and approved by the Court, to manage and administer the process by which Class Members are notified of and paid pursuant to this Agreement. Claims Administrator shall effectuate the Notice Plan, shall administer and calculate the claims submitted by Settlement Class Members in accord with the Class Distribution Order entered by the Court, and shall oversee distribution of the Net Settlement Fund to Authorized Claimants in accordance with the Plan of Distribution.

k. “Class Distribution Order” means the Court order approving the distribution of the Settlement Fund, as described in Paragraph 27.

l. "Class Member" means any person or entity within the definition of the Injunctive Relief Class or Damages Class.

m. "Class Notice" means the notice to Class Members approved by the Court.

n. "Class Representatives" means Subscriber Class Representatives and Self-Funded Sub-Class Representatives.

o. "Commercial Health Benefit Product" means any product or plan providing for the payment or administration of health care services (including but not limited to medical, pharmacy, dental, and vision products and services) or expenses through insurance, reimbursement, or other similar healthcare financing mechanism, for Members in the U.S. (however funded, including insured or self-funded) other than a product or plan offered under the Children with Special Health Care Needs Program (CSHCN); Children's Health Insurance Program (CHIP); Civilian Health and Medical Program of the Department of Veteran's Affairs (CHAMPVA); Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Indian Health Service, Tribal, and Urban Indian Health Plan; Medicaid; Medicare; Medicare Advantage (including but not limited to Medicare Advantage Prescription Drug Plans and Special Needs Plans, including but not limited to Medicare-Medicaid or Dual-Eligible Plans); Medicare Stand-Alone Prescription Drug Plans; Refugee

Medical Assistance Program; State Maternal and Child Health Program (MCH); or TriCare. For purposes of clarity, it excludes any product or plan purchased or offered by a Government Account.

p. "Commercial Health Insurance" means any Commercial Health Benefit Product which (1) an insurer, carrier, or health plan underwrites, issues, insures, or reinsures (e.g., through a stop-loss policy) to cover healthcare costs and/or utilization risk, or (2) is filed with the applicable state regulator as, or is considered by the applicable state regulator to be, an insured product.

q. "Confidential" means information or material that (1) any Party designates or has designated as "Confidential," "Confidential—Attorney Eyes Only," or "Confidential—Outside Counsel Only" in the Subscriber Actions or in connection with this Agreement, including without limitation under the Qualified Protective Order (Dkt. 550), or (2) this Agreement identifies as "Confidential." Confidential information or material shall not be disclosed beyond what is allowed by the terms of this Agreement, Court order, or through mutual agreement of the Parties.

r. "Control Plan" means the Settling Individual Blue Plan from which an Individual Member, Insured Group, or Self-Funded Account purchases a Blue-Branded Commercial Health Benefit Product.

s. "Controlled Affiliate Licensee" means a company operating under the control of a Primary Licensee that is licensed to use the Blue Marks pursuant to a Controlled Affiliate License Agreement (Larger or Smaller) granted by BCBSA.

t. "Court" means the United States District Court for the Northern District of Alabama, Southern Division.

u. "D&B Analysis" means the process that will be used to identify Qualified National Accounts. Such Qualified National Accounts will have 33 million Members in the aggregate. This number of Members in Qualified National Accounts approximates half of Members of Employers that have at least 5,000 employees in the U.S. and offer a Self-Funded Health Benefit Plan to their employees, and approximately 31% of Members of Self-Funded Accounts. The D&B Analysis is objective and verifiable, and comprises the following steps: (1) using data from Dun & Bradstreet, identify Employers with at least 5,000 total U.S. employees; (2) compute each Employer's estimated Members, using data from Dun & Bradstreet, the Medical Expenditure Panel Survey promulgated by the U.S. Department of Health & Human Services' Agency for Healthcare Research and Quality, and Individual Blue Plans' aggregate average contract-to-member rate; (3) include Employers with the highest Dispersion Percentages up to and only until the aggregate number of estimated Members of such Employers totals at least 33 million after accounting for

an estimate of Members of fully insured Employers in the Dun & Bradstreet data. The resulting Employers, whose aggregate estimated membership totals at least 33 million, are the Qualified National Accounts. The initial list of Qualified National Accounts, subject to removal of Opt-Outs as contemplated by Paragraph 1.z, is included as Appendix C. Included in the list of Qualified National Accounts are all Employers that have at least 5,000 employees in the U.S. and are headquartered in overlapping Settling Individual Blue Plans' Service Areas based on the analysis in Paragraph 1.v, as designated in Appendix C. BCBSA will refresh this list once every two years after the Effective Date using the methodology described in this Paragraph 1.u.

v. "Damages Class" means all Individual Members (excluding dependents and beneficiaries), Insured Groups (including employees, but excluding non-employee Members), and Self-Funded Accounts (including employees, but excluding non-employee Members) that purchased, were covered by, or were enrolled in a Blue-Branded Commercial Health Benefit Product (unless the person or entity's only Blue-Branded Commercial Health Benefit Product during the Settlement Class Period was a stand-alone vision or dental product) sold, underwritten, insured, administered, or issued by any Settling Individual Blue Plan during the Settlement Class Period. Excluded from the Damages Class are Government Accounts, Medicare Accounts of any kind, Settling Defendants themselves, and any

parent or subsidiary of any Settling Defendant (and their covered or enrolled employees). Also excluded from the Damages Class are Opt Outs, the judge presiding over this matter, and any members of his judicial staff, to the extent such staff were covered by a Commercial Health Benefit Product not purchased by a Government Account during the Settlement Class Period. For purposes of this Paragraph 1.v, "employee" means any current or former employee, officer, director, partner, or proprietor of an entity.

w. "Dispersion Percentage" means the percentage of an Employer's employees that are located outside the Service Area that contains an Employer site meeting the first of the following criteria in the Dun & Bradstreet data: (1) the only location flagged as a U.S. headquarter; (2) the U.S. location with the highest employee count, with one exception: if multiple locations are flagged as a U.S. headquarter and one portion of a Service Area up to a single state contains more headquarter locations than any other portion of a Service Area up to a single state, the U.S. headquarter for purposes of the Dispersion Percentage will be the location with the highest employee count within the Service Area that has the most headquarter locations. The Dispersion Percentage is calculated by dividing the number of employees that are located outside the Service Area by the total number of employees.

x. "Drug Screening Services" means testing and providing results of tests of employees and

contractors for illicit drugs in (1) freestanding centers, (2) medical offices and facilities, or (3) workplaces.

y. "Effective Date" has the meaning given to it in Paragraph 8.

z. "Employer" means entities (other than Settling Defendants) which are identified by Dun and Bradstreet as employers. For clarity, Government Accounts, Taft-Hartley trusts, multiple employer welfare arrangements, association health plans, retiree groups, and Opt-Outs are not Employers.

aa. "Escrow Account" means the account into which the Settlement Amount, Notice and Administration Fund, and Fee and Expense Award(s) will be deposited, held, and ultimately distributed, as further described in Paragraph 26. The Escrow Account is intended to be a separate taxable entity and is intended to qualify as a "qualified settlement fund" within the meaning of Section 1.468B-1(c) of the Treasury Regulations promulgated under Section 468B of the Internal Revenue Code of 1986, as amended from time to time.

bb. "Escrow Agent" means the agent responsible for the Escrow Account, as further described in Paragraph 26.

cc. "Execution Date" means the latest date of the execution of this Agreement by counsel for Settling Defendants and Settlement, Class Counsel, and Self-Funded Sub-Class Settlement Counsel.

dd. "Fee and Expense Award" means the attorneys' fees and expenses awarded by the Court upon an application or applications, as further described in Paragraph 28.

ee. "Final Approval Motion" means the motion submitted to the Court seeking final approval of this Agreement, as further described in Paragraph 6.

ff. "Final Fairness Hearing" means the hearing to be held by the Court to determine whether the settlement set forth in this Agreement shall receive final approval pursuant to Federal Rule of Civil Procedure 23.

gg. "Final Judgment and Order of Dismissal" means the order of the Court providing final approval of the settlement set forth in this Agreement and dismissing with prejudice the claims of the Class Representatives and Settlement Class Members against Settling Defendants.

hh. "Government Account" means only a state, a county, a municipality, an unincorporated association performing municipal functions, a Native American tribe, or the federal government (including the Federal Employee Program). A Government Account includes all Members of the Government Account. No other entity that is not a state, county, municipality, unincorporated association performing municipal functions, Native American tribe or the federal government is a Government Account, unless

it is required by law to provide any health care coverage it makes available to Members only under, or as a participant in, a Commercial Health Benefit Product approved, selected, procured, sponsored or purchased by a Government Account. Entities that are not Government Accounts (e.g., utility companies, school districts, government-funded hospitals, public retiree benefit plans, public libraries, port authorities, transportation authorities, waste disposal districts, police departments, fire departments) will receive notice and an opportunity to submit a claim form to the extent they are otherwise within the definition of the Damages Class.

ii. "Headquarters" means a group or account's principal business address, as further defined in BCBSA rules and policies in place on the Execution Date. If subsequent changes are made to the definition of Headquarters under BCBSA rules and policies, such definition shall apply to this Agreement only if approved by the Monitoring Committee Process.

jj. "Health Care Delivery Network" means the group of Providers, including professional medical practitioners, healthcare facilities, labs and other organizations that provide health care services to patients through written contracts with an entity that offers a Commercial Health Benefit Product.

kk. "*In Camera* Supplement" means the agreement containing certain Confidential terms allowing rescission of the Settlement Agreement that will be submitted *in camera* to the Court.

ll. "Independent Health Benefit Decision Location" means any location of a national account which makes decisions for the purchase of a Commercial Health Benefit Product for its local employees independently from the Headquarters of the account.

mm. "Individual Member" means a person (including dependents and beneficiaries under the policy) covered by an individual Commercial Health Insurance policy (i.e., a non-group Commercial Health Insurance policy).

nn. "Initial Control Plan" means a Settling Individual Blue Plan that has the right to bid on an account using the Blue Marks under current BCBSA rules and policies.

oo. "Injunctive Relief" refers to the provisions in Paragraphs 10–18.

pp. "Injunctive Relief Class" means all Individual Members, Insured Groups, Self-Funded Accounts, and Members that purchased, were covered by, or were enrolled in a Blue-Branded Commercial Health Benefit Product sold, underwritten, insured, administered, or issued by any Settling Individual Blue Plan during the Settlement Class Period.

qq. "Insured Group" means a health benefit plan, group account, or employer, including all Members, sponsors, administrators, and fiduciaries

thereof, that purchases, subscribes to, or is covered by Commercial Health Insurance. For associational entities (e.g., trade associations, unions, etc.), this includes any member entity which is covered by, enrolled in, or included in the associational entity's Blue-Branded Commercial Health Benefit Product. For clarity, this definition excludes all Government Accounts.

rr. "Joint Venture" means a written contractual arrangement involving a Provider or its affiliates and a Settling Individual Blue Plan representing that the parties have agreed to share resources to provide health services to Individual Members, Insured Groups, or Self-Funded Accounts.

ss. "License Agreement" means the written document between BCBSA and a Settling Individual Blue Plan (and its Controlled Affiliate Licensees, if applicable) conferring permission to use the Blue Marks in accordance with the Membership Standards and other BCBSA rules and requirements.

tt. "Local Best Efforts Requirement" means the requirement contained, as of the Execution Date, in the BCBSA Guidelines to Administer the Membership Standards, Standard 10, Guideline 2.2.1, including that at least 80% of the annual combined local net revenue of a Settling Individual Blue Plan and its licensable controlled affiliates attributable to health care plans and related services and hospital services offered within the designated Service

Area must be sold, marketed, administered, or underwritten under the Blue Marks.

uu. "Member" means any individual enrolled in or covered by a Commercial Health Benefit Product regardless what term or title is used to refer to the individual in documents that pertain to the Commercial Health Benefit Product, including employees, their spouses and dependents, beneficiaries, and ERISA participants.

vv. "Member Concierge Services" means health advocacy and navigation services that help Members make healthcare and healthcare benefit decisions and choose Providers.

ww. "Membership Standards" means the membership requirements included in the License Agreement, including the standards and rules applicable to the Settling Individual Blue Plan contained within the BCBSA Guidelines to Administer the Membership Standards as of the Execution Date.

xx. "Monitoring Committee" means the committee established by the Final Judgment and Order of Dismissal to serve during the Monitoring Period, which shall be made up of (1) two members appointed collectively by Settling Defendants, (2) one member appointed collectively by Settlement Class Counsel, (3) one member appointed by Self-Funded Sub-Class Settlement Counsel, and (4) one member appointed by the Court.

yy. "Monitoring Committee Process" means all of the review and actions by the Monitoring Committee as well as the arbitrations of issues originally submitted to the Monitoring Committee.

zz. "Monitoring Period" means the period of five (5) years from the Court's entry of the Final Judgment and Order of Dismissal.

aaa. "Most Favored Nations" or "MFN" means a contract provision which requires a Provider to offer to a health plan payment rates that are as favorable as or more favorable than those that the Provider offers to any comparable health plan during the performance period of the contract. A requirement or representation at or before the time of execution of a contract that the Provider's offer is as favorable as or more favorable than the terms the Provider is currently offering other health plans is not an MFN.

bbb. "Most Favored Nations-Differential" or "MFN-Differential" means an MFN which requires that the Provider offer a health plan financial terms that are more favorable by a specified rate than those it offers any comparable health plan during the performance period of the contract.

ccc. "National Best Efforts Requirement" means the requirement, as of the Execution Date, that is contained in the BCBSA Guidelines to Administer the Membership Standards, Standard 10, Guideline 2.2, including that at least 66-2/3% of the annual

combined national net revenue or annual combined national enrollment of a Settling Individual Blue Plan and its licensable controlled affiliates attributable to health care plans and related services must be sold, marketed, administered, or underwritten under the Blue Marks.

ddd. "Net Settlement Fund" means the Settlement Fund less payments relating to: (1) the Monitoring Committee, as set forth in Paragraphs 20 and 21, (2) the Escrow Account (including Taxes and Tax Expenses), as set forth in Paragraph 26, (3) the Notice and Administration Fund, as set forth in Paragraph 23, and (4) the Fee and Expense Awards and Service Awards, as set forth in Paragraph 28.

eee. "Non-Provider Vendor" means a vendor providing services to Self-Funded Accounts outside the Blue-Branded Health Care Delivery Network or not covered by a Blue-Branded Commercial Health Benefit Product, to include only Member Concierge Services, Provider Analytic Services, Drug Screening Services, and Account Benchmarking or Analytic Services.

fff. "Notice and Administration Costs" means all Court-approved costs reasonably incurred or assessed by the Special Master, Claims Administrator, Escrow Agent, Section 468B Administrator, Settlement Class Counsel, Self-Funded Sub-Class Settlement Counsel, and Settlement Administrator in connection with providing notice to the Settlement Classes, locating

Class Members, administering and distributing the Settlement Fund and Escrow Account, purchasing an insurance policy for the members of the Monitoring Committee, as well as costs reasonably and actually incurred by the Monitoring Committee, the Special Master, Settlement Class Counsel, and Self-Funded Sub-Class Settlement Counsel in connection with monitoring under Paragraph 20 (including but not limited to costs of arbitration pursuant to Appendix D, Paragraph 2(e)).

ggg. "Notice and Administration Fund" means the amount used to pay for Notice and Administration Costs. The Notice and Administration Fund shall be funded by Settling Defendants in the amount of $100 million ($100,000,000.00). Any amount remaining at the expiration of the Monitoring Period and the completion of Settlement administration (including accrued income on the Notice and Administration Fund) will revert to Settling Defendants within 10 calendar days of such expiration. Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel may petition the Court for replenishment from Settling Defendants upon a showing of a necessity (after using accrued income on the Notice and Administration Fund to pay Notice and Administration Costs).

hhh. "Notice Motion" means the motion(s) that Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel shall submit to the Court for authorization to disseminate Class Notice

of the settlement and the Final Judgment and Order of Dismissal contemplated by this Agreement to all Settlement Class Members. It shall be filed simultaneously with the Preliminary Approval Motion.

iii. “Notice Plan” means any plan and methodology used to notify Class Members that is approved by the Court.

jjj. “Opt-Out” means only persons and entities within the Damages Class who file a timely and appropriate written request for exclusion from the settlement in accordance with the exact procedures set forth in the Class Notice or are excluded from the Damages Class.

kkk. “Opt-Out Deadline” means the Court-ordered date(s) by which all persons and entities seeking exclusion from the Damages Class must submit a written request for exclusion as set forth in the Class Notice.

lll. “Party” means any Class Representative, Settlement Class Member, BCBSA, or Settling Individual Blue Plan. “Parties” means the collective of all Class Representatives, all Settlement Class Members, BCBSA, and all Settling Individual Blue Plans.

mmm. “Plan of Distribution” means the plan of allocation of the Settlement Fund whereby

the Net Settlement Fund shall be distributed to Authorized Claimants after payment of Notice and Administration Costs, Taxes and Tax Expenses, Fee and Expense Award(s), and Service Awards. At a time and in a manner determined by the Court, Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel shall submit for Court approval a Plan of Distribution for each of the Settlement Classes that will provide for the distribution of the applicable Net Settlement Fund and the foundation for the requested allocation. Each Plan of Distribution shall be devised and implemented with the assistance of the Claims Administrator, and shall contemplate the refund of the Net Settlement Fund under Paragraphs 8, 24, 28, 41, or 43.

nnn. "Preliminary Approval Motion" means the motion submitted to the Court seeking preliminary approval of this Agreement, as further described in Paragraph 3.

ooo. "Preliminary Approval Order" means the Court order preliminarily approving this Agreement.

ppp. "Primary Licensee" means an entity that has been granted a Primary License Agreement by BCBSA. Primary Licensees are listed by name in Appendix A.

qqq. "Provider" means any person or entity that provides health care services in the U.S., including but not limited to a physician, group practice, or facility.

rrr. "Provider Analytic Services" means data-driven services to support Employers in independent assessment of Provider performance, including relative costs, utilization, and quality or outcomes to support decisions about benefit design.

sss. "Qualified National Account" means a Self-Funded Account that (i) is an Employer with at least 5,000 employees in the U.S., and (ii) satisfies the D&B Analysis. The initial list of Qualified National Accounts, subject to removal of Opt-Outs as contemplated by Paragraph 1.z, is included as Appendix C.

ttt. "Re-Establishment Fee" means the fee required by the License Agreement by which a Settling Individual Blue Plan is required to compensate BCBSA for the cost of re-establishing a new licensee in the event the Settling Individual Blue Plan's License Agreement is terminated.

uuu. "Released Claims" means any and all known and unknown claims, causes of action, cross-claims, counter-claims, charges, liabilities, demands, judgments, suits, obligations, debts, setoffs, rights of recovery, or liabilities for any obligations of any kind whatsoever (however denominated), whether class or individual, in law or equity or arising under constitution, statute, regulation, ordinance, contract, or otherwise in nature— including without limitation any and all actual or potential actions, losses, judgments, fines, debts, liabilities (including

joint and several), liens, causes of action, demands, rights, damages, penalties, punitive damages, costs, expenses (including attorneys' fees and legal expenses), indemnification claims, contribution claims, obligations, compensation, and claims for damages or for equitable or injunctive relief of any nature (including but not limited to antitrust, RICO, contract, tort, conspiracy, unfair competition, or unfair trade practice claims)—known or unknown, suspected or unsuspected, asserted or unasserted, direct or derivative, based upon, arising from, or relating in any way to: (i) the factual predicates of the Subscriber Actions (including but not limited to the Consolidated Amended Class Action Complaints filed in the Northern District of Alabama) including each of the complaints and prior versions thereof, or any amended complaint or other filings therein from the beginning of time through the Effective Date; (ii) any issue raised in any of the Subscriber Actions by pleading or motion; or (iii) mechanisms, rules, or regulations by the Settling Individual Blue Plans and BCBSA within the scope of Paragraphs 10 through 18 approved through the Monitoring Committee Process during the Monitoring Period. Nothing in this Release shall release claims, however asserted, that arise in the ordinary course of business and are based solely on (i) whether a particular product, service or benefit is covered by the terms of a particular Commercial Health Benefit Product, (ii) seeking resolution of a benefit plan's or a benefit plan participant's financial responsibility for claims, based on either the benefit plan document or statutory law, or (iii) challenging a

Releasee's administration of claims under a benefit plan, based on either the benefit plan document or statutory law. Any claim, however asserted, (i) that a product, service, or benefit should be or should have been covered, but was not covered, (ii) seeking resolution of a benefit plan's or benefit plan participant's financial responsibility for claims, or (iii) challenging a Releasee's administration of claims under a benefit plan, based in whole or in part on the factual predicates of the Subscriber Actions or any other component of the Released Claims discussed in this Paragraph, is released. Notwithstanding any other provision of this Agreement, a Provider who is a Settlement Class Member as defined in this Agreement does not release any claims arising from his, her or its sale or provision of health care products or services (as opposed to the purchase of a Commercial Health Benefit Product). Settling Defendants agree not to raise Providers' releases under this Agreement as a defense to Providers' claims brought in their capacity as Providers of health care products or services in MDL No. 2406. For purposes of clarity, Released Claims include, but are not limited to, claims that arise after the Effective Date.

vvv. "Releasees" means (i) Settling Individual Blue Plans; (ii) BCBSA; (iii) NASCO; (iv) Consortium Health Plans, Inc.; and (v) for each of the persons and entities listed in subparts (i)–(iv) of this Paragraph 1.vvv, any and all of their past, present, and future, direct and indirect, parent companies,

subsidiary companies, affiliated companies, affiliated partnerships, and joint venturers, including all of their respective predecessors, successors and assigns, and each and all of their present, former and future principals, partners, officers, directors, supervisors, employees, agents, stockholders, members, representatives, insurers, attorneys, heirs, executors, administrators, beneficiaries, and representatives of any kind.

www. "Releasors" means the Class Representatives and each and every Settlement Class Member and all of their predecessors, successors, heirs, administrators, and assigns. Each Releasor releases Released Claims on behalf of themselves and on behalf of any party claiming by, for, under, or through the Releasors or the Commercial Health Benefit Product that Releasors purchased, were covered by, or were enrolled in, with such claiming parties to include any and all of Releasors' past, present and future officers, directors, supervisors, employees, agents, stockholders, members, attorneys, servants, representatives, accounts, plans, groups, parent companies, subsidiary companies, affiliated companies, divisions, affiliated partnerships, joint venturers, principals, partners, wards, heirs, assigns, beneficiaries, estates, next of kin, family members, relatives, personal representatives, administrators, agents, representatives of any kind, insurers, and all other persons, partnerships, or corporations with whom any of the foregoing have been, or are now or become, affiliated, and the predecessors, successors,

heirs, executors, administrators, and assigns of any of the foregoing.

xxx. “RFP” means any account-specific request for information, request for proposal, or request for a bid related to a Commercial Health Benefit Product.

yyy. “Second Blue Bid” means any response to an eligible Second Blue Bid Request provided to a Qualified National Account other than to decline the Request.

zzz. “Second Blue Bidder” means the Settling Individual Blue Plan that provides a Qualified National Account with a Second Blue Bid pursuant to the terms of this Agreement and Appendix D.

aaaa. “Second Blue Bid Request” means an RFP from a Qualified National Account to a Settling Individual Blue Plan in addition to an Initial Control Plan for the Qualified National Account’s Self-Funded Health Benefit Plan contract for a specific benefits period.

bbbb. “Section 468B Administrator” means the administrator of the Escrow Account for the purpose of Section 468B of the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.

cccc. “Self-Funded Account” means any account, employer, health benefit plan, ERISA plan,

non-ERISA plan, or group, including all sponsors, administrators, fiduciaries, and Members thereof, that purchases, is covered by, participates in, or is enrolled in a Self-Funded Health Benefit Plan. For associational entities (e.g., trade associations, unions, etc.), this includes any member entity which is covered by, enrolled in, or included in the associational entity's Blue-Branded Commercial Health Benefit Product. A Self-Funded Account that purchases a Blue-Branded Self-Funded Health Benefit Plan and Blue-Branded stop-loss coverage remains a Self-Funded Account. For clarity, Self-Funded Account also excludes all Government Accounts.

dddd. "Self-Funded Sub-Class Representative" means Hibbett Sports, Inc.

eeee. "Self-Funded Sub-Class Settlement Counsel" shall mean Burns Charest LLP, as appointed by the Court.

ffff. "Self-Funded Health Benefit Plan" means any Commercial Health Benefit Product other than Commercial Health Insurance, including administrative services only ("ASO") contracts or accounts, administrative services contracts or accounts ("ASC"), and jointly administered administrative services contracts or accounts ("JAA").

gggg. "Service Area" means the area in which a Settling Individual Blue Plan is granted rights to use the Blue Marks under its License Agreement(s) with BCBSA as of the Execution Date.

hhhh. "Service Award" means the Court-approved monetary award for Class Representatives paid from the Settlement Amount, as further defined in Paragraph 28.c.

iiii. "Settlement Administrator" means the settlement administrator selected by the Court, who will assist in the implementation of the Plan of Distribution and the resolution of any disputes between Settlement Class Members and the Claims Administrator pursuant to the Plan of Distribution.

jjjj. "Settlement Amount" shall be $2.67 billion. The Settlement Amount includes Notice and Administration Costs, and any Fee and Expense Award and Service Awards.

kkkk. "Settlement Class Counsel" means the Co-Lead Counsel law firms appointed by this Court: (1) Hausfeld LLP and (2) Boies Schiller Flexner LLP.

llll. "Settlement Class Members" means collectively any person or entity within the definition of the Injunctive Relief Class or Damages Class, excluding Government Accounts and Opt-Outs.

mmmm. "Settlement Classes" means collectively the Injunctive Relief Class and the Damages Class.

nnnn. "Settlement Class Period" means February 7, 2008, through the Execution Date, except

for Self-Funded Accounts, for whom the Settlement Class Period is September 1, 2015 through the Execution Date.

oooo. "Settlement Fund" means the amount paid by Settling Defendants for the Settlement Amount, which includes the Notice and Administration Fund, the Service Awards, and the Fee and Expense Award(s) plus any income or accrued interest earned on those monies. In no event shall Settling Defendants be required to contribute more than $2.67 billion ($2,670,000,000.00) to the Settlement Fund, except as modified by the procedure set forth in Paragraph 1.ggg.

pppp. "Settling Defendants" means all Settling Individual Blue Plans and BCBSA collectively.

qqqq. "Settling Individual Blue Plan" means a Primary Licensee, including Controlled Affiliates Licensees.

rrrr. "Settling Individual Blue Plans" means all Settling Individual Blue Plans collectively.

ssss. "Specialty Service Provider Vendor" means a vendor offering a network of Providers delivering primarily radiology, vision, or dental services.

tttt. "Standard of Review Order" means the April 5, 2018 Memorandum Opinion Regarding

Section 1 Standard of Review and Single Entity Defense (Dkt. 2063) and the accompanying Order (Dkt. 2064).

uuuu. "Subscriber Actions" means the lawsuits brought by persons and entities within the Settlement Classes and consolidated in *In re Blue Cross Blue Shield Antitrust Litigation*, Case No. 13-cv-20000-RDP (MDL No. 2406), including the Consolidated Amended Class Action Complaint, which is currently pending in the Court, all actions that may be transferred or consolidated prior to the time Class Notice is mailed, and all actions that are otherwise based, in whole or in part, on the conduct alleged in MDL No. 2406, including *Piercy v. Health Care Service Corp.*, Case No. 124-28, in the Circuit Court for the First Judicial Circuit, Union County, Illinois. Appendix B lists such actions as of the Execution Date.

vvvv. "Subscriber Class Representatives" means Galactic Funk Touring, Inc.; American Electric Motor Services, Inc.; CB Roofing, LLC; Pearce, Bevill, Leesburg, Moore, P.C.; Pettus Plumbing & Piping, Inc.; Consumer Financial Education Foundation of America, Inc.; Fort McClellan Credit Union; Rolison Trucking Co., LLC; Conrad Watson Air Conditioning, Inc.; Linda Mills; Frank Curtis; Jennifer Ray Davidson; Pete Moore Chevrolet, Inc.; Jewelers Trade Shop; Saccoccio & Lopez; Angel Foster (fka Angel Vardas); Monika Bhuta; Michael E. Stark; G&S Trailer Repair Incorporated; Chelsea

L. Horner; Montis, Inc.; Renee E. Allie; John G. Thompson; Avantgarde Aviation, Inc.; Hess, Hess & Daniel, P.C.; Betsy Jane Belzer; Bartlett, Inc., d/b/a Energy Savers; Matthew Allan Boyd; Gaston CPA Firm; Rochelle and Brian McGill; Sadler Electric; Jeffrey S. Garner; Amy MacRae; Vaughan Pools, Inc.; Casa Blanca, LLC; Jennifer D. Childress; Clint Johnston; Janeen Goodin and Marla S. Sharp; Erik Barstow; GC/AAA Fences, Inc.; Keith O. Cerven; Teresa M. Cerven; Sirocco, Inc.; Kathryn Scheller; Iron Gate Technology, Inc.; Nancy Thomas; Pioneer Farm Equipment, Inc.; Scott A. Morris; Tony Forsythe; Joel Jameson; Ross Hill; Angie Hill; Kevin Bradberry; Christy Bradberry; Tom Aschenbrenner; Juanita Aschenbrenner; Free State Growers, Inc.; Tom A. Goodman; Jason Goodman; Comet Capital, LLC; Barr, Sternberg, Moss, Lawrence, Silver & Munson, P.C.; Mark Krieger; Deborah Piercy; and Lisa Tomazzoli.

wwww. "Taxes" means any and all federal, state and local income taxes, excise taxes, estimated taxes, gross receipt taxes, or any other taxes, as well as interest, penalties, tax detriments, and any other additions to taxes, arising with respect to the income of the Escrow Account or the operations of the Escrow Account, including any such federal, state and local taxes (and interest, penalties, tax detriments, and additions to tax) to which Settling Defendants or any other Releasee may be subject with respect to (i) any income earned by the Escrow Account for any period during which the Escrow Account is not

treated, or does not qualify, as a "qualified settlement fund" for federal or state income tax purposes, and (ii) the payment or reimbursement by the Escrow Account of any amounts described in clause (i) of this Paragraph 1.wwww.

xxxx. "Tax Expenses" means expenses and costs incurred in connection with the operation and implementation of the Escrow Account (including expenses of attorneys and/or accountants and mailing and distribution costs and expenses relating to filing, or failing to file, any Tax returns, including any such costs and expenses relating to filing, or failing to file, returns in respect of distributions from the Escrow Fund).

yyyy. "Term Sheet" refers to any and all term sheets proposed or negotiated between or among the Parties, including the final consolidated term sheet executed on November 14, 2019.

zzzz. "U.S." means all fifty states, the District of Columbia, and Puerto Rico.

B. APPROVAL OF SETTLEMENT AGREEMENT AND DISMISSAL OF CLAIMS

2. **Reasonable Best Efforts.** For each term in this Agreement, Settlement Class Counsel, Self-Funded Sub-Class Settlement Counsel, and Settling Defendants shall use their reasonable best efforts to effectuate this Agreement, including but not limited to cooperating

in seeking the Court's approval for the establishment of procedures (including providing Class Notice under Federal Rules of Civil Procedure 23(c) and (e)) to secure the complete and final dismissal with prejudice of the Subscriber Actions as to the Releasees.

3. **Preliminary Approval Motion.** Unless the schedule is modified by the Court, within 30 days of executing this Agreement, Class Representatives shall submit to the Court a Preliminary Approval Motion. The Preliminary Approval Motion shall include (i) the proposed form of an order preliminarily approving this Agreement, and (ii) a proposed Final Judgment and Order of Dismissal that shall include, at a minimum, the terms set forth in Paragraph 6.

4. **Preliminary Approval and Preliminary Fairness Hearing.** Settling Defendants, Settlement Class Counsel, and Self-Funded Sub-Class Settlement Counsel agree to collaborate in their presentations at the preliminary approval and preliminary fairness hearing, with Settling Defendants, Class Representatives, Settlement Class Counsel, and Self-Funded Sub-Class Settlement Counsel using their reasonable best efforts to establish that this settlement is in the best interests of the Settlement Classes.

5. **Notice Motion.** Simultaneously with the Preliminary Approval Motion, Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel shall submit to the Court all Notice Motion(s). The Notice Motion(s) shall include a proposed form of, method for, and date of dissemination of Class Notice.

Appendix D

a. Class Notice and procedures governing dissemination of the Notice will be reasonably calculated to apprise Class Members of the pendency of the Subscriber Actions, the Agreement, and their opportunity to be heard and to opt out (where applicable).

b. At their own expense, Settling Defendants agree to, within the later of 5 days after Court approval of the Notice Plan or 45 days after agreement between the Parties regarding the scope and methodology of Class Notice, supply to the Claims Administrator in electronic format data in their possession and kept in the ordinary course of business regarding the last known contact information of Class Members ("Class Member Data"). The Class Member Data will cover the entire Settlement Class Period and with respect to each Class Member will at least include: a to-be-agreed personal identifier (that can be cross referenced with a Member's first name, last name, and date of birth), last-known phone number (if any), last-known mailing address, and, if ordered by the Court, last-known email address (if any). The Claims Administrator may request any other data reasonably necessary to effectuate the Notice and Claims Administration ordered by the Court, and Settling Defendants will not unreasonably deny any such additional requests or fail to timely produce such data. Nothing in this Paragraph shall prevent Settlement Counsel from requesting samples of data from Settling Defendants to be produced prior to submission of the Notice Plan, and requests for such samples shall not be unreasonably denied.

i. Any delay in the production of Class Member data that will affect the Court-ordered Notice Plan shall be timely reported to the Court by Settling Defendants.

c. Settling Defendants agree to use reasonable best efforts to identify and promptly produce such information for the entirety of the Settlement Class Period, and to work with the Claims Administrator to resolve any issues with the format of the information or its use by the Claims Administrator.

d. Such information shall be provided directly to the Claims Administrator to maintain Confidentiality.

6. **Final Approval Motion.** If the Court preliminarily approves this Agreement, Class Representatives shall submit a Final Approval Motion to the Court, after appropriate notice to the Settlement Classes, and shall seek entry of a Final Judgment and Order of Dismissal. The Final Approval Motion and proposed Final Judgment and Order of Dismissal shall state that, upon Final Approval of the Settlement Agreement, the Court's Standard of Review Order does not apply to the Blue System, as revised by this Settlement Agreement. The proposed Final Judgment and Order of Dismissal shall include, at a minimum, the substance of the following provisions:

a. Certifying the Settlement Classes, pursuant to Rule 23 of the Federal Rules of Civil Procedure, solely for the purposes of this settlement;

b. Providing final approval of this settlement and its terms as being fair, reasonable, and adequate within the meaning of Rule 23 and directing its consummation according to its terms;

c. Directing that all Releasors shall, by operation of law, be deemed to have released all Releasees from the Released Claims;

d. Directing that the Subscriber Actions be dismissed with prejudice and, except as provided for in this Agreement, without costs;

e. Reserving exclusive jurisdiction over the settlement and this Agreement, including the interpretation, administration, and consummation of this settlement, to the Court, and including any Fee and Expense Award and/or Service Awards;

f. Determining under Federal Rule of Civil Procedure 54(b) that there is no just reason for delay and directing that the judgment of dismissal of the Subscriber Actions shall be final; and

g. Enjoining all Releasors from asserting any Released Claim against any Releasee.

7. **Review of Filings and Other Settlement-Related Documents.** All motions, pleadings, filings, reports, forms, and other documents related to approval or performance of the settlement shall be submitted to Settling Defendants for reasonably prompt comment as

to form and content prior to submission or transmission to the Court and/or Class Members. This includes, but is not limited to, the Preliminary Approval Motion, the Notice Motion, the Claim Process, the Final Approval Motion, the proposed Final Judgment and Order of Dismissal, and all exhibits thereto.

8. **Finality of Agreement.**

a. The Effective Date of the settlement shall be the latest date when all of the following events shall have occurred and shall be conditioned on the occurrence of all of the following events, and the Agreement shall become final upon the occurrence of all of the following events:

i. Execution of this Agreement;

ii. All monies to the Settlement Fund have been paid by Settling Defendants pursuant to this Agreement;

iii. Entry of the Preliminary Approval Order;

iv. Entry of the Class Notice Approval Order;

v. The deadline for Class Members to request exclusion from the settlement has passed;

vi. Entry of the Final Judgment and Order of Dismissal, following dissemination of Class Notice and the Final Fairness Hearing;

vii. The Final Judgment and Order of Dismissal becoming final per Paragraph 8.a.viii below;

viii. The time for appeal or to seek permission to appeal from the Final Judgment and Order of Dismissal expires, or if appealed, (1) such appeal is finally dismissed prior to resolution by the applicable court; (2) the Final Judgment and Order of Dismissal is affirmed in its entirety by the court of last resort to which such appeal may be taken; or (3) the Final Judgment and Order of Dismissal is modified, the Parties agree to the modifications and withdraw any pending appeals, and such document is finally entered; and

ix. Neither Class Representatives nor Settling Defendants have availed themselves of their respective rights to cancel and rescind the Agreement pursuant to this Paragraph 8 or Paragraphs 24, 28, 41, or 43 and the deadlines for doing so have passed.

b. For purposes of this Paragraph 8, an appeal of the Final Judgment and Order of Dismissal includes

but is not limited to appeals as of right, discretionary appeals, interlocutory appeals, proceedings involving writs of certiorari or mandamus, and legally comparable appellate proceedings regardless of nomenclature (excluding any appeal related to the Fee and Expense Application or the Monitoring Committee Process).

c. Notwithstanding any other provision in this Paragraph 8, any proceeding, order, or motion for reconsideration, appeal, petition for a writ of certiorari or its equivalent, pertaining solely to any Plan of Distribution, Fee and Expense Application, and/or the actions of the Monitoring Committee shall not in any way delay or preclude the Effective Date.

d. Notwithstanding any other provision in this Paragraph 8, if the Final Judgment and Order of Dismissal as set forth in Paragraph 6 is modified by any court in a material way (i.e., except solely as to any Plan of Distribution, Notice Plan, and/or Fee and Expense Application that does not have the effect of increasing Settling Defendants' financial obligation under this Agreement), Settling Defendants or Settlement Class Counsel (on behalf of the Settlement Classes) may rescind this Agreement subject to Paragraph 44.

e. For purposes of this Paragraph 8, this Agreement will become final upon the occurrence of all of the events listed in Paragraph 8.a even if the Monitoring Period has not concluded.

9. **No Admission of Wrongdoing or Liability by Settling Defendants.**

a. Nothing in this Agreement will constitute or be construed as an admission of liability or wrongdoing by any Settling Defendant. Neither this Agreement (regardless whether it becomes final), nor the Final Judgment and Order of Dismissal, nor any and all negotiations, documents, or discussions associated with them, nor any proceedings undertaken in accordance with the terms set forth herein, shall be deemed or construed to be (i) an admission or concession by any of the Settling Defendants (or evidence thereof) in any action or proceeding of any kind whatsoever, civil, criminal, or otherwise, before any court, arbitrator, administrative agency, regulatory body, or any other body or authority, present or future, (ii) evidence of any violation of any statute or law or of any liability or wrongdoing whatsoever by any Settling Defendant, or (iii) evidence of the truth or validity of any of the claims or allegations contained in any complaint or any other pleading that Class Representatives or Class Members have or could have asserted against Settling Defendants, including without limitation that Settling Defendants have engaged in any conduct or practice that violates any antitrust statute, or other law, regulation, or obligation. Settling Defendants expressly deny any wrongdoing or liability whatsoever for any and all such claims and allegations.

b. Neither this Agreement, nor any of its terms or provisions, nor any statement or document made or filed in connection herewith, nor the fact of this Agreement, nor any of the negotiations or proceedings connected with it, nor any other action taken to carry out this Agreement by any Settling Defendant, shall be discoverable or be filed, referred to, offered as evidence or received in evidence, or otherwise used against Settling Defendants in any way, directly or indirectly, in any pending or future civil, criminal, or administrative action, arbitration, or proceeding whatsoever, except in a proceeding (i) to enforce this Agreement, (ii) to defend against the assertion of Released Claims, or (iii) regarding a Settling Individual Blue Plan's own insurance coverage related to the Subscriber Actions; and even in such circumstances, such documents continue to be subject to their Confidentiality designations pursuant to the Qualified Protective Order (Dkt. 550).

C. CLASS INJUNCTIVE RELIEF

10. **National Best Efforts.** BCBSA and Settling Individual Blue Plans will eliminate and no longer enforce the National Best Efforts Requirement. Further, BCBSA and Settling Individual Blue Plans will not adopt or implement any equivalent requirement or any rule in any future License Agreement or Membership Standard that imposes a cap, ratio, or other quantitative limit on a Settling Individual Blue Plan's non-Blue-Branded healthcare business outside of its Service Area.

11. **Local Best Efforts.** Compliance with the Local Best Efforts Requirement shall be based on a geographic area no larger than a state level. The Local Best Efforts Requirement shall not exceed 80%.

12. **Self-Funded Account Vendors.**

a. BCBSA and Settling Individual Blue Plans agree not to prohibit direct contracting between Non-Provider Vendors and Self-Funded Accounts, provided however that BCBSA and Settling Individual Blue Plans shall not be required to communicate with or administer claims for any Non-Provider Vendors.

b. BCBSA and Settling Individual Blue Plans agree not to prohibit Settling Individual Blue Plans from doing business with Self-Funded Accounts that contract directly with Specialty Service Provider Vendors, provided that any obligations under such contracting between a Self-Funded Account and a Specialty Service Provider Vendor are separate from, and completely carved out of, the Settling Individual Blue Plan's benefits, services, obligations, and use of the Blue Marks, and neither BCBSA, nor any Settling Individual Blue Plan shall be required to communicate with or administer claims for any Specialty Services Provider Vendor. Nothing in this provision shall limit a Settling Individual Blue Plan's discretion to independently choose the Self-Funded Accounts with which it will contract.

c. When Settling Individual Blue Plans report allowed amounts for covered services to Self-Funded Accounts, they will do so accurately in all material respects in accordance with the terms of the contract with the Self-Funded Account and any mutually agreed-upon definition of "allowed amounts." Any dispute between a Self-Funded Account and a Settling Individual Blue Plan regarding the definition of allowed amounts shall be handled in the ordinary course of business between the Settling Individual Blue Plan and the Self-Funded Account and is not covered by the releases defined in Paragraphs 32 and 33.

d. During the Monitoring Period and unless otherwise agreed to by the Settling Individual Blue Plan and Self-Funded Account, for a given contracted Provider, the Settling Individual Blue Plan will not enter into different standard commercial fee schedules for medical and surgical claims for its Self-Funded Accounts, on the one hand, and Insured Groups (other than Insured Groups who purchase an ACA-compliant individual or small-group product), on the other hand, if the products, networks, administrative services, and plan designs are the same, excluding differences in reimbursement rates individually negotiated with a contracted Provider.

13. **Service Areas.** Subject to the provisions of Paragraphs 10–12 and 14–18, nothing in this Agreement shall prevent any Settling Individual Blue Plan from continuing to operate its Blue-Branded business only

in its Service Area, in accordance with the License Agreement(s) and Membership Standards as of the Execution Date. Any material qualitative changes to the system of Settling Individual Blue Plan Service Areas after the Effective Date will not be covered by the releases defined in Paragraphs 32 and 33 unless such changes are approved by the Monitoring Committee pursuant to Paragraph 20 or Court order. For the avoidance of doubt, mergers or consolidations among Settling Individual Blue Plans, termination of a Settling Individual Blue Plan's License Agreement, and/or the issuance of License Agreements to replacement Settling Individual Blue Plans do not constitute such material qualitative changes.

14. **National Accounts.**

a. When a Settling Individual Blue Plan bids a multi-Service Area account with more than 250 total Members and with Headquarters in its Service Area, the Settling Individual Blue Plan will only use the Blue Mark(s), provided however:

i. A Settling Individual Blue Plan may choose to bid such an account solely under a non-Blue Brand. If it does so, it must cede the right to submit a Blue-Branded bid to another Settling Individual Blue Plan. The ceded right will be awarded to another Settling Individual Blue Plan in the following order:

a. Any other Settling Individual Blue Plan in whose Service Area the account is Headquartered;

b. The Settling Individual Blue Plan in whose Service Area resides the greatest number of the account's employees, provided that, for multi-state Settling Individual Blue Plans, the account's employees are to be counted separately in each state or portion of a state when the Service Area is not state-wide (i.e., a single state is the largest possible unit of employee count).

b. Accounts with Independent Health Benefit Decision Locations outside the Initial Control Plan's Service Area can request a bid for the employees covered by such a decision location from the Settling Individual Blue Plan in whose Service Area the decision location is situated rather than from the Initial Control Plan. BCBSA and Settling Defendants will not prohibit requests for such bids based on any rules related to Service Areas.

15. **Second Blue Bid.** A Qualified National Account shall have the right to send a Second Blue Bid Request to any one Settling Individual Blue Plan, in addition to an Initial Control Plan, for a total of two bids. Under all circumstances, the Qualified National Account shall have the right to select the Settling Individual Blue Plan bidder from these two bids. Where the Qualified National Account has the right to request a bid from more than one Settling Individual Blue Plan under the current BCBSA rules (*e.g.*, the Qualified National Account's Headquarters is located

in multiple Settling Individual Blue Plans' Service Areas), this term is satisfied, and the Qualified National Account shall not have the right to request any additional bids from other Settling Individual Blue Plans. Rules governing the Second Blue Bid for Qualified National Accounts whose Headquarters is not located in multiple Settling Individual Blue Plans' Service Areas are contained in Appendix D.

a. If any Employer contends that the data BCBSA used for that particular Employer are different from the data that Dun & Bradstreet ("D&B") provided to BCBSA as provided in Paragraph 1.u, such Employer shall have the right to appeal its status to the Monitoring Committee. The Monitoring Committee will decide any appeals based solely on whether BCBSA used the data provided by D&B for that Employer as of the date BCBSA received the data from D&B. Such decision will be made within 14 days of receipt of the appeal. The decision of a majority of the Monitoring Committee will be final and binding with respect to the Employer. If a majority of the Monitoring Committee decides in favor of the Employer, the Employer will be added to the list of Qualified National Accounts.

16. **Additional Brand-Protection Mechanisms.** Nothing in this Agreement shall prevent Settling Defendants from adopting reasonable mechanisms designed to promote and build the competitiveness or efficiency of the Blue-Branded business or of the Blue Marks that they in good faith adopt consistent with the terms of this Agreement and all state and federal antitrust

and trademark laws. These mechanisms include but are not limited to the following:

a. Adopting reasonable mandatory metrics relating to membership, revenue, and financial stability tailored to each Settling Individual Blue Plan;

b. Requiring reasonable additional or increased affirmative uses of the Blue Marks by Settling Individual Blue Plans within their Service Areas;

c. Adopting reasonable requirements that protect non-public assets or information of or developed by Settling Individual Blue Plans collectively or BCBSA. A Settling Individual Blue Plan may use, in connection with any of its non-Blue-Branded business, its own assets or information. With respect to assets or information of or developed by other Settling Individual Blue Plans or BCBSA, such requirements may include, but are not limited to, rules that prohibit Settling Individual Blue Plans, in connection with any non-Blue-Branded business, from:

i. Using the Blue Marks (e.g., co-branding);

ii. Appropriating or using data that includes, reflects, or incorporates non-public information relating to any other Settling Individual Blue Plan's Members or contracted Providers; and

iii. Appropriating or using non-public plans developed by or among Settling Individual Blue Plans and/or BCBSA.

d. Increasing the Re-Establishment Fee by a reasonable amount;

e. Requiring a Settling Individual Blue Plan to spend a reasonable minimum annual expenditure on media advertising and other promotional efforts to affirm and/or enhance the value of the licensed Blue Marks;

f. Requiring a Settling Individual Blue Plan to pay reasonable minimum annual royalties for use of the licensed Blue Marks; and

g. Instituting intermediate remedial measures (including cure periods) for non-compliance by a Settling Individual Blue Plan with BCBSA rules and regulations, including newly adopted reasonable mechanisms. A Settling Individual Blue Plan may be subject to termination of its License Agreement if it is found to have acted in a manner which failed to protect, maintain, and promote the value and goodwill of the Blue Marks consistent with the terms of this Agreement or has otherwise breached its commercial obligations or responsibilities under its respective contracts. Before any termination decision is made, a Settling Individual Blue Plan will be extended the opportunity, if appropriate, to remedy the alleged failure.

h. Nothing in this Agreement shall prevent BCBSA from making additional changes it deems appropriate in the future governance of the Blue System as long as such changes are not prohibited by this Agreement. Such changes will not be covered by the releases defined in Paragraphs 32 and 33 unless Settling Defendants comply with the notice and monitoring mechanisms in Paragraph 20 below or the changes are ordered by the Court.

17. **Acquisitions.** BCBSA and Settling Individual Blue Plans can collectively impose legal and reasonable conditions on the acquisition of a Settling Individual Blue Plan, but only to the extent that those conditions are reasonably necessary to prevent impairment of (1) the value of the Blue Marks, or (2) the competitiveness or efficiency of the Blue-Branded business or of the Blue Marks. Any conditions imposed or required by BCBSA on the acquisition of a Settling Individual Blue Plan shall include a provision allowing a potential acquirer of an Individual Plan or the target Settling Individual Blue Plan to challenge any rejection by BCBSA of a formal acquisition bid during the Monitoring Period through a mediation by the Monitoring Committee, followed by binding arbitration (if the mediation is unsuccessful). Rules related to such arbitration are contained in Appendix E. If the arbitrators determine that the rejection was based on a reasonable need to prevent impairment of (1) the value of the Blue Marks, or (2) the competitiveness or efficiency of the Blue-Branded business or of the Blue Marks, the rejection may be upheld. If the arbitrators instead determine that the rejection has the purpose

or effect of unreasonably restricting or foreclosing competition generally for Commercial Health Insurance or Self-Funded Health Benefit Plans, the rejection may not be upheld. Otherwise, the rejection may be upheld. Nothing in this Paragraph 17 is intended to affect or restrict the conditions that a Settling Individual Blue Plan may unilaterally impose on an acquisition to which it is a party, or a Settling Individual Blue Plan's unilateral rejection of an acquisition bid.

18. **Most Favored Nations Clauses**

a. Where state law, or any existing written agreement between a Settling Individual Blue Plan and a state regulatory agency or subdivision as of November 2019, expressly regulates the use of MFNs and/or MFN-Differentials in Provider contracts and such existing written agreement has been disclosed to Settlement Class Counsel, a Settling Individual Blue Plan will abide by state law or said agreement.

b. Where state law does not expressly regulate the use of MFNs and/or MFN Differentials, MFNs and/or MFN-Differentials may be negotiated between a Settling Individual Blue Plan and any Provider to the extent permitted by law except as set forth in this Paragraph.

c. If a Settling Individual Blue Plan enters into an MFN-Differential under any portion of this Paragraph 18, the Settling Individual Blue Plan shall provide the Monitoring Committee proof that it is not prohibited by the terms of Paragraph 18.d.i.

d. During the Monitoring Period, and subject to the monitoring provisions in Paragraph 20, where state law does not expressly regulate the use of MFNs and/or MFN-Differentials in Provider contracts, a Settling Individual Blue Plan agrees not to enter into MFN Differentials where:

i. the number of the Settling Individual Blue Plan's enrollees in Blue-Branded Commercial Health Benefit Products in a state, Puerto Rico, or Washington, D.C., is greater than 40% of all enrollees in Commercial Health Benefit Products in that state other than Government Accounts, except where (A) the Provider has agreed to such provisions with one or more other payers, (B) the Provider offers a Commercial Health Benefit Product in competition with the Settling Individual Blue Plan, (C) the Settling Individual Blue Plan made an investment of at least $100,000 in the Provider or has entered into a Joint Venture with the Provider, or (D) the Settling Individual Blue Plan has agreed to an accountable care organization, narrow network, cost sharing, capitation, or value-based arrangement with the Provider.

19. **Implementation of Class Injunctive Relief.** Settling Defendants shall begin taking steps necessary to implement Paragraphs 10–15 and 17–18 upon entry of the Preliminary Approval Order. Settling Defendants shall implement as soon as practicable, but in no event later than

60 calendar days after the Effective Date for Paragraphs 10–14 and 17–18, and the later of three months after the Effective Date or April 1, 2022, for Paragraph 15. These deadlines may be extended only by unanimous vote of the Monitoring Committee or Court approval.

20. **Monitoring and Reporting.** During the Monitoring Period, BCBSA may advise Settlement Class Counsel, Self-Funded Sub-Class Settlement Counsel, and the Monitoring Committee of BCBSA Board actions to be taken adopting rules or regulations that are within the scope of Paragraphs 10–18. The communications shall remain Confidential. During the Monitoring Period, Settlement Class Counsel, Self-Funded Sub-Class Settlement Counsel, and Settlement Class Members will report to the Monitoring Committee any and all disputes related to the Agreement, and Settling Defendants will report drafts of new rules or measures for approval under Paragraphs 10 through 18 to the extent Settling Defendants advise of such potential rules or measures and disputes related to obligations created by this Agreement. Any reporting obligation and the authority of the Monitoring Committee shall cease at the conclusion of the Monitoring Period.

a. As to drafts of new rules or measures for approval under Paragraphs 10 through 18, the following rules shall apply to the reporting and resolution of disputes:

i. Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel must

raise to the Monitoring Committee in writing any dispute to Settling Defendants' actions within 90 calendar days of notice by Settling Defendants to Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel.

ii. If Settlement Class Counsel or Self-Funded Sub-Class Settlement Counsel raises a dispute within 90 calendar days, the Parties will attempt to resolve the dispute through good-faith negotiation. If the Parties agree that the rule, regulation, or action is within the scope of Paragraphs 10–18, the rule, regulation, or action will constitute a Released Claim. If the Parties cannot agree about whether a rule, regulation, or action is within the scope of Paragraphs 10–18, the Monitoring Committee will attempt to mediate the dispute. If the dispute is not resolved within 90 days following the date that Settlement Class Counsel or Self-Funded Sub-Class Settlement Counsel raises the dispute, it will be deemed unresolved, with the mediation being unsuccessful.

iii. If the mediation is unsuccessful, any Party to the dispute may take the dispute to arbitration as described in Appendix E. Further rules related to the Monitoring Committee and such arbitration are contained in Appendix E. If the arbitrators find that the rule, regulation, or action is outside the

scope of Paragraphs 10–18, the rule will not constitute a Released Claim. Otherwise, the rule, regulation, or action will constitute a Released Claim.

iv. Any newly adopted rule or regulation for which Settling Defendants do not provide notice to Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel initiating the process described in this Paragraph 20 during the Monitoring Period or receive a Court order will not constitute a Released Claim.

b. The Parties will attempt to resolve all disputes related to obligations created by this Agreement through good-faith negotiation. If the Parties cannot resolve an issue informally, the Monitoring Committee will attempt to mediate the dispute upon the request of any Party. If the mediation is unsuccessful, any Party to the dispute may take the dispute to arbitration as described in Appendix E; provided that any unresolved dispute related to the Release, including the scope of the Released Claims, Releasors, or Releasees, will be submitted to the Court instead of to arbitration. Further rules related to the Monitoring Committee and such arbitration are contained in Appendix E.

c. Good-faith disputes over the interpretation or implementation of this Agreement shall not vitiate the releases described in Paragraphs 32 and 33.

d. Nothing in this Paragraph 20 shall apply to disputes regarding the applicability of the releases described in Paragraphs 32 and 33.

21. **Monitoring Fees and Expenses.** Fees and expenses actually and reasonably incurred in connection with monitoring under Paragraph 20 shall be paid from the Notice and Administration Fund upon approval by the Court. These include the actual and reasonable fees and expenses of the Monitoring Committee and neutral arbitrator, and actual and reasonable Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel monitoring fees and expenses. For purposes of clarity, no attorneys' fees or attorney expenses for Settling Defendants shall be paid from the Notice and Administration Fund. Any money remaining in the Notice and Administration Fund at the expiration of the Monitoring Period and the completion of Settlement administration will immediately revert to Settling Defendants.

D. SETTLEMENT AMOUNT

22. **Settlement Amount.** Subject to the provisions hereof, and in full, complete, and final settlement of the Subscriber Actions as provided herein, Settling Defendants shall pay or cause to be paid the Settlement Amount of $2.67 billion ($2,670,000,000.00), subject to increase only for potential replenishment of the Notice and Administration Fund pursuant to Paragraph 1.ggg. The Settlement Amount shall be paid in U.S. dollars into the Escrow Account.

23. **Payment Timing.** The Settlement Amount shall be paid in the following installments:

a. Within 30 calendar days of entry of the Preliminary Approval Order, Settling Defendants shall cause to be transferred into the Escrow Account (1) the $100 million ($100,000,000.00) Notice and Administration Fund, and (2) an advance of $300 million ($300,000,000.00) of the remaining Settlement Amount.

b. Within 30 calendar days of the Court's entry of the Final Judgment and Order of Dismissal, Settling Defendants shall cause the remaining portion of the Settlement Amount to be transferred into the Escrow Account.

c. All (1) Notice and Administration Costs, (2) Fee and Expense Awards, (3) Service Awards, (4) Taxes and Tax Expenses, and (5) any other Court-approved costs of implementing the settlement shall be paid solely from the Escrow Account, as further specified in Paragraph 26. Amounts in the Escrow Account shall be paid and distributed only in accordance with the terms of this Agreement and the terms of a mutually agreed upon Escrow Agreement entered into by the parties, to be overridden only by Court order.

24. **Failure to Fund.** Without prejudice to Settlement Class Members' right to seek enforcement of this Agreement, if the Settlement Amount is not timely transferred to the Escrow Account in accordance with

the terms of Paragraph 23, Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel may rescind this Agreement if: (i) Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel have notified Settling Defendants' counsel in writing of their intention to rescind this Agreement; and (ii) the entire Settlement Amount is not transferred to the Escrow Account within thirty (30) business days after Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel have provided such written notice of insufficient payment.

25. **Tax Benefits and Consequences.**

a. Settling Defendants, Settlement Class Counsel, and Self-Funded Sub-Class Settlement Counsel do not warrant to Class Representatives or Settlement Class Members any tax benefits or consequences arising from this Agreement or any of the payments made to Class Representatives and Settlement Class Members pursuant to this Agreement. All federal, state, and local taxes owed by Class Representatives and Settlement Class Members on any of the amounts paid pursuant to this Agreement are the responsibility of Class Representatives and Settlement Class Members, and not the Releasees, Settlement Class Counsel, or Self-Funded Sub-Class Settlement Counsel.

b. Settling Defendants do not warrant to Settlement Class Counsel or Self-Funded Sub-Class Settlement Counsel any tax benefits or consequences arising from this Agreement or any of the payments

made to Settlement Class Counsel or Self-Funded Sub-Class Settlement Counsel pursuant to this Agreement. All federal, state, and local taxes owed by Settlement Class Counsel or Self-Funded Sub-Class Settlement Counsel on any of the amounts paid pursuant to this Agreement are the responsibility of Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel, and not the Releasees.

c. Class Representatives, Settlement Class Members, Settlement Class Counsel, and Self-Funded Sub-Class Settlement Counsel acknowledge that Settling Defendants and the Section 468B Administrator will engage in reporting to the Internal Revenue Service and such other state and local taxing authorities as may be required by law. Class Representatives, Settlement Class Members, Settlement Class Counsel, and Self-Funded Sub-Class Settlement Counsel further acknowledge that the Section 468B Administrator and the Escrow Agent will comply with all withholding obligations as required under the applicable provisions of the Internal Revenue Code and such other state and local laws as may be applicable, and the regulations promulgated thereunder.

26. **Escrow Account.** The Escrow Account shall be selected by the Parties and will be established at the Bank with such Bank serving as Escrow Agent subject to escrow instructions regarding investment types and reinvestment of income and proceeds mutually acceptable to Settlement Class Counsel, Self-Funded Sub-Class Settlement

Counsel, and Settling Defendants. Such Escrow Account is to be administered by the Escrow Agent under the Court's continuing supervision and control.

a. No monies shall be paid from the Escrow Account without the specific written authorization of Settlement Class Counsel, Self-Funded Sub-Class Settlement Counsel, and a designated representative of the Settling Defendants, and such authorization shall not be unreasonably withheld. Counsel for the Parties agree to cooperate, in good faith, to negotiate and execute an appropriate and separate Confidential escrow agreement in conformance with this Agreement prior to the date on which any portion of the Settlement Amount is required to be paid pursuant to Paragraph 23 of this Agreement.

b. The Escrow Agent shall cause the funds deposited in the Escrow Account to be invested in short-term instruments backed by the full faith and credit of the U.S. Government or fully insured in writing by the U.S. Government, or money market funds rated Aaa and AAA, respectively by Moody's Investor Services and Standard and Poor's, invested substantially in such instruments, and shall reinvest any income from these instruments and the proceeds of these instruments as they mature in similar instruments at their then-current market rates. The Parties shall bear no risk related to the management and investment of the Settlement Fund or Escrow Account. Settling Defendants shall not be required to deposit additional funds as a result of investment

or other losses to the Settlement Fund or Escrow Account.

c. All funds held in the Escrow Account shall be deemed and considered to be in custodia legis of the Court and shall remain subject to the jurisdiction of the Court, until such time as such funds shall be distributed pursuant to the terms of this Agreement and/or order(s) of the Court.

d. Class Representatives and Settling Defendants agree to treat the Escrow Account as being at all times a "qualified settlement fund" within the meaning of Treas. Reg. § 1.468B-1. In addition, the Section 468B Administrator and, as required, the Parties, shall timely make such elections and filings as necessary or advisable to carry out the provisions of this Paragraph 26. Such elections shall be made in accordance with the procedures and requirements contained in the regulations promulgated under Internal Revenue Code Section 468B. It shall be the responsibility of the Section 468B Administrator to timely and properly prepare and deliver the necessary documentation for signature by all necessary parties, and thereafter to cause the appropriate filing to occur. All provisions of this Agreement shall be interpreted in a manner that is consistent with the Escrow Account being a "qualified settlement fund" within the meaning of Treasury Regulation § 1.468B-1.

e. The Section 468B Administrator shall timely and properly file all information and other Tax returns necessary or advisable with respect to

the Escrow Account (including without limitation the returns described in Treas. Reg. § 1.468B-2(k), (1)). Such returns shall be consistent with subparagraph (d) and in all events shall reflect that all Taxes shall be paid out of the Escrow Account as provided in subparagraph (g) hereof.

f. Each Settling Defendant shall timely deliver to the Section 468B Administrator a "Section 1.468B-3 Statement" (as provided in Treas. Reg. § 1.468B-3(e)) with respect to any transfers it makes to the Escrow Account.

g. The Escrow Account is intended to be a separate taxpaying entity for purposes of federal and state tax law. All Taxes and Tax Expenses arising from the operation and income of the Escrow Account shall be paid out of the Escrow Account.

h. Unless otherwise set forth in this Agreement, the Section 468B Administrator shall be solely responsible for directing the filing of all informational and other Tax returns necessary to report any income earned by the Escrow Account.

i. Settling Defendants makes no representation to Settlement Class Counsel or Self-Funded Sub-Class Settlement Counsel regarding the appropriate tax treatment of the Settlement Fund, income earned on the Settlement Fund, or any distribution taken from the Settlement Fund. Neither Settling Defendants nor any other Releasee nor their respective counsel

shall have any liability or responsibility for the Taxes or the Tax Expenses. Settling Defendants shall have no responsibility to make any filings relating to the Settlement Fund and will have no responsibility to pay tax on any income earned by the Settlement Fund or to pay any taxes on the Settlement Fund unless the settlement is not consummated and the Settlement Fund is returned to Settling Defendants. Further, Taxes and Tax Expenses shall be treated as, and considered to be, a cost of administration of the Escrow Account and shall be timely paid or reimbursed out of the Escrow Account without prior order from the Court. The Escrow Agent shall reimburse Settling Defendants out of the Escrow Account for any Taxes and Tax Expenses to which Settling Defendants are subject. The Escrow Agent shall be obligated (notwithstanding anything herein to the contrary) to withhold from distribution to any claimants authorized by the Court any funds necessary to pay such amounts including the establishment of adequate reserves for any Taxes and Tax Expenses (as well as any amounts that may be required to be withheld under Treas. Reg. § 1.468B-2(l)(2)). Class Representatives, Settlement Class Counsel, Self-Funded Sub-Class Settlement Counsel, and Settling Defendants agree to cooperate with the Section 468B Administrator, the Escrow Agent, each other, and their attorneys and accountants to the extent reasonably necessary to carry out the provisions of subparagraphs (d)–(g).

27. **Distribution of Net Settlement Fund to Classes.** After this Agreement becomes final on the Effective Date and the Court enters a Class Distribution Order, the amounts in the Escrow Account consisting of the Net Settlement Fund shall be distributed to Authorized Claimants in accordance with the Plan of Distribution, which shall include the foundation for the requested allocation, to be submitted to the Court at the appropriate time by Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel, subject to approval by the Court in the Class Distribution Order. The Plan of Distribution will provide an opportunity to submit a claim for monetary payments by all members of the Damages Class. In no event shall any Settling Defendant or any other Releasee have any responsibility, financial obligation, or liability whatsoever with respect to the allocation, investment, distribution, or administration of the Escrow Account, including, but not limited to, the costs and expenses of such distribution and administration except as expressly otherwise provided in Paragraphs 23 through 26 to be borne by the Notice and Administration Fund.

28. **Attorneys' Fees and Expenses and Service Awards.** Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel shall be reimbursed and indemnified solely out of the Escrow Account for all attorneys' fees, expenses, and costs, in amounts not to exceed those provided by Court order. Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel shall file their Fee and Expense Application(s), and provide notice to Class Members, in accordance with Eleventh

Circuit practice. All such expenses as are approved by the Court shall be solely paid out of the Escrow Account. In the event that the Effective Date does not occur, only actually and reasonably incurred Notice and Administration Costs may be payable from the Escrow Account, and such amounts shall not be refunded to Settling Defendants.

a. Settlement Class Counsel may submit an application(s) to the Court ("Fee and Expense Application") for: (i) an award of attorneys' fees plus (ii) reimbursement of expenses and costs reasonably and actually incurred in connection with prosecuting the Subscriber Actions, up to a combined total of 25% of $2.67 billion (i.e., $667,500,000.00), which shall include Self-Funded Sub-Class Settlement Counsel's application.

b. If the Fee and Expense Award exceeds 25% of $2.67 billion, Settling Defendants may rescind the settlement.

c. Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel may also seek Service Awards for Class Representatives as part of their Fee and Expense Application in accordance with Eleventh Circuit practice. Any Service Awards approved by the Court shall be payable from the Settlement Amount.

d. A partial award of seventy-five million ($75,000,000) of the total attorneys' fees, expenses, and interest as are awarded by the Court shall be paid from the Escrow Account no later than 31 days

after the entry of an order preliminarily approving the Settlement. The partial award shall be distributed at the discretion of Settlement Class Counsel. The partial award shall be subject to Plaintiffs' Counsel's provision of an irrevocable letter of credit from the Bank securing the amount of the partial award. Plaintiffs' counsel shall be required to repay those amounts to the Escrow Account, plus accrued interest at the same net rate as is earned by the Escrow Account, and subject to an appropriate undertaking, if and when, as a result of any appeal and further proceedings on remand, or successful collateral attack, and after the exhaustion of all appeals, the Fee and Expense Award is reduced or reversed below seventy-five million ($75,000,000), or return of the Escrow Account is required.

e. Neither Settling Defendants nor any other Releasee under this Agreement shall have any responsibility for, interest in, or liability whatsoever with respect to any payment to Settlement Class Counsel, Self-Funded Sub-Class Settlement Counsel, and/or Class Representatives of any Fee and Expense Award or Service Award.

f. Notwithstanding any other provision of this Agreement to the contrary, the Fee and Expense Application shall be considered by the Court separate and apart from its consideration of the fairness, reasonableness, and adequacy of the settlement, and any order or proceeding relating to the Fee and Expense Application, or any appeal of any

order relating thereto or reversal or modification thereof, that does not have the effect of increasing Settling Defendants' financial obligation under this Agreement, shall not operate to terminate or cancel this Settlement Agreement or the settlement of the Action, or affect the finality or binding nature of any of the releases granted hereunder. Nothing in this Paragraph affects Settling Defendants' rights under Paragraph 28.b.

g. Other than as set forth in this Paragraph, Settling Defendants and the other Releasees shall not be liable for any costs, fees, or expenses of any of Class Representatives or the Settlement Classes, including without limitation attorneys' fees and expenses, attorneys' fees and expenses associated with the provision of Class Notice, attorneys' fees and expenses incurred in administering the Escrow Account, attorneys' fees and expenses of expert witnesses and consultants, and attorneys' fees and expenses associated with discovery, motion practice, hearings before the Court, and appeals.

h. Separate and apart from the Fee and Expense Award, Settling Defendants further agree to reimburse plaintiffs' counsel's actual and reasonable fees and expenses incurred for Notice and Administration in an amount not to exceed seven million dollars ($7,000,000). Such reimbursements shall further be limited to no more than 2.33 million dollars ($2,330,000) per year, with any remainder of that amount rolling over year over year for final

accounting upon completion of the process. Such reimbursements will be paid from the Notice and Administration Fund.

29. **Distributions of the Settlement Fund.** The Parties agree that the Escrow Account shall be paid out as follows:

a. After entry of an order approving such distribution, the Claims Administrator and Settlement Administrator shall be paid Notice and Administration Costs.

b. After the Effective Date, the Fee and Expense Award and Service Awards shall be paid; provided, however, that any amounts in the Escrow Account necessary for Taxes and Tax Expenses shall remain in the Escrow Account.

c. After (1) the Effective Date, (2) written certification by Settling Defendants, Settlement Class Counsel, and Self-Funded Sub-Class Settlement Counsel that the Agreement is final pursuant to Paragraph 8 (which may occur before the conclusion of the Monitoring Period), and (3) receipt of Court order approving distribution of the Net Settlement Fund to Authorized Claimants, the Net Settlement Fund shall be distributed as ordered by the Court; provided, however, that any amounts in the Escrow Account necessary for Taxes and Tax Expenses shall remain in the Escrow Account.

30. **Balance Remaining in Settlement Fund.** Any funds remaining in the Notice and Administration Fund, plus income accrued on the Notice and Administration Fund (but not any other portion of the Settlement Fund), will be immediately returned to Settling Defendants when the administration and monitoring during the Monitoring Period is completed and Settlement administration is completed. Each Settling Defendant will be paid in proportion to its respective contribution to the Settlement Fund. If there is any balance remaining in the Escrow Account after distributions to Authorized Claimants, the Fee and Expense Award, and Service Awards, and after any payment in full of the remaining balance of the Notice and Administration Fund to Settling Defendants (including accrued income), the Claims Administrator will, subject to Court approval, reallocate the Settlement Fund among Settlement Class Members in an equitable and economic fashion. Following such distributions, if it is not economical to distribute to Settlement Class Members any residual amounts, then, subject to Court approval, the Claims Administrator may follow the directions set forth in the Plan of Distribution approved by the Court. Other than the remaining balance of the Notice and Administration Fund (including accrued income), which shall be distributed to the Settling Defendants as described herein, in no event shall any portion of the Settlement Fund be paid to Settling Defendants (except in the event of rescission in accordance with Paragraphs 8, 24, 28, 41, or 43 of this Agreement). In no event shall any portion of the Net Settlement Fund be distributed to Settlement Class Counsel or Self-Funded Sub-Class Settlement Counsel.

31. **Amounts Paid Not a Penalty.** It is understood and agreed that no consideration or amount or sum paid, credited, offered, or expended by Settling Defendants in performance of this Agreement constitutes a penalty, fine, punitive damages, or other form of assessment for any alleged claim or offense.

E. RELEASE, DISCHARGE, AND COVENANT NOT TO SUE

32. **Released Claims and Covenant Not to Sue.** In addition to the effect of any final judgment entered in accordance with this Agreement, upon the Effective Date as set out in Paragraph 8, and in consideration of the Injunctive Relief and payment of the Settlement Amount into the Settlement Fund, and for other valuable consideration, the Releasors shall be deemed to have, and by operation of the Final Judgment and Order of Dismissal shall have, fully, finally, and forever released, relinquished, and discharged all Released Claims against any and all of the Releasees. Persons or entities in both the Injunctive Relief Class and the Damages Class release all Released Claims. Persons or entities in the Injunctive Relief Class but not the Damages Class, release only claims for equitable or injunctive relief, provided that persons or entities that are within the definition of the Damages Class release any claims for damages that may be asserted by persons or entities (including dependents and beneficiaries) who claim by, for, under, or through a Damages Class member or the Commercial Health Benefit Product that a Damages Class member purchased, was covered by, or was enrolled in. The Parties intend that the

releases in this Agreement be interpreted and enforced broadly and to the fullest extent permitted by law. Each Releasor shall be deemed to have released all Released Claims against the Releasees regardless whether any such Releasor ever seeks or obtains by any means, including without limitation through the Claim Process, any distribution from Settlement Fund. Class Representatives and Settling Defendants acknowledge, and Settlement Class Members shall be deemed by operation of the Final Judgment and Order of Dismissal to have acknowledged, that the foregoing waivers and releases were separately bargained for and a key element of the settlement of which these releases are part.

a. All Releasors also covenant not to sue any Releasee with respect to any Released Claim, and agree that all Releasors shall be permanently barred and enjoined from commencing, maintaining, prosecuting, causing, cooperating with, advising to be commenced or maintained, or encouraging any action, suit, proceeding, or claim in any court, tribunal, administrative agency, regulatory body, arbitrator, or other body in any jurisdiction against any Releasee based in whole or in part upon, arising out of, or in any way connected or related to any Released Claim.

b. Each Releasor may hereafter discover facts other than or different from those which he, she, or it knows or believes to be true with respect to the claims which are the subject matter of the provisions of this Paragraph 32 and Paragraph 33. Nevertheless, each Releasor hereby expressly waives and fully, finally,

and forever settles and releases, upon this Agreement becoming final, any known or unknown, suspected or unsuspected, contingent or non-contingent claim with respect to the subject matter of the provisions of this Paragraph 32, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts.

33. **California Civil Code.** In addition to the provisions of Paragraph 32, Releasors expressly waive and release, upon this Agreement becoming final, any and all provisions, rights, and benefits conferred by § 1542 of the California Civil Code, which states:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY;

or by any law of any state or territory of the U.S., or principle of common law, which is similar, comparable, or equivalent to § 1542 of the California Civil Code.

34. **All Claims Satisfied by Settlement Fund.** Each Releasor shall look solely to the Plan of Distribution and Net Settlement Fund as deposited in the Escrow Account

for settlement and satisfaction, as provided herein, of all Released Claims for any form of monetary compensation or relief (including attorneys' fees and costs). Except as provided by order of the Court pursuant to this Agreement, no Class Member shall have any interest in the Escrow Account or the Settlement Funds deposited therein, or any portion thereof.

35. **Enforcement of Release.** Notwithstanding any other provision of this Agreement, nothing in this Agreement will prevent Releasees from pleading this Settlement Agreement as a full and complete defense to any action, suit, or other proceeding that has been or may be instituted, prosecuted, or attempted with respect to any of the Released Claims and may be filed, offered, and received into evidence, and otherwise used for such defense.

F. ADMINISTRATION OF SETTLEMENT

36. **Claims and Release.** Any Settlement Class Member who does not follow the instructions of the Notice Program will not be entitled to any of the proceeds under the Plan of Distribution and from the Net Settlement Fund, but will otherwise be bound by all of the terms of this Agreement, including the terms of the Final Judgment and Order of Dismissal to be entered in the Subscriber Actions and the releases provided for herein, and will be barred from bringing any action or proceeding against the Releasees based in whole or in part upon, arising out of, or in any way connected or related to the Released Claims.

37. **Claims Administrator.** The Claims Administrator shall process the Settlement Fund in accord with the Notice Plan submitted in connection with the settlement, and, after entry of the Class Distribution Order, distribute the Net Settlement Fund in accordance with the Class Distribution Order. Except for their obligation to fund the settlement or cause it to be funded as detailed in this Agreement, Settling Defendants shall have no liability, obligation, or responsibility for the administration of the settlement or disbursement of the Net Settlement Fund. Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel shall have the right, but not the obligation, to advise the Claims Administrator to waive what Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel reasonably deem to be formal or technical defects in any proofs of claim submitted, including without limitation failure to submit a document by the submission deadline, in the interests of achieving substantial justice.

38. **Written Exclusion for Opt-Outs from Damages Classes.** Subject to Court approval, persons and entities within the Damages Class shall have the right to exclude themselves from their respective Damages Classes pursuant only to the procedure set forth in the Class Notice and approved by the Court. Any person or entity seeking exclusion from any Damages Class must serve a written request for exclusion by the Opt-Out Deadline. Any Class Member that serves such a request shall be excluded from the applicable Damages Class and shall have no rights with respect to the Damages Class (or Classes) from which such Class Member has

requested to be excluded. Settling Defendants reserve their legal rights and defenses, including, but not limited to, any defenses relating to whether any excluded Class Member is a Class Member or has standing to bring a claim against any Settling Defendant. Each person or entity in the Damages Class that does not file a timely and appropriate written request for exclusion in accordance with the procedures set forth in the Class Notice shall be bound by all of the terms of this Agreement, including the releases defined in Paragraphs 32 and 33, and by all proceedings, orders, and judgments in this Action, even if any such person or entity has pending, or subsequently initiates, litigation, arbitration, or any other claim, action, or proceeding against any or all of the Releasees relating to any Released Claim.

39. **Failure to Properly Exclude.** Subject to Court approval, a request for exclusion that does not comply with all of the provisions set forth in the applicable Class Notice will be invalid, and the person(s) or entity(ies) serving such an invalid request shall be deemed a Settlement Class Member of the applicable Settlement Class (or Classes) and shall be bound by the Agreement upon entry of the Final Judgment and Order of Dismissal.

40. **Identification of Opt-Outs.** Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel shall, within 20 business days of the Opt-Out Deadline, provide Settling Defendants with a list and copies of all opt-out requests they received in the Subscriber Actions and shall file with the Court a list of all persons and entities who timely and validly opted out of the settlement.

41. **Settling Defendants' Right to Rescind.** Settling Defendants shall have the right to rescind this Agreement under the terms of the *In Camera* Supplement. If Settling Defendants do not rescind this Agreement, there shall be no reduction of the Settlement Fund to the Damages Class by reason of any Opt-Outs.

G. STAY OF PROCEEDINGS

42. **Stay.** Upon execution of this Agreement, the Parties agree to stay any and all proceedings against Settling Defendants in the Subscriber Actions, other than those incident to the settlement process, and agree to extensions of time with respect to any court filings necessary to effectuate such stays.

H. RESCISSION IF AGREEMENT IS NOT APPROVED OR FINAL JUDGMENT NOT ENTERED

43. **Rescission.** The Class Representatives and Settling Defendants shall each, in their sole discretion, have the option to rescind this Agreement in its entirety if any of the following occurs:

a. The Court refuses to approve this Agreement or any part hereof, including if the Court does not certify the Settlement Classes in accordance with the specific Settlement Class definitions set forth in this Agreement;

b. Such approval is modified or set aside on appeal;

c. The Court does not enter the Final Judgment and Order of Dismissal provided for in Paragraph 8; or

d. The Court enters the Final Judgment and Order of Dismissal and appellate review is sought, and on such review, such Final Judgment and Order of Dismissal is not affirmed in its entirety.

e. Written notice of the exercise of any such right to rescind shall be given to the Parties according to the terms of Paragraph 50 and to the Escrow Agent within 30 business days following the occurrence of such an event. A modification or reversal on appeal of any Fee and Expense Award or any Service Awards awarded by the Court from the Settlement Fund shall not be deemed a modification of all or a part of the terms of this Agreement or such Final Judgment and Order of Dismissal, unless such modification or reversal has the effect of increasing Settling Defendants' financial obligation under this Agreement.

44. **Return of Settlement Funds.** In the event that this Agreement does not become final as set forth in Paragraph 8, or this Agreement otherwise is rescinded or terminated, then this Agreement shall be of no force or effect and any and all parts of the Settlement Fund caused to be deposited in the Escrow Account (other than Notice and Administration Costs reasonably and actually incurred), along with any income accrued thereon, shall be returned to the entities that paid such amounts into the

Escrow Account. Each entity will be paid in proportion to its respective contribution to the Settlement Fund. Such payments will be made from the Escrow Account by the Escrow Agent within ten (10) calendar days of rescission, termination, or a court's final determination denying final approval of the Agreement and/or any of the Settlement Classes, whichever occurs first. The Parties expressly reserve all of their rights if this Agreement is rescinded or does not become final.

45. **Resumption of Litigation.** The Parties agree, subject to approval of the Court, that in the event the Agreement is not approved by the Court, the Agreement does not become final pursuant to Paragraph 8, or the Agreement is otherwise rescinded, litigation of the Subscriber Actions against Settling Defendants will resume in a reasonable manner to be approved by the Court upon application by the Parties. The Parties expressly reserve all of their rights if this Agreement is rescinded or does not otherwise become final.

I. MISCELLANEOUS

46. **Confidentiality; Third-Party Communications.**

a. All Parties and counsel agree that all orders entered during the course of the Subscriber Actions relating to the Confidentiality of information shall survive this Agreement. All Parties and counsel agree to maintain the Confidentiality of the *In Camera* Supplement at all times and agree to take such steps as may be necessary to accomplish this.

b. No Confidentiality obligation prevents Settling Defendants from asserting any release as a defense.

c. No Class Representative, Settlement Class Counsel, Self-Funded Sub-Class Settlement Counsel, or other agent for or representative of Class Representatives or Class Members will make or cause to be made any public statement or comment regarding this settlement or Agreement until after the earlier of (i) the filing of the Preliminary Approval Motion or (ii) any public disclosures by Settling Defendants regarding this settlement or Agreement other than Defendants' communications with their employees, auditors, and regulatory bodies. Settling Defendants shall be entitled to make such disclosures to their employees, auditors, and regulatory bodies of the Agreement as they, in their sole discretion, determine are appropriate. The Parties will coordinate regarding any public statement or comment regarding this settlement or Agreement before the filing of the Preliminary Approval Motion. This provision does not apply to statements made in judicial filings necessary to obtain preliminary Court approval of the settlement or effectuate the Notice Plan approved by the Court.

d. Excluding the communications authorized by the Court-approved Notice Plan, during the Monitoring Period, all Parties and their counsel will mutually agree upon the content of all website postings and communications to public-facing third parties

regarding any matter related to this Agreement or any of the allegations in the Consolidated Amended Class Action Complaint or answers. The Parties shall use best efforts to give each other at least two business days' notice of any draft posting or communication. In the event such notice is not practicable, the Party shall contact the other Party's designee as early as possible regarding the communication and shall rely upon previously agreed-upon materials in any event. The foregoing does not apply to Defendants' communications with their employees, auditors, or regulatory bodies. Quoting materials in the public record is permissible and does not require agreement under this Paragraph. The Special Master appointed by the Court is the arbiter of what is contained in the public record.

e. Nothing in this Paragraph 46 limits the communications Settling Defendants may have with third parties regarding the operations of their business under the terms of this Agreement.

47. **California Health and Safety Code. Nothing in this arbitration decision (or settlement agreement) prohibits or restricts the enrollee from discussing or reporting the underlying facts, results, terms and conditions of this decision (or settlement agreement) to the Department of Managed Health Care.**

48. **Communications with Class Members.** Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel acknowledge and agree that Settling

Defendants have the right to communicate with Class Members for the purpose of encouraging them to remain in the Settlement Classes, as well as for other legitimate business purposes, provided that, if any Class Member raises a question about the terms of the Agreement, Settling Defendants shall, as part of the communication, refer such Class Member to the toll-free number or website established by the Claims Administrator.

49. **Binding Effect.** Each and every covenant and agreement in this Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of all Class Representatives, Settling Defendants, Releasors, Settlement Class Members, and their counsel.

50. **Notice.** Any and all notices, requests, consents, directives, or communications by any Party intended for any other Party related to this Agreement shall be in writing and shall, unless expressly provided otherwise herein, be given by e-mail, to the following persons, and shall be addressed as follows:

TO THE CLASS REPRESENTATIVES and SETTLEMENT CLASSES:

Michael Hausfeld
Megan Jones
Swathi Bojedla
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Warren Burns
Christopher Cormier
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ccormier@burnscharest.com

TO SETTLING DEFENDANTS:

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Daniel E. Laytin, P.C.
Zachary D. Holmstead
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zachary.holmstead@kirkland.com

Blue Cross Blue Shield Association; Wellmark of South Dakota, Inc. (Wellmark Blue Cross and Blue Shield of

South Dakota); Wellmark, Inc. (Wellmark Blue Cross and Blue Shield of Iowa); Hawaii Medical Service Association (Blue Cross and Blue Shield of Hawaii); Triple-S Salud, Inc.

Craig A. Hoover
E. Desmond Hogan
HOGAN LOVELLS US LLP
craig.hoover@hoganlovells.com
desmond.hogan@hoganlovells.com

Anthem, Inc., f/k/a WellPoint, Inc., and all of its named subsidiaries in this consolidated action; Blue Cross and Blue Shield of North Carolina, Inc.; Louisiana Health Service & Indemnity Company (Blue Cross and Blue Shield of Louisiana); BCBSM, Inc. (Blue Cross and Blue Shield of Minnesota); Blue Cross and Blue Shield of South Carolina; Horizon Healthcare Services, Inc. (Horizon Blue Cross and Blue Shield of New Jersey); Blue Cross & Blue Shield of Rhode Island; Blue Cross and Blue Shield of Vermont; Cambia Health Solutions, Inc.; Regence Blue Shield of Idaho; Regence Blue Cross Blue Shield of Utah; Regence Blue Shield (of Washington); Regence Blue Cross Blue Shield of Oregon

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Jeffrey J. Zeiger, P.C.
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Blue Cross of Idaho Health Service, Inc.; Blue Cross and Blue Shield of Kansas, Inc.; Blue Cross and Blue Shield of Kansas City; Blue Cross and Blue Shield of Nebraska; Blue Cross Blue Shield of Arizona; Blue Cross Blue Shield of North Dakota; Blue Cross Blue Shield of Wyoming; HealthNow New York Inc.; BlueShield of Northeastern New York; BlueCross BlueShield of Western New York

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Carefirst, Inc.; Carefirst of Maryland, Inc.; Group Hospitalization and Medical Services, Inc.; CareFirst BlueChoice, Inc.

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Excellus Health Plan, Inc.

John Briggs
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Independence Blue Cross

Gwendolyn Payton
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gpayton@kilpatricktownsend.com

Premera Blue Cross, d/b/a Premera Blue Cross Blue Shield of Alaska

51. **Integrated and Final Agreement.** This Agreement comprises the entire, complete, and integrated statement of each and every term and provision agreed to by and among the Parties, and is not subject to any condition except as explicitly provided herein. This Agreement supersedes any prior agreements, representations, warranties, statements, and/or understandings, whether written or oral, between or among the Parties regarding the subject matter of the Subscriber Actions. The Parties hereby disclaim reliance on any prior agreements, representations, warranties, statements, and/or understandings, whether written or oral, in entering into and performing in accordance with this Agreement. Any and all prior Term Sheets are rendered null and void upon full execution of this Agreement. In no event is any prior Term Sheet deemed to be the Agreement. This Agreement may not be modified or amended except in writing executed by all Class Representatives and Settling Defendants, and approved by the Court.

52. **CAFA.** Defendants shall timely submit all materials required to be sent to appropriate federal and state officials pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1715, and notify the Court that CAFA compliance has been accomplished.

53. **Future Rules.** Future BCBSA and Individual Blue Plan rules will comply with this Agreement.

54. **Headers.** The headings used in this Agreement are intended for the convenience of the reader only and shall not affect the meaning or interpretation of this Agreement.

55. **No Party Is the Drafter.** This Agreement was jointly negotiated, prepared, and drafted by Settlement Class Counsel, Self-Funded Sub-Class Settlement Counsel, and counsel for Settling Defendants. This Agreement shall be construed and interpreted to effectuate the intent of the Parties, which is to provide for a complete resolution of the Released Claims with respect to the Releasors. None of the Parties hereto shall be considered to be the drafter of this Agreement or any provision hereof for the purpose of any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter thereof.

56. **Choice of Law.** All terms of this Agreement shall be governed by and interpreted according to the substantive laws of the State of New York without regard to its choice-of-law or conflict-of-laws principles.

57. **Consent to Jurisdiction.** Settling Defendants and each Settlement Class Member hereby irrevocably submit to the exclusive jurisdiction of the Court for any suit, action, proceeding, or dispute arising out of or relating to this Agreement or the applicability of this Agreement (except those arising under Paragraphs 17 and 20 during

the Monitoring Period, which are subject to binding arbitration as further described in those Paragraphs) to resolve any disputes or controversies, including but not limited to enforcement regarding Released Claims and Paragraphs 32 and 33.

a. Settling Defendants and Class Members (including those who challenge their inclusion in the Settlement Classes) also agree that, in the event of such dispute, they are and shall be subject to the jurisdiction of the Court and that the Court is a proper venue and convenient forum. Settling Defendants, Settlement Class Members, Settlement Class Counsel, and Self-Funded Sub-Class Settlement Counsel shall jointly urge the Court to include the provisions of this Paragraph 57 in its Final Judgment and Order of Dismissal.

58. **Non-Disparagement.** All Parties and their counsel agree not to disparage, criticize, or denigrate opposing Parties (individually or collectively) to any person or entity (including but not limited to any media outlet, television station or program, radio station or program, newspaper, magazine, website, editor, reporter, journalist, photo-journalist, interviewer, author, columnist, blogger, mobile application (*e.g.*, Facebook, Twitter, Instagram), writer, or current or former employee or customer of any Settling Defendant) regarding any matter related to the Agreement or any of the allegations, claims, or defenses in the Consolidated Amended Class Action Complaint, answers, or other filings in the Subscriber Actions. Quoting materials currently in the public record as of the

Execution Date would not constitute a violation of this Paragraph. Nothing in this Paragraph shall limit a party's ability to challenge conduct and/or provisions through the Monitoring Committee or in a court of law.

59. **Voluntary Settlement and Agreement; Advice of Counsel.** Each Party agrees and acknowledges that it has (1) thoroughly read and fully understands this Agreement and (2) received or had an opportunity to receive independent legal advice from attorneys of its own choice with respect to the advisability of entering into this Agreement and the rights and obligations created by this Agreement. Each Party agrees that this Agreement was negotiated in good faith by the Parties under the supervision and with the assistance of court-appointed mediators, and reflects a settlement that was reached voluntarily after consultation with competent legal counsel. Each Party enters into this Agreement knowingly and voluntarily, in consideration of the promises, obligations, and rights set forth herein.

60. **Authorization to Enter Agreement.** The undersigned Settling Defendants' counsel represent that they are fully authorized to enter into and to execute this Agreement on behalf of the Settling Defendants on whose behalf they sign. The undersigned Settlement Class Counsel and Self-Funded Sub-Class Settlement Counsel represent that they are fully authorized to enter into and to execute this Agreement on behalf of Settlement Class Counsel, Self-Funded Sub-Class Settlement Counsel, Class Representatives, and the Settlement Classes, subject to Court approval.

61. **Non-Assignment.** Class Representatives represent and warrant that they have not assigned, transferred, conveyed, released, or discharged, voluntarily or involuntarily, or by operation of law, to any other person or entity any interest in the claims, actions, or disputes which are the subject of this Agreement.

62. **Inconsistency with the Settlement Agreement.** In the event of a conflict between the terms of this Settlement Agreement, the *In Camera* Supplement, any escrow agreement, or any other document arising out of this Settlement Agreement, the terms of the Settlement Agreement, including the Appendices hereto, shall control.

63. **Privilege.** Nothing in this Settlement Agreement is intended to waive any right to assert that any information or material is protected from discovery by reason of any individual or common interest privilege, attorney-client privilege, work product protection, or other privilege, protection or immunity, or is intended to waive any right to contest any such claim of privilege, protection or immunity.

64. **Execution in Counterparts.** This Agreement may be executed in counterparts. Facsimile or .pdf signatures shall be considered valid signatures as of the date thereof, although the original signature pages shall thereafter be appended to this Agreement and filed with the Court. On the Execution Date, Class Representatives, Settlement Class Members, and Settling Defendants shall be bound by the terms of this Agreement, and this Agreement shall not be rescinded except in accordance with Paragraphs 8, 24, 28, 41, or 43 of this Agreement.