No. 18-90020-E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE: BLUE CROSS BLUE SHIELD ANTITRUST LITIGATION,
BLUE CROSS BLUE SHIELD ASSOCIATION V. JOSEPH ACKERSON, ET AL.

On Petition from the United States District Court
For The Northern District of Alabama, Southern Division
Case No. 2:13-cv-20000-RDP

ANSWER OF PROVIDER RESPONDENTS IN OPPOSITION TO PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(b)

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Interested Persons. Pursuant to 11th Cir. R. 26.1, Respondents hereby certify that the following is a complete listing of additional persons that have an interest in the outcome of this particular case on appeal.

/s/ Joe R. Whatley, Jr.
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2. Lundberg Law, PLC (Counsel for Respondent)
3. Olwan, Ph.D., Dena Z. (Respondent)
4. Snowden, Ph.D., James V. (Respondent)
5. U.S. Imaging Network, LLC (Respondent)
6. Weaver, D.P.M., Benjamin W. (Respondent)

Corporate Disclosure. Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1- 1, 26.102, and 26.1-3, Provider Respondents respectfully submit this Corporate Disclosure Statement and state as follows:

1. Brain & Spine, LLC has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
2. BreakThrough Physical Therapy, Inc. is a wholly-owned subsidiary of Confluent Health. Confluent Health has no publicly held corporation that owns ten percent or more of its stock.
3. Bullock County Hospital has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
4. Crenshaw Community Hospital has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
5. Dunn Physical Therapy, Inc. is a wholly-owned subsidiary of Confluent Health. Confluent Health has no publicly held corporation that owns ten percent or more of its stock.
6. Ear, Nose & Throat Consultants and Hearing Services, P.L.C. has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
7. Evergreen Medical Center, LLC is a wholly-owned subsidiary of Gilliard Health Services, Inc. Gilliard Health Services, Inc. has no

publicly held corporation that owns ten percent or more of its stock.

8. Ferezy Clinic of Chiropractic and Neurology has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

9. Gaspar Physical Therapy, P.C. has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

10. Greater Brunswick Physical Therapy, P.A. has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

11. Hillside Family Medicine, LLC has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

12. Ivy Creek of Butler, LLC d/b/a Georgiana Medical Center is a wholly-owned subsidiary of Ivy Creek Healthcare. Ivy Creek Healthcare has no publicly held corporation that owns ten percent or more of its stock.

13. Ivy Creek of Elmore, LLC d/b/a Elmore Community Hospital is a wholly-owned subsidiary of Ivy Creek Healthcare. Ivy Creek Healthcare has no publicly held corporation that owns ten percent or more of its stock.

14. Ivy Creek of Tallapoosa, LLC d/b/a Lake Martin Community Hospital

is a wholly-owned subsidiary of Ivy Creek Healthcare. Ivy Creek Healthcare has no publicly held corporation that owns ten percent or more of its stock.

15. Jackson Medical Center, LLC is a wholly-owned subsidiary of Gilliard Health Services, Inc. Gilliard Health Services, Inc. has no publicly held corporation that owns ten percent or more of its stock.

16. Julie McCormick, M.D., LLC has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

17. Michael Dole, M.D., LLC has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

18. Neuromonitoring Services of America, Inc. has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

19. North Jackson Pharmacy, Inc. has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

20. Northwest Florida Surgery Center, LLC has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

21. ProRehab, P.C. is a wholly-owned subsidiary of Confluent Health. Confluent Health has no publicly held corporation that owns ten percent or more of its stock.

22. Snowden Olwan Psychological Services has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

23. Spine Diagnostic Center of Baton Rouge, Inc. has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

24. Texas Physical Therapy Specialists, LLC is a wholly-owned subsidiary of Confluent Health. Confluent Health has no publicly held corporation that owns ten percent or more of its stock.

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INTRODUCTION

The Court should deny the Blues' petition because: (1) Supreme Court precedent is unequivocal with regard to the certified question; (2) the Blues' argument—which does not respond to the certified question—presents the "antithesis of a proper § 1292(b) appeal"—"one that turns on whether there is a genuine issue of fact or whether the district court properly applied settled law to the facts or evidence of a particular case," *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004); and (3) permitting this appeal will not materially advance the ultimate termination of the litigation.

The petition barely addresses the question of law the district court certified:

> Whether *Topco*, *Sealy*, and *Palmer* remain viable and require the application of the per se rule to a combination of restraints, involving horizontal market allocation and horizontal output restrictions, agreed to by competitors and potential competitors, where Defendants claim, under *BMI*, that there are at least arguable procompetitive benefits to the combination?

Pet. Addendum 3 ("Cert.Op.") at 12. Just two pages of the petition, pages 13 and 14, discuss the *per se* rule as a legal question, as opposed to its application to the facts of this case. On those two pages, none of these words, essential to the certified question, even appear: "*Topco*," "*Sealy*," "*Palmer*," "combination," "horizontal," "market," "allocation," "output," or "restriction."

The petition's avoidance of the certified legal question reflects the absence of any real dispute over the viability of *Topco*, *Sealy*, and *Palmer*. To be sure, the

per se rule has been limited in certain ways. But the Supreme Court has never held that competitors can agree to allocate markets and restrict output, and then escape the *per se* rule by asserting "arguable procompetitive benefits." Not even the Blues suggest that there is any authority for a position so radical. In fact, just seven days ago, the Supreme Court reaffirmed that *Topco* is still good law. *Ohio v. Am. Express Co.*, 585 U.S. ___, 2018 WL 3096305, at *12 n.10 (June 25, 2018). Particularly with this unequivocal reaffirmation of *Topco*, there cannot be "substantial ground for difference of opinion" as to the certified legal question, as § 1292(b) requires.

Unable to effectively address the certified question of law, the petition begins with six pages of factual assertions, many of which were disputed and unresolved on summary judgment, and some of which even contradict the district court's findings. Pet. 3–9. The petition then summarizes the Blues' central argument with language lifted nearly verbatim from *McFarlin*'s holding on what *not* to do in a § 1292(b) appeal: "[T]here are substantial grounds for disagreement about [the *per se* rule's] application to this important and far-reaching case." *Id.* at 14. Interlocutory appeal, however, is never granted to examine whether a district court's decision was correct in the context of a specific case. "The legal question must be stated at a high enough level of abstraction to lift the question out of the details of the evidence or facts of a particular case and give it general relevance to

other cases in the same area of law." *McFarlin*, 381 F.3d at 1259. Everything the Blues say about their business, their supposed trademark rights, and their supposed procompetitive activities is categorically irrelevant under § 1292(b).

Finally, even if all the other requirements of §1292(b) were met, interlocutory review would still be unwarranted because it would delay resolution of the case, not accelerate it. Since the Plaintiffs have also asserted claims under Section 2 of the Sherman Act arising out of the same conduct underlying their Section 1 claims, class certification and subsequent issues will have to be briefed and argued under the *per se* and rule of reason standards anyway.

Because the Blues' petition identifies no substantial ground for difference of opinion regarding the certified question, because it focuses almost exclusively on the application of settled law to the facts of this case, and because answering the certified question now will not materially advance the ultimate termination of the litigation, the petition should be denied.

ARGUMENT

I. There Is No Ground for Difference of Opinion Because the Supreme Court Has Definitively Answered the Certified Question.

When a petition for interlocutory review presents a question squarely controlled by binding, unequivocal Supreme Court precedent, it should be denied because there is no "substantial ground for difference of opinion" about the correct result. Controlling Supreme Court precedent leaves no room for disagreement, and

this Court does not grant review under Section 1292(b) when it is "in 'complete and unequivocal' agreement with the district court." *McFarlin*, 381 F.3d at 1258 (internal quotation marks omitted). In other words, "[t]he antithesis of a proper § 1292(b) appeal is one that turns on whether … the district court properly applied *settled law* to the facts or evidence of a particular case." *Id.* at 1259 (emphasis added). No matter how vehemently a party disagrees with settled law, interlocutory review is not an avenue to challenge it. *Graham v. Mukasey*, 608 F. Supp. 2d 56, 57 (D.D.C. 2009).

The answer to the first part of the certified question, "Whether *Topco*, *Sealy*, and *Palmer* remain viable," is inarguably "yes." This Court has recognized that only the Supreme Court may overrule its precedents:

> The high Court could not have been clearer about this than it has been. The Court has told us, over and over again, to follow any of its decisions that directly applies in a case, even if the reasoning of that decision appears to have been rejected in later decisions and leave to that Court "the prerogative of overruling its own decisions."

Evans v. Sec'y, Fla. Dep't of Corr., 699 F.3d 1249, 1263 (11th Cir. 2012) (quoting *Tenet v. Doe*, 544 U.S. 1, 10–11 (2005)). The Supreme Court has never explicitly called *Topco*, *Sealy*, or *Palmer* into doubt; in fact, it has cited all three with approval, as the district court noted. Pet. Addendum 1 ("Op.") at 29–30 (citing *F.T.C. v. Actavis, Inc.*, 133 S. Ct. 2223, 2230 (2013); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 552–53 (2013); *Am. Needle, Inc. v. Nat'l Football*

League, 560 U.S. 183, 200-01 (2010); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133–34 (1998)). The Blues claim that *Topco*'s holding is "questionable in light of subsequent caselaw," Pet.16, yet the Supreme Court stated just last week that "*Topco* concluded that a horizontal agreement between competitors was unreasonable *per se*, even though the agreement did not extend to every competitor in the market," without implying that this conclusion has ever been undermined, *Am. Express*, 2018 WL 3096305, at *12 n.10. Whatever criticism *Topco* and *Sealy* may have received from academia or other courts, the inescapable fact is that these decisions are still good law. In the words of the certified question, they unquestionably "remain viable."

The next question is whether *Topco*, *Sealy*, and *Palmer* "require the application of the per se rule to a combination of restraints, involving horizontal market allocation and horizontal output restrictions, agreed to by competitors and potential competitors." There is no substantial ground for difference of opinion here either, because that is what those cases expressly hold. In *Sealy*, the Supreme Court required the application of the *per se* rule because "the arrangements for territorial limitations are part of 'an aggregation of trade restraints' including unlawful price-fixing and policing." 388 U.S. at 357 (quoting *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951)). In *Topco*, the Court clarified that price-fixing was not necessary to require the *per se* rule: "To the

extent that *Sealy* casts doubt on whether horizontal territorial limitations, unaccompanied by price fixing, are *per se* violations of the Sherman Act, we remove that doubt today." 405 U.S. at 609 n.9. And in *Topco*, as in *Sealy*, horizontal market allocation was part of a combination of restrictions, agreed to by potential competitors. *Id.* at 602. This Court too has cited *Topco* for the proposition that "[e]xamples of such per se illegality include … horizontal market division—business relationships that, in the courts' experience, virtually always stifle competition." *Jacobs v. Tempur-Pedic Int'l, Inc.*, 636 F.3d 1327, 1334 (11th Cir. 2010). And in *Palmer*, the Supreme Court summarily reversed this Court's limitation of the *per se* rule to situations in which the parties had previously been competitors: "Moreover, it is equally clear that the District Court and the Court of Appeals erred when they assumed that an allocation of markets or submarkets by competitors is not unlawful unless the market in which the two previously competed is divided between them." 498 U.S. at 49. In doing so, the Supreme Court embraced *Topco* without reservation. *Id.* Moreover, with one exception not relevant here, agreements by competitors to limit output are always unlawful *per se*.[2] *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886, 893 (2007).

[2] There is an exception for situations in which an agreement among competitors is "essential if the product is to be available at all." *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984); *see also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979). But that exception does not apply here because

Nothing in *Sealy*, *Topco*, *Palmer*, or any subsequent opinion remotely suggests that "a combination of restraints, involving horizontal market allocation and horizontal output restrictions, agreed to by competitors and potential competitors," can be evaluated under anything but the *per se* rule.

But what if, as the certified question asks, "Defendants claim, under *BMI*, that there are at least arguable procompetitive benefits to the combination?" This variable too has been rejected as a ground for avoiding the *per se* rule in *Sealy*, *Topco*, and many cases since. On appeal to the Supreme Court, the cornerstone of Sealy's argument was that "[t]he relevant facts, as shown mainly in the district court's findings and the Government's own exhibits, fully support the court's ultimate finding and demonstrate the lawfulness of the purpose and the procompetitive effects of the Sealy licenses." Brief of Sealy, Inc., 1966 WL 100609, at *4. The Supreme Court acknowledged this argument: "It may be true, as appellee vigorously argues, that territorial exclusivity served many other purposes." *Sealy*, 388 U.S. at 356. But it rejected the argument out of hand: "Within settled doctrine, [Sealy's trade restraints] are unlawful under § 1 of the Sherman Act without the necessity for an inquiry in each particular case as to their business or economic justification, their impact in the marketplace, or their

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the district court made a factual finding that the Blues' restraints do not enable the creation of a new product, Op.42–44, 48, and an interlocutory appeal is not granted so that a party can challenge factual findings, *McFarlin*, 381 F.3d at 1259.

reasonableness." *Id.* at 357–58. Likewise, in *Topco* the procompetitive benefit of the defendants' agreements was not just plausible, but proven; the trial court found that "Topco was doing a greater good by fostering competition between members and other large supermarket chains," *Topco*, 405 U.S. at 610, and the Supreme Court noted that the existence of private-label products "has improved the competitive potential of Topco members with respect to other large and powerful chains," *id.* at 600. Still, the Supreme Court held that the defendants' allocation of territories, which they claimed was vital to their procompetitive collaboration, was unlawful *per se*.

After *BMI* was decided, the Supreme Court again rejected the possible existence of procompetitive benefits as a reason for avoiding the *per se* rule: "The respondents' principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept." *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 351 (1982).[3] More recently, the Court reiterated this guidance: "The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work …. Restraints that are per se unlawful include

[3] *BMI* itself did not imply that alleged procompetitive benefits remove a horizontal market allocation or output restriction from the *per se* rule. *See infra* p.10.

horizontal agreements among competitors … to divide markets." *Leegin*, 551 U.S. at 886 (internal citations omitted) (citing *Palmer*).[4] When a course of conduct is in a *per se* unlawful category, such as horizontal market allocation, the possibility of procompetitive benefits, no matter how strong, cannot justify imposing the rule of reason.

While the district court noted that a handful of court decisions and academic articles complain that *Topco* and *Sealy* were poorly reasoned, Op.6–8, none of them even arguably suggests that those cases have been overruled in the context of "a combination of restraints, involving horizontal market allocation and horizontal output restrictions, agreed to by competitors and potential competitors." In any event, no court of appeals or academic article can give this Court permission to reject binding precedent. *Evans*, 699 F.3d at 1263. We nonetheless discuss each below.

Dagher

While the Supreme Court stated in *Texaco v. Dagher* that it "presumptively applies rule of reason analysis," it noted in the very next sentence that some

[4] The Blues attack the district court's decision to aggregate their market allocation and their output restrictions instead of analyzing them separately, Pet.18, but the district court explained that the result of this aggregation was a set of anti-competitive rules more restrictive than in *Sealy* and *Topco*, Op.40–41. Therefore, there was no need to analyze them separately. In any event, either one separately would qualify for *per se* treatment, as explained above.

practices are still subject to the *per se* rule. 547 U.S. 1, 5 (2006). Nowhere in *Dagher*, a price-fixing case involving a legitimate joint venture,[5] did the Supreme Court imply, much less hold, that "a combination of restraints, involving horizontal market allocation and horizontal output restrictions, agreed to by competitors and potential competitors," is subject to the rule of reason instead of the *per se* rule. In fact, the Court's only citation for its statement that it presumptively applies the rule of reason is *State Oil Co. v. Khan*, 522 U.S. 3 (1997), a case whose discussion of the *per se* rule draws heavily from *Maricopa County*, which approvingly cites *Topco* four times. *Maricopa County*, 457 U.S. at 343, 344 n.16, 354, 355 n.30.

BMI

The district court stated that the Supreme Court "has criticized a 'literal approach' of applying the per se standard of review to any practice that can be labeled a per se category." Cert.Op.6 (quoting *BMI*, 441 U.S. at 9). *BMI* involved a "sui generis" arrangement, which was necessary if the product was to be available at all. 441 U.S. at 10, 23. Here, the district court has already determined that the Blues' arrangement does not fit this mold. Op.43. More importantly, *BMI* approvingly cited *Topco* twice, indicating that *BMI* did not undermine *Topco*'s holdings. 441 U.S. 8 n.11, 9.

[5] The Blues' license agreements specifically disclaim that the Blues are joint venturers, and the district court rejected the Blues' argument that their ESAs can be justified as ancillary to a joint venture. Op.8, 44–45.

Rothery

The district court noted Judge Bork's statement that "to the extent that *Topco* and *Sealy* stand for the proposition that all horizontal restraints are illegal per se, they must be regarded as effectively overruled." Cert.Op.6 (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 226 (D.C. Cir. 1986)). But that statement is uncontroversial. As *Rothery* points out, the Supreme Court held in *BMI* and *NCAA* that there are circumstances in which price fixing is not unlawful *per se*, and it applied the rule of reason to group boycotts in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). *Rothery*, 792 F.2d at 226. But *Rothery* identified no Supreme Court precedent holding that horizontal agreements to allocate markets and restrict output, which are the subject of the certified question here, can ever be examined under the rule of reason. To the extent that *Rothery* stands for the broad proposition that horizontal market allocation and output restrictions can be exempted from the *per se* rule based on a claim of arguable procompetitive benefits, it must be regarded as effectively overruled by several Supreme Court opinions stretching from *Palmer* to *American Express*.

Addamax

The district court cited the First Circuit's reference to the "ever narrowing per se niche." Cert.Op.7 (quoting *Addamax Corp. v. Open Software Found., Inc.*,

152 F.3d 48, 51–52 (1st Cir. 1998)). But the First Circuit acknowledged that the *per se* niche still contains "output fixing agreements (horizontal market division agreements are of essentially the same character)." *Addamax*, 152 F.3d at 51.

Academic Articles

Some academics have criticized *Sealy* and *Topco* for applying "an overly aggressive per se rule to restraints that were ancillary to legitimate, efficiency-enhancing joint ventures by firms that lacked significant market power." Herbert Hovenkamp & Christopher R. Leslie, *The Firm as Cartel Manager*, 64 Vand. L. Rev. 813, 864 (2011); *see also* Benjamin Klein, *Single Entity Analysis of Joint Ventures After* American Needle*: An Economic Perspective*, 78 Antitrust L.J. 669, 684–85 (2013) (citing the small market share of the *Sealy* defendants). The Blues, by contrast, collectively cover "more than 100 million subscribers," Pet.1, far more than any other insurer.[6] And at the risk of beating a dead horse, no academic, no district court, and no court of appeals, no matter what they say, can make a Supreme Court precedent no longer binding. Only the Supreme Court may do so, and it has not.

[6] While the Blues have invoked this figure as a measure of the gravity of this case, they have never suggested that anyone would lose coverage if the Blues, who are 15 of the 25 largest insurers in the country, began to compete with each other.

II. The Blues' Arguments for Appeal Depend Almost Entirely on Unresolved Factual Disputes

The Blues' petition would have benefitted from a serious discussion of the law like the one above. Instead, it spends page after page discussing purported facts about the Blues' business, and then using those facts to try to distinguish controlling precedent. Pet.3–9, 15–19. This is impermissible: "The antithesis of a proper § 1292(b) appeal is one that turns on whether there is a genuine issue of fact or whether the district court properly applied settled law to the facts or evidence of a particular case." *McFarlin*, 381 F.3d at 1259. To make matters worse, the facts on which the Blues rely are either disputed or were resolved *against* the Blues on summary judgment. "Section 1292(b) appeals were intended, and should be reserved, for situations in which the court of appeals can rule on a pure, controlling question of law without having to delve beyond the surface of the record in order to determine the facts." *McFarlin*, 381 F.3d at 1259. Yet every one of the Blues' arguments against applying the *per se* rule would require a deep dive.

To take just one example of what an interlocutory appeal would involve, consider the Blues' argument that *Topco* and *Sealy* are distinguishable because "ESAs originated from independent, pre-existing common-law trademark rights, *not* from any horizontal agreement that could justify a *per se* claim." Pet.16. After examining the voluminous record, the district court explicitly rejected this claim: "[T]he ESAs established by the Association must be examined as horizontal

allocations, not vertical ones. … Defendants claim that the service areas arose from either common law trademark rights or plan requirements imposed vertically by the AHA and AMA. The court is not persuaded." Op.38–39 (citation omitted). In their briefing on the origin and control of the Blues' trademarks, the parties cited 101 exhibits, stretching back more than 80 years and covering 11,150 pages. Before considering the effect of the Blues' trademark rights on the standard of review, this Court would have to delve into that vast record and decide whether to reverse the district court's factual determination. All for a fact-specific issue not even mentioned in the certified question.

The issue of trademarks is one among many on which the petition stretches the record. The Blues ask this Court to take it on faith that "ESAs encourage Blue Plans to invest in their local service areas, offer customers access to strong local provider networks, and extend coverage even in areas that national insurers have avoided or abandoned as unprofitable." Pet.7. But their citations for this statement are a footnote in the district court's opinion that makes no reference at all to ESAs, Op.19 n.9, and their own summary judgment brief, in which every relevant fact was disputed, Dkt.1349 at 12–13; Dkt.1431 at 8–10; Dkt.1435 at 17–20. Similarly, their claim that the output restriction known as the National Best Efforts Rule gives "Blue Plans strong incentives to continue promoting the Blue System" cites only a set of disputed facts from the summary judgment briefs. Pet.7–8; Dkt.1349 at 10–

11; Dkt.1431 at 6–8; Dkt.1435 at 15–17. Resolving these disputes on appeal, like the trademark disputes, would require an arduous journey through the extensive record.[7]

Because of the sheer number of disputed facts on which the Blues intend to rely, an interlocutory appeal would create not only an incredible burden on this Court to make sense of those facts, but also a danger of entering an advisory opinion. If the "facts" on appeal are not the facts ultimately proven at trial, then this Court's answers to the Blues' fact-bound questions will be of no use. For that reason, several courts have prudently avoided interlocutory appeals when the facts were not fully developed. *E.g.*, *Control Data Corp. v. Int'l Bus. Machines Corp.*, 421 F.2d 323, 325 (8th Cir. 1970) ("We are persuaded that an early ruling on the points certified by the district court could only be hypothetical or advisory as to what may or may not be admissible in the actual trial itself."); *Nickert v. Puget Sound Tug & Barge Co.*, 480 F.2d 1039, 1041 (9th Cir. 1973) ("An announcement by a trial court of its then opinion on an abstract question of law prior to the taking of final, definitive action affecting the substantial rights of the parties is … purely advisory, hypothetical and tentative on an issue which may never arise."); *see also*

[7] These examples provide just a sense of the quagmire to which an interlocutory appeal will lead. For a more complete picture, Appendix A to this brief lists the other assertions from the petition's Statement of Facts that are either disputed or were resolved against the Blues on summary judgment.

Ahrenholz v. Bd. of Trs. of Univ. of Ill., 219 F.3d 674, 676–77 (7th Cir. 2000); *Md. Cas. Co. v. W.R. Grace & Co.*, 128 F.3d 794, 797 (2d Cir. 1997); *Palandjian v. Pahlavi*, 782 F.2d 313, 314 (1st Cir. 1986). If the Blues want to appeal on the grounds that the facts of their business arrangements are distinguishable from the ones held to be *per se* unlawful in *Sealy* and *Topco*, they must wait until those facts are established at trial.

III. An Interlocutory Appeal Will Not Materially Advance the Ultimate Termination of the Litigation.

The final requirement for a § 1292(b) appeal—that resolution of the controlling legal question "may materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b)—also presents an insurmountable obstacle here. The Blues do not even attempt to, and cannot, show that permitting an appeal now "would serve to avoid a trial or otherwise substantially shorten the litigation." *McFarlin*, 381 F.3d at 1251.

A distinguishing feature of this case is that, regardless of whether an appeal is permitted, the same issues must be litigated in the district court, requiring the same expenditure of resources and time. Apart from the Sherman Act § 1 claims that the district court held must be reviewed under the *per se* rule, Plaintiffs also assert § 1 claims that will be reviewed under the rule of reason. Op.49–55. The parties, therefore, inevitably must litigate issues—e.g., the definition of the relevant market, the alleged procompetitive and anticompetitive aspects of the

Blues' conduct, and class certification—that would arise *even* if the stated purpose of the Blues' appeal were achieved—applying rule of reason analysis to all of Plaintiffs' § 1 claims. Moreover, Plaintiffs assert Sherman Act § 2 claims relating to the same anticompetitive conduct underlying the § 1 *per se* claims Dkt.1083 ¶¶ 507–26, and rule of reason analysis will apply to the § 2 claims, requiring litigation of the same issues the Blues inaccurately claim cannot be raised without this appeal. *See United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (applying rule of reason standard to § 2 claims) (citing *Mid-Texas Commc'ns Sys., Inc. v. AT&T*, 615 F.2d 1372, 1389 n.13 (5th Cir. 1980)); *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 994 (11th Cir. 1993) (holding that defining the relevant market is an "indispensable element" of a § 2 claim). Far from advancing the ultimate termination of the litigation, then, this proposed appeal will not even narrow the issues that must be litigated, a result that cannot be squared with the requirements of § 1292. *See McFarlin*, 381 F.3d at 1262 ("[R]esolution of one claim out of seven would do little, if anything, to 'materially advance the ultimate termination of the litigation.'").

While an interlocutory appeal might create some minor efficiencies in the next stages of this litigation, the prospect for "expensive, duplicative work," Cert.Op.10, is not nearly strong or likely enough to justify the long delay inherent in an appeal. In response to Plaintiffs' proposal to submit expert reports and

briefing under both standards of review, the district court identified several rule of reason issues that, in its view, would not need to be litigated if its summary judgment order were affirmed on appeal. Cert.Op.9–10. But most (or perhaps all) of those issues must be litigated, in either event, for Plaintiffs' remaining § 1 and § 2 claims. Because the parties must obtain expert reports, brief class certification, and present *Daubert* and summary judgment arguments on each of these issues irrespective of the certified question, permitting an appeal now would save minimal time and expense of a final order.

The Blues also conflate the "controlling question of law" requirement with the "ultimate termination of litigation" requirement. Pet.20–22. Claiming that the "remaining stages of litigation . . . depend heavily on the standard of review," the Blues warn that the district court will need to redo its work if its standard of review ruling is reversed. Pet.21–22. Yet this claim is, as discussed above, factually inaccurate, as well as legally inadequate. Emphasizing that aspects of Plaintiffs' claim may depend on the court's ruling merely restates the "controlling" element, without addressing the wholly separate "ultimate termination of litigation" requirement of § 1292.

The Blues attempt to excuse their failure to satisfy this requirement by citing several cases in which orders on antitrust claims were reviewed under § 1292. Pet.21. But these decisions do not help the Blues because not one involved separate

claims—such as Plaintiffs' § 2 and rule-of-reason § 1 claims—that would require full-blown litigation unaffected by the outcome of the interlocutory appeal. *E.g.*, *Valley Drug Co. v. Geneva Pharm., Inc.*, 344 F.3d 1294, 1301 (11th Cir. 2003) (involving only application of the *per se* rule to § 1 claims challenging reverse-payment agreements). Nor do any of the decisions—all of which pre-date this Court's detailed articulation of the § 1292 requirements in *McFarlin*—contain any analysis of the "termination of litigation" requirement. The appeals in *Catalano*, 446 U.S. at 644, and *Maricopa County*, 457 U.S. at 336, moreover, involved orders holding that the rule of reason applied, the reversal of which *eliminated* the need for an "elaborate inquiry into the reasonableness of a challenged business practice entail[ing] significant costs," *id.* at 343, the opposite of the posture here. And potentially case-dispositive issues were raised in *Valley Drug*, 344 F.3d at 1311 n.27, 1312 ("patent exception to antitrust liability"), and *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 900 (6th Cir. 2003) (lack of antitrust injury), unlike in this proposed appeal.

This appeal, at most, has the limited potential to alter the course of litigation as to a subset of Plaintiffs' claims, and even then, not by much. This circumscribed impact cannot be reconciled with the plain language, or this Court's interpretation, of § 1292's requirement that an appeal "materially advance the ultimate termination of the litigation."

CONCLUSION

The Blues' petition forfeits any serious discussion of the question of law the district court certified, focusing almost exclusively on disputed factual issues. Moreover, an immediate appeal will delay, not advance the litigation. The petition should be denied.

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Respectfully submitted,

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Appendix A

"Fact"	Disputed or Refuted at:
"In 1939, the American Hospital Association ("AHA") issued standards for prepaid hospital plans." Pet.3.	Op.3; Dkt.1431 at 16, 24–26 (court said "by" 1939; actual date was 1938, meaning Hospital Service Corporation of Alabama had no common-law rights).
AHA obtained federal registration of Blue Cross mark. Pet.4.	Op.7 (AHA had no assignment from first user); Dkt.1431 at 25 (trademark application may have been fraudulent).
BSMCP licensed Blue Shield Plans in areas where they held pre-existing trademark rights. Pet.4.	Op.6 (no geographic restriction in license).
BlueCard provides seamless coverage. Pet.5.	Dkt.1431 at 6; Dkt.1435 at 14–15; Dkt.1553 at 3.
BlueCard ensures consistent provider charges and gives subscribers and providers a single point of contact. Pet.5.	Op.16 (no mention of consistent charges); Dkt.1431 at 6 (purpose is price-fixing); Dkt.1553 at 3 (no single point of contact for providers).
1972 Blue Cross license agreement recognized pre-existing trademark rights. Pet. 6.	Op.9 (agreement recognized territories as of 1972, not "pre-existing trademark rights").
The AMA generally licensed the Blue Shield in exclusive territories. Pet.6–7.	Dkt.1431 at 3; also, the cited exhibit was not in the summary judgment record.
Uncoupling rules prevent Plans from taking unfair advantage of the positive reputation of the Blue Marks. Pet.8.	Op.18 (not citing this purpose for the uncoupling rules); Dkt.1552 at 5.
In 1947, the U.S. Public Health Service reviewed the Blue System in depth and specifically approved of ESAs. Pet.8.	Dkt.1431 at 14.

An FTC staff report in 1979 recognized that Blue Shield Plans operate in non-overlapping areas without criticizing this approach. Pet.8.	Dkt.1431 at 14.
In clearing the Anthem/Wellpoint merger in 2004, DOJ again acknowledged ESAs without suggesting they might be anticompetitive. Pet.8.	Dkt.1431 at 14.
DOJ closed its 2004 investigation without action. Pet.8.	Dkt.1431 at 14.
Blue System representatives have testified before Congress about ESAs. Pet.8–9.	Dkt.1431 at 14.
Numerous cases have enforced ESAs. Pet.9.	Dkt.1431 at 14.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 5(c)(1) because this brief contains 5,144 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4 and the accompanying documents required by Fed. R. App. P. 5(b)(1)(E).

2. This brief complies with the type face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type.

Dated: July 2, 2018

/s/ Joe R. Whatley, Jr.
Joe R. Whatley, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2018, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Joe R. Whatley, Jr.
Joe R. Whatley, Jr.