

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN**

UNITED STATES OF AMERICA and  
STATE OF MICHIGAN,

*Plaintiffs,*

v.

HILLSDALE COMMUNITY HEALTH  
CENTER, W.A. FOOTE MEMORIAL  
HOSPITAL D/B/A ALLEGIANCE  
HEALTH, COMMUNITY HEALTH  
CENTER OF BRANCH COUNTY, and  
PROMEDICA HEALTH SYSTEM, INC.,

*Defendants.*

Case No. 5:15-cv-12311-JEL-DRG  
Judge Judith E. Levy  
Magistrate Judge David R. Grand

**PLAINTIFFS' MOTION IN LIMINE TO PRECLUDE DR. SUSAN  
MANNING FROM OFFERING AT TRIAL OPINIONS ON  
ANTICOMPETITIVE EFFECTS AND PROCOMPETITIVE BENEFITS  
AND TO STRIKE THOSE OPINIONS FROM HER REPORT**

Pursuant to Rules 402 and 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), Plaintiffs the United States and the State of Michigan respectfully move this Court to preclude Dr. Susan Manning from offering at trial any opinion on anticompetitive effects or procompetitive benefits and to strike those opinions from her report for the reasons stated in Plaintiffs' accompanying memorandum.

Pursuant to Local Rule 7.1(a), attorneys for the United States and the State of Michigan conferred with counsel for defendant W.A. Foote Memorial Hospital d/b/a Henry Ford Allegiance Health (“Allegiance”), who stated that Allegiance does not consent to any of the requested relief.

Respectfully Submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

Peter Caplan (P-30643)	<u>/s/ Jill C. Maguire</u>
Assistant United States Attorney	Jill Maguire (D.C. Bar No. 979595)
U.S. Attorney’s Office	Katrina Rouse
Eastern District of Michigan	Garrett Liskey
211 W. Fort Street	Antitrust Division, Litigation I Section
Suite 2001	U.S. Department of Justice
Detroit, Michigan 48226	450 Fifth St. NW
(313) 226-9784	Washington, DC 20530
peter.caplan@usdoj.gov	(202) 598-8805
	jill.maguire@usdoj.gov

FOR PLAINTIFF STATE OF MICHIGAN:

/s/ with the consent of Mark Gabrielse  
Mark Gabrielse (P75163)  
Assistant Attorney General  
Michigan Department of Attorney General  
Corporate Oversight Division  
G. Mennen Williams Building, 6th Floor  
525 W. Ottawa Street  
Lansing, Michigan 48933  
(517) 373-1160  
Email: gabrielsem@michigan.gov

February 28, 2017

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v.

HILLSDALE COMMUNITY HEALTH  
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CENTER OF BRANCH COUNTY, and  
PROMEDICA HEALTH SYSTEM, INC.,

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Case No. 5:15-cv-12311-JEL-DRG  
Judge Judith E. Levy  
Magistrate Judge David R. Grand

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THE MOTION IN  
LIMINE TO PRECLUDE DR. SUSAN MANNING FROM OFFERING AT  
TRIAL OPINIONS ON ANTICOMPETITIVE EFFECTS AND  
PROCOMPETITIVE BENEFITS AND  
TO STRIKE THOSE OPINIONS FROM HER REPORT**

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STATEMENT OF ISSUES

- I. Whether under the per se rule Allegiance’s proposed expert may opine as to asserted anticompetitive effects and procompetitive benefits of the customer allocation agreement between Allegiance and HCHC.
- II. Whether Allegiance’s proposed expert may opine as to asserted anticompetitive effects and procompetitive benefits of the customer allocation agreement where she failed to apply commonly accepted, reliable economic principles and methods to isolate the effects of the agreement.
- III. Whether Allegiance’s proposed expert may opine as to asserted procompetitive benefits of Allegiance’s broader “market strategy” rather than the particular customer allocation agreement that is the subject of this litigation.

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\* Denotes controlling or most appropriate authority for the relief sought. Local Rule 7.1(d)(2).

## I. INTRODUCTION

Plaintiffs contend that defendant W.A. Foote Memorial Hospital d/b/a Henry Ford Allegiance Health (“Allegiance”) and Hillsdale Community Health Center (“HCHC”) entered into an agreement in which Allegiance restricted its marketing of overlapping services in Hillsdale County in order to allocate Hillsdale County customers for these services to HCHC (the “Allegiance-HCHC agreement”). The Allegiance-HCHC agreement is a customer allocation agreement of the type that courts have held to be per se unlawful.

Allegiance’s proffered economic expert, Dr. Susan Manning, has offered opinions in her report and at deposition that the Allegiance-HCHC agreement did not result in anticompetitive effects and, in fact, generated procompetitive benefits. If this case proceeds to trial, Plaintiffs expect Allegiance will seek to introduce these opinions. Pursuant to Federal Rules of Evidence 402 and 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), Plaintiffs move (1) to exclude from being offered at trial Dr. Manning’s proposed testimony concerning asserted anticompetitive effects or procompetitive benefits of Allegiance’s customer allocation agreement or its “market strategy” and (2) to strike those portions of her report addressing any such asserted anticompetitive effects or procompetitive benefits. These opinions are irrelevant and unreliable, and therefore, inadmissible.



The parties have filed competing summary judgment motions addressing the proper legal framework to apply to the Allegiance-HCHC agreement. If the Court finds the per se rule applicable, Dr. Manning's proposed testimony as to anticompetitive effects and procompetitive benefits is irrelevant and should be excluded. Under the per se rule, the Court presumes the agreement's illegality and does not consider the agreement's actual effects.

Even if the Court finds the per se rule inapplicable, Dr. Manning's proposed testimony as to anticompetitive effects and procompetitive benefits should be excluded because it is based on simple market-share trends that fail to isolate the impact of the Allegiance-HCHC agreement from other relevant market influences. In economic parlance, Dr. Manning violated the concept of *ceteris paribus* by failing to hold "other things equal" in performing her analysis—a well-known "pitfall[]" in the "path of the serious economist."<sup>1</sup> This basic analytical failure contravenes well-accepted principles and methods of economic analysis, rendering Dr. Manning's conclusions unreliable under Rule 702.

Dr. Manning's proposed testimony as to procompetitive benefits suffers from at least two additional flaws. First, her proposed testimony as to the effects of Allegiance's overall marketing strategy is not relevant to the question that is before the Court: the effects of the Allegiance-HCHC agreement. Second, Dr.

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<sup>1</sup> Samuelson, P.A. and Nordhaus, W.D., *Economics* (14th ed. 1992) at pp. 5-6 (excerpted in Exhibit C).

Manning simply repeats statements made by Allegiance executives in discovery responses and deposition testimony, without applying any economic expertise that would assist the Court in understanding the evidence or determining a fact in issue.

## **II. LEGAL STANDARD**

A court has an obligation to act as a gatekeeper to ensure the “reliability and relevancy of expert testimony.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). A qualified expert may provide opinion testimony relating to “scientific, technical, or other specialized knowledge” only if it will “help the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702(a). Such testimony must “rest[] on a reliable foundation and [be] relevant to the task at hand.” *Daubert*, 509 U.S. at 597. As the proponent of the expert testimony, Allegiance bears the burden of establishing its admissibility by a preponderance of proof. *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 251 (6th Cir. 2001).

## **III. ARGUMENT**

### **A. Under the Per Se Rule, Dr. Manning’s Proposed Testimony as to Asserted Anticompetitive Effects and Procompetitive Benefits Resulting from the Allegiance-HCHC Agreement Is Irrelevant**

Plaintiffs moved for summary judgment on the grounds that the Allegiance-HCHC agreement is a customer allocation agreement that is per se unlawful under

Section 1 of the Sherman Act.<sup>2</sup> Should the Court find that the per se rule applies to the Allegiance-HCHC agreement and that a trial is needed to determine only whether an agreement existed, the Court should exclude Dr. Manning's proposed testimony as to anticompetitive effects and procompetitive benefits because it would be irrelevant.

Where the per se rule applies, it provides "a 'conclusive presumption' of illegality" to the agreement, and courts give "no consideration . . . to the intent behind the restraint, to any claimed pro-competitive justifications, or to the restraint's actual effect on competition." *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 906 (6th Cir. 2003); *see also Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 351 (1982) (the per se rule demands "facial invalidation" of per se illegal agreements even where a defendant proffers "procompetitive justifications").

Thus, under the per se rule, Dr. Manning's opinions as to any alleged anticompetitive effects or procompetitive benefits of the Allegiance-HCHC customer allocation agreement are not relevant and should be excluded because they will not "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a); *see also Pagan-Aponte v. McHugh*, No. 3:09-CV-0800, 2011 WL 1789962, at \*3 (M.D. Tenn. May 10, 2011) (expert opinion

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<sup>2</sup> *See* ECF No. 73 at Section IV.B; *see also United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1372-73 (6th Cir. 1988) (an agreement not to solicit a rival's existing customers is a per se unlawful customer allocation).

excluded under *Daubert* and Rule 402 where it would not help the jury answer pertinent question in employment discrimination case), *aff'd per curiam*, 510 F. App'x 438 (6th Cir. 2013).

**B. Dr. Manning's Opinions as to Anticompetitive Effects and Procompetitive Benefits Resulting from the Allegiance-HCHC Agreement Are Based on a Flawed Methodology and Are Therefore Unreliable**

Even if the Court were to evaluate the Allegiance-HCHC customer allocation agreement outside of the per se context, Dr. Manning's opinions about anticompetitive effects and procompetitive benefits resulting from that agreement should be excluded because they are unreliable.

Plaintiffs expect Dr. Manning to opine at trial, as she did in her report, that her "analysis indicates no economic evidence supporting a market-wide dampening or reduction in competition *resulting from* the alleged agreement."<sup>3</sup> Plaintiffs also expect Dr. Manning to offer a related opinion that is not in her report, but that she presented for the first time during her deposition: that the Allegiance-HCHC agreement resulted in procompetitive benefits in Hillsdale County.<sup>4</sup> Dr. Manning

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<sup>3</sup> Expert Report of Susan Henley Manning, Ph.D., Nov. 14, 2016 ("Manning Rpt.") ¶ 20 (emphasis added) (excerpted in Exhibit A); *see also id.* ¶¶ 19, 171; *see also* Allegiance's Mot. For Partial Summ. J. (ECF No. 68) ("Def.'s Br.") at 15-16 (citing Manning Rpt. ¶¶ 107-162).

<sup>4</sup> Deposition of Susan H. Manning, Ph.D., Dec. 14, 2016 ("Manning Dep.") at 235:5-9 (excerpted in Exhibit B); *see also* Def.'s Br. at 20 (citing Manning Rpt. ¶¶ 100, 163-67); *id.* at 23 (citing Manning Rpt. ¶¶ 163-73); Allegiance's Reply to its Mot. for Partial Summ. J. (ECF No. 82) ("Def.'s Reply Br.") at 25-26 (citing

primarily bases her opinion on market share trends over a 13-year period from 2003 to 2016 that show that Allegiance’s market share—and the market share of other hospitals—increased for certain health services among patients residing in Hillsdale County.<sup>5</sup> But these trends are insufficient to support her opinions.

**1. Dr. Manning Failed to Isolate the Effects of the Allegiance-HCHC Agreement**

Dr. Manning failed to identify whether the Allegiance-HCHC agreement caused any competitive effects. Dr. Manning’s opinions as to competitive effects rely mainly on her market share analysis. But that market share analysis reflects “*all* elements of competition, not just the elements of competition that relate to the alleged agreement[.]”<sup>6</sup> And she readily agreed that a “myriad of factors” could have influenced Allegiance’s and other hospitals’ market share trends during this 13-year time period, including: the types of services offered, brand positioning, length of wait times, quality of services offered, and number of admitting physicians.<sup>7</sup> Yet Dr. Manning conceded that she did not control for any changes in

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Manning Rpt. ¶¶ 166-67); *id.* at 27 (citing Manning Rpt. ¶¶ 163-73 and Tables 6-10 and 15).

<sup>5</sup> Manning Rpt. ¶¶ 107-62 and Table 15; Manning Dep. at 235:10-241:20; *see also id.* at 264:19-268:7.

<sup>6</sup> Manning Dep. at 192:22-193:21 (emphasis added).

<sup>7</sup> *Id.* at 206:4-207:19; *see also id.* at 194:7-195:13 (agreeing that market share can be affected by price competition and non-price competition, including marketing, product differentiation, new services, and hospital branding); *id.* at 230:9-231:2 (noting “quality is one element upon which hospitals compete, and I think quality adversely affected Hillsdale’s ability to retain and increase its share”).

these factors over time.<sup>8</sup> As a result, her analysis does not isolate the effect of the Allegiance-HCHC agreement itself.

In economic terms, Dr. Manning did not conduct a “but-for analysis”—an analysis showing what would have happened in the absence of the agreement—despite recognizing that it is a standard approach to assess the effects from an agreement.<sup>9</sup> While Dr. Manning can conclude that Allegiance’s market share increased, her analysis simply cannot explain why it increased, or how the *agreement* affected Allegiance’s market share. She admitted that her analysis cannot address the possibility that Allegiance’s market share in Hillsdale County would have increased *more* but for the Allegiance-HCHC agreement.<sup>10</sup>

As part of her competitive effects analysis, Dr. Manning also considered trends in quality of services and access to care for Hillsdale County residents. She found no declines in quality or access as a result of the Allegiance-HCHC agreement.<sup>11</sup> As with her market share observations, however, Dr. Manning made

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<sup>8</sup> *Id.* at 207:20-210:6.

<sup>9</sup> *See id.* at 241:12-20 (“Q: Did you do your own But-For analysis?” A: No.”); *see also id.* at 160:16-19 (“Q: Why is what would have happened, but for the alleged agreement, important? A: Because you’re trying to assess [what the] effect of the agreement is.”); *id.* at 161:6-18 (but-for analysis is a standard approach to assess effects of an agreement); *see also* Manning Rpt. ¶ 104.

<sup>10</sup> Manning Dep. at 164:13-165:1.

<sup>11</sup> *See* Manning Rpt. ¶¶ 139-48, 150-62.

no attempt to identify a causal link between the customer allocation agreement and this quality or access.<sup>12</sup>

Dr. Manning's failure to isolate the effect of the Allegiance-HCHC agreement is fatal to her analysis of anticompetitive effects and procompetitive benefits.

**2. Because Dr. Manning Failed to Isolate the Effects of the Allegiance-HCHC Agreement, Her Methodology Is Flawed and Her Resulting Opinions Are Unreliable**

Dr. Manning's analysis does not meet the standard for admissibility under Rule 702 and *Daubert*.<sup>13</sup> An expert's opinion should be excluded as unreliable where the expert's underlying methodology is flawed because the expert failed to account for alternative explanations. In *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244 (6th Cir. 2001), the Sixth Circuit upheld the exclusion of an expert's opinion as unreliable because it ignored other "confounding factors" that could have caused the plaintiffs' health condition. "[T]here was 'simply no basis for [the expert's] assumption that PCBs, and not one of numerous other factors, was the cause of plaintiffs' reported maladies.'" *Id.* at 253 (citation omitted); *see also Iams Co. v. Nutro Prod., Inc.*, No. 3:00-CV-566, 2004 WL 5496244, at \*6 (S.D. Ohio

<sup>12</sup> *See id.* ¶¶ 139-48, 150-62; *see also* Manning Dep. at 231:14-232:2, 245:2-246:6.

<sup>13</sup> "Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include: . . . (3) Whether the expert has adequately accounted for obvious alternative explanations." Fed. R. Evid. 702 advisory committee's notes (2000 Amends.).

June 30, 2004) (finding economist's analysis flawed where he "omitted several important potentially explanatory variables[,] and excluding the resulting causation opinion).

Other courts agree. For example, in *Blue Dane Simmental Corp. v. Am. Simmental Ass'n*, 178 F.3d 1035 (8th Cir. 1999), the Eighth Circuit upheld the exclusion of the expert economist's testimony where he had failed to control for factors that could have impacted his conclusions. The Eighth Circuit concluded that the expert could not use the proposed methodology to opine "regarding causation without considering all independent variables that could affect the conclusion."<sup>14</sup> *Id.* at 1040-41.

And in the United States' recent Sherman Act case against Apple, Inc., the district court excluded testimony from Apple's economic expert as to the asserted procompetitive benefits of the agreements at issue because the expert "did not offer any scientifically sound analysis of the cause for this purported price decline or seek to control for the factors that may have led to it." *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 694 n.61 (S.D.N.Y. 2013), *aff'd on other grounds*, 791 F.3d

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<sup>14</sup> See also *In re Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 427-28 (S.D.N.Y. 2005) (expert's opinion as to anticompetitive effects inadmissible because his "failure to test for these obvious and significant alternative explanations renders [his] analysis 'essentially worthless'" (citation omitted)); *In re Aluminum Phosphide Antitrust Litig.*, 893 F. Supp. 1497, 1507 (D. Kan. 1995) (excluding expert opinion as "economically unreliable" where the expert "has not through proper scientific method established that price declines are attributable to the alleged conspiracy, to the exclusion of all other relevant factors").



290, 334-35 n.24 (2d Cir. 2015) (Livingston, J.) (finding that “[t]he district court . . . acted well within its discretion in excluding [the expert’s] testimony” because the expert “did not account” for whether alternative explanations “were responsible for lower prices”).

Failure to examine causality in her market share analysis renders Dr. Manning’s opinions on any harmful or beneficial effects *resulting from* the Allegiance-HCHC agreement unreliable and, therefore, inadmissible.

**C. Dr. Manning’s Opinions Concerning the Asserted Procompetitive Benefits of Allegiance’s “Market Strategy” Are Irrelevant and Do Not Reflect Economic Expertise**

Dr. Manning’s opinions on the asserted procompetitive benefits of Allegiance’s “market strategy” suffer from at least two additional defects that make them inadmissible. First, Dr. Manning offers an opinion concerning conduct by Allegiance that is *not* part of the Allegiance-HCHC agreement. Second, Dr. Manning offers as her own opinions, without applying economic expertise, statements made by Allegiance’s executives.

**1. Because Plaintiffs Do Not Challenge Allegiance’s “Market Strategy,” Dr. Manning’s Opinions as to the Asserted Procompetitive Benefits of That Strategy Are Irrelevant**

In her report, Dr. Manning based her opinions regarding procompetitive benefits on what she referred to as Allegiance’s overall “Market Strategy.”<sup>15</sup> At

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<sup>15</sup> Manning Rpt. ¶¶ 163-73.

her deposition, Dr. Manning explained that she used the term “Market Strategy” in her report “because the restrictions [are] one element of an overall marketing strategy.”<sup>16</sup>

But Plaintiffs are not challenging Allegiance’s overall marketing strategy, which presumably includes business decisions unrelated to its agreement with HCHC. Plaintiffs’ complaint focuses exclusively on Allegiance’s customer allocation agreement, and it is this restraint that must provide procompetitive benefits. *See In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 275 (6th Cir. 2014) (under quick look analysis, defendant must “provid[e] some ‘competitive justification’ for the restraint at issue” (citation omitted)). Any evidence of procompetitive benefits arising from other conduct cannot justify the challenged Allegiance-HCHC agreement. Such evidence would be irrelevant and should be excluded.

**2. Dr. Manning Repeating Statements Made by Allegiance Executives in Discovery Responses and Deposition Testimony Does Not Reflect Economic Expertise**

Beyond her faulty market share analysis, Dr. Manning offers no opinions regarding Allegiance’s asserted procompetitive benefits that reflect economic expertise. In the few paragraphs she devotes to the issue, she essentially repeats statements made by Allegiance’s executives in discovery responses and deposition

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<sup>16</sup> Manning Dep. at 232:13-233:10.

testimony.<sup>17</sup> But merely parroting statements made by others is not the same as applying “technical, or other specialized knowledge [that] will help the trier of fact.” Fed. R. Evid. 702(a); *see also Ask Chems., LP v. Comput. Packages, Inc.*, 593 F. App’x 506, 510-11 (6th Cir. 2014) (“Where an expert merely offers his client’s opinion as his own, that opinion may be excluded.”); *Lang v. Koh’s Food Stores, Inc.*, 217 F.3d 919, 924 (7th Cir. 2000) (“Relaying the [witnesses’] likely testimony is not an example of expertise.”).

While an economic expert certainly can rely on ordinary course documents to inform economic principles and methods, and then render an expert opinion on that basis, that is not at all what Dr. Manning did in this case. Here, in these few paragraphs, she simply repeats statements of Allegiance’s executives without applying any of her own economic expertise or a reliable analysis to those statements.<sup>18</sup> Because such an approach falls far short of the requirements of Rule 702, her proposed testimony should be excluded. *See, e.g., Ctr. for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 949 n.1 (N.D. Cal. 2010) (striking the declaration of Dr. Manning, in part, because “she did not apply her expertise in her declaration”).

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<sup>17</sup> Manning Rpt. ¶¶ 163-73 and Table 15.

<sup>18</sup> *Id.*

#### IV. CONCLUSION

For the foregoing reasons, the Court should exclude Dr. Manning's proposed testimony as to anticompetitive effects and procompetitive benefits from being offered at trial and strike those opinions from her report.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

Peter Caplan (P-30643)	<u>/s/ Jill Maguire</u>
Assistant United States Attorney	Jill Maguire (D.C. Bar No. 979595)
U.S. Attorney's Office	Katrina Rouse
Eastern District of Michigan	Garrett Liskey
211 W. Fort Street	Antitrust Division, Litigation I Section
Suite 2001	U.S. Department of Justice
Detroit, Michigan 48226	450 Fifth St., NW
(313) 226-9784	Washington, DC 20530
peter.caplan@usdoj.gov	(202) 598-8805
	jill.maguire@usdoj.gov

FOR PLAINTIFF STATE OF MICHIGAN:

/s/ with the consent of Mark Gabrielse  
Mark Gabrielse (P75163)  
Assistant Attorney General  
Michigan Department of Attorney General  
Corporate Oversight Division  
G. Mennen Williams Building, 6th Floor  
525 W. Ottawa Street  
Lansing, Michigan 48933  
(517) 373-1160  
Email: gabrielsem@michigan.gov

February 28, 2017

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2017, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of the filing to the counsel of record for all parties for civil action 5:15-cv-12311-JEL-DRG, and I hereby certify that there are no individuals entitled to notice who are non-ECF participants.

/s/ Jill C. Maguire  
Jill C. Maguire (D.C. Bar No. 979595)  
Antitrust Division, Litigation I Section  
U.S. Department of Justice  
450 Fifth St. NW, Suite 4100  
Washington, DC 20530  
(202) 598-8805  
jill.maguire@usdoj.gov

*Attorney for United States of America*